Francisco v. Chin, 10 ROP 44 (2003)

NGIRAKESIL FRANCISCO and CINDARELLA ADACHI,
Appellants,

v.

CAMSEK ELIAS CHIN,
Appellee.

CIVIL APPEAL NO. 02-25
Civil Case No. 01-140

Supreme Court, Appellate Division
Republic of Palau

Submitted: January 20, 2003
Decided: January 22, 2003
⊥45
Counsel for Appellants: Jon Van Dyke and Johnson Toribiong

Counsel for Appellee: Antonio Cortes and Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JANET HEALY WEEKS, Part-Time Associate Justice; and DANIEL N. CADRA, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

NGIRAKLSONG, Chief Justice:

In November 2000, the people of the Republic of Palau elected Camsek Elias Chin to represent them in the Senate of the Sixth Olbiil Era Kelulau. Since then, considerable controversy and litigation have ensued with respect to, among other things, whether Chin had been a citizen and five-year resident of Palau prior to the election, as required by Article IX, Section 6 of the Constitution. In *Ngerul v. ROP*, 8 ROP Intrm. 295 (2001), this Court decided that Chin met the ⊥46 Constitution's residency requirement after determining that a "resident" was "a person who maintains a residence in Palau for an unlimited or indefinite period, and to which the person intends to return, whenever absent, even if absent for an extended period of time." *Id.* at 298. Today we address a question that we did not have occasion to reach in *Ngerul*, that is, the extent to which the Senate's own final conclusion regarding Chin's qualification is insulated from judicial review.

Francisco v. Chin, 10 ROP 44 (2003)

BACKGROUND

Shortly after the November 2000 election, the nine candidates for Senate membership who received the highest number of votes established a Credentials Committee to investigate their qualifications for office. The Committee's December 2000 report, which was adopted by the Senate in January 2001 as Senate Resolution 6-1, recommended seating each senator-elect except Chin, who was to remain unseated pending a further investigation of his qualifications and the outcome of the then newly-filed *Ngerul* lawsuit. In *Ngerul*, an individual voter sought to invalidate the Election Commission's certification of Chin, alleging, as relevant, that Chin had not been a five-year resident of Palau. This Court issued an April 2001 decision determining that Chin met the residency requirement in connection with the November 2000 election. *Id.*

Several weeks after we issued our decision in *Ngerul*, the Senate debated and rejected Draft Resolution 6-41, which would have found Chin qualified for office and seated him as a member of the Senate. That same day, the Senate adopted Resolution No. 6-42, which reads in pertinent part that: "simultaneously with Senator-elect Chin's signing [a] written consent in the form above . . . Senator-elect Chin shall be entitled to take his seat as a Senator of the Sixth Olbiil Era Kelulau." The referenced consent form would have allowed the Senate access to any records of the United States government that pertained to Chin's United States citizenship status. In the weeks that followed, Chin did not sign the form. On June 11, 2001, the Senate adopted Senate Resolution No. 6-49, which declared Chin "not qualified" and indicated that a special election to fill his seat was required.

Thereafter, Chin filed this lawsuit seeking declaratory and injunctive relief against the Senate, certain of its members and employees (collectively, the Senate Appellants), and the Election Commission. In July 2001, the trial court granted a preliminary injunction prohibiting the Election Commission from holding a special election for Chin's seat. Soon after, the Senate adopted Resolution 6-52, which reopened the Credentials Committee's investigation of Chin, and Resolution 6-54, directing the Committee to determine whether Chin met the residency requirement in light of the Senate's conclusion that such requirement "means that a citizen must have maintained actual residence in the Republic of Palau for not less than five (5) years immediately preceding the election, except for short, temporary, and intermittent absences." The Credentials Committee reported that Chin did not meet the residency requirement as defined in Resolution 6-54. On September 18, 2001, the Senate adopted Resolution 6-55, which approved the Credentials Committee's report and determined that Chin was ineligible because he had not been a five-year resident within the meaning of Resolution 6-54.[1]

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[1]Resolution 6-55 also contained language to the effect that Chin would not have met the definition of "resident" that we set forth in *Ngerul* because he did not "maintain a residence" in Palau for five years prior to the election. Despite this language, we do not understand the Senate to have followed *Ngerul* in deciding that Chin was not a five-year resident. First, other portions of Resolution 6-55 expressly disavowed any reliance on *Ngerul*. Second, the facts recited in Resolution 6-55 do not differ significantly from those in *Ngerul*, and the Senate's statement that Chin did not maintain a residence in Palau prior to the election seems instead to be premised on a different understanding of what it means to "maintain a residence." In any event, Appellants concede in their brief that, "[i]n the Course of its deliberations regarding Mr. Chin's qualifications, the Senate utilized the definition of 'residency' that it had first adopted in Senate Resolution 6-54." Appellants' Opening Br. at 10.

⊥47 In a series of rulings, the trial court dismissed as defendants the five named senators and the Senate itself, rejected Chin's equal protection and due process claims, granted partial summary judgment in favor of Chin, denied the Senate Appellants' motion to recuse Justice Michelsen from further proceedings, rejected Chin's request for an injunction against the named Senate employees, declined to rule on Chin's request for compensation, denied Chin's request for attorney's fees and costs, and enjoined the Election Commission from holding any election to fill Chin's seat. The trial court also issued a declaratory judgment stating:

> The provisions of Senate Resolution 6-42, which impose an additional qualification upon Senator-elect Chin that he sign a consent "to the disclosure by the United States Government to the Senate of all documents and information the Senate deems relevant to its investigations," is in conflict with the Palau Constitution and is invalid and unenforceable. That part of Resolution 6-42 resolving "that Senator-elect Camsek Elias Chin shall be seated as a Senator of the Sixth Olbiil Era Kelulau" was a valid exercise of the Senate's authority and is valid and enforceable. Senate Resolution 6-55 . . . failed to secure the 2/3 vote required by the Palau Constitution to expel a member, and hence did not create a vacancy in Senator-elect Chin's seat.

The parties appeal various aspects of the trial court's rulings.

ANALYSIS

We begin our *de novo* review, *see Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001), with the trial court's dismissal of the Senate. It is now beyond serious dispute that the Senate is a legal entity with the capacity to sue and be sued. *See Senate v. Remeliik*, 1 ROP Intrm. 90, 94 (Tr. Div. 1983); *see also generally Senate v. Nakamura*, 7 ROP Intrm. 8 (1998); *Palau Chamber of Commerce v. Ucherbelau*, 5 ROP Intrm. 300, 301 (Tr. Div. 1995); *Remeliik v. Senate*, 1 ROP Intrm. 1 (TT 1981). Nevertheless, the Senate Appellants contend that dismissal of the Senate was properly based on Article IX, Section 9 of the Palau Constitution, which provides: "No member of either house of the Olbiil Era Kelulau shall be held to answer in any other place for any speech or debate in the Olbiil Era Kelulau." By its express terms, the "Speech or Debate Clause" applies to *members* of the Senate, not to the Senate as an entity. The purpose of this provision, according to the Constitution's ⊥48 framers, was to preserve "the principle of separation of powers by protecting the *legislators* from outside pressure and by allowing them to debate issues freely." Palau Const. Conv. Standing Comm. Rep. No. 22, at 16 (Mar. 2, 1979) (emphasis added). Had the framers intended the Speech or Debate Clause to protect the legislature as well, we believe they would have said so. The Senate Appellants have not cited any cases where a legislative body was protected under the Speech or Debate Clause or a parallel constitutional provision, nor have we found any such cases. Accordingly, we conclude that dismissal of the Senate based on the Speech or Debate Clause was inappropriate.[2] *Cf. Salii*

[2]The Senate Appellants have argued that without the Senate as a party, the trial court's judgment was merely an advisory opinion. We do not reach Appellants' argument in light of our conclusion that the Senate is a proper party.

v. House of Delegates, 1 ROP Intrm. 708 (1989) (dismissing as moot an appeal from House after trial court had dismissed its members based on Speech or Debate clause).

We next consider whether the trial court correctly determined that the portion of Resolution 6-42 requiring Chin to sign a consent form was severable from the remainder of the resolution, and hence that Resolution 6-42 effectively determined Chin to be entitled to be seated. The trial court relied on the plain language of the Palau Constitution Article II, Section 2, which provides that an act of government conflicting with the Constitution "shall be invalid to the extent of the conflict," and cited *Yalap v. ROP*, 3 ROP Intrm. 61, 66 (1992), for the proposition that a court must "uphold those parts of an act which are severable from invalid parts." In our view, however, these authorities do not automatically mean that Chin was entitled to be seated. Instead, the trial court should have determined "the extent of the conflict" between the law and the constitution, and determined whether the valid parts were "severable." That analysis, as we stated in *Termeteet v. Ngiwal State*, 5 ROP Intrm. 236, 237 (1996), is ultimately a matter of divining legislative intent. *See also* 16A Am. Jur. 2d *Constitutional Law* § 212 (1998) ("If . . . the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but . . . the portion which remains after the deletion must express the legislative will independently of the void part."). We do not believe that the Senate would have intended for Resolution 6-42 to seat Chin without his having signed the consent form. Resolution 6-42 expressly stated that Chin would only be qualified to be seated "simultaneously with" his signing of the form. Further, the Senate had already rejected, that very day, a resolution entitling Chin to be seated without signing any form. Because the consent-form requirement was not severable from the remainder of Resolution 6-42, and because Chin never signed the consent form, we conclude that Resolution 6-42 did not have the effect of seating Chin.[3]

Since Chin has not been seated, we need not decide whether the trial court would otherwise have erred in failing to grant an injunction against Senate employees Francisco and Adachi–an injunction which in ⊥49 effect would have required them to treat Chin like a seated Senator. Further, our conclusion that Chin has not been seated dictates that Resolution 6-55 was a vote to exclude Chin rather than a vote to expel him, and hence could be adopted by a simple majority vote. Palau Const. art. IX, § 10; *see also Powell v. McCormack,* 89 S. Ct. 1944, 1956 & n.27 (1969). It is undisputed that Resolution 6-55 was adopted by at least a simple majority, and we therefore need not review the trial court's conclusion that Resolution 6-55 failed to carry the two-thirds affirmative vote that would have been required to expel a member.

Having decided that Resolution 6-55 was adopted, we must now consider whether it is constitutional. Our analysis begins with deciding the extent to which this issue is justiciable, and more specifically, the extent to which the "Sole Judge" Clause in Article IX, Section 10 of the Constitution is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr,* 82 S. Ct. 691, 710 (1962). Whether the controversy is textually committed to resolution by another governmental branch is itself an issue that this

[3]The Senate's final decision to exclude Chin from membership was not premised on Chin's failure to sign the consent form, and we therefore express no view as to whether the Senate's attempt to condition membership on Chin's signing of the form was permissible under the constitution.

Court must decide. *Powell,* 89 S.Ct. at 1962-63. In doing so, our analysis turns on whether the Senate exceeded the power committed to it. *See id.* at 1964 ("[W]hether the action of [either the legislative or executive branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

The Sole Judge Clause provides that "[e]ach house of the Olbiil Era Kelulau shall be the sole judge of the election and qualifications of its members." Palau Const. art. IX, § 10. In interpreting the Constitution, our guiding principle is the framers' intent. *See Remeliik*, 1 ROP Intrm. at 5. Therefore, we have frequently turned to the records and committee reports of the Constitutional Convention to ascertain the meaning of constitutional language. *See, e.g.*, *Gibbons v. Etpison*, 4 ROP Intrm. 1, 6 (1993); *Koror State v. ROP*, 3 ROP Intrm. 314, 319-20 (1993); *Gibbons v. Salii*, 1 ROP Intrm. 333, 339-44 (1986). The Committee Analysis of what was to become Article IX, Section 10, stated:

> Consistent with the doctrine of separation of powers, *the Assembly is to be the sole judge of the election and qualifications of its members with the implied exception of those eligibility requirements set forth in the Constitution*. The Assembly has the power to determine which candidate is elected in any election and whether a person is qualified to hold the office of senator.

Palau Const. Conv. Standing Comm. Rep. No. 22, at 15 (Mar. 2, 1979) (emphasis added). The Committee's report suggests that while the framers intended for the Senate to determine which candidates were elected and whether those candidates were qualified, they did not intend for the Senate to pass judgment on what the eligibility requirements set forth in the constitution were.

The framers' understanding of the Sole Judge Clause is consistent with the long-standing principle that this Court is the ultimate interpreter of the Constitution. *See, e.g.*, *Gibbons*, 4 ROP Intrm. at 6. It is the Court's province and duty to "say what the law is," *Becheserrak v. Koror State*, 3 ROP Intrm. 53, 55 (1991), and to decide whether another branch of government has exceeded ⊥50 whatever authority was been committed to it by the Constitution, *see Salii v. House of Delegates*, 3 ROP Intrm. 351, 357 (Tr. Div. 1989). While the Sole Judge Clause empowers the Senate to make a final factual determination concerning Chin's qualification, it does not divest this Court of its role as the ultimate interpreter of the meaning of the age, residency, and citizenship requirements set forth in Article IX, Section 6. Thus, the Senate exceeded its authority by promulgating its own definition of the residency requirement.

Our interpretation of the Sole Judge Clause is in accord with United States case law. In reviewing the parallel sole judge provision of the United States Constitution, the United States Supreme Court has held that it could overturn the House of Representatives' decision to exclude a representative for a reason *not* set forth in the Constitution, while expressly reserving the question whether "federal courts might . . . be barred . . . from reviewing the House's *factual* determination that a member did not meet one of the standing qualifications." *Powell,* 89 S. Ct. at 1963 n.42 (emphasis added). In *United States v. Nixon*, which involved a challenge to the method by which the Senate conducted an impeachment, the Supreme Court explained *Powell* as

holding that:

> The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership. The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not.

United States v. Nixon, 113 S. Ct. 732, 740 (1993). The U.S. Supreme Court has since explained that the legislative eligibility requirements are "fixed in the Constitution," are "of a precise, limited nature," and are "unalterable by the legislature." *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1852 (1995) (citations and internal quotations omitted). According to the reasoning of *Powell*, *Nixon*, and *U.S. Term Limits*, the Senate was authorized to be the sole judge of whether Chin met the qualifications set forth in Article IX, Section 6, but the Senate was not entitled to reach its own conclusion as to what those qualifications were. We therefore find it difficult to distinguish between the legislative body's attempt to add an eligibility requirement in *Powell*, and the Senate's attempt to alter the meaning of such a requirement here.

As the Senate Appellants point out, the United States Supreme Court has also stated in an election contest case that the issue of "[w]hich candidate is entitled to be seated in the Senate is . . . a non-justiciable political question." *Roudebush v. Hartke*, 92 S. Ct. 804, 807 (1972); *see also Morgan v. United States*, 801 F.2d 445, 447-50 (D.C. Cir. 1986); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985). In *Roudebush*, *Morgan*, and *McIntyre,* the question of which candidate had been elected was held to have been textually committed to the legislative body under the Sole Judge Clause, and was therefore insulated from judicial review. In those cases, unlike in *Powell*, there was no independent constitutional provision that would have been ⊥51 defeated by allowing the legislature to make the final decision as to whether to seat one particular candidate over another. Specifically, in *Roudebush* the underlying dispute was over the propriety of recounting votes in certain areas, *see Roudebush*, 92 S. Ct. at 809-11; and in *Morgan* and *McIntyre*, the controversy was over which of certain contested ballots to count in a close election, *see Morgan*, 801 F.2d at 446; *McInyre*, 766 F.2d at 1080-81. In contrast, this Court has already determined that resolution of Chin's eligibility required construction of the term "resident" in Article IX, Section 6(3), and it therefore fell "squarely within the Court's constitutional authority to 'say what the law is'" concerning an independent constitutional provision. *Ngerul,* 8 ROP Intrm. at 296.

Compared to the instant controversy, election contest cases better lend themselves to final resolution by the legislature. In election contest cases, the court cannot resolve the case by interpreting the constitution, and therefore is less likely to have judicially manageable standards for resolving the dispute. *Compare Roudebush*, 92 S. Ct. at 809-11; *Morgan*, 801 F.2d at 446; *McInyre*, 766 F.2d at 1080-81; *with Salii v. House of Delegates*, 3 ROP Intrm. 351, 358 (Tr. Div. 1989), *vacated as moot*, 1 ROP Intrm. 708 (1989) ("The interpretation of the Constitution . . . always follows judicially manageable standards."). The fact that we can resolve the instant

dispute with resort to interpretation of an independent constitutional provision (the residency qualification set forth in Article IX, Section 6) strengthens our conclusion that the issue is not a textually demonstrable commitment to the Senate. *See Nixon*, 113 S. Ct. at 735 ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.").

The Senate Appellants also cite *Foster v. Harden*, 536 So. 2d 905 (Miss. 1998), where a sharply divided Mississippi Supreme Court declined to hear a complaint that a candidate did not meet a constitutional residency requirement, and *Lessard v. Snell*, 63 P.2d 893 (Ore. 1937), where the Oregon Supreme Court dismissed a complaint attacking the qualifications of a state senator. The reasoning employed by these courts–that the Sole Judge Clause precludes a court from ever considering a legislature's decision to seat or exclude a candidate–is difficult if not impossible to square with the intent of the Palau Constitution's framers, as discussed above. Moreover, the *Foster* and *Lessard* courts had not been asked, as we have, to review a legislative body's extraordinary–and, so far as we can tell, unprecedented–decision to knowingly promulgate an interpretation of the Constitution at odds with that of the judicial branch's highest court. Our duty to interpret and apply a constitutional provision was held to give rise to a justiciable controversy, notwithstanding the Sole Judge Clause, in *Olikong v. ROP*, 8 ROP Intrm. 250 (2000). In *Olikong*, we held that a suit by the Office of the Special Prosecutor to enjoin certain defendants from holding other public office while they were Olbiil Era Kelulau members did not implicate the Sole Judge Clause. Specifically, we adopted the trial court's statement that:

> the Court's resolution of this case does not affect the OEK's ability to be the sole judge of the elections and qualifications of its members. This Court must decide whether members ⊥52 of the OEK are violating the Constitution by holding of the [sic] public office or public employment. To reach this decision, it is unnecessary to evaluate the defendants' qualifications as OEK members.

Id. at 254. Likewise, we believe this case presents a justiciable controversy to the extent we determine that Resolutions 6-54 and 6-55 are in conflict with the meaning of Palau Constitution, Article IX, Section 6. To reach that determination, it is unnecessary to evaluate whether Chin is in fact qualified for membership.

The Senate Appellants argue that the definition of "resident" in Resolution 6-54 is permissible because it is "not inconsistent" with this Court's definition in *Ngerul*. We respectfully disagree, and we pause to point out what we regard as the salient differences between the two. In *Ngerul*, we emphasized that a resident need only maintain a residence in Palau to which he intends to return, a qualification which we found satisfied in Chin's case by the fact that Chin intended to return to the Palauan residence of his wife and children. In contrast, the Senate found that a resident must maintain "actual" residence in Palau, meaning, we presume, that such resident could not have a home anywhere else and must reside in Palau exclusively. Further, Resolution 6-54 stated that a resident must live in Palau "except for short, temporary, and intermittent absences," whereas we said in *Ngerul* that a resident could be

"absent for an extended period of time" provided he intended to return to his Palau residence. The Senate is not bound by our *factual* findings in *Ngerul*, and is free to–as it did before–rely on new or different evidence in order to reach its own conclusion. But because of the considerable differences between our definition of resident in *Ngerul* and the definition employed by the Senate, we cannot say that the Senate necessarily would have reached the same final conclusion about Chin's qualification if it had employed the correct constitutional standard. Therefore, we decide today that Resolutions 6-54 and 6-55 are unconstitutional and therefore void, and that the Sole Judge Clause does not prevent us from so holding. We reiterate, however, that the factual decision as to whether Chin met the definition of resident in *Ngerul* still lies with the Senate, and for that reason we reject Chin's argument that the trial court should have issued a declaratory judgment finding him qualified to be a senator.

We do not disturb the trial court's[4] conclusion that Justice Michelsen was not subject to disqualification for bias. Under 4 PNC § 303, the American Bar Association's Code of Judicial Conduct applies to the judges on this Court. Canon 3(E)(1) of the Code provides that a judge should be disqualified "in a proceeding in which the judge's impartiality might reasonably be questioned." To the extent that it was improper for Justice Michelsen to seek out and rely on information from a Senate employee in ruling upon the parties' cross motions for summary judgment, we agree with the trial court that the impropriety was mitigated by the fact that Justice Michelsen invited the parties to submit further evidence and then decided the matter by relying on the evidence of record. We also note, as did the trial court, that Justice Michelsen's handling of the case as a whole was far from one-sided; in fact, many of Justice Michelsen's rulings were favorable to ⊥53 the Senate Appellants. Accordingly, we conclude from our review of the record as a whole that Justice Michelsen's actions do not create an inference of bias that would subject him to disqualification.

We turn now to Chin's contention that he is entitled to vote on his own qualification as a Senator, which is the primary thrust of his due process and equal protection claims. Chin relies on four sections of the Constitution, which provide, when read together, that "Senators and delegates shall be elected for a term of four (4) years," that each house of the OEK "shall be the sole judge of the election and qualification of its members," that each house "shall convene on the second Tuesday in January following the regular general election," and that "Every person shall be equal under the law and shall be entitled to equal protection . . . . No person shall be treated unfairly in legislative . . . investigations." Palau Const. art. IV, § 5 & art. IX, §§ 2, 10, 11. According to Chin, the Senate can *only* pass judgment on Senate *members*, and that therefore in order for the Senate to judge his qualification, he must be sworn in and seated–in other words, that while the Senate may *expel* its members, it has no power to *exclude* a candidate seeking membership. Under Chin's reasoning, both candidates in an election dispute would also be entitled to vote as members of the Senate on the issue of who had won the election, resulting in the logical absurdity of at least one "member" of the Senate who necessarily had not been elected.

In the pertinent United States cases, the incumbents were never able to vote on whether they were duly elected, *see, e.g.*, *Barry v. United States*, 49 S. Ct. 452, 455 (1929), or qualified,

[4]The Honorable LARRY W. MILLER presided over the motion to disqualify Justice Michelsen.

see Powell, 89 S. Ct. at 1949; *Bond v. Floyd*, 87 S. Ct. 339, 344 (1966). Indeed, the United States Supreme Court has expressly rejected Chin's argument:

> It is said . . . that the power conferred upon the Senate is to [judge] the elections, returns, and qualifications of its "members," and, since the Senate had refused to admit [plaintiff] to a seat in the Senate, or permit him to take the oath of office, that he was not a member. It is enough to say of this that upon the face of the returns he had been elected, and had received a certificate . . . to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of [the Sole Judge Clause]. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the power by both houses of Congress; and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either house, he of course is elected a member of the body; and when that body determines, upon presentation of his ⊥54 credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership.

Barry, 49 S. Ct. at 455.

We agree. The Senate need not have sworn and seated Chin before it could determine his eligibility. *Cf. Powell,* 89 S. Ct. at 1963 n.42 (explaining difference between legislature's exclusion and expulsion power). It is uncontested that at the January 2001 installation Chin was allowed to vote along with the other senators-elect on the question of who was among them qualified. The fact that the Senate later revisited the issue of Chin's qualification does not mean that Chin was entitled to vote along side them as though he had been sworn and seated.

Chin also contends that he was denied equal protection because he was forced to sign a consent form as a prerequisite for being seated, while the other senators-elect were not. Aside from perhaps being moot in light of the subsequent Senate resolutions, Chin's claim fails because he was not similarly situated to the other senators at the time he was asked to sign the consent form: he was the only senator-elect who had not been seated and whose qualifications were still under investigation. *See Ngerur v. Supreme Court*, 4 ROP Intrm. 134, 137 (1994) (holding that equal protection does not require identical treatment of persons who are not similarly situated). We also find no merit to Chin's claim that the Credential's Committee, which is not a party to this case, violated his due process rights by failing to adopt rules of procedure.

The trial court denied Chin's request for attorney's fees and costs on the ground that costs could not be awarded against the government under 14 PNC § 703, and that Chin had provided no basis for an award of attorney's fees under Palauan law. As Chin concedes, absent Palauan authority, the attorney-fee issue should have been decided according to the common law of the United States, *see* 1 PNC § 303, under which each party pays for its own counsel absent a contrary statute or contract. Chin argues, quoting from *Chambers v. Nasco Inc.*, 111 S. Ct. 2123, 2133 (1991), that the "American Rule" regarding attorney's fees has a well-established exception empowering the Court "to award attorney's fees to a party whose litigation efforts directly benefits others." Chin believes this exception applies because he is seeking to vindicate constitutional rights. The full passage from *Chambers* shows, however, that the phrase "directly benefits others" arose in the context of explaining the "common fund" exception. The common fund exception "allows the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his attorneys fees and costs from the fund or property itself," *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612, 1621 (1975), and it has no bearing here. Therefore, we agree with the ⊥55 trial court that there is no basis for an award of attorney's fees or costs.

CONCLUSION

In summary, we vacate the trial court's declaratory judgment in favor of Chin, finding that Senate Resolution 6-42 had not been intended to seat Chin notwithstanding his failure to sign the consent form. It follows, therefore, that Senate Resolution 6-55 was a vote to exclude rather than expel Chin from office and was properly adopted by a majority vote of the Senate. We conclude, however, that Resolution 6-55 is unconstitutional, because the Senate exceeded its authority under the Sole Judge Clause by adopting and applying its own interpretation of the residency requirement set forth in Article IX, Section 6 of the Constitution instead of that set forth by this Court in *Ngerul*. Nevertheless, the factual determination as to whether Chin was a five-year resident remains with the Senate using the standard set forth in *Ngerul*.