Akiwo v. ROP, 6 ROP Intrm. 105 (1997)
RAYMOND AKIWO, et al.,
Appellants,

v.

REPUBLIC OF PALAU, et al.,
Appellees.

CIVIL APPEAL NO. 7-96
Civil Action No. 350-95

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: March 26, 1997

Counsel for Appellants: Dorji Roberts, Randy Riddle, Drew Bohan, Alex Gorman

Counsel for Appellees: Jeffery A. Tomasevich, Assistant Attorney General

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

BEATTIE, Justice:

Members of the OEK appeal from the trial court's decision holding that they must repay compensation they received in the form of "official expenses" because such payments resulted from an increase in their compensation during the term of their office in violation of the Palau Constitution. We affirm in part and reverse in part.

BACKGROUND

The facts of this case are not in dispute. On September 22, 1993, the OEK passed, and the President signed into law, RPPL 4-10(4)(7). The law increased the OEK members' monetary allotments for "official expenses" from $1,000 per month to $2,000 per month. On April 3, 1995, the Trial Division of this Court struck down the ⊥106 statute which authorized the increase in monthly expense payments as unconstitutional under Article IX, Section 8 of the Palau Constitution. *See Palau Chamber of Commerce v. Ucherbelau* , 5 ROP Intrm. 300. (" *Chamber*") That section states in pertinent part that "the compensation of the members of the [OEK] shall be determined by law. No increase in compensation shall apply to members of the [OEK] during the term of enactment . . . ." The Court found that the extra expense payments were "compensation" and were therefore unconstitutional. None of the appellants appealed that decision. After the *Chamber* decision, the appellants continued to collect monthly expense

payments, but in the amount of $1,000 rather than $2,000.[1]

After the increase in expenses was invalidated by *Chamber*, Plaintiffs filed the instant case, seeking restitution of the excess amounts paid to appellants and an injunction to prevent appellants from collecting further monthly expense payments. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of the appellees, ordering each OEK member to repay the excess expense payments which he had received. The Court, however, denied appellees' request for an injunction. This appeal followed.

ANALYSIS

I. *Standard of Review*

Our review of summary judgment is de novo and plenary. *Lew v. Kona Hospital* , 754 F.2d 1420 (9th Cir. 1985); *Slattery v. Bower* , 924 F.2d 6 (1st Cir. 1991). Therefore, this court must reach the same conclusion of law as the trial court did to uphold a summary judgment ruling, and no deference is appropriate.

II. *Applicability of § 46(a) of the Restatement of Restitution*

The trial court, having found no Palauan statutory, customary or case law addressing the issue before it, turned to the Restatement of Restitution [2] and found § 46(a) of the Restatement of ⊥107 be controlling. Restatement § 46(a) states:

> A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty to do so, is entitled to restitution as though the mistake were one of fact if:[3]
>
> > (a) the benefit was conferred by a State or subdivision thereof, ...

Appellants argue that § 46(a) is not applicable to the facts at hand and that therefore the common law as expressed in United States case law governs. We disagree.

In general, a mistake of law occurs "where a party, having knowledge of the facts, is

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[1] Although it is not apparent from the record, appellees state in their brief that one of the appellants, Senator Sam Masang, stopped accepting any monthly expense payments sometime after this appeal was filed.

[2] In the absence of applicable Palauan statutory or customary law, the court is directed by statute that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . ." 1 PNC 303.

[3] In general, a payment induced by a mistake of fact is recoverable, while one induced by a mistake of law is not. Compare *Restatement of Restitution* §§ 15-43 with § 45.

ignorant of the legal consequences of his conduct or reaches an erroneous conclusion as to the effect thereof." 34 Am. Jur. 2d *Mistake, Accident, or Surprise* § 8 (1971). By receiving the funds, the Appellants were acting under a mistake of law, for "An unconstitutional law is void, and is as no law." *Ex Parte Royall* 12 S.Ct. 734, 738, 117 U.S. 241, 248 (1886). Moreover, there is no dispute that the funds at issue were conferred by the national government, placing the case within subsection (a) of the rule.

Appellants deny the applicability of § 46(a) on the basis that the official expense money which was received pursuant to RPPL 4-10(4)(7) was not a "benefit" within the meaning of the rule. In support of their position, they cite the first illustration of the rule:

> County X pays to its treasurer a salary fixed by statute which is greater than the constitutional limit. The county is entitled to restitution of the surplus.

Appellants contend that the distinction between "salary" and "official expenses" is dispositive. They argue that a salary differs from official expenses in that the recipient of a salary may spend it on anything, whereas the recipients of funds under ⊥108 RPPL 4-10(4)(7) could only spend that money on items "related to or resulting from the discharge of the member's official duties." Consequently, they argue, the money appropriated for official expenses was the public's money rather than their own and the OEK members were not receiving a "benefit" because they could not use the money for personal matters.

But however appellants may now wish to characterize the "official expense" payments, in the *Chamber* case the payments were held to be part of appellants' compensation, and that holding, which was not appealed, is binding on them. Compensation is clearly a benefit. Restatement of Restitution § 1 comment (b) provides:

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, . . . or in any way adds to the other's security or advantage.[4]

Therefore, § 46(a) of the Restatement of Restitution is applicable to this case and, absent any exception to the general rule or some affirmative defense, that section requires that appellants pay restitution.

III. *Change of Circumstances*

Appellants contend that, even if § 46(a) does apply, there is no right to restitution here because there was a change of circumstances which would make restitution inequitable.

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[4] Illustration 2 to § 46 further undermines any suggestion that funds paid out for public purposes may not be subject to restitution:

> County X, owing to a misinterpretation of a statute by its council, pays to town Y more than its share of tax money. The county is entitled to restitution.

Appellants rely on Restatement of Restitution § 142[5], entitled *Change of Circumstances*, which provides that:

> (1) The right of a person to restitution from another because of a benefit received because of a mistake is ⊥109 terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
>
> (2) Change of Circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.
>
> (3) Change of Circumstances is not a defense if
>
> > (a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious, or
> >
> > (b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution and had an opportunity to make restitution.

The comments and illustrations to § 142 make clear that a change of circumstance occurs when the recipient of the money incurs liabilities in good faith reliance upon, and due to, the receipt of that money. Restitution in these instances is not mandated, as it would be inequitable to do so.

The Appellants cite a number of recent and analogous cases wherein the courts, applying the same principles which form the foundation for the Change of Circumstances exception, held that recipients of benefits under an unconstitutional statute were not required to make restitution of the benefits. *See inter alia, Lemon v. Kurtzman*, 93 S.Ct. 1463 (1973); *Barker v. Harmon*, 882 S.W.2d 352 (Tenn. 1994); and *Maricopa County v. Cities & Towns of Avondale, Etc.*, 467 P.2d 949 (Ariz. 1970). In each of these cases the court considered the extent of the recipients' detrimental reliance. For example, in *Lemon v. Kurtzman*, 93 S.Ct. 1463 (1972), a school system which had received funds under a statute which was later declared unconstitutional was not required to pay the funds back because it had executed contracts in reliance on the funds. The court stated that "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Lemon* at 1471. Likewise, in *Barker*, a judge was paid monthly expense allowance payments under a statute later deemed ⊥110 unconstitutional.[6] He was not forced to pay the money back, in part because the judge had passed up other employment opportunities in expectation of getting the money. Finally, in *Maricopa County*, the recipient towns spent mistakenly conferred money to substantially improve their roadways. In refusing to

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[5] Restatement §§ 69 and 142 are identical. This Court will only refer to § 142 when speaking of Change of Circumstances.

[6] The judge was elected to a term of office and the court held that the monthly expense payments were "compensation" and that they violated a constitutional provision prohibiting an increase in judges' compensation during the term for which they are elected.

order restitution, the *Maricopa* court stated:

> Acting innocently and with as much logic as the situation permitted, they [the towns] poured the funds into asphalt, concrete, and maintenance. These are not marketable or recoverable items; the money spent cannot be unspent.

Maricopa at 954.

It is worth noting that restitution is an equitable remedy. The Change of Circumstances exception is rooted in the recognition of the equitable nature of restitution and prevents restitution under certain circumstances where it would be inequitable. The cases cited by appellants are firmly rooted in equity in that they recognize that a duly enacted law is presumed to be constitutional, and the reliance interests of those whose conduct is governed by the statute should not be ignored if the statute is later declared void.[7] "This court presumes every legislative act constitutional and indulges every intendment in favor of its validity . . . . No penalties should be visited upon the citizenry for doing likewise." *Austin v. Campbell*, 370 P.2d 769, 775 (Ariz. 1962) (en banc).

In determining whether restitution may be avoided due to a change of circumstances in this case, we start by noting that the *Chamber* case held that RPPL 4-10(4)(7) violated Art. IX, Sec. 8 of the Constitution, which prohibits OEK member from receiving an increase in compensation during the term for which they are elected.[8] When appellants were elected to serve their four year ⊥111 term of office, the "official expenses" component of their compensation for that term was set by statute at $48,000 ($1,000 per month for a 48 month term). Any increase enacted during that term could not apply to them.

On April 3, 1995, the date that the *Chamber* decision declared that RPPL 4-10-(4)(7) was invalid, the appellants had not yet collected $48,000 in "official expenses" during their term of office. They had only collected $44,000. It was only after *Chamber* declared the statute invalid that appellants collected the funds which pushed them over their constitutional ceiling of $48,000.[9] Had they adjusted the amount of monthly expenses they collected after the *Chamber*

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[7] There is no suggestion in the record that appellants relied on a plainly invalid statute or otherwise lacked good faith in relying on RPPL 4-10(4)(7). *Cf. Lemon v. Kurtzman*, 93 S.Ct. 1463, 1472 (1973).

[8] "No increase in compensation shall apply to the members of the [OEK] during the term of enactment." Palau Constitution, Art. IX, § 8.

[9] Given the circumstances of this case, we need not decide whether the Constitution prohibits an increase in not only the aggregate amount of compensation a legislator may receive during his term, but also an increase in the rate at which that compensation is paid. To use an extreme example, there is a serious question whether the Constitution would permit the OEK, within the same term of office, to amend the law to provide that each legislator should receive his or her salary all at once at the beginning of a term instead of on a monthly basis over four years. Here, it is an open question whether there still would have been a constitutional violation by reason of the increase from $1000 to $2000 a month even if appellants had stopped taking additional expense funds when they reached $48,000. Since they did not do so, but exceeded the

decision, they would not have exceeded the constitutional limit. Instead, they chose to continue to collect $1,000 each month, notwithstanding the knowledge that it caused them to exceed $48,000 during their term of office.[10]

All of the cases cited by appellants concerned money expended for services rendered or expenses incurred in good faith reliance upon a duly-enacted law *before* that law was declared unconstitutional.[11] Obviously, there can be no good faith reliance ⊥112 on the presumed constitutionality of a statute *after* a court has stricken down the statute. It is therefore not surprising that Section 142(3)(b) denies the use of the Change of Circumstances defense in cases where the recipient incurred liabilities *after* learning that the money was mistakenly conferred and had the opportunity to pay it back. Here, the appellants received the excess compensation after learning that the expense increase was unconstitutional.[12] In this case, the appellants'

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aggregate limit in any event, that question need not be answered now.

[10] The trial court in *Chamber* did not, as the dissent suggests, "expressly permit[] continuation of the payments at the rate of $1,000 a month." The complaint in that case sought prospective relief only, and the trial court granted it. Its declaration that "RPPL 4-10(4)(7) is unconstitutional on its face" and its order "enjoin[ing] the national treasury from issuing any checks . . . in excess of $1,000 per month," 5 ROP Intrm. at 304, cannot fairly be read to express any view on the issue now presented.

[11] Likewise, there is not a single case cited in the dissent wherein a recipient of money paid for an expense incurred *after* the statute authorizing the expense was declared unconstitutional was allowed to keep the money. Moreover, contrary to the dissent's suggestion, *New York Public Interest Research Group v. Steingut*, 353 N.E.2d 558 (N.Y. 1976) is simply a glove that won't fit. As a close reading of the *Steingut* decision makes clear, unlike here, there was no fixed periodic expense allowance from which a term-wide constitutional ceiling could be derived. Rather, every year, "the legislature [chose] to fix allowances by annual budgetary appropriations." 353 N.E.2d at 563. In *Lemon*, the expenses were incurred after the lower court had *upheld* the constitutionality of the authorizing statute, but before the Supreme Court had later stricken down the statute.

[12] Thus, we do not, as the dissent suggests, require appellants to pay back official expense money "expended pursuant to a law that was entitled to a presumption of constitutionality." All of the subject expense money was received *after* the *Chamber* decision eradicated any such presumption. After the *Chamber* struck down the statute, appellants were clearly on notice that they might have to repay expense payments in excess of the $48,000. Indeed, there were troubling signs even before the decision. The Attorney General met with the appellants in February of 1994, shortly after the *Chamber* case was filed, and urged them to repeal RPPL 4-10 (4)(7) because "it was [the Attorney General's] opinion that plaintiff's position [that the statute was unconstitutional] was the better interpretation . . . ." Affidavit of Acting Attorney General Jon Hinck.

When, after the *Chamber* decision, the Attorney General instructed the Treasury to cut off the monthly expense payments, the appellants prevailed upon the President, who agreed that the Treasury would continue making monthly expense payments until the Court ordered otherwise. When the Attorney General requested a preliminary injunction to stop the monthly payments, appellants successfully opposed it on the grounds that the money could be recovered from them

actions fall squarely within the contemplation of § 142(b)(3).

Accordingly, we hold that Restatement of Restitution § 46(a) ⊥113 mandates that restitution be paid by the appellants [13] and that the Change of Circumstances exception does not apply under the facts here presented.

IV. *The Speech and Debate Clause*

The appellants contend that the Speech or Debate Clause, Article IX, Section 9 of the Palau Constitution, provides them with absolute immunity from suit in this matter. The trial court ruled that the Clause was not applicable because this suit does not revolve around the debate and passage of RPPL 4-10(4)(7), but rather the subsequent receipt of money.

The Speech or Debate Clause provides in part:

> 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.

The Court notes initially that this clause is virtually identical to its counterpart in the United States Constitution. Therefore, it is appropriate to examine United States case law to delineate the bounds of the Clause. Appellants cite cases which state that the Clause should be interpreted very broadly to include much more of the OEK members' duties than simply debating the passage of legislation. In *Doe v. McMillan* , for example, the Court held that actions which are within the "sphere of legitimate legislative activity" are absolutely immune from legal challenge. 93 S.Ct. 2018, 2025 (1973). Appellants rely on this general language taken in concert with the rule that the Clause should be construed broadly, *see Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 926-27 (D.C. Cir. 1986), for their proposition that the receipt and usage of the expense money is an integral part of their legislative function and is therefore covered by the Speech or Debate Clause.

The Appellees argue that the Speech or Debate Clause should be ⊥114 applied primarily as a shield to suits arising from oral or written discourse on the floor of the legislature, as its name implies. Appellees' main reliance is upon *Gravel v. United States* , 92 S.Ct. 2614 (1972), *United States v. Brewster*, 92 S.Ct. 2531 (1972), and *United States ex rel. Hollander v. Clay* , 420

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if the Court awarded restitution. Indeed, after obtaining a stay of the trial court's judgment in this case, appellants received at least $10,000 of the $16,000 in excess compensation not only after the *Chamber* decision, but after the trial court had declared their obligation to make restitution in this case.

[13] Arguing that this court should deny relief, the dissent focuses on the conduct of the President, suggesting that the President could have vetoed or refused to enforce RPPL 4-10(4)(7) and that his power to veto or refuse to enforce such a law is what protects the public. It is open to debate whether the President should have, as the dissent suggests, adopted the approach taken by the Governor of Chuuk in the *Innocenti* case (where the Chuuk Governor vetoed a tax law he thought was unconstitutional) and vetoed the law or refused to enforce it. We fail to see, however, how the President's action or inaction bears on the issues we must decide today.

F. Supp. 853 (D.D.C. 1976). In *Gravel*, the Court stated:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 2627. The Court proceeded to state that the protections of the Clause should be extended beyond speech or debate only "when necessary to prevent indirect impairment of such deliberations." *Id.*

The *Clay* decision is the most pertinent to the case before the Court. In *Clay*, legislators accused of submitting false travel vouchers for reimbursement attempted to avail themselves of the immunity provided by the Speech or Debate Clause. They argued that the act of getting paid was a part of the legislative process and is covered by the Clause. The court found this contention to be untenable due to "the pay function's dubious connection with the deliberative and communicative processes that make up protected legislative activities." *Id.* at 856.

As in *Clay*, the appellants are claiming immunity because they consider the act of receiving compensation to be an essential part of the legislative function. Although the legislators receive compensation for the performance of their duties, it hardly follows that the act of receiving the compensation itself is one of their duties--the compensation itself has only a tenuous relation to their acts as legislators. The Speech or Debate Clause is designed to ensure lively and effective debate of legislation; to extend it to cover the receipt of compensation would not serve its purpose. Therefore, we affirm the trial court's holding that the Speech or Debate Clause provides no immunity to the appellants in this suit.

V. *Qualified Immunity*

Appellants next argue that even if the absolute bar of the Speech or Debate Clause does not apply here, they are nevertheless ⊥115 entitled to qualified immunity for their actions. Appellees assert that the doctrine of qualified immunity does not apply to appellants, as they are members of the legislative rather than the executive branch. We find that we need not resolve this dispute because we conclude that even if appellants were generally entitled to qualified immunity, they would still be liable to make restitution in the circumstances of this case.

Appellants argue that this Court should follow U.S. cases holding that legislators are entitled to qualified immunity for actions taken in an administrative capacity, *e.g., Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1966); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995); *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994), *cert. denied* 115 S.Ct. 1098 (1995); and they contend that their acceptance of official expense payments falls into that category. [14] They then argue that we should adopt the test for qualified immunity set

[14] Appellants do not contend that their actions in receiving these payments were

forth by the U.S. Supreme Court in *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). There, the Court held that:

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

We assume, without deciding, that appellants are generally entitled to claim qualified immunity for their actions, [15] and that ⊥116 the test set forth in *Harlow v. Fitzgerald* [16] should govern whether they are immune from liability in the circumstances of this case. Nevertheless, we conclude that appellants fail that test.

An action is to be considered in contravention of clearly established law when precedent is "clear enough to put a reasonable official on notice that his actions are illegal or unconstitutional." *Birrel v. Brown*, 867 F.2d 956, 958 (6th Cir. 1989). As we did in rejecting appellants' reliance on the Change of Circumstances exception, we focus on appellants' actions after the *Chamber* case was decided. The *Chamber* decision clearly and unequivocally established that the Palau Constitution allowed the legislators a maximum of $48,000 in expense money during their four year term in office. After the *Chamber* decision, appellants, acting as reasonable officials, were on notice that collection of official expenses in excess of $48,000 for their term of office was unconstitutional. Nonetheless, the legislators exceeded that amount after *Chamber* had been handed down.

Appellants cite only one case, *Virginians Against a Corrupt Congress v. Moran*, 805 F.

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undertaken in their legislative capacity. *See Tenney v. Brandhove*, 71 S.Ct. 783 (1951) (holding that legislators are entitled to absolute immunity for actions taken in their legislative capacity).

[15] The question whether appellants should be qualifiedly immune from liability in circumstances not covered by the Speech or Debate Clause does not turn on whether we believe such immunity would be sound policy, but whether such immunity is part of the "common law", as expressed in the Restatement or otherwise, such that it is applicable in Palau pursuant to 1 PNC § 303. *See Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994) (applying doctrine of prosecutorial immunity as set forth in Section 656 of the Restatement (Second) of Torts). We leave for another day whether the cases relied on by appellants, which generally relate to the scope of 42 U.S.C. § 1983, a civil rights statute, are nevertheless reflective of the common law. *See Burns v. Reed*, 111 S.Ct. 1934, 1941 (1991) (noting that the Court "look[s] to the common law and other history for guidance . . . to discern Congress' likely intent in enacting § 1983); *Malley v. Briggs*, 106 S.Ct. 1092, 1095 (1986) ("our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts . . ."); *cf.* Restatement (Second) of Torts § 895D (discussing public officers' immunity from tort liability).

[16] The test formulated in *Harlow* was designed to "focus[] on the objective legal reasonableness of an official's acts," 102 S.Ct. at 2739, and thereby to eliminate "the substantial costs [that] attend the litigation of the subjective good faith of government officials" which had been permitted by earlier formulations. *Id.* at 2737.

Supp. 75 (D.D.C. 1992), that is analogous to the case at bar. In that case, a member of Congress was sued for declaratory judgment and damages due to his allegedly unconstitutional use of the franking privilege. In *Moran*, the defendant had stopped the questioned use of the franking privilege as soon as the statute authorizing it was declared unconstitutional. Therefore, the Court held that the defendant was entitled to qualified immunity because "there was no clearly established constitutional right violated by defendant at the time of the disputed actions." *Id.* at 77.

Moran is not helpful to appellants because, unlike the defendant in *Moran* who stopped his disputed use of the franking privilege when the statute was declared unconstitutional, ⊥117 appellants continued to collect expense payments in excess of $48,000 even after the statute authorizing them was declared unconstitutional. As already stated, that conduct clearly contravened a constitutional provision that would be apparent to a reasonable person due to the *Chamber* decision. Thus, the trial court did not commit error in holding that qualified immunity does not shield the appellants from suit.

VI. *The Treasurer's Right to Offset*

The Appellants argue that it was an error for the trial court to order that the Restitution be paid back via set off of future expense allowances. Appellants do not cite any persuasive authority in support of this contention.

"Few principles are so well established as the right of the Government to recover by offset or otherwise sums illegally or erroneously paid." *Lodge 2424, Int'l Ass'n of Machinists v. United States*, 564 F.2d 66, 71 (Ct. Cl. 1977). Therefore, we affirm the trial court's decision to allow the set-off.

VII. *Prejudgment Interest*

Appellants' final assertion of error is that the trial court improperly awarded the Appellees prejudgment interest on the money owed. Initially, the Appellants state that the Appellees should not be awarded prejudgment interest on the basis that they waived their right to such interest by not raising it until after the judgment. As Appellees point out, this is simply not true. Appellees' complaint specifically requests prejudgment interest as part of their prayer for relief. The Appellants had notice of the request for interest from the day the case was filed, and thus, there is no waiver.

In its Judgment of January 22, 1996, the trial court based its award of prejudgment interest on Restatement of Restitution § 156, which provides that:

> . . . a person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if:
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> (a) the benefit consisted of a definite sum of money, or

> (b) the value of the benefit can be ⊥118 ascertained by mathematical calculation from the terms of the agreement between the parties or by established market prices
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> (c) payment of interest is required to avoid injustice.

Clearly, section (a) applies here. The Comment to this section states that where a transaction is rescinded for mistake, there is a breach of duty upon "notice of the facts." [Comment, § 156(a)] This Comment refers us to the *Restatement of Restitution* § 63, which states:

> There is no breach of duty to make restitution because of a transfer made by mistake until the transferee or beneficiary has notice of the facts upon which the transferor's right depends and has had a reasonable opportunity for making restitution.

The trial court found that the Appellants had notice of the mistake of law on April 3, 1995, when the decision in *Chamber* was issued and that interest commenced running on that date. The court did not, however, give effect to the requirement that appellants be given a "reasonable opportunity for making restitution." We believe that such a reasonable opportunity is precisely what we understand that the government proposed at that time -- that appellants simply take no payments for official expenses at all for the next sixteen months. That was an equitable plan which gave appellants an opportunity to make restitution while recognizing that they had, in effect, been given an advance on their expense payments so that it was appropriate that no more be collected by them until the last four months of their term.

Therefore, although we affirm the trial court's ruling that appellees are entitled to interest at the rate of 9% per annum, we reverse the ruling that interest runs from April 3, 1995. Instead, recognizing that appellants were entitled to a reasonable opportunity to make restitution, we hold that interest runs from the date appellants collected the first payment they received after the *Chamber* decision was issued. There is no single date for which interest commences to run on the total of the excess payments, but rather the interest on each of the first sixteen post- *Chamber* payments will run from the date the payment was collected.

CONCLUSION

For the foregoing reasons, the decision of the trial court is AFFIRMED with respect to all issues except interest and the amount ⊥119 due from Senator Sam Masang. As to interest, the decision is REVERSED and REMANDED to the trial court for proceedings necessary to properly calculate the interest consistent with this Opinion. [17] On remand, the trial court shall also conduct any proceedings necessary to determine the amount, if any, by which the total official expense payments collected by Senator Sam Masang during his term exceeded $48,000 and shall modify the judgment against him so that the amount thereof is equal to only such

[17] The Court assumes that the parties will be able to enter into a stipulation regarding the interest calculation.

excess amount, plus interest.

MICHELSEN, Justice, concurring in part and dissenting in part:

In every state Supreme Court case addressing the issue in the last 60 years, government employees, including legislators, who have received compensation pursuant to a statute later declared unconstitutional, have *never* had to repay the money. The majority believes that it has uncovered a creative accounting approach that allows this case to be decided differently than all previous cases, but for the reasons set forth in Section 6 of this opinion, I find the argument unpersuasive. For the reasons stated herein, I think this case ought to be decided in line with American caselaw, and therefore respectfully dissent.[18]

1. THE APPLICABILITY OF 1 PNC § 303.

The Trial Division, and the majority opinion, correctly look to the provisions of 1 PNC § 303 for the rule to apply in this case. Section 303 provides:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law ⊥120 Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.

The statute is derived from 1 TTC § 103, which was promulgated as the law of the Trust [19]

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[18] I concur with Parts IV and V of the majority opinion holding that no immunity defense is applicable in this case.

[19] "Restatements of the Law" are publications of the American Law Institute. The Institute has, for the past 70 years, been drafting volumes dedicated to summarizing the law in specific areas. Although many Restatements have been revised in later editions, the Restatement of the Law of Restitution has not been updated since its publication in 1937.

> The purpose of the restatements are:
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> to present an orderly statement of the general common law of the United States, including in that term, not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.
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> *Restatement of the Law of Restitution*, American Law Institute Publishers, 1937, p. ix.

Territory sometime before 1961.[20] This language is, in turn, taken from section 34 of the original Judiciary Act passed by the United States Congress in 1789. The section is still in effect and "has remained substantially unchanged to this day." *Black's Law Dictionary* 5th ed. 1979, P. 1197.

This "Rules of Decision Act" provides that the laws of the several states shall be the "rules of decision" in federal courts unless a federal law applies. 28 U.S.C. § 1652.

Consequently, when this Court looks for the law to apply, unless there is an applicable written law or custom, U.S. common law provides the "rules of decision," and pertinent restatement provisions stating United States common law are authoritative.

2. THE APPLICABILITY OF SECTION 46(a).

The Trial Division and the majority logically begin by a consideration of § 46 of the Restatement of Restitution. The section states:

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> A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty to do so, is entitled to restitution as though the mistake were one of fact if:
>
> (a) the benefit was conferred by a State or subdivision thereof:

The Legislature argues that the funds were for "expenses" and hence were not a "benefit," but the distinction is untenable, because reimbursement of expenses is an obvious "benefit" and the *Chamber* case [*Palau Chamber of Commerce v. Ucherbelau*, 5 ROP Intrm. 300 (Tr. Div. 1995)] has already decided that the funds were "compensation."

Therefore, the Legislature must demonstrate that it comes within an exception to the above stated rule.

3. THE EXCEPTION TO THE RULE: "CHANGED CIRCUMSTANCES"

Two sections [§§ 69 and 142] of the Restatement, state the same exception to a right to restitution:

> (1) The right of a person to restitution from another because of a benefit received because of mistake is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
>
> (2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.

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[20] The statute is referred to in *Etpison v. Indalecio*, 2 TTR 186 (Palau Dist. Tr. Div. 1961).

So even when § 46(a) *is* applicable, the Restatement provides that it is possible that "circumstances have so changed" that restitution need not be made. The Restatement does not instruct as to what constitutes a "changed circumstance" sufficient to call these sections into action, so we must review American case law to determine whether "the common law" has formulated an answer to the question. Specifically, the question presented is whether a public official must return the compensation received pursuant to a particular statute if that statute is later found to be unconstitutional.

⊥122 4. APPLICABLE CASE LAW

It so happens that there are two cases involving the specific issue of whether legislators are personally liable under such circumstances.[21] The first was *Austin v. Campbell*, 370 P.2d 769 (Ariz. 1962).[22] The suit involved a taxpayer's action to recover the amount paid as expense reimbursements to legislators. The Governor of Arizona had signed into law an amendment to the law that allowed reimbursements to legislators "upon approval of the president of the senate or the speaker of the house . . . ."

> It will be noted that [pursuant to the amendment] the claims are neither verified nor itemized, and no pretense is made to support the claimed reimbursement by attaching any vouchers or receipts.

Giss v. Jordan, 309 P.2d 779, 783 (Ariz. 1957).

The *Austin* litigation began six months after the enactment. In the separate *Giss* case[23] the amendment was held to be unconstitutional, because the amendment placed "legislators in a favored class by giving to their presiding officers the exclusive power to audit the claims of its members for reimbursement of expenditures claimed to have been made by them . . ." thereby violating the Arizona Constitution's separation of the Auditor's function from the legislative function. The result of the amendment was that "the legislature, through its presiding officers, in effect audits its members' claims." *Id.* at 784-785.

After the *Giss* decision was rendered, the *Austin* litigation continued on the restitution issue. Campbell won at the trial level, and Austin appealed. In support of the trial court judgment that the legislators had to reimburse the state for the expense money they had received, the Plaintiff argued that:

> an unconstitutional statute is a nullity and that therefore the payments received thereunder by defendant ⊥123 legislators were 'illegal' and must be returned to the state.

Austin at 774. The Plaintiff relied upon an 1886 United States Supreme Court case; *Norton v. Shelby*, 6 S.Ct. 1121 (1886) for that proposition. The *Austin* court noted that *Norton* was obsolete. In *Chicot County Drainage District v. Baxter State Bank*, 60 S.Ct. 317, 318 (1940), Chief Justice Hughes wrote:

> The actual existence of a statute, prior to such a determination is an operative fact

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[21] In neither case was it suggested that the legislators were entitled to any immunity defense.

[22] The plaintiff, Campbell, who was also a member of the legislature, was represented by William H. Rehnquist, future Chief Justice of the United States.

[23] There were two cases because sometime after Mr. Campbell sued, apparently the government cut off the payments to the legislators, who then sued for the money. They did not prevail because the amendment was found to be unconstitutional.

> which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.
>
> Consequently, the *Austin* court stated:
>
> However desirable the total nullity doctrine of *Norton* may be from the standpoint of symmetrical jurisprudence it does not conform to reality. For a statute, until legislatively or judicially excised, is an operative fact which cannot be ignored. This court presumes every legislative act constitutional and indulges in every intendment in favor of its validity. [citations omitted] No penalties should be visited upon the citizenry for doing likewise.

Austin at 775. [24] Plaintiff further argued that the legislators should not be able to argue a good faith reliance of constitutionality, because they were the ones who enacted the unconstitutional law. The Court rejected the argument.

> The good or bad faith of these legislators in voting to enact the statute exempting themselves from P.R.S. § 35-181 cannot be inquired into by this or any other court in Arizona. 'It is not for us to say that the legislature did not act properly.' [citation omitted.] That power is reposed in the voters alone.

Id. at 776.

In summary, *Austin* stands for the proposition that persons may ⊥124 act consistent with the presumption of constitutionality, without risking that a later authoritative holding of unconstitutionality will subject them to the equitable remedy of restitution, and that includes legislators.

The second case involving legislators arose in New York. *New York Public Interest Research Group v. Steingut* , 353 N.E.2d 558 (N.Y. 1976). In 1975, the legislators of New York State increased allowances for certain officers in excess of the authorizations allowed in 1974. The increased amount was challenged in court, the law was declared unconstitutional, and the trial court ordered restitution by the legislators. The Appellate Division upheld the finding of unconstitutionality, but reversed the restitution orders. Both sides then appealed to the Court of Appeals.

> The increases were held to be unconstitutional. However, the court made clear that:
>
> [o]ur deliberations must begin with an awareness of the respect due the legislative branch, which finds articulation in the precept that 'as a matter of substantive law every legislative enactment is deemed to be constitutional until its challengers have satisfied the courts to the contrary.' [citation omitted.] Even more important

[24] The total nullity doctrine is now considered "abandoned" by the United States Supreme Court. *Lemon v. Kurtzman*, 93 S.Ct. 1463, 1468 (1973). Because Justice Rehnquist joined in the opinion, apparently his views have changed since he represented Mr. Campbell.

> in this instance is respect for the basic policy of distribution of powers in our state government, and the exercise of a proper restraint on the part of the judiciary in responding to invitations to intervene in the internal affairs of the legislature as a co-ordinate branch of government-'it is not the province of the courts to direct the legislature how to do its work.' [citations omitted].

Id. at 562. The Court rejected the argument that the legislators had to pay back the compensation received pursuant to the unconstitutional enactment "either by reimbursement or withholding." *Id.* at 564.

> In denying restitution we accept the rationale expressed by the Appellate Division - that restitution of moneys received under a statute subsequently declared to be unconstitutional is not always required [citation omitted], that the funds here disbursed - incident to the performance of essential legislative responsibilities - - were not for an unconstitutional purpose but were merely improperly authorized, and that 'equitable interests of fairness and justice' mandate that no reimbursement be demanded from the recipients who, in good faith and ⊥125 supported by long-continued practice, relied on the disbursements as authorized and proper.

Id. at 562. So in the two cases where the courts have struck down compensation of legislators on constitutional grounds, both courts noted that a presumption of constitutionality was in effect at the time of the disbursement, and that the invalidation of the law did not justify requiring a return of the compensation.

It is not just legislators who are successfully avoiding paying back compensation after a statute is declared constitutionally infirm. As previously noted, no Supreme Court has ordered any public official or employee to repay compensation under such circumstances since the publishing of the Restatement in 1937.

In *State for Use and Benefit of Lawrence County v. Hobbs* , S.W. 2d 549 (Tenn. 1952), salary payments to a county clerk and master were not recoverable, the Court held, even if the challenged private acts were unconstitutional. "While a citizen is presumed to know the law he is not presumed to know that a statute, which the Supreme Court presumes to be constitutional, is unconstitutional." *Id.* at 553.

In *Wichita County v. Robinson*, 276 S.W.2d 509 (Tex. 1954), the county sought to recover compensation from assessors-collectors. It was determined that a state statute used to compensate their pay violated the Texas Constitution. The statute, providing for salary plus a percentage of fees of office (rather than straight salary) was unconstitutional.

The Court, on rehearing, held the compensation paid prior to the determination of unconstitutionality was not recoverable from the state employees.

While as a general rule a law held unconstitutional is void from the beginning and

> was never valid and enforceable at any time, nevertheless those obeying the law before its invalidity was determined are not to be punished but on the contrary their rights are to be protected.

Id. at 515.

Bayless v. Knox County , 286 S.W.2d 579 (Tenn. 1955), was another case where the State Supreme Court did not require repayment of compensation that had been paid based upon a statute later declared unconstitutional.

⊥126 In *State ex rel. Barker* , 882 S.W.2d 352 (Tenn. 1994), an issue was whether the fact that the Court held unconstitutional a law authorizing a monthly expense allowance a General Sessions Judge required the judge to reimburse the county for those sums paid pursuant to the unconstitutional tax. The answer was no. "Because of the presumption in favor of the constitutionality of statutes, the public and individuals are bound to observe a statute though unconstitutional, until it is declared void by an authoritative tribunal." *Id.* at 356. The court ruled similarly in *Franks v. State* , 772 S.W.2d 428 (Tenn. 1989). [Unconstitutional salary supplement need not be paid back.]

There are many cases stating the general rule as found in section 46 of the Restatement, and those cases are cited by the Executive, and were relied upon by the Trial Division. But those other cases do not concern the presumption of constitutionality and compensation paid to public officials. The pertinent issue is whether a later determination of unconstitutionality requires public officials who have received compensation to pay it back to the government on a theory of restitution. The answer, gleaned from an examination of the caselaw, is that American courts have treated the removal of the presumption of constitutionality as a changed circumstance, at least with respect to compensation of public officials.

5. THE "ILLUSTRATION" OF SECTION 46(a) AND OTHER AUTHORITY RELIED UPON BY THE EXECUTIVE

The Appellee and the Trial Division gave great weight to the "illustration" that follows the 1937 comment to section 46.

> County X pays its treasurer a salary fixed by statute which is greater than the constitutional limit. The county is entitled to restitution of the surplus.

My first comment is that this Court is bound to apply the "rules of the common law, as expressed in the restatements . . ." not the "illustrations." The illustrative cases and the comments are not "rules of decision." Secondly, the illustration concerns § 46(a). In drafting the "illustration" to § 46(a), the drafters were not necessarily thinking of, and certainly not applying, the changed circumstances exception. We are not looking for "illustrations" showing that § 46(a) applies. It obviously does. What we are now attempting to determine is whether there is an exception to the rule.

On a more substantive note, if no case can be found over a 60 year period applying the illustration to order a government ⊥127 official to return compensation, the illustration must not reflect American common law.

The two pre-Restatement cases relied upon by the Trial Division are not in conflict with the rule suggested here. In 1895, the Idaho Supreme Court stated "we must hold that payments made by the county commissioners to public officers, which are positively and absolutely forbidden by the statutes of the state and by the constitution thereof may be recovered back." *Ada County v. Gess* , 43 P. 71, 72 (Id. 1895). No law was declared unconstitutional. No presumption was removed.

If it *had* been a matter of constitutionality, the case might well have come out differently, for a contemporaneous United States Supreme Court case stated just six months later in another context:

> Although it should finally turn out that the law is invalid, and is so pronounced, yet, during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. Under such circumstances, can it be said that the plaintiffs in these suits, and persons situated like them, were bound to know what the law was and would be pronounced unconstitutional, and that no rights would be acquired under it . . .?

United States v. Realty Co. 16 S.Ct. 1120, 1125 (1896). The above language could be used to describe this case.

The second pre-Restatement case relied upon, *Austin v. Barrett*, 16 P.2d 12 (Ariz. 1932), is a straightforward example of mistake of law. The claimant argued that payments he received for a mileage allowance were authorized by statute. The Court said the law of Arizona made no provision for reimbursement for mileage costs for county employees. The case had nothing to do with the presumption of constitutionality.[25]

⊥128 6. THE MAJORITY APPROACH: EXPENSE MONEY AS AN AGGREGATE FIGURE

Despite the best efforts of both parties in this case, and our own independent research, no case has been found requiring a government official to make restitution of compensation received under a law subsequently declared to be unconstitutional. [26] Nonetheless, the majority

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[25] I have uncovered one other pre-Restatement case: *Roberts v. Roane County*, 23 S.W.2d 239 (Tenn. 1929). A sheriff was paid a salary for a year. The law was declared unconstitutional. Held: the sheriff did not have to make restitution.

[26] The majority opinion correctly gives no weight to an advisory opinion of the Supreme Court of New Hampshire cited by the Appellee in this case. The undersigned has practiced law in New England, and can confirm that in New England, advisory opinions:

> are the opinions of the individual justices, rendered within a tight time schedule

still affirms the restitution ordered in this case. Noting that no increase in compensation is constitutionally permitted by Article IX section 8 of the Palau Constitution, and converting the monthly expense allowance to a four year lump sum amount, the majority notes that the legislators could have avoided reaching the aggregate amount of their monthly allowance by not taking any expense allowance for, basically, their remaining term of office. Since they did not do so, the restitution is to be off-set by not paying them their future monthly expenses. Using this type of accounting, the majority says, means this case is different than all American cases.

However, the New York case, *Steingut*, fits like a glove. One need only fill in the blanks.

In [1992] [1974], elections for the [Palau] [New York] legislature were held. The next year, the legislators enacted a law that increased their allowable expenses during the present term of office. A group representing the public, [the Palau Chamber of Commerce] [the New York Public Interest Research Group], ⊥129 sued and successfully argued that the increase was in violation of the Constitution. Judgment was granted the plaintiffs, and restitution ultimately ordered by the trial court. On appeal it was argued that payments of such additional expense allowances be repaid "by deducting the amounts from payments hereafter to become due the recipients." *Steingut* at 560.

Note that at the time that the court declared the increase unconstitutional, the New York legislators had not reached their constitutional ceiling on expenses. [27] They could have stayed within the ceiling if the plaintiffs had prevailed in their request to have the excess expense money paid back "by deducting the amounts hereafter to become due to the recipients." Therefore the relief granted by this Court is the very same relief *denied* by the New York Court of Appeals.

Another example is *Lemon v. Kurzman, supra* , where the issue was whether particular funds could be released to parochial schools even though the law authorizing the compensations had been declared unconstitutional. The United States Supreme Court authorized release of the funds *after* the finding law was declared unconstitutional. This result was justified on the basis that the schools had already entered into contracts to spend the money before the statute was struck down.

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and without the benefit of full factual development, oral argument, or full briefing by all interested parties.

Opinion of the Justices, 673 A.2d 693, 695 (Me. 1996).

In New Hampshire, an advisory opinion is only that Supreme Court's "best review of the general law we have been able to make in the time available to us," with "no record beyond the assumptions stated in the requests themselves." *Opinion of the Justices*, 592 A.2d 180, 188 (N.H. 1991).

[27] Since the Court of Appeals' decision was issued June 17, 1976, the Appellate Division decision must have been in late 1975, or early 1976. Therefore, the original trial court decision had to be issued in 1975, and the legislative terms were not up until 1977. *Book of the States 1980-1981*, Council of State Governments, p. 85.

Aside from the fact that the result reached by the majority has no precedent in American Law, this "aggregate total" approach does not represent what happened in this case. The fact is (and the majority concedes this much) that the expense allowance increase was held to be immediately unconstitutional, not just after the payments hit the $48,000 total figure. Therefore, the Constitution was violated the first time the members of the legislative received a monthly check of $2,000. And it was violated again the second month when another $2,000 in expense money was paid each legislator. It was this monthly increase that the Trial Division held unconstitutional and disallowed. In the original litigation, the court expressly permitted continuation of the payments at the rate of $1,000 a month. *Palau Chamber*, 5 ROP Intrm at 304. Now we find out from the majority that it was the receipt of these later amounts that were the unconstitutional sums.

⊥130 In addition, this after-the-fact accounting misses a key point. If persons may, without penalty, presume a law constitutional, then these legislators were entitled to budget for expenses at the rate of $2,000 per month. If the law had only allowed for official expenses of $1,000 a month, then it may be assumed they would have made sure that they incurred expenses at that lower rate. This money was just as spent and gone as Judge Barker's expense check in Tennessee, Representative Steingut's allowance in New York, and Senator Giss' subsistence money in Arizona. Post hoc accounting cannot change that fact.

As the United States Supreme Court stated in *Lemon*:

> [S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping conduct. This fact of legal life underpins our modern decisions recognizing nonretroactivity.

Lemon v. Kurtzman, 93 S.Ct. at 1468.

A fair question to ask is what, therefore, protects the public from legislators who pass unconstitutional pay raises if they get to keep the money anyway? The answer is the doctrine of separation of powers. A law obviously unconstitutional should be vetoed, and if enacted over a veto, should not be enforced by the Executive until there is a judicial determination regarding constitutionality. *See e.g. Innocenti v. Wainit* , 2 FSM Intrm 173 (App. 1986). See also *Giss v. Jordan, supra*, for an example of an executive officer not acquiescing to an unconstitutional law. But in this case the Office of the Attorney General argued in this Court that the law was constitutional; "all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument." *United States v. Realty Co., supra* . Therefore I do not believe the legislators have to absorb their official expenses until they have paid back, with interest, the payments that Attorney General Mansfield told this Court were constitutionally made.

I therefore respectfully dissent from that part of the opinion upholding the order of restitution.