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FOR PUBLICATION

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,

Plaintiff,

v.

JOAQUIN PEREDO,

Defendant.

CRIMINAL CASE NO. 04-0181

**ORDER DENYING
DEFENDANT’S MOTION
TO DISMISS INFORMATION
AS NOT BROUGHT BY LAWFUL
ATTORNEY GENERAL**

I. INTRODUCTION

DEFENDANT Joaquin Peredo (“Peredo”) moved this Court to dismiss the four-count Information charging him with First Degree Sexual Abuse of a Minor, Attempted Sexual Abuse of a Minor, Assault and Battery, and Disturbing the Peace. The rationale behind Defendant’s Motion is not rooted in the particular facts of this case, but rather in the fact that there is currently a dispute regarding the validity of Ms. Pam Brown’s (“Ms. Brown”) appointment to the office of Attorney General. Defendant takes the position that if Ms. Brown does not legitimately hold the position of Attorney General (“AG”), then any Information brought by the Attorney General’s Office, under her authority, is a nullity. (Defendant’s Statement of Facts and Memorandum of Law in Support of Motion to Dismiss Information as Not Brought by Lawful Attorney General at 2, lines 4-7.) Except for this, Defendant does not otherwise raise any issue regarding the validity of the Information.¹

Thus, the primary question presented to this Court is whether or not the Government, through the Office of the Attorney General, can continue to file criminal prosecutions if no one person

¹ The Defense has not raised any issue in this case implying that the prosecution of this particular Defendant is politically motivated, or that the Defendant was in some way chosen for criminal prosecution because of the possible illegitimacy of Ms. Brown’s tenure as the Attorney General. If this prosecution were conducted as political retribution on Ms. Brown’s part, the analysis of this issue would be dramatically different.

1 legitimately holds the title of Attorney General. If the answer to this question is yes, then there is
2 no need to reach the issue of the validity of Ms. Brown’s tenure as AG. For the reasons listed below,
3 the Court finds that it can resolve this Motion without making a determination regarding Ms.
4 Brown’s authority as the Attorney General.

5 **II. FACTUAL BACKGROUND**

6 On May 30, 2003, the position of Commonwealth Attorney General became vacant after the
7 resignation of then Attorney General Ramona V. Manglona (“Judge or AG Manglona”). AG
8 Manglona resigned to accept an appointment from Governor Juan Babauta (“Governor Babauta”)
9 as Judge of the Superior Court. Upon appointment to office, AG Manglona appointed Assistant
10 Attorney General Clyde Lemons (“Lemons”) to serve as the Deputy AG in her absence.

11 On June 16, 2003, approximately two weeks after AG Manglona’s resignation, Governor
12 Babauta appointed Ms. Brown as the next Attorney General.² At that time, the Senate was going
13 through a period of political upheaval, and there is a legitimate dispute as to whether or not Ms.
14 Brown’s appointment was officially accepted or rejected by the Senate. What is not in question is
15 that Governor Babauta never submitted an alternate for Ms. Brown, and that Ms. Brown has been
16 serving in the capacity of Attorney General since that point in time. It is also not disputed that after
17 the departure of AG Manglona, Mr. Lemons continued acting as the head of the AG’s office, or
18 “Deputy AG,” pending the appointment and confirmation of the new AG.

19 On June 3, 2004, Assistant AG Alex Shapiro filed the aforementioned four-count
20 Information against the Defendant—nearly one year after Ms. Brown assumed office. The
21 Information lists Ms. Brown as the AG, and it was filed pursuant to her authority in that capacity.
22 (Information at 2.)

23 **III. ARGUMENT**

24 In Defendant’s Motion to Dismiss, the Defendant devotes substantial time describing the
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26 ² It is important to understand the historical context of Attorney General appointments in the CNMI. Between
27 June 1995, and November 1999, approximately nine different “acting” AGs were appointed about 71 different times to
28 hold the position for periods as short as one day. None of these appointments were ever considered permanent, and were
essentially made to avoid the advice and consent confirmation of the Senate. As may be imagined, this political
maneuvering was ultimately the subject of a lawsuit. *See Demapan v. Kara*, Civ. No. 99-0548 (N.M.I. Super. Ct.
January 20, 2000) (Decision and Order).

1 N.M.I. Constitution, the nature of the appointment process for the Attorney General, the facts
2 surrounding Ms. Brown’s appointment as Attorney General, the confirmation process, and Mr.
3 Lemons’ role as a possible “usurper” to the position of AG. However, it is crucial to remember that
4 all of this analysis is meaningless if, through the AG’s office, the Government retains the power to
5 prosecute criminals regardless of the presence of an Attorney General, or that particular *individual’s*
6 legitimate claim to that position. First, the Court disagrees with Defendant’s constitutional
7 interpretation that the AG’s power to prosecute is personal to the individual. Further, because the
8 Court finds ample precedent and strong policy considerations indicating that the Government retains
9 the power to prosecute criminal cases with or without a validly appointed AG, Defendant’s analysis
10 of Ms. Brown’s appointment is essentially irrelevant to this case.

11 **A. Jurisdictional Issues**

12 It is important to remember that this is a criminal case, whose merits are criminal in nature,
13 and have absolutely nothing to do with politics, Governor Babauta, Pam Brown, the Senate, or the
14 appointment process. Legitimately or not, Ms. Brown has acted as the AG for more than one year.
15 It is unfortunate that more than twenty months have passed since Ms. Brown was appointed, and the
16 legitimacy of her tenure is only just now being litigated directly in a taxpayer’s grievance cause of
17 action, *Demapan v. Brown*, Civ. No. 04-0573, filed December 9, 2004. The Court believes that this
18 action is the forum best suited to determine the validity of Ms. Brown’s appointment.

19 The issue of Ms. Brown’s appointment is a collateral matter to this case. To the Court’s
20 knowledge, the common law “de facto officer doctrine”³ has never been officially accepted or
21 rejected in the Commonwealth. However, as this issue has been the subject of multiple motions in
22 both civil and criminal cases, and because this issue is so crucial to the continued prosecution of
23 criminal cases in the Commonwealth, the Court will also address the merits of Defendant’s claim
24 that the Attorney General’s office is powerless to prosecute criminal actions without a properly
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27 ³ “Under the de facto officer doctrine, the invalidity of the appointment of a government official may be
28 challenged only by direct and not collateral attack.” *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1036 n2 (9th
Cir. 1991). Only two circuits have adopted it, and it appears that its continued vitality may be in serious doubt. *Id.*

1 appointed Attorney General in charge.⁴

2 Defenses and objections based on defects in the Information must be filed pretrial. Com. R.
3 Crim. P. 12(b)(2). If a defendant believes that the Information filed against him is improper, the
4 defendant is required to present these objections prior to trial. *Commonwealth v. Yi Xiou Zhen*, 2002
5 MP 4 ¶38. Ninth Circuit precedent indicates that if a defendant loses this challenge and is ultimately
6 convicted, he could challenge the Attorney General’s authority in a direct appeal. *See U.S. v.*
7 *Plesinski*, 912 F.2d 1033, 1036 (9th Cir. 1990).

8 **B. Legal Precedent**

9 Defendant’s argument is primarily based on his reading of the Commonwealth Constitution
10 as providing that the Government is divested of all power to prosecute criminal cases when there
11 is a (possible) defect in the appointment or confirmation of the Attorney General. This is discussed
12 at greater length in Section III-C, *infra*. However, Defendant provides little authority⁵ either from
13 local cases, or from cases of other jurisdictions, supporting this interpretation.

14 **1. CNMI Case Authority**

15 While Defendant is correct that none of the cases supplied by the Government are exactly
16 on point, each addresses a circumstance where the validity of the CNMI Attorney General was
17 called into question, and merit consideration. Any analysis of the Attorney General’s power to
18 prosecute in the Commonwealth must begin with a review of *Commonwealth v. Yi Xiou Zhen*, 2002
19 MP 4. There, the defendant asked the Supreme Court to vacate her conviction on the grounds that
20 her prosecution was a nullity because it was commenced by an Acting Attorney General who had
21 not been confirmed by the Senate pursuant to the requirements of Section 11, of Article III of the

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23 ⁴ The Court has suggested to both parties that an interlocutory appeal of this order to the Commonwealth
Supreme Court may be the best way to quickly, and finally, resolve this issue.

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25 ⁵ The Government strongly criticized Defendant for not including relevant case law in Defendant’s Motion to
Dismiss. Defendant has in turn criticized the Government for not filing replies in each case, but instead only filed its
26 argument once—expecting that since the arguments on this issue were consolidated, and because the issue was essentially
the same in all three cases, there was no need to file essentially the same brief each time.

27 The Court does not approve of either tactic. The Court would have liked Defendant to notify the court of these
opinions in the original Motion to Dismiss, even if only to distinguish them. The Government must still file any Reply
or Opposition for *each* case, even if argument on the issue has been consolidated. While this Court has traditionally been
28 very lenient with procedural errors, all attorneys should be aware that it will not treat such omissions lightly in the future.

1 CNMI Constitution. *Id.* at ¶36. Unfortunately, the Court did not need to reach the issue of the AG’s
2 power to prosecute, as the appellant did not present her objection prior to trial and therefore waived
3 her challenge. *Id.* at ¶38. However, the Court did cite, with approval, the principle that the
4 appointment of a United States Attorney that is not made as provided by the Appointments Clause
5 does not affect the U.S. government’s power to prosecute. *Id.* at ¶40 (citations omitted). The Court
6 also noted that even if the acting Attorney General’s appointment was invalid, it did not deprive the
7 trial court of its jurisdiction. *Id.* at ¶41.

8 Any discussion of the validity of the AG’s authority must include a review of *Demapan v.*
9 *Kara*, Civ. No. 99–0548 (N.M.I. Super. Ct. January 20, 2000) (Decision and Order). In *Demapan*,
10 plaintiffs filed a taxpayer grievance asserting that Acting Attorney General Maya B. Kara (“Kara”)
11 had improperly assumed the position of AG. *Id.* at 9. As mentioned *supra*, in footnote 2, this case
12 involved a scenario whereby numerous acting Attorneys General were repeatedly “appointed” for
13 very short periods of time in an effort to avoid rejection by the Senate.⁶ The court concluded that
14 the Governor does not have the power to make interim thirty day appointments pursuant to 1 CMC
15 § 2902. *Id.* at 18. Instead, the court found that the Governor may appoint a nominee to the position
16 of Attorney General, and that person shall be confirmed or rejected within the proscribed time
17 period. *Id.* at 22. However, despite these findings, the court still concluded that the plaintiffs were
18 lawfully and properly placed under arrest. *Id.* at 23.

19 *Demapan* is not the only CNMI Superior Court case to address this issue. The *Rabauliman*
20 court also addressed a claim that the trial court lacked jurisdiction over the offenses charged,
21 because the Information was filed under the authority of an “acting” Attorney General—a designation
22 which does not exist according to *Demapan*. *Commonwealth v. Rabauliman*, Crim. No. 98-0083
23 (N.M.I. Super. Ct. May 15, 2000) ([Unpublished] Order at 3). The Commonwealth Constitution
24 confers original jurisdiction in all criminal actions on the Superior Court.⁷ N.M.I. Const. art. IV, §2.
25 However, it is clear from reading *Rabauliman* that the real concern was not the jurisdiction of the

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27 ⁶ Kara herself was appointed sixteen different times for a total of 504 days. *Demapan v. Kara*, Civ. No.
28 99–0548 (N.M.I. Super. Ct. January 20, 2000) (Decision and Order at 19-20).

⁷ In the present case, the trial court’s jurisdiction over this matter has not been questioned by the Defendant.

1 trial court, but the power of the Attorney General to prosecute the defendant.

2 As the *Rabauliman* court stated, “[d]efendant’s contention that no prosecution can take place
3 without a validly appointed Attorney General is misplaced.” *Commonwealth v. Rabauliman*, Crim.
4 No. 98-0083 (N.M.I. Super. Ct. May 15, 2000) ([Unpublished] Order at 4). The executive power
5 is the power to implement and enforce the laws passed by the legislature, including the power to
6 prosecute those who violate those laws. *Id.* The Attorney General brings all prosecutions in the
7 name of the Commonwealth. *Id.* at 5 (*citing* 6 CMC § 6301). Therefore, the Attorney General and
8 her staff do not act as private employees, but as officers of the Commonwealth. *Id.* The Attorney
9 General is an integral part of the executive branch that acts on behalf of the Governor and the
10 Commonwealth as a whole. *Id.* “The power to prosecute is an executive function and the CNMI
11 is not divested of this power given a vacancy in the Attorney General’s Office.” *Id.*; *see also*
12 *Commonwealth v. Wen Hui Liu*, Crim. No. 99-0536 (N.M.I. Super. Ct. May 17, 2000) (Order at 7).
13 “To follow the Defendant’s argument to its logical conclusion would lead to an unacceptable and
14 absurd result.” *Commonwealth v. Rabauliman*, Crim. No. 98-0083 (N.M.I. Super. Ct. May 15,
15 2000) ([Unpublished] Order at 5). The Court finds the reasoning in *Rabauliman* very persuasive.

16 Defendant contends that *any* time the position of Attorney General stands vacant, the power
17 of the AG’s Office to prosecute is temporarily lost. Under Defendant’s interpretation, the power of
18 the Attorney General’s office to prosecute is flipped on and off like a switch—depending on the
19 presence of an Attorney General. In reality, the “power to prosecute” is more than just the filing of
20 an Information. Plea bargains, trials, discovery, etc. would all be suspended every time the position
21 stood empty. Taken to its logical conclusion, virtually all functions⁸ of the Attorney General’s
22 Office’s Criminal Division would cease until a new AG could be appointed.⁹ It is inconceivable to
23 this Court that important Government duties to the people should cease to operate simply because
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25 ⁸ Not to mention the other duties of the AG specifically cited in the Constitution.

26 ⁹ Defendant argues that, taken to its logical conclusion, the Government’s argument is also untenable. To wit:
27 if the AG’s office can continue to function without an AG, then why bother to appoint one? This ignores the plain
28 language of N.M.I. Const., art. III, § 11: “The governor **shall** appoint an Attorney General . . .” Also, it ignores practical
and political reality. What reasonable governor would operate an executive branch without an Attorney General? What
would be the response at the polls if s/he did not? The Court finds that this argument unpersuasive.

1 of a rejected appointment, procedural delays in making an appointment, or any circumstance
2 resulting in a temporary “power vacuum” in the AG’s office.

3 That Defendant has taken an untenable position is further demonstrated in light of the attack
4 on the authority of Assistant AG Clyde Lemons. Mr. Lemons acted as the “Deputy” AG under AG
5 Manglona. At oral argument, defense counsel asserted that after AG Manglona’s resignation, Mr.
6 Lemon’s power to act as AG essentially evaporated, creating a power vacuum at the AG’s office
7 prior to Ms. Brown’s appointment. However, as stated in *Atalig*,

8 In this case, the action is brought by a duly hired Assistant Attorney General, acting
9 on behalf of the *People* of the Commonwealth through *the People’s* Attorney
10 General’s office. This Court finds that the important factor in this quo warranto
11 proceeding is that it is brought against Mr. Atalig by the Office of the Attorney
General. Clyde Lemons, at this moment, is the closest the Commonwealth has to a
legitimate Attorney General and is, therefore, a fit and proper person to institute this
action.

12 *Commonwealth v. Atalig*, Civ. No. 03-0396 (N.M.I. Super. Ct. October 2, 2003) (Order Denying
13 Writ of Quo Warranto and Dismissing Counterclaim at 4). Defendant contends that *Atalig* is merely
14 a standing issue, where even a private citizen could have standing. (Defendant’s Reply to
15 Government’s Opposition to Motion to Dismiss Information as Not Brought by Lawful Attorney
16 General at 7, lns 7-8.) However, the Court strongly disagrees with Defendant’s characterization that,
17 “*Atalig* does not suggest, much less hold, that the Office of the Attorney General could
18 constitutionally prosecute crimes in the absence of a lawful Attorney General.” *Id.* at 7, lns 10-11.
19 To the contrary, it is clear that the *Atalig* court believed that Mr. Lemons could properly represent
20 the Government through the office of the Attorney General on that matter.

21 *Atalig* involved a Government action against a duly elected Senator convicted of felonies.
22 *Rabauliman* was a criminal rape case. *Demapan* involved illegal gambling. This case involves the
23 alleged sexual abuse of a minor. Clearly, something is terribly amiss if the Government cannot
24 prosecute cases such as these because of a particular interpretation of the Constitution. None of these
25 cases takes such a position. The Court cannot, in good conscience, find for the Defendant without
26 other more persuasive authority to the contrary.

27 **2. Authority From Other Jurisdictions**

28 Perhaps surprisingly, neither party has cited any cases exactly on point. Perhaps they do not

1 exist if this issue is indeed unique to our jurisdiction and our Constitution. However, the Court has
2 found several rulings which at least provide persuasive reasoning on this issue.

3 Upon the resignation of a U.S. Attorney for the District of Puerto Rico, AG Janet Reno
4 appointed an Assistant U.S. Attorney to fill the vacancy. *United States v. Hilario*, 218 F.3d 19, 21
5 (1st. Cir. 2000). However, because the President failed to name a replacement within 120 days, the
6 appointment lapsed. *Id.* The judges of the District Court responded to the exigency and appointed
7 Guillermo Gil as interim U.S. Attorney. *Id.* Six years elapsed without a Presidential nomination,
8 and criminal defendants began to challenge Gil’s authority. *Id.* at 22. The court determined the
9 infirmity in Gil’s appointment did not strip the court of its jurisdiction. *Id.* Further, the court held
10 that the indictment against the defendant was duly authorized, and should not have been dismissed.
11 *Id.* at 29.

12 The *Hilario* court goes to significant lengths to analyze the Appointments Clause of the U.S.
13 Constitution. Further, it addresses a scenario where powers are derived from the Constitution itself,
14 not from statute.

15 In another federal case, the special prosecutor’s possibly defective appointment, “would not
16 be sufficient to upset the conviction.” *United States v. Durham*, 941 F.2d 886, 892 (9th. Cir. 1991).
17 And in yet another case, a defendant contended that the proceedings were null and void because a
18 valid oath was not administered to prosecution personnel. *United States v. Emery*, 1 C.M.R. 643,
19 644 (U.S. Air Force Bd. of Review 1951). The *Emery* court found that despite procedural failings,
20 the actions were a valid exercise of authority. *Id.* at 646-47. Many more cases take a similar
21 approach to the rational outlined in these cases, finding that defective appointments neither strip the
22 court of its authority to hear the case, nor denying the government the power to prosecute.

23 The Defendant has provided no authority from any U.S. jurisdiction to support the principle
24 that a defect in the appointment of the Attorney General would divest the Government of its
25 authority to prosecute criminal cases. The Defendant has failed to even provide analogous
26 scenarios, wherein some governmental agency was deprived of a fundamental power due to a
27 procedural defect. However, the Court finds that significant authority exists refuting this argument.

28 **C. The Power of the Attorney General**

1 The position of “Attorney General” is established by the CNMI Constitution, which states:

2 The governor shall appoint an Attorney General with the advice and consent of the
3 Senate. The Attorney General shall be a resident and a domiciliary of the
4 Commonwealth of the Northern Mariana Islands for at least three years immediately
5 preceding the date on which the Attorney General is confirmed. The Attorney
6 General shall be **responsible** for providing legal advice to the governor and
7 executive departments, representing the Commonwealth in all legal matters, and
8 prosecuting violations of Commonwealth law.

9 N.M.I. Const. art. III, § 11 (emphasis added). Literally, the Constitution refers to the creation of a
10 governmental position in the Executive Branch that is filled by a person. It does not specifically
11 create an “office” for the Attorney General.

12 However, the reality is that the broad duties of the Attorney General described in the
13 Constitution far exceed the capacity of any one individual. Recognizing this, the Legislature created
14 an “Office of the Attorney General,” which is headed by the Attorney General. 1 CMC §§ 2151,
15 *et seq.* The Legislature also specifically provided for the AG’s Office to assume a variety of roles
16 with a number of staff, including an attorney employed to lead the Division of Intergovernmental
17 Relations,¹⁰ an attorney employed to lead the Office of Consumer Counsel,¹¹ and a Director of
18 Immigration to lead the Division of Immigration.¹² Further, aside from the powers mentioned in the
19 Constitution, the Attorney General is charged, among other things, with such duties as: registering
20 corporations and businesses; providing general supervision for immigration and naturalization
21 matters; reviewing and approving all contracts, bonds, and other contractual obligations of the
22 Commonwealth, its agencies, and instrumentalities; and to act, upon request, as counsel to all
23 departments, agencies, and instrumentalities of the Commonwealth. 1 CMC §§ 2153, 2172-73.

24 The Office of the Attorney General encompasses the work of dozens of attorneys and staff
25 working to ensure that many of the important functions of the executive branch are carried out.
26 Essentially, the person holding the title of “Attorney General” acts more as the administrator of the
27 office, not a practicing attorney. Further, it is clear that the role of AG goes far beyond the brief,
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26 ¹⁰ 1 CMC § 2154(c).

27 ¹¹ 1 CMC § 2155.

28 ¹² 1 CMC § 2171.

1 somewhat vague description of the position provided in the Constitution.

2 The Defendant has focused on the AG's role as the sole prosecutor for violations of
3 Commonwealth law. "Because the Commonwealth Constitution has designated a specific person
4 to 'prosecut[e] violations of Commonwealth law,' that person—and no one else—may prosecute
5 criminal violations." (Defendant's Statement of Facts and Memorandum of Law Supporting Motion
6 to Dismiss Information at 9, Ins 7-9.) However, even in performing this single function, the work
7 load far exceeds what any single person could possibly handle. Typically, about five hundred new
8 criminal¹³ cases are filed each year with the Superior Court. Clearly no one, including Defendant,
9 would rationally say that it is the AG's job to prosecute each of these cases personally. Instead, the
10 various powers of the AG, including the power to prosecute, is delegated, by statute, to the Office
11 of the Attorney General. 1 CMC § 2154(a). Assistant Attorneys General assist in performing the
12 duties of the Attorney General. *Id.*

13 Defendant's entire argument is based on one single premise: that the Constitution itself
14 gives all the power to prosecute all crimes to one single person, the Attorney General, and only that
15 person may act upon that power or delegate that power to a subordinate. This premise turns on the
16 meaning of one word: "responsible." "The Attorney General shall be **responsible** for providing
17 legal advice to the governor and executive departments, representing the Commonwealth in all legal
18 matters, and prosecuting violations of Commonwealth law." N.M.I. Const. art. III, § 11 (emphasis
19 added). Defendant makes the argument that because the power of criminal prosecution is
20 specifically mentioned in the Constitution itself, that this "power" is therefore somehow personal
21 to the person appointed Attorney General.¹⁴ In Defendant's view, the word "responsible" means
22 "personally responsible" to perform that duty him or her self. This is a particularly narrow and self-
23 serving reading of the text, and completely ignores the statutory provisions.

24
25 ¹³ This number does not include juvenile or traffic cases, or civil cases where the Commonwealth is a party.

26 ¹⁴ If that is true, then what of the other two powers expressly mentioned in the Constitution at Article III, Section
27 11: "providing legal advice to the governor and executive departments," and "representing the Commonwealth in all
28 legal matters?" Does the lack of a properly appointed Attorney General mean that in the absence of a properly appointed
AG, the Office of Attorney General can no longer carry out these functions, either? By Defendant's logic, every time
there was a change in the AG, no one would have the power to perform these important functions, either.

1 The Court believes that Section 11 is a general designation of power to, and description of
2 the role of, the Attorney General—a description and designation then further defined by the
3 Legislature. The proper reading of Section 11 is to view the word “responsible” in a real world,
4 practical sense. The person holding the position of Attorney General is *responsible* for her office.
5 She is *responsible* to make sure that it functions properly. She can be held accountable for both its
6 functions and its failures. The Court finds that in the Constitution, the word “responsible” is
7 synonymous with “answerable” or “accountable.” As clearly no one person can possibly handle all
8 of these duties personally, it makes much more sense to characterize the role of AG as being the one
9 person to whom everyone looks to for leadership and accountability.

10 In light of the contentious nature of politics, and mindful that all appointments and
11 confirmations take considerable time,¹⁵ it is truly amazing to think that the Framers’ intent behind
12 Article III, Section 11 was to vest all of this power in an individual in such a manner that these
13 functions would cease anytime the office stood vacant for any length of time.¹⁶ The court cannot
14 give Section 11 such an illogical interpretation. Although little is provided by way of legislative
15 intent, it is the Court’s duty to interpret Section 11 in the manner that makes the most logical and
16 practical sense.

17 It should be clear to all that the NMI Constitution is of, and for, the people of the
18 Commonwealth. Pursuant to the Constitution, the legislative branch creates the laws, and the
19 executive branch enforces them. The Attorney General, and her office, are the arm of the executive
20 branch charged with *inter alia* carrying out the necessary and important function of protecting the
21 people from criminals by enforcing the law. The work of the Attorney General goes on every single
22 day, regardless of whom heads the department. The people require it.

23 **D. Policy Considerations**

25 ¹⁵ Even when there is no controversy, it still takes time to appoint and confirm a new Attorney General.
26 Defendant does not even address emergency situations, such as if the current AG were suddenly incapacitated.

27 ¹⁶ This argument clearly shows that defense counsel’s argument goes too far: even the duly appointed deputy
28 AG Clyde Lemons allegedly “lost” his ability to prosecute on behalf of the Government when the AG resigned. It is
irrational to believe that there can be no “smooth transition of power” anytime (and every time) an AG resigns or is
incapacitated, until the Governor can appoint a new AG.

1 In the Commonwealth's Opposition to Defendant's motion, the Government suggests that
2 the Defendant is proposing virtual anarchy in the criminal justice system. "The chaos invited by the
3 Defendant would be truly newsworthy--no criminal cases prosecuted in this Commonwealth since
4 September 2003 could withstand appellate challenge, and since jeopardy has attached, none of these
5 cases could be refiled." (Commonwealth's Opposition to Defendant's Motion to Dismiss at 2, ln 17-
6 19.) The Opposition also suggests that any defendant convicted during the *five-year* period when
7 the Commonwealth had no Attorney General would similarly benefit. Finally, the Opposition
8 concludes with dire predictions regarding sources of public funding and grants and the possible loss
9 of Government contracts.

10 The Defendant counters stating that the Government's apocalyptic predictions are unfounded
11 and ridiculous. (Defendant's Reply to Government's Opposition to Motion to Dismiss at 1, ln 17.)
12 While the court agrees with the Defendant that many of the convictions could not be overturned due
13 to the Supreme Court's ruling in *Yi Xiou Zhen*, and that jeopardy has not yet attached in many
14 others, there are still many cases pending before this Court that would be affected.¹⁷ In fact, defense
15 counsel has filed similar motions in at least two other criminal cases¹⁸ pending before this very
16 Court. It is clear that attacking the validity of every Information filed during Ms. Brown's tenure,
17 not protected by *Yi Xiou Zhen* is the focal point of these motions. If the Court were to adopt this
18 logic, then all "non-*Yi Xiou Zhen*" cases filed in the last twenty months could be subject to dismissal.

19
20 The Court must always have an eye toward the rights of a criminal defendant, while also
21 considering the public welfare. Obviously, it is not in the interest of the public welfare to rule that
22 the Commonwealth is effectively paralyzed from prosecuting criminals every time a vacancy in the
23

24
25 ¹⁷ At oral argument on January 19, 2005, and in her Reply to the Commonwealth's Opposition, defense counsel
26 openly admitted that minor offenses with a statute of limitations of one year would probably be subject to dismissal,
27 without the possibility of refileing. However, she maintained that more serious cases, such as this one with a four year
28 statute of limitations, could simply be refiled by the Commonwealth--under a validly appointed AG, of course. If true,
that removes the concern that the opportunity to try more serious criminal cases would be forever lost. However, it also
begs the question: what is the point? If the AG's office could just re-file a new Information against this Defendant, then
this has all been nothing more than an interesting academic exercise.

¹⁸ *Commonwealth v. Cheng*, Crim. No. 03-0316; *Commonwealth v. Hossain*, Crim. No. 03-0398.

1 Attorney General's office occurs, including vacancies awaiting a new appointment from the
2 Governor, or confirmation by the Senate. It is also not in the public's interest to have criminal cases
3 dismissed merely because politicians are engaged in power struggles that have nothing to do with
4 the merits of that particular Defendant's case. Unfortunately, criminal activities such as murders,
5 rapes, child molestation, assaults, and thefts, will continue to occur regardless of the status of the
6 Attorney General. The people cannot and will not lose the power to prosecute these crimes.

7 The Court would be more receptive to this policy issue if it were shown that a particular
8 defendant was being prosecuted because of the political power struggle behind Ms. Brown's
9 nomination. Here, there is nothing of the sort. This Defendant is still being afforded his
10 Constitutional right to Due Process, and nothing here suggests the existence of an Equal Protection
11 violation. Defendant will still be adjudged innocent or guilty on the merits of his case, and the
12 strength of the evidence presented by both sides.

13 IV. CONCLUSION

14 For the foregoing reasons, Defendant's Motion to Dismiss Information as not Brought by
15 Lawful Attorney General¹⁹ is **DENIED**.

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18 **SO ORDERED this 31st day of January 2005.**

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21 /s/
22 ROBERT C. NARAJA, Presiding Judge

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28 _____
¹⁹ This ruling also serves as the basis for the Court's ruling DENYING Defendant's Motion to Disqualify
Deputy Attorney General Clyde Lemons, and GRANTING Plaintiff's Motion to Quash Subpoena (for Clyde Lemons).