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Legislative Needs Assessment

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ABBREVIATIONS AND GLOSSARY

Ainiken Dri-Majol	Voice of the Marshalls
Alab or Alap	Clan head
Art.	Article
CEDAW	Conv. Elimination of Discrimination against Women
Con.	Constitution
Dri Jerbal	Commoner or worker
GAO	U.S. General Accounting Office
Iroij	Member of a Chiefly Family
Iroij Edrik	Lesser chief
Iroijlaplap	Paramount Chief
Leroij	Female of iroij
MBC	Marshall Islands Broadcasting Corporation
MIRC	Marshall Islands Revised Code
NESS	National Economic and Social Summit
RMI	Republic of the Marshall Islands
Nitijela	Marshallese Parliament
	[literally, gathering of the wise (and powerful) people]
P.L.	Public Law
PSC	Public Service Commission
R&P	Rules and Procedures of the Nitijela
S.	Section
WUT/MI	Women United Together in the Marshall Islands.

Executive Summary

Since the start of constitutional self-government in 1979, the Marshall Islands has witnessed six elections each occurring, without interruption, every four years. There have been no coups, no premature dissolutions of parliament and no successful votes of 'no confidence'. The constitution has, in most respects, served the country reasonably well. There exists considerable popular engagement in political life. Parliamentary sittings are broadcast live on national radio, provoking considerable public interest. Popular extra-parliamentary campaigns have proved able to significantly influence the political agenda, national economic and social summits (NESS) have drawn together a wide range of stakeholder participants and Marshallese citizens have shown a notable independence in several constitutional referenda since 1979.

Despite this enviable record of political stability and strengthening political life, the Republic of the Marshall Islands government faces serious and widely acknowledged problems of accountability and transparency. During the first phase of the Compact of Free Association with the United States (1986-2001), successive reports from the US General Accounting Office and from several RMI Government Task Forces, as well as independent auditors Deloitte and Touche, highlighted poor accounting standards, misuse of funds and persistent non-reporting by government agencies, state-owned enterprises, local governments and ministries. There is an urgent need to strengthen the oversight and enforcement role of parliament, and in particular to revitalise the links between the Nitijela's public accounts committee, the Auditor General, Attorney General and Finance Ministry.

The Nitijela itself needs to enhance and refine its legislative output, and increase the efficiency of parliamentary support services. Parliamentary sessions have not proved able to generate essential legislation in key areas, partly due to poor planning and organisation. At present, Nitijela back-up services aimed at enhancing parliamentary debate are weak and parliamentary business is not organised around a clear annual programme. Cabinet dominates the legislature, while parliament serves as a talking shop rather than a key nation-building institution. The Nitijela's potentially strong committee system is not functioning to potential in scrutinizing the Executive. The Public Service Commission has not, historically, plays its' intended neutral role in the regulation of state employment, but has regularly been subject to ministerial control.

Recommendations

The following recommendations are based on a review of the operations of the Nitijela, key legal documents, the role of the main oversight institutions, electoral processes and parliament-constituency relationships, women's role in political life and human resource constraints

Strengthening the Office of the Speaker & Clerk

1. That the offices of the Clerk be thoroughly re-organised and strengthened to play the role of an independent parliamentary secretariat, and provide legal advice and skilled

background research for senators and committees, as well as facilitating the making available of records and technical resources to Senators and committees.

2. That skilled resource personnel be appointed capable of fulfilling research roles for the committees and senators, and assisting in the drafting of private member's Bills.
3. That comprehensive job descriptions be introduced for all positions in the Offices of the Clerk
4. That the appointment of any appointee in the Offices of the Clerk who is a close relative of any Minister or Senator be accompanied by a report from the Clerk and/or Speaker detailing why this appointee is qualified to hold the post and demonstrating that the appointment is not the result of undue influence being exerted.
5. That performance-related pay should be used for those employed in the typing of the journal of the house, and that these staff be required to prepare the Journal of the House and Bills and Resolutions of the Nitijela within a specified period of time.
6. As regards performance targets, it should never be the case that a new session of the Nitijela has to commence before the completion of records covering the previous session.
7. That the position of 'Custodian' be converted to that of record-keeper/Librarian and that the occupant be a trained librarian.¹
8. That a shake-up in the production of records of parliamentary business and storing and record-keeping be viewed as a pre-requisite for the establishment, in the not-too-distant future, of a parliamentary library for the Nitijela.
9. That libraries of deposit be established for all government publications (including all statistical abstracts, electoral records, Auditor-General's reports and General Purpose Financial statements and legal documents). These libraries of deposit should include the Nitijela's own records office, the Alele Archives, the College of the Marshall Islands Library and the University of the South Pacific library.
10. That the Speaker's training exercises for new members on role and duties of parliamentarians be expanded to include coverage of parliamentary procedure (written and oral questions, points of information and order, and roles while participating in committees).

The Law-Making Function of the Nitijela

11. At the opening of parliament, the President, after consultation with cabinet, should outline the legislative program of the government for that year, and this should serve as

¹ Grants are available from the US Institute of Museum and Library Services (ILMS) for the training of librarians.

the basis for a schedule, drawn up by the Clerk in collaboration with the Speaker, for the order of business for the session.

12. Rules and procedure of the Nitijela be amended to require government to give notice of the annual legislative agenda, including Bills and Resolutions, at the start of each session in January.
13. That the Office of the Clerk and the Office of the Speaker, in consultation with the Cabinet Chief Secretary, draw up an annual agenda at the start of each annual session and submit this to the Nitijela for approval.
14. That a) non-government senators select by secret ballot a senator, or that b) the Speaker identify a senator based on consultations with non-government senators, to respond in the Nitijela to the agenda of the government, as set out by the President, at the start of each parliamentary session and to the budget speech of the Minister of Finance.
15. Senators be encouraged to submit all private members Bills for a session at the start of each annual session.
16. That restricted time-slots be made available for Bills and Resolutions that have not been announced at the start of each year [So that the only certain way of ensuring that new legislation is tabled during a session is via prompt submission at the start of the year].
17. That the President's annual speech be followed by a comprehensive Nitijela discussion covering all aspects of the legislative program for that session.
18. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:
 - a) there is public exposure of issues, papers and consultation on major reforms including draft bills. In particular, there should be an obligation to call public hearings where there is an item of widespread popular concern.
 - b) Standing orders provide a delay of some specified period between introduction and debate to enable adequate representation of public comment unless suspended by consent or a significantly high percentage vote of the chamber; and
 - c) Major legislation can be referred to a select committee for the detailed examination of such legislation and the taking of evidence from members of the public.
19. Rules & procedures should be amended to require public hearings on any matter before a committee of the Nitijela that is of broad public interest.
20. The Rules & Procedures should be amended to require at least two weeks notice of any public hearings, with notification broadcast live on Radio V7AB and published in the Marshall Islands Journal.

21. The Office of the Clerk should be required to send out invitations to any public hearing to interested stakeholders and/or expert witnesses.
22. Avoidance of excessive delays in referral of Bills to committees should occur by provision of a clear timetable for such consultation.
23. All cabinet-initiated Task Force reports relating to financial impropriety & Auditor General's Reports (revised as suggested below) should be tabled on the parliamentary agenda.
24. That a new edition of the Marshall Islands Revised Code, involving a new consolidation of laws, be speedily produced, with full corrections of cross-references, numbering, appendices.
25. Questions addressed to ministers that require detailed factual answers, as contrasted with those that require broad statements of policy, should be submitted in writing before being raised orally.
26. Support services should be improved to assist senators in preparing questions, so as to reinforce parliamentary scrutiny of the executive.
27. That there should be no call for an early 'recess' of parliament, unless the statutory question and answer session has been completed.
28. That Gender-neutral language should be used in the drafting and use of legislation to promote a more gender balanced society.
29. That speedy and effective steps should be taken by the Nitijela to implement Marshall Islands' international human rights obligations by enacting appropriate human rights legislation.
30. That the Nitijela should raise awareness and encourage people to enforce their rights through the courts.
31. That all members of Parliament and the Council of Iroij should have access to human rights education.
32. That the rules governing the Judicial Services Commission be revised to include a substitute for each of its' three participants. At present, the Commission comprises the Chief Justice of the High Court, Attorney General and a public member. There exists provision for the substitution of the Attorney general by the Public Service Commissioner, and of the Chief Justice by Chief Justice of the Supreme Court, but the public member has no substitute. To appoint someone only as and when the need arises could prejudice the outcome in given situations. Hence, it would be better if a potential substitute existed for the public member.

Strengthening Nitijela-Constituency Relationships

33. Standing orders should be amended to formalize established practice regarding radio transmissions of Nitijela proceedings – ie that live broadcast of proceedings occurs at all times when the Nitijela is in session except recesses. The Nitijela recesses during power outages.
34. That the role of the Elections Office be enhanced and given a higher profile.
35. That an Electoral Commission, consisting of three members, and with a chair qualified to be a judge, be appointed and required to report to parliament on a) voter registration, b) revisions to the number and/or distribution of seats and c) the functioning of the Elections Office, as well as d) other electoral matters as they see fit.
36. As regards resident voters, the Nitijela should either;
- a) eliminate strategic re-registration by requiring voters to settle for, and stick to, one electoral district (unless the change requested is by virtue of a change in residence)².
- Or,
- b) establish electoral registration based on residence³.
37. Whatever the decision as regards national elections, the Nitijela should look separately at the issue of local government election registration, and at whether off-island electorates should be able to participate in local government elections on the outer islands.
38. The Nitijela should act on its constitutional responsibility to provide a report, either by a parliamentary committee or separate body authorized by parliament (such as an Electoral Commission), looking into the desirability or otherwise of changing the number and distribution of seats inside the Nitijela⁴.
39. As regards, absentee voters who reside abroad, the Nitijela should either
- a) guarantee non-residents' (including those citizens in the US, Hawaii, etc) ability to exercise their vote
- Or
- b) restrict the right to vote to residents.
- The present system creates the potential for abuse.

² The Constitution provides that 'every person otherwise qualified to be a voter shall have the right to vote in one and only one electoral district, being an electoral district in which he either resides or has land rights, but a person who has a choice of electoral districts pursuant to this paragraph shall exercise that choice in any manner prescribed by law' [Art. 4. Section 3 (3)]. In other words, laws, rather than constitutional amendments, may lay down procedures as regards the district of registration for any person who has a choice in the matter

³ This would require a constitutional amendment.

⁴ The 1979 constitution [article. IV, S. 2, (6)] provides that the Nitijela, or some other authorised body, review the composition of the Nitijela at least once in every ten years.

40. If a), a charter providing a government guarantee of the right to vote to overseas voters should include a legal responsibility to distribute ballot papers in a specified time period, and to provide voter education programs via mailing publicity campaigns explaining electoral procedures as regards the affidavit from a public notary required and the postal mark on the ballot paper. Alternatively, these rules should be simplified⁵.
41. That the electoral rolls be fully updated by the deletion of deceased persons from the register, and the addition of new eligible voters to the register.
42. Improve methods of linking the system used at the Ministry of Internal Affairs' Register of Births and Deaths with that used by the Elections Office.
43. That the Electoral and Referenda Act be amended so that the Electoral Register used in each election be publicly available and held in several libraries of deposit, including the Nitijela Records Office, the Alele Archives, College of the Marshall Islands and University of the South Pacific.
44. That reporting of election results be improved in line with accepted international standards. For each constituency data should be published including (1) number of registered voters, divided between those a) resident on-island, b) those resident off-island but elsewhere in the Marshall Islands, c) those resident overseas. (2) Numbers of ballots declared invalid should be listed, followed by (3) valid ballots (ie the valid ballots cast for each candidate). Postal ballots should be accounted for separately, and a breakdown of the reasons for rejection of any postal ballots should be provided.
45. That the Elections Office be made responsible for providing neutral voter education programs.
46. That voter education be introduced as part of the school curriculum
47. That the Nitijela enact campaign finance laws making illegal
 - a) The use of government funds or property for election campaigns
And requiring;
 - b) All candidates should be required by law to publicly disclose all offshore donations
48. Whilst being responsive to the needs of society and minority views, Ministers and Senators should avoid improper influence of lobbyists and special interest groups
49. That a charter for National Radio V7AB be published protecting the station from direct intervention or tacit encouragement of self-censorship.

⁵ Another alternative, as recently adopted in the Cook Islands, is to provide for a separate seat or separate seats for overseas resident Marshallese voters.

50. Radio V7AB should be encouraged to develop radio programs, in Marshallese, detailing the meaning and ramifications of bills and develop programs that touch on controversial issues, such as the Compact negotiations, Kwajalein or financial issues.
51. That standing orders be amended to clarify whether secret ballots or roll call be required in votes of no confidence.
52. That votes by roll call be introduced for any vote of no confidence to improve accountability.
53. Provisions enabling the Nitijela to challenge the Speaker's rulings should be strengthened.
54. That the current 30-day time period for disputes arising regarding elections results be reduced to 14 days.
55. That procedures for the dissolution of parliament in the event of two successful votes of no confidence, and failures to select another President, be re-considered at the next Constitutional Convention. At present, the previous President is then returned to office and dissolution only occurs at his or her discretion. Although such a situation has not, so far, arisen, it is worth revisiting at a future Constitutional Convention. The reluctance, back in 1978, to accept the possibility of a premature dissolution of parliament may not be as strong today.
56. A Leadership Code, with specified codes of conduct for all members of the Nitijela and Council of Iroij, should be developed and published, as spelt out in the government's document Vision 2018.
57. Codes of conduct should require full disclosure by ministers and senators and council members of their financial, monetary and commercial interests.
58. That a register of commercial interests of ministers and senators be established.
59. That the Speaker be empowered to refer conflict of interest issues to the Ethics Board.

The Oversight Function of Parliament

60. That consideration be given to the desirability or otherwise of establishing a separate office for a Leader of the Opposition, with appropriate support services.
61. That job descriptions for the positions of chairs on each of the seven committees be developed and that these specify a preference for experienced and/or well-qualified senators who are not part of the cabinet, and who have a reputation for independent thinking.

62. That rules governing the conduct of senators on committees be promulgated, including financial penalties for non-attendance and/or financial incentives for attendance and active participation, particularly for committee chairs.
63. Senators should be appropriately remunerated for their participation in the standing committees, either by a) earmarking an element of the existing 'official allowances' to be specifically paid in accordance with committee attendance and active participation or b) the provision of additional funding for this same purpose.
64. Whenever a committee meeting takes place, whether this is a public hearing or not, the names of those attending, those sending apologies and those absent should be broadcast on Radio V7AB.
65. That training programs be initiated for the chairs of committees at the start of their period in office.
66. At the start of their period in office, committee chairs should be required to conduct a written review of their areas of responsibility, which should include expressions of intention regarding the passage of new legislation.
67. Those reviews should be published both in English and Marshallese.
68. Support from the parliamentary secretariat, and from within the ministries, should be given to committee chairs in the preparation of those reports.
69. Initial committee meetings at the start of a new parliamentary term (following an election) should include a discussion of chair's reports completed by the chair.
70. That the current public accounts committee should be disbanded and reconstituted.
71. The Chair of the newly constituted public accounts committee should be an experienced and/or well-qualified senator who belongs to the opposition or is known for independence in thinking. The post should be given to a Senator who is capable and willing to uncover necessary information from a wide range of sources.
72. Enact as Act of Parliament a new charter for the operation of the Public Accounts Committee (incorporating guidelines), and for coordination, between the Public Accounts Committee, Auditor General's Office, Attorney general's Office and Secretary of Finance.
73. The Public Accounts Committee should be empowered under relevant laws to initiate prosecution for all offences relating to public accounts arising from its own investigation.
74. That a report from the Public Accounts Committee regarding intended action on the Auditor General's annual report must be placed on the Nitijela Order of Business at least two times a year. The Auditor General's reports should, twice a year, be tabled before

the Public Accounts Committee which should, in turn, provide the Nitijela with a written report, within a specified time period.

75. That the position of Special Prosecutor be created within the Offices of the Attorney General, but with separate responsibility, with the objective of enhancing the operations of that office.
76. That Ministers and/or Governments be required to respond publicly, within a defined time period, to reports emanating from the standing committees.
77. All state institutions, including the courts and other constitutional offices, should report directly to the Nitijela on their operations each financial year.
78. That the independence of the PSC be fostered and respected, and that means be sought to bolster the separation of powers between the executive and the legislature. In particular, Ministerial interventions, or suggestions of any kind, as regards the employment decisions of the PSC requires a clear sanction. This should also be spelt out in the Leadership Code.
79. That the Auditor-General's reports should contain two-to-four page cover statements, translated both into English and Marshallese, alerting members of the Public Accounts Committee to a) improper procedures or absence of procedures, b) any evidence of fraud or other illegal activity, c) any areas of waste or abuse of public funds. These statements should also be made public.
80. Cover statements ('Independent Auditor's reports') already accompany the Finance Ministry's General Purpose Financial Statements. These should include recommended action statements.
81. That a bi-annual summit of the Public Accounts Committee, bringing together the Auditor-General, Attorney-General and Senators on the Public Accounts Committee should be scheduled in the wake of the publication of the Auditor-General's reports.
82. That Public hearings should be held, concerning the reports of the Public Accounts Committee, at least twice a year.
83. That an Ombudsman be created by Act of Parliament and empowered to play an investigative role in regards to administrative matters by any ministry, department or other statutory authority in respect of which a complaint has been made to the Ombudsman or at his or her own instigation. The Ombudsman should report to parliament on any such investigations and should provide an annual report to parliament.
84. Provisions regarding the appointment of chairs to the Standing Committees. By convention, the Chairperson on the committees is not a cabinet member, but the Vice-Chairperson is a minister. This should be formalized.
85. The Speaker should play a more active role in fulfilling his obligations under sections 37 (2) of standing orders – namely that 'if in his opinion the work of the committee is not

being properly and expeditiously carried out he may cancel the appointment [of the Chair] and make a fresh appointment’.

86. The Speaker should play a more active role in fulfilling his obligations under sections 35 (5) of standing orders regarding the cancellation of appointments of members of the committee, particularly where members are regularly absent. The Nitijela should also note its own responsibilities in this respect, since section 35 (5) is explicit that the Speaker’s decision is ‘subject to any order of the Nitijela’.

Women Participation and Leadership Roles

87. That the Nitijela carry through its international human rights commitments, for example by ratifying CEDAW
88. That the Nitijela pay particular attention to drawing local and national women’s organizations into involvement in its legislative program, including involvement of representatives at the initial stages of framing legislation and public hearings arranged to discuss proposed legislation, where these are issues that are clearly of concern to the women’s movement.
89. That the Ministry of Internal Affairs recognise and acknowledge the independence of WUT/MI, and its role as a genuine NGO
90. That steps be taken at the next election to encourage a greater number of women candidates, both for national and local polls, and that voter education programs be devised to challenge negative stereotypes regarding women’s involvement in politics.
91. Potential & existing women’s leaders should be assisted in building skills, confidence & opportunities through training and other support activities.
92. Bills introduced into parliament should include a gender impact analysis.

1. Introduction

This report provides a comprehensive needs assessment of the national parliament (Nitijela) of the Marshall Islands and identifies priority areas for future support programmes. The Government of the Republic of the Marshall Islands is committed to implementing principles of good governance, and has endorsed the Pacific Island Forum's eight principles of accountability⁶. This report is aimed at strengthening of the operations of the Nitijela with respect to enhancing democratic participation, equity and representation, ensuring free and fair elections and improving the accountability, transparency, integrity and efficiency of government operations.

The first part of the report looks at the development and functioning of Marshallese political and juridical institutions and examines some of the key recent political developments.

Subsequent sections consider the country's key legal documents, parliament-constituency relations, the passage of legislation through the Nitijela, the functioning of parliamentary and other oversight organisations, human resource constraints and the role of civil society groups and in particular women's organisations, in Marshallese political life.

The appendices include

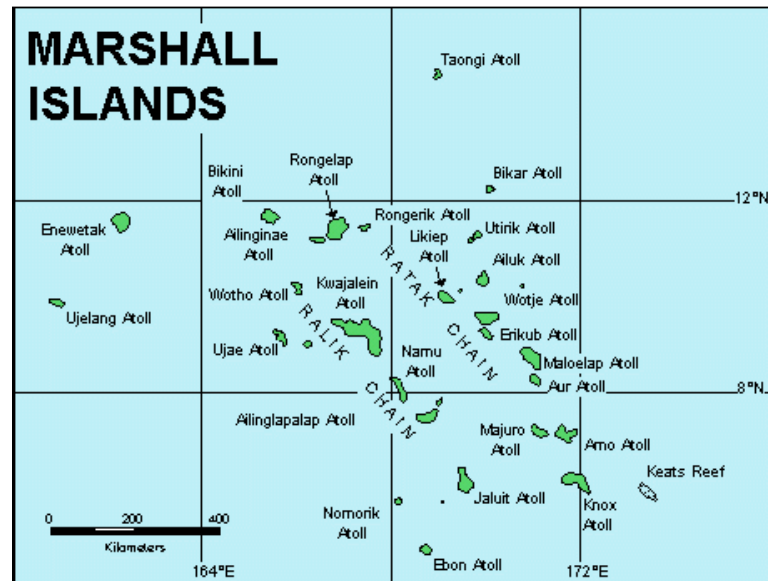
- The Mission Terms of Reference
- The Consultation Programme
- Task Force on Accountability, Report 1a.
- Rulings of the High Court and Supreme Court concerning the Conduct of the Speaker in declaring conflicts of interest during the Parliamentary Debate on the 'Gaming Bill'.
- The Opinion and Declaratory Judgement of the High Court and corresponding Ruling of the Supreme Court concerning the 'Vote of no Confidence'.
- The Consultants personal details

1.1. Context of the Consultation

The Nitijela was in session during the time that the legislative needs assessment was undertaken, and several key committees also held public hearings. Important events, such as Nuclear Victims Remembrance Day and WUT/MI annual convention, took place. The Offices of the Clerk were able to arrange an initial interview with the Speaker and, half way through the mission, an audience with President and an introduction of the consultant in the Nitijela Chamber. No other meetings with any senators were scheduled either before or during the mission. Where possible, these therefore had to be arranged directly. Access to published information was also highly limited, owing in particular to the disorganised state of

⁶ http://www.undp.org/fj/gold/Eight_principlesof_accountability.htm.

the Records Office (Storeroom) and the evident unfamiliarity of employees in the Offices of the Clerk with search activities. The mission was nevertheless completed within two weeks.



Source; GIS, Geography Department, University of the South Pacific.

1.2. Background

The Republic of the Marshall Islands consists of 180 square km of coral atolls and islands spread over nearly a million square km of Pacific Ocean. The islands are separated into two chains, the Ratak (sunrise) and Ralik (sunset) chain. The northern atolls of Bikini, Rongelap, Enewetak and Utrik were affected by some 67 American nuclear tests between 1946 and 1958. On Kwajalein, the United States continues to maintain a military base and missile testing facility. US payments for the occupancy of the Kwajalein base, compensation to the nuclear-affected atolls and agreed payments and program support under the 1986 Compact of Free Association with the United States account for a large part of the country's annual income.

The Marshall Islands population in 1999 was 50,864⁷. Nearly 50% live on Majuro Atoll, where the capital is located, and another 21% live on Kwajalein Atoll with the remainder (29%) very unevenly spread across 22 other inhabited atolls and coral islands. Relatively slow recent population growth (on average 1.5% per annum between 1988-99), despite high birth-rates, is widely attributed to a sizeable rise in overseas migration, particularly to Guam, Hawaii and, above all, mainland USA. Under the Compact of Free Association, Marshallese citizens are treated as non-immigrants in the United States and have the right to live and work in that country.

⁷ 1999 Census of Population and Housing, Final Report, Office of Planning and Statistics

The Marshall Islands commenced constitutional self-government in 1979 and became officially independent on 22nd December 1990, when the United Nations formally dissolved US 'trusteeship'. Earlier, it had periods under German control (1885-1914), Japanese control (1914-1945) and American control (1944-1979). During the post-World War Two years, the Marshall Islands, along with the bulk of Micronesia, became designated as a United Nations 'strategic trust', at first administered by the US Navy (1947-51) and thereafter by a U.S. Department of the Interior-appointed High Commissioner. Criticisms of the U.S. administration by a touring U.N. Mission in 1961 triggered an increased annual appropriation for the Trust Territory and greater U.S. Support for the development of Micronesia-wide political institutions.

In July 1965, a bicameral Congress of Micronesia met for the first time, with representatives from the Northern Marianas, Palau, the Caroline Islands and the Marshall Islands. The present-day Nitijela of the Marshall Islands functioned as a district legislature during the days of the Congress of Micronesia. Lack of strong cultural or linguistic ties with the neighbouring Caroline Islands and objections to the centralisation of Kwajalein revenues led Marshall Islands citizens to vote for a breakaway from the rest of Micronesia in 1978, and a separate Marshall Islands constitution was ratified in 1979. A further UN-observed referendum in 1983 backed a 'Compact of Free Association' with the USA. As a result, the country has full internal self-government, and significant authority in foreign affairs, while the US remains responsible for defence and has long-term 'strategic denial' rights over the territory⁸.

The Marshall Islands became a member of the United Nations in September 1991. It maintains embassies in Fiji, Japan, China, Taiwan and the United States.

The national languages are Marshallese and English, and both are used in the passage of legislation through parliament and in the law courts.

1.3. Type of Government

The Republic of the Marshall Islands has a unicameral parliamentary system but with a consultative upper house (The Council of Iroij), comprising traditional leaders.

The Nitijela has 33 members, who represent the country's 24 inhabited atolls and coral islands but with multi-member constituencies for the more populous atolls. They are elected on the basis of universal suffrage and a first-past-the-post (or plurality) system every four years, unless the assembly is dissolved beforehand.

An upper house for Marshallese traditional leaders, the Council of Iroij, discusses all Bills that go before the Nitijela and can request, within 7 days, that any that touch on issues of customary law, traditional practice or land rights be reconsidered. The Council of Iroij has no veto powers.

⁸ Meaning that the U.S. has the right to deny military access to the islands by other nations, and an option to establish military bases.

The Head of State is the President and is elected by the Nitijela from among its members. Unlike most Presidential systems, he/she can be ousted in a vote of 'no confidence' by parliament. If no new President is elected after two 'no confidence' motions, the previous President has the right to dissolve parliament.

Executive power is vested in a cabinet, selected after each general or presidential election by the President. The cabinet comprises between six and ten ministers, who can be dismissed and replaced by the President. The cabinet is collectively responsible to the Nitijela.

The Judiciary consists of a Supreme court, High Court and a Traditional Rights Court, as well as various subordinate district or community courts. Judges of the Supreme or High Courts are appointed by cabinet on the recommendation of a Judicial Services Commission and ratified by the Nitijela. The Traditional Rights Courts sit only at the direction of the High Court and advise on customary matters⁹. Their decisions are not binding. A proposal to give the Traditional Rights Courts power over all land and chiefly title disputes was defeated by referendum in 1995.

Local Government is run by councils representing all of the inhabited 24 atolls and coral islands¹⁰, each of which operates under a separate district constitution.

The Nitijela has to concur also by resolution (of a simple majority) before the Auditor-General, The Attorney General, the Public Service Commission, Members of the Judiciary, Ambassadors and Members of the Nuclear Claims Tribunal are appointed.

1.4. The Capitol Building

The country's Capitol building was constructed in 1994. It houses the Nitijela chamber and the Council of Iroij, the Presidential and Cabinet offices, the Ministries of Finance and Foreign Affairs and the Attorney General's office, the President's office, the Attorney-General's and Kwajalein negotiating Committee offices and offices for Nitijela Senators. The Nitijela sits in an octagon-shaped chamber with ministers, including the President, assembled towards the centre of the Chamber and backbenchers situated further back. It therefore differs from the Westminster-style division of the house, with government and opposition facing each other across the floor of the chamber, as found in many other parts of the Pacific. The Speaker of the House sits slightly aloft at the front of the chamber, and controls Senators access to national radio via a switchboard. All senators have microphones linked to the Speaker's switchboard. The Speaker controls their access to national radio, which reaches all parts of the Marshall Islands (see figure 1).

⁹ The Traditional Rights Courts is normally invoked by the High Court, and consist of panels of three or more judges intended to 'include a fair representation of all classes of land rights, including, where applicable, the Iroijlaplap, Irojedrik, Alap and Dri Jerbal.' (Art VI. Sect 4. [1]). Their jurisdiction is limited to issues of titles, land rights, customary law and traditional practice. According to the Chief Justice, the Traditional Rights Courts have been a great success.

¹⁰ However, there are only 22 mayors because one presides over three outer island municipalities.

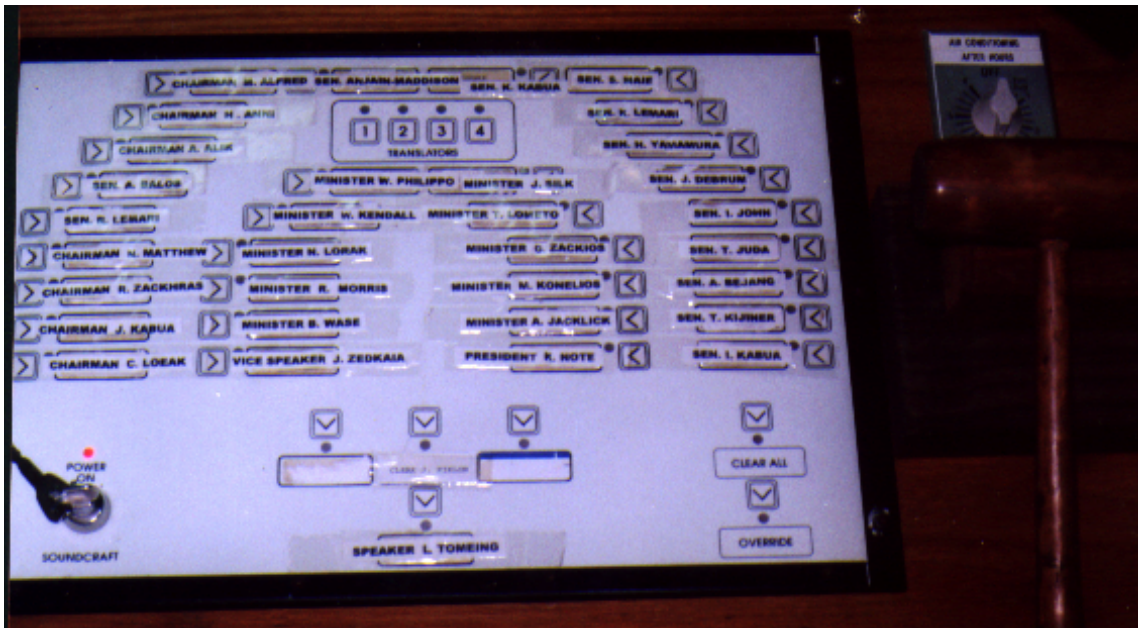


Figure 1: The Speaker's Switchboard - showing the seating arrangement of the *Nitijela*. The Speaker controls senators' access to national radio by touching the arrows next to each name.

Towards the rear of the chamber, on both sides, is the public gallery. The offices of the Clerk, Deputy Clerk and Legal Counsel are situated behind the Speaker's desk, and senators and other Nitijela staff have offices located off the hallway that surrounds the Nitijela chamber.

1.5. The Political Context

For more than thirty years until his death in office, President Amata Kabua dominated Marshall Islands politics – first as a Congress of Micronesia senator and then as President. He was elected as the first president of the republic in 1979, and subsequently re-elected in 1983, 1987, 1991, and 1995. Opposition groupings came together primarily prior to elections or referenda, focussing on specific issues, and fragmenting thereafter. President Kabua died in office in 1996, an event that signalled a sea change in Marshall Islands politics.

His first cousin, Imata Kabua, was elected President in January 1997 by the Nitijela in the first contested election that had ever occurred¹¹. In 1998, opposition to the government rallied first around a successful effort to declare gambling illegal and second around an ultimately unsuccessful vote of no confidence in the Imata Kabua-led government (see section 2.3. below). Elections held in late 1999 resulted in victory for the opposition. Senators backing the new government represent mainly Majuro, Jaluit and the Ratak chain. The Kwajalein-based paramount chief and former President, Imata Kabua, retained significant support in the Ralik chain of islands.

¹¹ Previously, nominations had invariably been closed immediately after Amata Kabua's nomination.

Kessai Note, the country's first ever commoner President, was elected on a platform of combating corruption and enhancing accountability. A new generation of cabinet ministers has emerged, while most former ministers and customary chiefs sit on the backbenches. The new government faced an attempted vote of 'no confidence' in January 2001, which was again defeated. It is currently engaged in negotiations with the USA concerning the renewal of the Compact of Free Association. The next elections are due to be held in late 2003.

2. Review of Key Legal Documents Covering the Conduct of the Nitijela

The key legal documents that deal with the role of the national government are the constitution, the Rules and Procedures of the Nitijela, the Elections and Referenda Regulations (1993), the Ethics in Government Act (1993) and the Compact of Free Association (1986).

2.1 The 1979 Constitution

The 1979 Constitution was a result of extensive consultation at the time of the breakaway from the Congress of Micronesia. It includes a US-style Bill of rights, and provides for a parliamentary system, although with a President elected by the Nitijela playing the role of Head of State.

The Bill of rights provides for freedom of the press, speech, religion, assembly, petition, association and thought, security against unreasonable searches and seizures, right to due process of law, trial by jury and just compensation for loss of private property (Con. Art II.).

In negotiations with the United States over the establishment of self-government, Marshallese political leaders opted for a parliamentary system, with a President elected by members of the Nitijela rather than directly by the electorate. One reason was that a tradition of local Marshallese government had already been established and entrenched under the Congress of Micronesia during the days of the Trust Territory. U.S. authorities were more likely to hand over authority to a well-established body rather than risk experimentation with a novel separately elected Presidency. Another was the desire to create greater cross-fertilization among the legislative and executive branches of government and to prevent the kinds of deadlock witnessed at that time in neighbouring Micronesian countries. The Marshall Islands has been described as a 'convert from the American to the Westminster system'¹².

The President is the Head of State, but divides certain powers normally associated with that office with the Speaker and Cabinet.

The Constitution 'recognizes the right of the people to responsible and ethical government' and obliges the government 'take every step reasonable and necessary to conduct

¹² 'The Relationship between the Executive and the Legislative in Pacific Constitutions', Guy Powles, p139, Law, Politics and Government in the Pacific Island States, (ed) Ghai, Y.H. IPS, USP, 1998.

government in accordance with a comprehensive code of ethics' (Art II. S. 16, discussed further below).

The constitution disqualifies a member of the Nitijela from holding 'any other office entitling him to compensation from public money' [Con. Art IV. S. 6. (e)].

The most fundamental parts of the constitution can be amended only after the establishment of (i) an elected Constitutional Convention and (ii) a two-thirds majority in a referendum¹³. Although the constitution is therefore reasonably firmly entrenched, it is a duty of Nitijela to make provision, at least once every ten years, for a report on the advisability of constitutional amendments or of holding a referendum on the question of calling a Constitutional Convention. The last such convention was held in 1994.

Referenda in the wake of constitutional conventions in 1990 and 1994 led to only minor changes, including renaming the country 'the Republic of the Marshall Islands' and a provision giving primacy to Marshallese over English language interpretations in any situation where legal conflict ensues between two versions of the law.

Whether or not to revise the constitution to provide for an elected Presidency was an issue raised by several senators, both from the government and the opposition. Whatever the outcome, the discussion of this issue at a new constitutional convention would enhance popular scrutiny of current parliamentary operations. Although some of the issues involved in that decision are set out below, it is not the intention here to prejudge that important debate.

In most respects, the RMI constitution has proved a workable and effective document and changes should only be considered where a pressing need is shown. The constitution is widely respected in the RMI, and most substantial proposed amendments were rejected in referenda after Constitutional Conventions in 1990 and 1994.

2.2. Rules and Procedures of the Nitijela

The 1979 Constitution itself provides an unusual degree of detail regarding the conduct of parliament. Its provisions, and the separate laws regulating the 'Rules and procedures' of the Nitijela are regularly conflated by senators, with the consequence that parliament has not taken many steps, as it is authorised by the constitution to do, to regulate its' own proceedings. In several areas where the Constitution explicitly highlights areas for the further regulation of political conduct by Act, these have not in fact been forthcoming. In particular, the number and distribution of seats in the Nitijela has not been changed since 1979.

The constitution provides that the Nitijela commence sitting on the first Monday in January of any year and remain in session for 50 days. By convention, the Nitijela tends to recess after 30 or so days and reconvene for a 20 or so-day special sitting, normally the budget session, in August. Parliament is called within two weeks following a general election or the

¹³ Amendments to some sections require a two-thirds majority in the Nitijela followed by a simple majority in a referendum.

election of a new President and sits no more than 30 days later. The President can call special sittings or extend sittings of the Nitijela, and a special session can be called following a petition to the President by not less than ten non-cabinet senators who represent at least four electoral districts if 120 days have elapsed since the previous sitting (Con. Art IV. S. 10).

The constitution allows for the 'Rules of the Nitijela' to provide for a recess, except in conditions where a cabinet has not been appointed (Art. 4. S.11. [1]) or where notice has been given of a vote of 'no confidence' (Art. 4. S.11. [2]). Dissolutions normally occur every four years, unless a) the President dissolves parliament after a vote of no confidence carried twice and no other President has held office or b) no cabinet has been appointed by a new President (Con. Art. IV. S. 13). This provision has been questioned:

'It is normal for the government in power to fall when the legislature expresses a vote of 'no confidence', and for the latter to be dissolved and a new election held when its members cannot agree upon another leader to form a new government. In Kiribati, dissolution of the Maneaba automatically follows a "no confidence" vote, and in Nauru the legislature is dissolved after seven days if a new President is not chosen. The Marshalls constitution embodies strikingly contrasting provisions, returning the rejected President to power should the Nitijela fail to select another member to be chief executive. Also, only should an unsuccessful vote of no confidence re-occur, or a cabinet fail to be appointed, may there be a dissolution of the Nitijela and this at the discretion of the discredited President'¹⁴.

This issue may be revisited at a future constitutional convention.

The Constitution entrusts the Speaker of the House with responsibility for ensuring that there should be an 'an opportunity for all points of view represented in the Nitijela to be fairly heard' (Con. Art. IV. S. 15. [2]).

In general, questions are required to be submitted to the Clerk a day earlier than they are asked orally in parliament [R&P S.99 (4)], although where the Speaker feels this to be 'impracticable or unreasonable', he/she may give 'special permission for the member to ask the question orally from the floor (R&P S. [5]).

In practice, Speakers have tended to interpret this liberally. Most questions are asked orally. Senators should recognise that the requirement for written, rather than oral, questions is intended to improve forethought, and framing, and to allow time for improved ministerial or committee responses. Support services should be improved to assist parliamentarians in framing written questions.

All Bills require three readings in the Nitijela and then pass to the Council of Iroij for a decision on whether they affect matters of custom or tradition. Once signed by the Speaker and counter-signed by the Clerk, they become law.

Both the Nitijela and Council of Iroij have a quorum of half the membership, as do the Standing Committees.

¹⁴ Meller, N 'On Matters Constitutional in Micronesia', *Journal of Pacific History*, 1980, 15, p83, 87.

2.3. Review of Recent Legal Cases Concerning the Operations of the Nitijela

In two important cases prior to the 1999 election, the courts upheld the authority of the Speaker and the powers of the Nitijela to regulate its' own proceedings (these are reproduced in appendices D & E).

The first case involved the Speaker's declaration of a conflict of interest against three members, including the then President, during a debate on the 'gaming Act' (Bill no 114.ND-2). The Speaker's decision to declare a conflict of interest was found to be in conformity with the Ethics in Government Act (3 MIRC 17¹⁵) and the 'Rules and Procedures of the Nitijela (S. 29¹⁶). Acting Chief Justice Harold Van Voorhis ruled that

'Insofar as the subject matter of the complaint is concerned with the exercise of the power of the Speaker to regulate the procedure, conduct the business, or maintain the order of the Nitijela, it is clear that Art. IV, section 16(3) of the Constitution specifically and explicitly prohibits the Speaker from being subjected to the jurisdiction of the Court in this Case'

'If the plaintiffs were allowed to continue with this case, every Bill, whether it was passed by a close margin or defeated by a close margin would find itself likewise the subject of review by the Court. If the Speaker found a member had a conflict of interest and disallowed his vote, he or any persons supporting his position for the Bills defeat could file a court challenge to the Bills passage. Likewise, if the Speaker did not find that the member had a conflict of interest and allowed his vote, those persons supporting the defeat of the Bill could file a challenge to the Bill's passage' ¹⁷.

The judgement upheld the separation of powers enshrined in the RMI constitution, and emphasised the 'mutual regard between the coordinate branches' (i.e. the legislative and the judiciary). The decision was upheld by the Supreme Court¹⁸.

The second case was concerned with an attempted 'no confidence' vote against the incumbent government. On 2nd September 1998, six opposition senators gave formal notice of their intention to hold a vote of 'no confidence' in the cabinet. Five days later, a dispute arose as to whether the vote would be by secret ballot or by roll-call. The then Speaker, Kessai Note, ordered a secret ballot precipitating a walk-out by the President and government senators. They also remained continued to remain away from the Nitijela chamber, leaving parliament short of a quorum. The result was that the 'no confidence' vote could not take place within the ten days specified in the constitution. The government argued that since the Nitijela had failed to deal with the motion within the constitutional time-frame, it should be considered as having 'lapsed'. The court ruled otherwise.

'To hold that the motion has 'lapsed' or is 'rendered moot and ineffective' because the vote did not occur within the 10 days would permit the evasion of a mandatory constitutional duty by

¹⁵ 'Public officials and Government shall give due disclosure of any conflict of interest such official or employee has or may have in the performance of his or her duties and recuse himself or herself of any involvement on the matter ...'

¹⁶ 'A member shall not vote on any matter in which he has a distinct, individual, pecuniary interest'.

¹⁷ Imata Kabua, Philip Muller and Tony DeBrum V Kessai Note & Joe Riklon, Civil Action No 1998-091, High Court, Republic of the Marshall Islands.

¹⁸ Supreme Court S. CT. Civil No. 98-03, Fields, C.J. Goodwin, A.J. & King, A.J.

unconstitutional means. Such a holding would send a message that public officials can ignore constitutional imperatives, as well as the obligations, duties and responsibilities of their office'¹⁹

Chief Justice Daniel Cadra concluded 'the proper remedy in this particular 'crisis' is to hold that the vote should occur on the first day a quorum is obtained'. On the second issue - regarding the Speaker's order for a secret ballot rather than a roll call - Justice Cadra found that the issue was 'non-justiciable under the separation of powers', concluding that 'the court should steer clear of telling the Nitijela how to conduct its internal proceedings'. The President's Special Counsel, David Lowe, denounced the judgement in the press²⁰. But the Supreme Court agreed with the High Court decision on the first issue and found no constitutional guidance on the second issue, suggesting that this could only be a matter of the Nitijela's own internal procedure²¹.

When parliament reconvened, the visitor's gallery was packed with onlookers. President Kabua had welcomed the motion as 'democracy in progress'²². The opposition mustered 16 votes in favour of the 'no confidence' motion, one vote short of the required number. But the government nevertheless fell in the general election held a year later.

The first case was important in bringing into operation entrenched conflict-of-interest provisions, which had never previously been used.

Both cases upheld the separation of powers between the legislature and the judiciary, and bolstered the position of the Speaker and the power of the Nitijela to regulate its' own proceedings.

In both cases, the aggrieved parties sought relief via the courts, which refused to take action on the grounds of the separation of powers. One obvious alternative, apparently not taken, was to appeal against the Speaker's rulings within parliament. The Speaker can be removed from office by two-thirds of the total membership (Con. Art. IV. S. 7. [d]) and 'the Speaker's rulings are subject to appeal to the Nitijela, except on a matter of the interpretation or application of the Constitution or of a law' (R&P. S. 113). Provisions enabling the Nitijela to challenge the Speaker's rulings should be clarified to avoid a recurrence of appeals to the law courts.

The issue of roll call or secret ballot in a vote of 'no confidence' is important because Senators and particularly Ministers are often reluctant to openly declare their lack of confidence in government for fear of jeopardising their position⁴ if the motion fails, but they may do so where the vote is by secret ballot. Hence, votes on no confidence motions would appear more likely to diminish changes in government if by roll call, but to diminish potential intimidation if by secret ballot. During the pre-1978 Constitutional Convention, the

¹⁹ 'Opinion and Declaratory Judgement in the Matter of the 19th Constitutional Regular Session, Interpretation of the Constitution and Rules and Procedure of the Nitijela', Chief Justice Daniel Cadra, 29th September 1998.

²⁰ See 'RMI Government: The majority Must be Allowed to Rule', Marshall Islands Journal, 9th October, 1998, p14.

²¹ Supreme Court Civil No. 1998-004

²² Cited Julianne Walsh, 'The Marshall Islands', Contemporary Pacific, 12, (1), 2000, p207.

section governing votes of no confidence was the most controversial of all²³. This right provides an important check and balance in the system.

The situation in 1998 was unusual in that the Speaker, although initially appointed by the Amata Kabua government had become associated with the opposition. More usually, a government-appointed Speaker would be likely to rule against a 'secret ballot', as indeed occurred under the next government in January 2001. For the future, the Nitijela would be well advised to regulate its own procedure in this respect and make explicit whether, or when and where, a roll call or secret ballot are required.

The Constitution specifies that 'when any question is put to the Nitijela, any member may call for a roll-call vote thereon, unless this constitution requires that vote to be by secret ballot' [Art.IV. S. 15. (5)]. It requires that votes for the President, Speaker and Vice-Speaker be by secret ballot. But it does not clarify in which other circumstances, if any, the Speaker is obliged to accept the secret ballot call. The Rules and Procedure of the Nitijela are ambiguous. S. 27 provides that the Speaker conduct a vote by call of the roll following a request by three members, whereas S.26 provides that the Speaker shall conduct a secret ballot 'on the request of three or more members, unless a vote by roll call is required or has been requested in accordance with Section 27(1)'.

The use of the past tense in this passage was used in January 2001 to sanction the Speaker's decision to opt for a vote by roll call. While the Constitution and laws regulating Nitijela procedure leave the Speaker with considerable discretion in such circumstances, in the longer term it is preferable that parliament amend the 'Rules and Procedures' to clarify whether secret ballots or roll calls are to be used in votes of no confidence.

Although providing for vote by roll call in no confidence votes might be thought to strengthen government, and providing for a secret ballot might render changes in government more likely, this should not decide the issue. The Republic of the Marshall Islands has not witnessed regular changes of government due to repeated opportunistic crossing of the floor by senators as seen in some of the Melanesian countries.

A more important argument in favour of providing for ballots by roll call in 'no confidence' votes is the need to make senators accountable for their actions to their constituents. The wider public should be able to establish, in such situations, whether their member of parliament has sought to undermine or support the government of the day.

²³ 'No aspect of the parliamentary system gave the members of the [1978] Constitutional Convention more trouble than the concept of a premature dissolution of the legislature, accustomed as they were to the election of legislators who would serve for a fixed term ... In the Marshall Islands cultural climate where it is customary to hold in respect those in authority, a vote of no confidence was not seen as part of the normal functioning of the Legislature. It was thought of as a measure of last resort to protect the Legislature, and through it, the people, against possible tyranny on the part of the Cabinet' (Quentin-Baxter, A 'The Constitutions of Niue and the Marshall islands: Common Traits and Points of Difference', p107.

2.4. The Elections and Referenda (Amendment Act) 1992

The Act enables all citizens over 18 years of age, aside from those certified insane or imprisoned, 'have the right and duty to vote in elections of members of the Nitijela' (Pt 2. D. 1 S5.).

It provides for the publication of, and for public access to, an electoral register at least 60 days prior to any election or referendum [Pt II. 106 (2)-(3)]. Such registers were available at the Elections Office for 1999 and 1995 only, and are apparently not deposited in the Nitijela Records Office or the Alele Archives.

The Act provides that the register be kept up to date, in particular by deleting entries that relate to deceased persons. Candidates, however, regularly commence campaigns by themselves crossing off the names of those deceased to discern their target voters. The register has not been kept up to date, and there is no established system of linking changes in the electoral rolls with changes in records at the neighbouring Register of Births and Deaths.

The Constitution specifies that any revision to the number and distribution of seats in the Nitijela must have the consequence of diminishing inequalities in constituency size, or moving in the direction of "one person, one vote".

Individuals are allowed to register as voters either based on residence or land rights, with the consequence that many eligible voters have multiple potential constituencies where they can register (or re-register). A person's right to register in a district may be challenged, but in practice such cases are, unsurprisingly given the prevalence of multiple land rights, rare.

The Act provides for postal votes for those who 'reside outside the Republic', and therefore permits non-residents to participate in elections. Perhaps a quarter of the total Marshallese citizens reside overseas²⁴. The Act provides that, in such cases, a postal ballot paper be sent to the Chief Electoral Officer and postmarked not later than 14 days before the election 'provided, however, that in no event will an application for a postal ballot received through the mail be accepted on or after a date three days prior to the date of the election'. Such votes also require 'an affidavit sworn to before a notary public in the country of residence'²⁵.

These elaborate rules have regularly opened the way to non-counting of postal ballots, and possible abuses of the system.

Provisions need either to be made to guarantee overseas resident RMI citizens the ability to exercise the right to vote or the right to vote should be adjusted to a residential basis. The current system creates the potential for abuse. If the Elections Office is unable to guarantee overseas Marshallese citizens who so desire to participate in the country's general elections, then the right to vote should be restricted to those resident in the country.

²⁴ Using the 1988 census of population projections for the year 1999, and comparing these with the actual population figure provided in the 1999 Census (50,864), suggests that perhaps 14,000 Marshallese now reside overseas.

²⁵ Elections and Referenda Regulations, 1993, Pt IV, S. 118

Although there have frequently been court challenges to election results, there has been an 'unbroken Marshall Islands Court record of rejecting election complaints'²⁶.

2.5. Ethics in Government Act of 1993

The Ethics in Government Act 'recognizes the right of the people to a responsible and ethnical government' and enacts the constitutional requirement that government follow a code of ethics (3 MIRC 17. Art. II. S. 16).

It emphasises the duty of government 'to govern in such a manner as to foster public confidence in the integrity of the government' and specifies that 'public service is a public trust, requiring public officials and Government employees to place loyalty to the constitution, the laws and ethnical principles above private gain' (17 MIRC 1702 [2]).

It forbids public officials or government employees from taking gifts, or items of monetary value, from individuals or entities doing official business with government and requires them to 'put forth honest effort in the performance of their duties'.

To enforce this it provides for a Government Ethics Board, comprising the Attorney general, Auditor-General and Chief Secretary. The Board is granted powers of subpoena and power to issue, to those found to have breached ethnical standards, a) oral and written warnings or reprimands, b) suspension without pay and c) termination of employment and d) fines not exceeding \$5,000.

The Ethics in Government Act is unfamiliar to many Marshallese politicians and most are unaware of its' existence. No functioning Government Ethics Board has ever been formed.

2.6. Compact of Free Association (1986)

The Compact of Free Association gives the United States long-term 'strategic denial' rights over the Marshall Islands, precluding other powers from constructing military bases in the region. The US is responsible for the defence of the Marshall Islands.

The temporary elements in the Compact – a security provision that gave the United States the ability to preclude RMI government action that the United States believes is incompatible with its defence responsibilities (the "defence veto") will expire in 2001 and is subject to renegotiation.

In a Compact-related agreement, the US had continued access to military facilities on Kwajalein Atoll for 15 years, with the right to extend this for an additional 15 years. That right was exercised in September 1999.

Compact-related agreements also provide for compensation for the victims of US nuclear tests on the northern atolls in the 1950s and 1960s.

²⁶ 'High Court dismisses Wotho, Mejit Complaints', Marshall Islands Journal, 7th January 2000, p14.

The Compact and related agreements influence the conduct of parliament in that the defence veto at least potentially gives the US veto rights over Marshallese foreign policy, although this right has never been exercised.

The US also has residual oversight authority over the expenditure of compact and related funds (through federal programmes). This is discussed further below (section 5.8).

3. Areas for Institutional Capacity Strengthening

3.1 Assessment of Parliament/Constituency Relationships

At the general level, relations of citizens to the legislature are highly sophisticated. Popular attention to parliamentary proceedings is far greater than in the Melanesian countries to the south²⁷. Nitijela sessions are broadcast live on national radio V7AB and attract considerable interest both on Majuro and on the outer-islands. Shared taxis running up the main street in Majuro are usually tuned into the Nitijela broadcasts and to important speeches on special occasions. On the outer islands, engagement with national politics may be less marked, but is nevertheless greater than in rural areas of Melanesia.

One reason for this popular political engagement is the centrality of government as a source of income. Concern over the Compact negotiations with the USA, for example, touches directly on standards of living in a country with a relatively low export/import ratio and a relatively high share of government-distributed-income in national income. In 1999, for example, commodity export earnings (\$US 7.7 million) paid for only 11% of the total import Bill (\$US 68.9 million). A large part of the remainder was obtained from payments under the Compact of Free Association, payments for the Kwajalein missile base, federal grants and nuclear compensation. The US government has historically insisted that these flow on a state-to-state basis to the RMI government, before wider distribution. In one form or another, and directly or indirectly, these issues therefore figure regularly in the Nitijela's deliberations and arouse considerable public interest and concern²⁸. Given that such a sizeable fraction of national income passes through the hands of the executive, strengthening institutions that encourage accountability and transparency becomes particularly significant and necessary.

Interest in the spectacle of Nitijela proceedings was also enhanced in 1998 by a top-level power struggle first over the Speaker's ruling concerning several members alleged 'conflict of interest' in a debate over the 'gaming Bill' and second over an attempted 'no confidence' vote later in that year (discussed in section 2.3. above). But a relatively high level of popular engagement with political developments in the Nitijela is not a new phenomenon. It was also a feature of the political life of the Marshall Islands under long-serving former President Amata Kabua (1979-1996) and during the government of his cousin Imata Kabua (1997-99).

²⁷ Senators in parliament are supremely conscious of their wider audience, and the tone of Nitijela proceedings changes notably when parliament goes off the air to sort out matters of procedure.

²⁸ Although the issue of confidentiality is often raised as regards the Compact negotiations themselves.

Nevertheless, the physical attendance in the public gallery of the parliamentary chamber is normally relatively low – except on important occasions such as the opening of parliament or when interesting or controversial issues are known to be on the agenda. The opening of the 2002 Nitijela session was attended by 172 politicians and dignitaries²⁹, as well as by members of the general public. Irregular public hearings sometimes attract greater interest, primarily because stakeholders are able to participate in deliberations. But public hearings are frequently planned only at the last moment, and invitations sent out only hours before their commencement, if at all.

Outside the formal sphere, Senators also relate to their constituents and to the wider public through community functions, ceremonies, weddings and funerals and various other customary and official occasions. Informal consultation occurs more regularly at these occasions than through formal surgeries. Once elected, senators are often viewed as seeking their own personal advancement, rather than engaging in an accountable process of representing the concerns of their electorates or providing feedback to constituents.

Being a parliamentarian imposes obligations. As in other parts of the Pacific, parliamentarian's extended families expect direct favours from their representatives, whether in the form of tangible goods or lodging in Majuro. Senators need to enhance their constituents conception of legitimate lobbying for communal or collective improvements, and to de-legitimise lobbying for personal favours. There are no direct constituency allocations for disbursement by MPs, although Senators receive annual official (\$8,000) and sitting (\$5,000)³⁰ allowances as well as their salaries.

As in many other parts of the Pacific, funds targeted at specific communities are notably correlated with constituencies having their member as a minister in cabinet. Hence, the shift between government and opposition tends also to entail a shift in the regional balance of resource distribution. A constituency whose representative is not part of the government is less likely to be able to attract resources than one whose member is a minister. To some extent, the current government has recognised the danger of this, for example, by continuing to target funding at Ebeye and Gugegue on Kwajalein Atoll.

Most senators live in Majuro, even when they represent outer islands and whether they are backbenchers or government ministers. This was found to spark little controversy, partly, it was often argued, because constituents expect their representatives to be near the centre of action and partly because some are nevertheless able to sustain close relationships with constituents via telephone, VHS radio or other means of communication. Some Majuro-resident senators regularly return home, for example, during Christmas breaks and for traditional festivities or funerals.

²⁹ 33 Senators and their spouses, 12 members of the Council of Iroij, 22 Mayors, 11 Ministerial secretaries and clerks, 17 managers or directors from department and semi-government agencies, 20 private sector managers, 7 judges, 6 officials from foreign missions, 6 RMI ambassadors, 3 members of the Public Service Commission, the chief Secretary and the former first lady – a total of around 172 invitees in addition to members of the general public.

³⁰ Compensation of Nitijela members' Act, 1980.

More controversial was the residence of numerous local government mayors who represent the outer islands on Majuro atoll. For the four nuclear-affected atolls, all of which have offices in the capital³¹, this location is understandable because of their dispersed communities and important central business with the Nuclear Claims Tribunal and the Compact Negotiating Team. Majuro-resident mayors representing other atolls, who often run affairs back home via acting deputies, spark greater controversy. There was also some ill-feeling about several senators who reside abroad, in Hawaii or the United States – although in some cases this is temporary residence for medical treatment.

3.2. Electoral Processes

In the past, senators could often rely on being returned election after election. There was little turnover of MPs. At the Nitijela election on November 15th 1999, five of the eight ministers lost their seats. Greater volatility in electoral outcomes is closely connected with internal migration and the increasing ability of off-island electorates to determine outcomes in their home constituencies. In the less developed outer islands, the iroij are able to sustain deeper allegiances, whether due to customary respect accorded to traditional rulers or, in some instances, overt or implied threats of withdrawal of land use rights. Such customary alliances also influence the Senators themselves, who can find themselves obliged to stand by the position of their peoples in the customary hierarchy.

Candidates rarely issue manifestos. Formal parties have, historically, been non-existent with the exception of short-lived pre-electoral groupings such as the 1970's Ainiken Dri-Majol and the 1991 Ralik-Ratak Democratic Party.

Under the former Trust Territory, extensive voter education programmes, sponsored by the USA, accompanied referenda. Nowadays, few such programmes are conducted. Schools do sometimes conduct mock elections. But the Elections Office confines itself to routine work on training counting officials, rather than undertaking a broader voter education program. The Ministry of Internal Affairs does occasionally run voter registration campaigns on national radio.

Prospective candidates normally look initially to their own family or clan connections for campaign and voter support. Campaigns can involve the provision of large quantities of food and drink ('banquets'). Candidates have also been known to tour the widely dispersed Marshallese communities overseas, particularly in Hawaii and mainland USA. Absentee voters are required to complete an affidavit with local election officers and mail this home before the deadline. According to the Elections Office, such votes regularly turn up late and are not counted. Changes are necessary in the provisions regarding absentee ballots.

There are no laws against use of government funds for incumbent-run election campaigns, or against receipt of overseas election funding and no laws requiring disclosure of sources of funds. There were reports of receipt of election finance from Taiwan during the 1999 election. The country's Capitol Building itself was decked out with campaign banners and posters in support of the government party during a rally before the 1999 elections.

³¹ The Bikini and Rongelap City Halls are on Majuro.

Reporting of elections results, at present, is rudimentary, and includes only the number of valid ballots cast for each candidate. Contemporary international standards require that the Elections Office public announcements include, for each constituency, the total number of registered voters, the total number of invalid ballots and valid ballots cast for each candidate. It should also be possible to identify a) the number of off-island registered voters in each constituency and b) the number of overseas resident voters in each constituency. Overseas postal ballots that have been rejected should have the reason for their rejection clearly identified in a separate return of overseas ballots, detailing, for example, the number of such ballots rejected due to late arrival, late postmarking, absence of a sworn affidavit etc.,.

Publication of such electoral data is an important method of enhancing accountability and comprehension of electoral processes, and enables candidates to analyse precisely the reasons for their success or failure at the polls.

3.3. Electoral Rolls and Registration.

The 1979 Constitution specifies that ‘every member of the Nitijela should represent approximately the same number of voters; but account shall also be taken of geographical features, community interests, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of population’ (Art. 4. S. 2. [4]). Eligible citizens have constitutional rights to register as voters in either based on residence or land rights

‘Every person otherwise qualified to be a voter shall have the right to vote in one and only one electoral district being an electoral district in which he either resides or has land rights, but a person who has a choice of electoral districts pursuant to this paragraph shall exercise that choice in any manner prescribed by law’ [Art. 4. Section 3 (3)].

Many Marshallese have land rights in multiple constituencies and therefore have several choices about where they register as electors. Since many take the option of registration in accordance with land rights, most senators represent highly dispersed communities.

A striking feature of Marshallese pre-election politics is the strategic re-registration of voters. Once candidates opt to stand in a certain constituency, they sometimes shift with them large numbers of registered voters, usually comprising kith and kin, to their prospective constituencies. Although the Constitution provides that the Nitijela is able to regulate the exercise of voter registration rights ‘in a manner prescribed by law’, the only such regulation in fact undertaken has been to limit the pre-election shuffling the electoral rolls, so as to ease the administrative tasks of the Elections Office. Strategic re-registration of voters remains commonplace and opens the door to potential manipulation and marked electoral imbalances. In theory, voter re-registration can be challenged in court. In practice, the laborious administrative requirements of litigation renders such court actions few and far between. Nevertheless, there is a surprising equity in the distribution of registered voters per constituency.

The 1979 Constitution provided for a separate senator for each of the 24 atolls, with the more populous atolls, such as Majuro and Kwajalein, being granted multiple members (via the block vote). Although the population of the country has increased 65% between 1980

and 1999, there has been no change in the size of the Nitijela. According to the 1999 Census of Population, Majuro now accounts for nearly 50% of the total RMI population and Kwajalein for another 21%, with the remaining 29% very unevenly dispersed on the other islands. Were voter registration based on residence, the consequence would have been big departures from the principle of 'one person, one vote'. Owing to the requirement that there be a senator for every atoll, the more populous urban centres would be severely under-represented. In practice, this potential under-representation of the more urbanised, migrant recipient, atolls has been avoided by voter retention of registration on ancestral islands and by strategic re-registration³². At the very least, 29% of Majuro residents and 15% of Kwajalein residents are registered as voters on other islands³³.

Even if land rights-based registration has avoided what would otherwise have been exceptional inequity in representation, it nevertheless presents Members of Parliament with significant difficulties in campaigning and representation. Campaigning in numerous outer-islands creates severe logistical problems. Candidates usually have to travel to several islands to appeal to dispersed electorates. Once in office, this spread of constituents also creates difficulties in maintaining communications and therefore problems of accountability. Although the relatively small and close knit Marshallese society has enabled MP-constituent linkages that would not be possible in a larger country, as the population grows in size former linkages are increasingly strained and senators inevitably become less aware of the aspirations and requirements of their constituents.

For the dispersed populaces of the four nuclear-affected atolls, such extra-territorial representation may be inevitable. Bikini, Rongelap, Enewetak and Utrik all have displaced populations, who in many cases have so far been unable to return to their ancestral home atolls. Pockets of these peoples live on numerous other atolls. Unless they were to eventually become assimilated with those of other islands or to abandon the aspiration for separate representation, their representation could only be that of a dispersed populace. Important issues, such as the attempt to link a 'changed circumstances' petition, referring to the Compact provision for additional compensation in the event of evidence of hitherto unforeseen repercussions of U.S. nuclear testing during the 1940s and 1950s, continue to bind these islanders to a common political cause.

3.4. Role of Tradition/Culture

Historically, the Marshall Islands' initial elections under the US Trust Territory administration in 1947 saw traditional chiefs, the iroij, being elected to nearly all magistrate positions³⁴. Over time, election of customary leaders has diminished. The country currently

³² It proved impossible to establish the relative extent of strategic re-registration as against retention of ancestral registration.

³³ Assuming that the atoll distribution of registered voters is close to that of population. This figure under-represents the total Majuro voters on other islands 1) to the extent that those on other islands also possess land rights, and therefore register, on Majuro and 2) because the migrant destination atolls are likely to have higher proportions of registered voters in their populations than other atolls.

³⁴ Hezel, F.X. *Strangers in their own land: A Century of Colonial Rule in the Caroline and Marshall Islands*, University of Hawaii Press, 1995, p279.

has its' first commoner president and the government is composed largely of non-chiefs. However, customary leaders continue to secure election, and the country's leading iroijlaplap families have representatives in parliament. Indeed, powerful traditional leaders have frequently sought election to the Nitijela rather than accepting a hereditary position in The Council of Iroij.

The grip of traditional leaders on government was notably weakened with the passing away of former President Amata Kabua, who as the iroijlaplap for Majuro was well positioned to combine customary and modern forms of authority at the centre of the Marshallese political stage. Majuro, with its five MPs, is now the key power base of the new government. Chiefs own land and control the right to occupy it, which is a powerful tool during elections. Some senators often owe their position to alliances within the customary/traditional system. The increase in the size of off-island electorates has tended to open up Marshallese politics to new influences.

As in many other Pacific Island countries, overt criticism of those in authority is often frowned upon in the Marshall Islands. Freedom of expression is written into the constitution, but is curtailed in everyday life by traditional obligations of respect. Public criticism of chiefs is rare, partly owing to the latter's control over land usage and partly owing to traditions of obedience to customary authority. Nevertheless, elections and referenda have been known to produce startling results, rejecting proposals of those in authority or over-turning well-established incumbents.

In 1990, a constitutional amendment proposed a revision of the constitutional division between three classes of land rights holders - iroij (high chief), alab (Clan head) and dri jerbal (Commoner/worker). The then President and senior cabinet ministers proposed instead bringing into line with Marshallese tradition by recognising only iroij and kajur (clans/people/power) – with potential implications for rental receipts. The amendment was defeated by the non-chiefly majority on the Constitutional Convention, who viewed this as a means of further consolidating power in the hands of the iroij³⁵.

3.5. Separation of Powers

The constitution contains no explicit statement of the doctrine of the separation of powers. In 1964, a New Zealand-led UN Visiting Mission had emphasised the 'practical difficulty' posed by a strict separation of powers 'in a territory which is relatively under-developed and which contains ... only a small elite of educated people'. The report claimed that this would 'hamper that cross-fertilization between administrators and legislators which can have an educative effect on both' warning of an 'unfortunate rivalry between the legislature and the executive'³⁶. Similar concerns were expressed at the 1978 Constitutional Convention, when delegates highlighted the difficulty of achieving the 'necessary spirit of political compromise

³⁵ See 'Con-Con: A Microcosm of Sweeping Pacific Change', Marshall Islands Journal, 23 March 1990.

³⁶ Report of the UN Visiting Mission to the Trust Territory of the Pacific Islands, 1964, Trusteeship Council Official Records, 31st session, 20 May-29 June 1964, supp No. 2, p37, para 196, cited D Jong, A 'The Constitution of the Marshall Islands', p19.

which must modify the inevitable sense of competition between the [legislative and executive] branches when each is separately elected'³⁷.

Two dozen years later, these problems might be seen in a different light. A directly elected US-style Presidency would emphasise the separation between the legislature and the executive. Yet the major Marshallese problem with lack of separation of powers has not been principally that between the judicial and executive/legislative arms, but rather the relationship between the cabinet (& to some extent, parliament) and the public service. The Public Services Commission has, in the past, been unable to function as a neutral, meritocratic, organisation with the consequence that the provision of state services is riddled with serious inefficiencies and problems of accountability.

Although abandoning the parliamentary system and opting for the U.S. style doctrine of a clear separation of powers might, perhaps, go some way towards enhancing the role of legislature as a check and balance in the system, even a directly elected Presidency requires a mixture of political and non-political civil service appointments. It would remain necessary to take steps to enhance the functioning and independence of the Public Service Commission.

3.6. The Role of Civil Society

The Marshall Islands does not have a strong independent grouping of NGOs, with the exception of WUT/MI (discussed separately below), Nuclear Victims groups and the Majuro Chamber of Commerce.

The Ministry of the Interior is charged with relations with civil society groups, involving liaison with women's, youth and community groups, as well as local governments. The Waan Aelon Majel (Canoes of the Marshall Islands) has a project near the Outrigger Hotel and links with the Ministry of Education.

The Chamber of Commerce had closer links with the Amata Kabua government, in its later stages, than it does with the current administration. Its' representatives expressed particular frustration with continued raising of taxes without sufficient improvements in tax enforcement and with last minute invitations to public hearings on subjects which affect the membership.

WUT/MI has only recently been revived under the current administration, with new elections for officers coordinated and supported by the Minister for Internal Affairs. Some WUT/MI activists suggested that their organisation, despite being independently funded, is regularly treated as if it were an arm of the government and argued that the Ministry of Internal Affairs should recognise WUT/MI as a genuine NGO.

³⁷ Loc cit.

3.7. Role of the Media

Despite close links with the government, the Marshall Islands media has remained relatively independent. The privately owned Marshall Island Journal is published weekly, and frequently questions government policy in editorials, occasionally publishes leaked government documents and topical or even controversial exchanges in letters pages. It also serves as a major publisher of government documents, which provide an important source of revenue. It employs no trained Marshallese journalists. Most articles are in English, although some letters are in Marshallese. The Journal is broadly supportive of the present government.

The Marshall Islands Journal reports a 3,500 print-run, and reckons that there are five readers of each copy heavily concentrated in the Majuro and Ebeye/Kwajalein areas.

By far the most significant media outlet is radio. The Office of Planning and Statistics reports that 92% of the population own radios³⁸. The government-owned national Radio station V7AB reaches the remotest outer islands

Another privately-owned radio station features mainly religious shows, but occasional broadcasts from the Voice of America, Radio Australia and the BBC.

V7AB broadcasts live sessions of the Nitijela, public hearings and important speeches at key events. Radio programs occasionally explain the details and purpose of Bills, amendments and resolutions, but usually provide little background detail on the controversies inside the Nitijela. There are no live 'phone-in' programmes that put senators on the spot on key political issues. The station generally steers clear of sensitive issues. Financial issues, and issues connected with the Kwajalein negotiations are avoided unless at the direction of ministers or those close to the President.

During elections, the station broadcasts campaign speeches and gives 15 minutes free air time to each candidate for both local and national government positions³⁹. Candidates can purchase additional air-time, but are at no point entitled to a rebuttal of opponents' positions. There are no restrictions on the issues raised on air by candidates during election campaigns. The Ministry of Internal Affairs does occasionally run programmes aimed at voter education and encouraging voter registration.

The US State Department Human Rights website in 1999 criticised interruptions of live broadcasts of the legislative session in 1998, during the 'No Confidence' debate. This was during the period when the government had walked out of the Nitijela and when parliament was legally not in session. The Speaker had gone on air explaining the absence of broadcast proceedings, arousing objections from the then government. Otherwise, a 'sunshine policy' of live broadcasts is a long-running feature, which goes back at least to the 1970s⁴⁰.

³⁸ Office of Planning & Statistics, Social Statistics Bulletin, November, 2001, p1.

³⁹ Elections for both tiers of government occur simultaneously.

⁴⁰ See Quentin-Baxter, 'The Constitutions of Nuie and the Marshall Islands: Common Traits and Points of Difference', in *Pacific Constitutions*, (ed) Stack, ANU, 1982, p102.

On Majuro, those able to afford cable TV are swamped with foreign media culture. The MBC pumps out 21 channels – including a daily diet of American action and war videos screened on two channels, but also BBC World and CNN. On Ebeye, Marshallese can tune into the US Armed Forces Television Network. There is no local TV station. 61% of Marshall Islanders are reckoned to have TV sets⁴¹.

3.8. Local Governance

The 1979 constitution gives 'the people of every populated atoll or island' the 'right to a system of local government' (Art. IX. S.1). The Local Government Act (1980) requires local constitutions to provide for elections, for methods of formation of local executives and selection of mayors and 'to make provision, to the satisfaction of the Minister, for the keeping of proper accounts and records of revenue, expenditure, assets and liabilities (P.L. 1981-2 S.18).

Local governments have powers to make ordinances and to levy taxes, subject to the approval of the Ministry of Internal Affairs. They also receive grants from central government.

Considerable variation exists both in the performance and financial basis of the various local governments. Bikini, for example, has a \$20 million trust fund, on account of nuclear testing compensation payments. Others atolls are reliant only on grants from central government – including recently aid from Taiwan and grant-in-aid programmes distributed on a first-come, first-served basis.

Many local governments have had serious financial problems over recent years, and repetition of auditing problems year after year is not unusual. As regards those atolls that received large compensation via the Nuclear Claims Tribunal, most have managed funds poorly. Central government threats to shut off funds to non-audited local governments have in general not been kept. With the exception of Utrik, local governments are generally not forced into receivership.

Representation by local government mayors is very mixed. Some mayors are effective in the locality, others live in Majuro and run affairs on the outer islands by proxy acting Mayors. National electorates are also used for local elections, so that large numbers of off-island voters participating in elections for 'their' distant islands.

Recommendations

- Standing orders should be amended to formalize established practice regarding radio transmissions of Nitijela proceedings – ie that live broadcast of proceedings occurs at all times when the Nitijela is in session except recesses. The Nitijela recesses during power outages.

⁴¹ Office of Planning & Statistics, Social Statistics Bulletin, November, 2001, p1.

- That the role of the Elections Office be enhanced and given a higher profile.
- That an Electoral Commission, consisting of three members, and with a chair qualified to be a judge, be appointed and required to report to parliament on a) voter registration, b) revisions to the number and/or distribution of seats and c) the functioning of the Elections Office, as well as d) other matters as they see fit (including those raised below).
- As regards, absentee voters who reside abroad, the Nitijela should either
 - c) guarantee non-residents' (including those citizens in the US, Hawaii, etc) ability to exercise their vote
 - Or
 - d) restrict the right to vote to residents.
 The present system creates the potential for abuse.
- If a), a charter providing a government guarantee of the right to vote to overseas voters should include a legal responsibility to distribute ballot papers in a specified time period, and to provide voter education programs via mailing publicity campaigns explaining electoral procedures as regards the affidavit from a public notary required and the postal mark on the ballot paper. Alternatively, these rules should be simplified⁴².
- As regards resident voters, the Nitijela should either;
 - c) eliminate strategic re-registration by requiring voters to settle for, and stick to, one electoral district (unless the change requested is by virtue of a change in residence)⁴³.
 - Or,
 - d) establish electoral registration based on residence⁴⁴.
- Whatever the decision as regards national elections, the Nitijela should look separately at the issue of local government election registration, and at whether off-island electorates should be able to participate in local government elections on the outer islands.
- The Nitijela should act on its constitutional responsibility to provide a report, either by a parliamentary committee or separate body authorized by parliament (such as an Electoral

⁴² Another alternative, as recently adopted in the Cook Islands, is to provide for a separate seat or separate seats for overseas resident Marshallese voters.

⁴³ The Constitution provides that 'every person otherwise qualified to be a voter shall have the right to vote in one and only one electoral district, being an electoral district in which he either resides or has land rights, but a person who has a choice of electoral districts pursuant to this paragraph shall exercise that choice in any manner prescribed by law' [Art. 4. Section 3 (3)]. In other words, laws, rather than constitutional amendments, may lay down procedures as regards the district of registration for any person who has a choice in the matter

⁴⁴ This would require a constitutional amendment.

Commission), looking into the desirability or otherwise of changing the number and distribution of seats inside the Nitijela⁴⁵.

- That the electoral rolls be fully updated by the deletion of deceased persons from the register, and the additional of new eligible voters to the register.
- Improve methods of linking the system used at the Ministry of Internal Affairs' Register of Births and Deaths with that used by the Elections Office.
- That the Electoral and Referenda Act be amended so that the Electoral Register used in each election be publicly available and held in several libraries of deposit, including the Nitijela Records Office, the Alele Archives, College of the Marshall Islands and University of the South Pacific.
- That reporting of election results be improved in line with accepted international standards. For each constituency data should be published including (1) number of registered voters, divided between those a) resident on-island, b) those resident off-island but elsewhere in the Marshall Islands, c) those resident overseas. (2) Numbers of ballots declared invalid should be listed, followed by (3) valid ballots (ie the valid ballots cast for each candidate). Postal ballots should be accounted for separately, and a breakdown of the reasons for rejection of any postal ballots should be provided.
- That the Elections Office be made responsible for providing neutral voter education programs.
- That voter education be introduced as part of the school curriculum
- That the Nitijela enact campaign finance laws making illegal
 - c) The use of government funds for election campaigns
 - And requiring;
 - d) That all candidates be required by law to publicly disclose all offshore donations
- Whilst being responsive to the needs of society and minority views, Ministers and Senators should avoid improper influence of lobbyists and special interest groups
- That a charter for National Radio V7AB be published protecting the station from direct intervention or tacit encouragement of self-censorship, and that the station be enabled to develop programs that touch on controversial issues, such as the Compact negotiations, Kwajalein or financial issues.
- Radio V7AB should be encouraged to develop radio programs, in Marshallese, detailing the meaning and ramifications of bills.
- That standing orders be amended to clarify whether secret ballots or roll call be ordered in votes of no confidence.

⁴⁵ The 1979 constitution [article. IV, S. 2, (6)] provides that the Nitijela, or some other authorised body, review the composition of the Nitijela at least once in every ten years.

- That votes by roll call be introduced for any vote of no confidence to improve accountability.
- Provisions enabling the Nitijela to challenge the Speaker's rulings should be strengthened.
- That the current 30-day time period for disputes arising regarding elections results be reduced to 14 days.
- That procedures for the dissolution of parliament in the event of two successful votes of no confidence, and failures to select another President, be re-considered at the next Constitutional Convention. At present, the previous President is then returned to office and dissolution only occurs at his or her discretion. Although such a situation has not, so far, arisen, it is worth revisiting at a future Constitutional Convention. The reluctance, back in 1978, to accept the possibility of a premature dissolution of parliament may not be as strong today.
- A Leadership Code, with specified codes of conduct for all members of the Nitijela and Council of Iroij, should be developed and published, as spelt out in the government's document Vision 2018.
- Codes of conduct should require full disclosure by ministers and senators and council members of their financial, monetary and commercial interests.
- That a register of commercial interests of ministers and senators be established.
- That the Speaker be empowered to refer conflict of interest issues to the Ethics Board.

4. Assessment of the Law-Making Procedures of the National Parliament

The record of successive governments in generating and facilitating passage of new legislation is mixed. In many sessions, the cabinet does not deliver a detailed legislative programme, and sitting days commence with little other than the formally-required order of business. The constitutionally-specified rules for passage of legislation creates the potential for bottle-necks, although these can be avoided with improved prior planning, encompassing both Nitijela and committee sessions. Logjams have also arisen due to political frictions and disagreements, and the Nitijela has proved reluctant to discuss legislation that covers sensitive issues, such as rape or child abuse. Nevertheless, the Chief Justice reports that the quality of legislation presents judges with no more difficulties than those experienced in California.

4.1. Laws Governing the Passage of New Legislation

The Constitution specifies that 'legislative power shall be vested in the Nitijela' (Art. IV, S. 1. [1]. Draft laws⁴⁶ need to be introduced in Nitijela, and approved, three times [Art IV. S. 15. (10).] and 'subject to any order of the Nitijela, each reading of a Bill shall be dealt with on a different day' [R&P S. 84. (2)].

Passage of a Bill at the first reading indicates that the Nitijela accepts the Bill for consideration. Bills are then referred to a Standing Committees or to a Special Committee established for that purpose, or directly placed on the agenda for a second reading

Where required, committees either recommend a second reading, reference to another committee or filing the Bill without further consideration (R&P. S.85).

A second reading of a Bill approves or rejects 'the principle of the Bill', and approved Bills then pass to one or more Standing Committee or to a Committee of the Whole. At this stage, Committees are empowered to summon and examine witnesses, call for papers and search documents and records. There is no explicit provision, at present, for public hearings, but Committees are empowered to 'do all things necessary to discover for the Nitijela all facts relevant to any matter referred to it' (R&P S.34). Committees are required to complete a report recommending unchanged further passage of the Bill, amendment or transfer to another committee (R&P S.86.). Subject to Nitijela orders, the completion of such a report refers the Bill to a Committee of the Whole, which discusses amendments but not the principle of the Bill itself. The completion of deliberations of a Committee of the Whole is accompanied by a report from the Speaker detailing the status of the Bill 'with' or 'without' amendments.

If there is no successful motion for a re-committal of the Bill, it passes to a third reading and a final vote by roll-call. A Bill that has passed a third reading is then transmitted to the Council of Iroij, which may declare an 'opinion' that it 'affects the customary law or a traditional practice, or land tenure, or a related matter' and may 'request' that the Nitijela reconsider the Bill (Con. Art. III. S. 3). Within seven days, Chairperson of Council of Iroij is required to communicate the Council's decision to speaker, after which the Speaker either certifies the Bill as an Act of parliament or asks the Nitijela to reconsider the Bill.

A Bill that has passed three Nitijela readings, and received no objection from the Council of Iroij, receives a 'certificate of compliance' that is signed by the Speaker and Counter-signed by the Clerk and then becomes an Act of Parliament (Art. IV. S.21).

In 2001, a Bill to make International Women's Day a national holiday was read and backed three times by the Nitijela, but returned to the Speaker with a Council of Iroij opinion that it conflicted with Marshallese custom. In accordance with the constitution [Art. III. S.3. (6)], a joint conference was held in the Nitijela chamber, attended by Nitijela senators and members of the Council. Owing to traditional leader's objections, the bill was filed.

⁴⁶ This section discusses Bills that do not entail constitutional amendments and Bills that are not money Bills. Rules governing constitutional amendments are discussed in section 2.1. above. Money Bills are briefly discussed at the end of this section.

Money Bills, those which touch on RMI revenues and expenditures, are a cabinet responsibility and require cabinet approval [Art. VIII. S. 2 & S. (5)]. They only proceed beyond the first reading, and can only be amended, with the recommendation and consent of a member of cabinet.

4.2. Legislative Process

There is a need for improved planning and cabinet direction to enhance the functioning, preparation and reporting of committees, and to increase public participation in the legislative process. Too frequently, a legislative programme is not set out at the start of the annual session, leading to low productivity of new legislation and rushed legislation towards the end of annual sessions. On specific days, the 'Order of Business' frequently follows little more than the standardised format set out in the 'Rules and procedures' of the Nitijela (S. 52), rather than providing a detailed programme for the deliberate and systematic parliamentary processing of new legislation.

The 'Rules and Procedures of the Nitijela' specify that 'subject to any order of the Nitijela, each reading of a Bill shall be dealt with on a different day' (R&P. 84. (2)). However, Bills are sometimes rushed through their various readings on a single day, with little time for detailed discussion or preparation.

Poor planning also inhibits the scope for thorough public consultation. Civil society groups identify minimal, and/or last minute, communication to stakeholders concerning public hearings dealing with relevant legislation. Some stakeholders argue that government public hearings occasionally give the impression of being mere window-dressing, with decisions having been previously taken. There is also a view that Committee members are reluctant to act on advice from expert witnesses, or to seek such advice before initially framing legislation. In the past, governments have been known to go ahead with proposed legislation, without public explanation, despite strong objections from interested parties.

The Nitijela has proved reluctant to discuss legislation that covers sensitive issues, such as rape or child abuse. In many areas, the Nitijela is way behind in facilitating the passage of new criminal legislation.

Some training for newer members in parliamentary procedure is conducted by the Speaker's Office.

Secretarial and legislative support services for new legislation need enhancing. At present, some Bills are accompanied by 'Bill summaries', usually in English. Much of this work devolves on the single Nitijela Legislative Counsel.

There are scarcely any resource facilities available for senators to examine background information to accompany debate on the passage of Bills, or to assist the formulation of private members' Bills [See section 6. below].

The Nitijela Standing Orders make no reference to the timing of distribution of Bills or resolutions or standing committee reports, but state only that the 'Clerk shall provide each member with a copy' (S. 75.)

Recommendations

- At the opening of parliament, the President, after consultation with cabinet, should outline the legislative program of the government for that year, and this should serve as the basis for a schedule, drawn up by the Clerk in collaboration with the Speaker, for the order of business for the session.
- Rules and procedure of the Nitijela be amended to require government to give notice of the annual legislative agenda, including Bills and Resolutions, at the start of each session in January.
- That the Office of the Clerk and the Office of the Speaker, in consultation with the Cabinet Chief Secretary, draw up an annual agenda at the start of each annual session and submit this to the Nitijela for approval.
- That a) non-government senators select by secret ballot a senator, or that b) the Speaker identify a senator based on consultations with non-government senators, to respond in the Nitijela to the agenda of the government, as set out by the President, at the start of each parliamentary session and to the budget speech of the Minister of Finance.
- Senators be required to submit all private members Bills for a session at the start of each annual session.
- That restricted time-slots be made available for Bills and Resolutions that have not been announced at the start of each year [So that the only certain way of securing passage of new legislation during a session is via prompt submission at the start of the year].
- That the President's annual speech be followed by a comprehensive Nitijela discussion covering all aspects of the legislative program for that session.
- Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:
 - d) there is public exposure of issues, papers and consultation on major reforms including draft bills. In particular, there should be an obligation to call public hearings where there is an item of widespread popular concern.
 - e) Standing orders provide a delay of some specified period between introduction and debate to enable adequate representation of public comment unless suspended by consent or a significantly high percentage vote of the chamber; and

- f) Major legislation can be referred to a select committee for the detailed examination of such legislation and the taking of evidence from members of the public.
- Rules & procedures should be amended to require public hearings on any matter before a committee of the Nitijela that is of broad public interest.
 - The Rules & Procedures should be amended to require at least two weeks notice of any public hearings, with notification broadcast live on Radio V7AB and published in the Marshall Islands Journal.
 - The Office of the Clerk should be required to send out invitations to any public hearing to interested stakeholders and/or expert witnesses.
 - Avoidance of excessive delays in referral of Bills to committees should occur by provision of a clear timetable for such consultation.
 - All cabinet-initiated Task Force reports relating to financial impropriety & Auditor General's Reports (revised as suggested below) should be tabled on the parliamentary agenda.
 - That a new edition of the Marshall Islands Revised Code, involving a new consolidation of laws, be speedily produced, with full corrections of cross-references, numbering, appendices.
 - Questions addressed to ministers that require detailed factual answers, as contrasted with those that require broad statements of policy, should be submitted in writing before being raised orally.
 - Support services should be improved to assist senators in preparing questions, so as to reinforce parliamentary scrutiny of the executive.
 - That there should be no call for an early 'recess' of parliament, unless the statutory question and answer session has been completed.
 - That Gender-neutral language should be used in the drafting and use of legislation to promote a more gender balanced society.
 - That speedy and effective steps should be taken by the Nitijela to implement Marshall Islands' international human rights obligations by enacting appropriate human rights legislation.
 - That the Nitijela should raise awareness and encourage people to enforce their rights through the courts.
 - That all members of Parliament and the Council of Iroij should have access to human rights education.

- That the rules governing the Judicial Services Commission be revised to include a substitute for each of its' three participants. At present, the Commission comprises the Chief Justice of the High Court, Attorney General and a public member. There exists provision for the substitution of the Attorney general by the Public Service Commissioner, and of the Chief Justice by Chief Justice of the Supreme Court, but the public member has no substitute. To appoint someone only as and when the need arises could prejudice the outcome in given situations. Hence, it would be better if a potential substitute existed for the public member.

5. Assessment of the Oversight Role of the National Parliament

Since the commencement of self-government in 1979, parliament has been unable to adequately fulfil its' role as the guardian of the national finances. Following the advent of the Compact of Free Association with the United States and up to 2001, around \$1 Billion flowed on a state-to-state basis from the USA to the Marshall Islands. Compact-funding, whether in the form of rents, nuclear compensation, programme support or straight financial aid was disposed of without the parallel development of robust oversight institutions. The Marshall Islands had, and still has, a relatively small and little developed export sector. Private sector activity was and is intimately linked to state disbursal of compact funding, and associated procurement and contracts. Government was unable to draw on a pool of relatively skilled private sector labour to establish efficient public sector oversight institutions.

During the first phase of the Compact of Free Association with the United States (1986-2000), successive reports from the US General Accounting Office and from RMI Government Task Forces, as well as independent auditors Deloitte and Touche, highlighted poor accounting standards, misuse of funds and persistent non-reporting by government agencies, state-owned enterprises, local governments and ministries. As regards the US Departments of State and Interior, one reason was a clear political differences, with the State Department counselling leniency on the grounds of the perceived geo-strategic significance of the central Pacific state. It is likely that the re-negotiation of the Compact of Free Association will be accompanied by greater oversight requirements on the part of the US government.

5.1. Creating a Culture of Accountability and Transparency.

There is an urgent need to strengthen the oversight role of parliament, and in particular to revitalise the links between the Nitijela's public accounts committee, the Auditor General, Attorney General and Finance Ministry.

The GAO has provided considerable evidence regarding expenditures or borrowing directed by previous governments accompanied by minimal or non-existent parliamentary oversight, and without normal procedures being used to initiate such expenditures or borrowing. The Office 'could find no evidence of any standardized form used to plan or track capital projects. In some cases, we found very limited files for sizable RMI ventures such as the airline or the resort hotel many project files that we reviewed lacked complete

documentation such as economic feasibility studies, competitive bids, contracts and inspection reports⁴⁷.

Independent auditors Deloitte Touche Tohmatsu have likewise, over many years, highlighted non-compliance by numerous in-auditable government entities over many years as well as clear cases of misuse of funds⁴⁸. Some of these reports have been reproduced in the Auditor-General's annual report, others in the Finance Ministry's General Purpose Financial Statements.

Independent Task Forces were established under the Amata Kabua government⁴⁹ and, more recently, during Kessai Note's administration⁵⁰. These have similarly highlighted serious deficiencies in the procedures and policies governing tax and social security contribution collection, government borrowing and, in particular, in the payroll department of the Ministry of Finance and in the Marshall Islands Social Security Administration (MISSA).

The new government has taken several important steps to rectify some of these longstanding difficulties, via a reorganisation of the Ministry of Finance and the appointment of a new board for MISSA.

Various directives have threatened to withhold funds from non-complying ministries and departments⁵¹, as well as agencies, corporations and institutions⁵². Such threats, however, have rarely been followed by action. Non-compliance with auditing requirements remains a serious issue.

It is beyond the scope of this report to explore in detail the auditing issues raised by recent reports and directives (Task Force Report No 1a is reproduced in appendix D). The concern here is primarily with the parliamentary oversight mechanisms, and therefore the ability of the Nitijela and its' committees to respond to those reports.

However, it is worth noting that while the detailed audits of Deloitte & Touche and the GAO have been funded by the US government, compliance by Marshallese agencies is

⁴⁷ GAO 'U.S. Funds to Two Micronesian Nations had little Impact on Economic Development', September 2000, p56-57, http://pidp.eastwestcenter.org/pireport/special/cofa_special.htm.

⁴⁸ See, for example, the long list of entities 'not able to produce financial statements' in Deloitte & Touche, 'General Purpose Financial Statements and Independent Auditors' Report', Year ended September 30th, 2000 and similar reports, normally highlighting the same entities, for previous years

⁴⁹ Report of the Commission of Inquiry', Warrant Number 1996-001', 19th September, 1996; 'Report of the Commission of Inquiry', Warrant Number 1997-002, 30th January 1998.

⁵⁰ 'Task Force on Accountability', Interim Reports 1-4, reproduced on the 'Pacific Islands Report website, PIDP, East-West Centre, Hawaii. See appendix C for report 1a.

⁵¹ 'All government Ministries and Departments must have been audited and complied with all audit recommendations prior to receiving any quarterly allocation. Any Ministry or Department unable to comply with all audit requirements much provide an expence (Sic) report before release of any funds' (Appropriations [Financial Year 2000]Act 2001, S. 13).

⁵² A cabinet memo specifies that 'Government will henceforth subject the release of subsidy or direct funding support to agencies and institutions operating outside the General to the provision by such agencies, corporations and institutions of audited financial statements to the Ministry of Finance. Audited financial statements must be for the year immediately prior to the financial year in effect' (Memorandum from President and Minister of Finance to all Ministries, Offices and Agencies, 30th August 2001).

normally not. In some cases, non-compliance may be the result of misuse of funds. In others, it is simply poor book-keeping and absence of requisite skills or experience. A draconian programme of enforcement, in such circumstances, may not have the desired effect. What is necessary is a case by case investigation to establish strategies for obtaining a once-and-for-all institutionalisation of agency, SOE and other government-funded institutional compliance. The Nitijela's Public Accounts Committee should be at the centre of this process. In some circumstances, prosecutions and employee terminations are a necessary element in generating clear disincentives against further illegal activities.

During the re-negotiation of the Compact, the RMI government has a strong incentive to strengthen its' own national oversight institutions, enhance the nexus between oversight and enforcement agencies, and to provide greater transparency and accountability in government operations. If any one leg of the stool collapses or ceases to function, the problems for the other institutions become insurmountable. The viable approach is to target once-and-for-all improvements in transparency and accountability, gradually moving across the range of ministries, local governments, agencies and state-owned enterprises, rather than a mere succession of piecemeal or ad hoc procedural changes. Institutions empowered to intervene directly, and enhanced instruments of enforcement, will be necessary to accomplish lasting changes.

Support for the programme of improved accountability and transparency in the Marshall Islands is mixed. Senators who backed a 'no confidence' vote against the Kessai Note government in January 2001 listed, without explanation, the 'Task Force on Accountability' as one of the reasons for seeking the defeat of the Note administration⁵³.

Opposition senators argued that Task Force was overly targeted at highlighting abuses by the previous government, rather than those associated with the current administration. Conversely, several pro-government senators argued that the Task Force did not draw sufficient attention to abuses under the previous government. In other words, both sides criticised the Task Force for not finding sufficient fault with those on the other side of the political spectrum.

It is important that the government's agenda of improving accountability and transparency be sustained. There is currently a danger that this objective may get derailed. The work of the Task Force has recently been halted, after some criticisms⁵⁴.

A critical way of reinvigorating the accountability drive is by strengthening parliamentary oversight institutions, so that all members of the Nitijela – whether on the government or opposition side – become engaged in a process of institutional strengthening.

Such reforms and actions need to be clearly perceived as oriented towards future performance improvement, and as unbiased, rather than overly backward-looking or one-sidedly targeted at a specific section of the populace.

⁵³ 'Justin: 'We don't mean War', Marshall Islands Journal, 12th January 2001.

⁵⁴ See, for example, 'Is the Task Force Going Too far?', Editorial, Marshall Islands Journal, 15th February, 2002.

Key oversight organisations include the Auditor-Generals' Office, the (intended) Ethics Board, the Ministry of Finance and the Nitijela's Public Accounts Committee. Key enforcement institutions are the Ministry of Finance, the Public Service Commission (as regards warnings, suspensions or termination of government employees) and the Attorney General's Office (as regards prosecutions).

5.2. The Executive

It is the cabinet that is ultimately responsible for the national finances; the supervision of all taxes and revenues paid into the 'general fund', and the Appropriations and Supplementary Appropriation Bills authorising expenditures (Con. Art VIII.).

The Executive comprises the President and the cabinet, who are 'collectively responsible to the Nitijela' (Con. Art. V. S. 1. [1]). The Cabinet consists of not more than ten, and not less than six, ministers who are chosen (and can be dismissed) by the President, but are formally appointed by the Speaker from amongst the members of the Nitijela.

According to the 1978 Marshall Islands Constitutional Convention,

'The fact that the members of the Cabinet are drawn from the members of the Nitijela does not mean that the identity of the two bodies is merged. In terms of organisation, powers and functions, the distinction between them is sharply maintained. In addition, there always [are] ... at least two thirds of the members of the Nitijela outside the Cabinet. Those members have the right and duty to question the members of the Cabinet about the way they are running the government. Despite the Marshallese tradition of being sparing with public criticism, the need for constant public explanations by the executive branch ... in itself [tends to] encourage good government'⁵⁵.

In practice, the Executive has often been able to avoid Nitijela scrutiny by invoking 'executive privilege'. Owing to the majority's role in appointing the Speaker, who ultimately determines the composition of the various committees of the House, the potentially powerful role of the committee system as a check and balance within the parliamentary system may be undermined. The executive dominates the legislature.

Historically, there has been a tradition of 'top-down' cabinet governance with little recognition of the broader benefits to be secured by enhancing the oversight activities of the committees or the Nitijela in general.

5.3. The Opposition

The Westminster-style system is based on the existence of a strong opposition, one that is able to scrutinise and criticise the activities of the executive. In many parts of the Pacific,

⁵⁵ Report of the Committee on Convention Procedure and Jurisdiction, (1978), cited in De Jong, A 'The Constitution of the Marshall islands: Its Drafting and Current Operation', p49-50.

parliamentary groupings are not organised in such a fashion, but depend instead on highly unstable alignments. Unbounded politics has been, in some situations, a source of strength and flexibility as well as weakness.

Historically, the Marshall Islands has not been characterised by the formation of durable political parties, with clear manifestos and membership, but rather by looser and more fluid groupings that came together immediately prior to elections or referenda, and fragmented thereafter. The unofficial opposition Ainiken Dri-Majol (ADM - Voice of the Marshalls) supported continued Micronesian unity in the 1970s. However, President Kabua successfully led the Marshall Islands' breakaway from the rest of Micronesia (1978). Opposition senators subsequently organised around opposition to the Compact of Free Association with the United States, but in the mid-1980s fragmented over factional atoll-specific issues and land disputes. In 1991, opposition forces joined together to form the Ralik Ratak Democratic Party, but they lacked a clear party programme or institutional base.

Elections in the Marshall Islands have been regarded as a 'winner takes all' affair - 'to the victor goes the spoils'. The new government seeks to consolidate its gains and decisively undermine its' opponents future prospects. Owing to the small and closely inter-linked character of Marshallese society, shifts in the parliamentary balance of power have tended to be reflected in significant swings in the balance of resource distribution. Given the great economic significance of government, such swings can result in the economic, as well as political, marginalisation of prominent opponents of the new regime.

Under long-serving President Amata Kabua, the absence of a coherent opposition was identified as a key weakness of the Marshallese parliamentary system.

'The biggest hindrance to open debate on government policy is the absence of an organised opposition. The parliamentary system of government in operation in the Marshalls does not offer the same division, and therefore check and balance, between the executive and legislative branches as the US system'.⁵⁶

The very design of the new Nitijela chamber, with ministers seated at the centre and backbenchers on the fringes, reflects the marginal position of opposition members. There is no provision for an elected leader of the opposition in the Constitution or in the Rules and Procedures of the Nitijela, and, in general, no shadow ministries are formed.

Nevertheless, the last five years have seen signs of the emergence of stronger oppositional currents inside parliament, most notably with the opposition's victory in the election in 1999. [During the mission, one opposition senator quipped in the Nitijela that the 'independents party' would be meeting during a recess].

The form of organisation chosen by opposition senators is ultimately a political question, and therefore outside the scope of this report. Similarly, whether or not opposition senators choose to form shadow ministries cannot be separated from the issue of their political coherence as a group. The Nitijela has veteran opposition senators chairing several key

⁵⁶ Giff Johnson 'Politics in the Marshall Islands', in *Micronesian Politics*, IPS, Suva, 1988, (eds), Crocombe, R et al, p81.

committees. This healthy development should be institutionalised, via a revision of the 'Rules and procedures'. Furthermore, in tandem with the proposal for greater advance planning for the annual session agenda, as reflected in the content of the legislative programme set out at the opening of parliament, non-cabinet or opposition senators should select one or more senator to respond to the cabinet programme.

In theory, technical support for opposition senators exists via the office of the Clerk of the Nitijela.

5.4. The Auditor General

The Auditor General is appointed by Speaker, and confirmed by the Nitijela. He or she is required to submit a semi-annual report to the Nitijela in the January and August session of each year (Con. Art. VIII. S. 13 & 15, 'Auditor-General Act, 1986' [PL. 1986-25]).

The Auditor General is empowered to audit, using US standard General Accounting Office procedures, 'all departments or offices of the legislative, executive and judicial branches of government and of any other public corporation or other statutory authority' (Con. Art. VIII. S. 15 [1], Auditor-General Act, 1986, S.8). 'The Office of the Auditor-General shall specifically act to prevent and detect fraud, waste and abuse in the collection and expenditure of all public funds', and also to investigate 'procurement of supplies or procurement of any construction' (Auditor-General Act, 1986, S. 4).

The Auditor General's reports are required to make specific mention of 'a) any violation of the laws within the scope of the audit' and b) 'any improper expenditure, any improper accounting procedures, all failures to properly record financial transactions, and all other inaccuracies, irregularities, shortages, defalcations and other improper practices' and, in a special confidential report to the Attorney-General, c) 'specific allegations naming persons involved in improper or illegal acts found in the course of an audit' (Auditor-General Act, 1986. S 9).

The Auditor-General's bi-annual reports are required to be reviewed by the Nitijela Committee on Public Accounts, with a view to determining action and recommending, where necessary, legal changes (Auditor-General Act, 1986. S10, R&P S.49).

The Auditor General is empowered to 'retain the services of any independent certified public accountants' (Auditor-General Act 1986, S.6) and in practice, the private firm Deloitte & Touche is contracted to conduct all the audits of the various state-owned enterprises and agencies covered in the Auditor-Generals annual report⁵⁷ and also audits the ministries via its' General Purpose Financial statements⁵⁸.

⁵⁷ For the second part of 2000, see 'Thirty-Sixth Semi-Annual Report of the Functions and Activities of the Office of the Auditor-General', July 1st-December 31st 2001.

⁵⁸ See Deloitte Touche Tohmatsu 'General Purpose Financial Statements', Year ended September 30th 2000.

The Auditor General's Office lost about half its' positions as part of the government's 'Reduction in Force' programme in the mid-1990s. They are now re-hiring staff. There are currently 11 employees, including the Auditor-General herself.

The role of the Office of the Auditor-General is to highlight weaknesses, but it is the Public Accounts Committee, the Nitijela or the Cabinet, or in the case of illegal activities, the Office of the Attorney-General, that is ultimately responsible for taking action. In many cases, entities do not have internal controls or manuals that specify policies or procedure that they are required to follow.

The Auditor-General's reports do not contain any cover statement, summarising recommended courses of action, particularly as regards the many cases of non-compliance, year after year. However, members of the Public Accounts Committee are not necessarily trained accountants, equipped to wade through such detail. It would facilitate a more efficient interaction between the two branches if such summary statements, including an action plan, could become an established part of the Auditor General's semi-annual reports.

The role of the Auditor Generals' Office needs to be enhanced; in ensuring compliance, identifying problems and recommending procedural changes. Some state-owned enterprises, local governments and agencies either fail to deliver auditable accounts or reveal serious process problems year-after-year, without action being taken. The primary responsibility here should lie with the Public Accounts Committee, but this is not functioning. The Auditor-General's Office has no powers of enforcement.

5.5. Standing Committees

The Nitijela has a potentially strong committee system, modelled on that of the U.S. Congress. According to the 'Rules and procedures of the Nitijela' (S. 43-50), all Bills, resolutions and motions in the appropriate areas must be referred to the appropriate committee.

Members of the committees are appointed by the Speaker. The Chair is normally not a member of cabinet, but, at present, ministers are the vice-chairs of each of the seven committees.

The Committees have powers to summon and examine witnesses, call for papers, search documents and records and 'do all things necessary to discover for the Nitijela all facts relevant to any matter referred to it' (R&P S.34).

The 'Legislative Procedure Act 1968' also allows Nitijela committees to 'issue subpoenas and subpoenas ducus tecum requiring the attendance of witnesses or the production of books, documents, records, or other evidence' and 'no witness is privileged to refuse to testify to any fact, or to produce any paper, book, document or records' (MIRC 3).

There has long been popular backing for greater use of public hearings to encourage popular participation in the formulation of legislation⁵⁹. Committee Chairs have been known to acquire considerable authority, and are granted a special seating position in the parliamentary chamber.

There are currently seven standing committees:

- Appropriations (APPRO)
- Health, Education and Social Welfare (HESA)
- Ways and Means (W&M)
- Public Accounts (PA)
- Judiciary and Government Relations (J&GR)
- Resources and Development (R&D)
- Foreign Affairs and Trade (FAT)

The 'Rules and procedures' (S.36) provide that, except with the approval of the Nitijela or the committee itself, 'not more than one member of Cabinet may be a member of any particular committee'. At present, there are four ministers on the HESA committee, two on W&M, two on PA, two on J&GR, two on R&D and three on FAT.

In some cases, the chairs of committees are, as is proper, experienced and/or well-qualified senators who are not part of the cabinet, with sufficient experience to ensure that the committee system serves as an important 'check and balance' in the parliamentary system. In other cases, this is not so.

The Nitijela does have powers to cancel appointments to the committees. "If in its opinion the work of a committee is not being properly and expeditiously carried out, the Nitijela may cancel the appointments of members of the committee and the Speaker shall, subject to any order of the Nitijela, make fresh appointments' (R&P S.35 [5]).

Six of the seven standing committees are points of reference for materials that initially arrive before the Nitijela. The Public Accounts Committee is unique in dealing primarily with materials initially referred from outside parliament.

5.6. The Public Accounts Committee

The terms of reference for this investigation state that;

'The role of the public accounts committee has to be strengthened in accordance with changes in the emphasis of the National Budgets where resources are now allocated on achievable targets. The Committee needs to have the appropriate powers to demand disclosure and prompt accountability from any government agency, public enterprise and any other entity, including NGOs, who received public funding' (see appendix 1).

The role of the Public Accounts Committee is to 'consider the public funds and accounts of the Marshall Islands' and the Auditor-General's bi-annual reports. It is intended to

⁵⁹ See 'More Public Hearings Needed', Editorial, Marshall Islands Journal, 14th September, 1990.

recommend action to the Nitijela in the case of 'unauthorised expenditure of funds' and 'propose any measures that it thinks necessary to ensure that public moneys are properly and economically spent and duly accounted for' (R&P S. 49).

Hence, the Public Accounts Committee is the crucial pivot in parliamentary control over the Executive. It is vital in preventing abuses by cabinet, and in driving public sector financial reforms.

The Public Accounts Committee, at present, is dysfunctional. This was also the case under some previous governments. It is often treated as the least powerful, and least popular, committee. It should be the most powerful, and a critical training-ground for those who aspire to government.

The government's recent Task Force on Accountability found that 'numerous and successive audit reports have detailed issues of financial mismanagement. Each year, relevant officials have indicated that such issues would be remedied. However, successive administrations have, for the most part, failed to remedy the identified problems. It appears that the Cabinet and the Nitijela do not adequately review or do not fully understand the findings of various audit reports'⁶⁰.

The Task Force's findings were never reviewed by the Public Accounts Committee. Nor were they placed before the Nitijela for discussion. Public access to the documents has only been facilitated by the publication of excerpts from all four reports in various editions of The Marshall Islands Journal⁶¹ They are also available on the internet on the Pacific Islands Development Programme website⁶². Many of the recommendations of the Task Force reports have not been implemented.

As it is presently constituted, the Public Accounts Committee is chaired by a junior pro-government senator, and has four opposition senators, two ministers, one senator described as neither part of the opposition nor the government and one Kwajalein senator who recently switched sides and backed the government on a no-confidence vote in early 2001. The total number of members is nine, although the Rules and procedures specify seven.

According to the current chair, the Public Accounts Committee has been unable to hold a quorate meeting for the last two years⁶³. At each meeting, only the chair and the two ministers turn up, while other Senators stay away.

Given the absence of control exercised by the Public Accounts Committee, Cabinet has regularly intervened directly, threatening, for example to cut off funds to entities failing to comply with auditor's requirements.

⁶⁰ Interim Report No 1, (a), Task Force on Accountability, Tax Evasion by businesses, or Employees of the RMI (see appendix C).

⁶¹ Marshall Islands Journal, January 18th 2002, p24; February 22nd 2002, p20; January 4th, 2002, p14-15; February 8th 2002.

⁶² <http://pidp.eastwestcenter.org/pireport/>

⁶³ 50% of the membership needs to be present for a quorum to be obtained (R&P. S. 38).

5.7. **Other Oversight Organisations I: Public Service Commission**

The Public Service Commission (PSC) plays an important oversight role in supervising the employment and termination of public sector employees.

The 1979 constitution specifies that ‘in all matters relating to decisions about individual employees (whether they relate to the appointment, promotion, demotion, transfer, disciplining or cessation of employment of any employee or any other matter) the Public Service Commission shall not receive any direction from Cabinet or from any other authority or person, but shall act independently, and in accord with criteria relating only to an individual’s ability to perform his duties’ (Art. 7, Sect 10. [2]).

In the past, the PSC has regularly been subject to ministerial control in specific cases. In smaller countries with close-knit communities and limited numbers of experienced personnel, differentiation of the roles of government can become difficult. Appointments to the public service can become conditioned by connections to the legislature, and developing relatively independent oversight institutions becomes crucial.

5.8. **Other Oversight Organisations II: U.S. Department of the Interior**

The Compact of Free Association bestows certain oversight functions on the United States government with regards to the expenditure of Compact-related funds. Since these comprise a large part of annual Marshall Islands’ government expenditure, the U.S. oversight role is potentially a highly important instrument in enhancing accountability as regards government expenditures.

However, investigations by the U.S. General Accounting Office found that ‘the U.S. government did not meet many of its oversight obligations’⁶⁴. In particular, the US Department of the Interior and the US Department of State did not consult annually with the government of the Republic of the Marshall Islands during the first seven years of the Compact, at least partly due to disagreements between the two departments. The GAO explained this as a result of ‘disagreements between the Departments of State and the Interior regarding the level of and responsibility for Compact oversight have led to limited monitoring’, and claimed that the Department of State had ‘counselled leniency in early days to preserve friendly relations’ owing to geo-strategic concerns and the desire to obtain U.N. votes⁶⁵.

Instead of providing, as initially planned, for 15 Department of Interior staff to supervise the implementation of the Compact in the Federated States of Micronesia and the Marshall Islands, not a single person was employed on the ground by the Interior Department to work in the Marshall Islands on Compact-finance.

⁶⁴ GAO. ‘U.S. Funds to Two Micronesian Nations had little Impact on Economic Development’, September 2000, p11-12

⁶⁵ *ibid*, P82.

Five yearly development plans were, according to the GAO's findings apparently not reviewed. None of the required consultations with the RMI government were held until 1994.

The Department of the Interior pays for the annual audits, but the GAO questions US reliance on these as the independent auditor has repeatedly stated 'that it has been unable to audit the financial statements of various recipient government subcomponents'.

For the future re-negotiated Compact, the GAO recommends US insistence on expanded auditing requirements. In their responses, the US Departments of the Interior and State have indicated a commitment to strengthening oversight provisions as part of efforts to re-negotiate the Compact.

Recommendations

- That consideration be given to the desirability or otherwise of establishing a separate office for a Leader of the Opposition, with appropriate support services.
- That job descriptions for the positions of chairs on each of the seven committees be developed and that these specify a preference for experienced and/or well-qualified senators who are not part of the cabinet, and who have a reputation for independent thinking.
- That rules governing the conduct of senators on committees be promulgated, including financial penalties for non-attendance and/or financial incentives for attendance and active participation, particularly for committee chairs.
- Senators should be appropriately remunerated for their participation in the standing committees, either by a) earmarking an element of the existing 'official allowances' to be specifically paid in accordance with committee attendance and active participation or b) the provision of additional funding for this same purpose.
- Whenever a committee meeting takes place, whether this is a public hearing or not, the names of those attending, those sending apologies and those absent should be broadcast on Radio V7AB.
- That training programs be initiated for the chairs of committees at the start of their period in office.
- At the start of their period in office, committee chairs should be required to conduct a written review of their areas of responsibility, which should include expressions of intention regarding the passage of new legislation.
- Those reviews should be published both in English and Marshallese.

- Support from the parliamentary secretariat, and from within the ministries, should be given to committee chairs in the preparation of those reports.
- Initial committee meetings at the start of a new parliamentary term (following an election) should include a discussion of chair's reports completed by the chair.
- That the current public accounts committee should be disbanded and reconstituted.
- The Chair of the newly constituted public accounts committee should be an experienced and/or well-qualified senator who belongs to the opposition or is known for independence in thinking. The post should be given to a Senator who is capable and willing to uncover necessary information from a wide range of sources.
- Enact as Act of Parliament a new charter for the operation of the Public Accounts Committee (incorporating guidelines), and for coordination, between the Public Accounts Committee, Auditor General's Office, Attorney general's Office and Secretary of Finance.
- The Public Accounts Committee should be empowered under relevant laws to initiate prosecution for all offences relating to public accounts arising from its own investigation.
- That a report from the Public Accounts Committee regarding intended action on the Auditor General's annual report must be placed on the Nitijela Order of Business at least two times a year. The Auditor General's reports should, twice a year, be tabled before the Public Accounts Committee which should, in turn, provide the Nitijela with a written report, within a specified time period.
- That the position of Special Prosecutor be created within the Offices of the Attorney General, but with separate responsibility, with the objective of enhancing the operations of that office.
- That Ministers and/or Governments be required to respond publicly, within a defined time period, to reports emanating from the standing committees.
- All state institutions, including the courts and other constitutional offices, should report directly to the Nitijela on their operations each financial year.
- That the independence of the PSC be fostered and respected, and that means be sought to bolster the separation of powers between the executive and the legislature. In particular, Ministerial interventions, or suggestions of any kind, as regards the employment decisions of the PSC requires a clear sanction. This should also be spelt out in the Leadership Code.
- That the Auditor-General's reports should contain two-to-four page cover statements, translated both into English and Marshallese, alerting members of the Public Accounts Committee to a) improper procedures or absence of procedures, b) any evidence of

fraud or other illegal activity, c) any areas of waste or abuse of public funds. These statements should also be made public.

- Cover statements ('Independent Auditor's reports') already accompany the Finance Ministry's General Purpose Financial Statements. These should include recommended action statements.
- That a bi-annual summit of the Public Accounts Committee, bringing together the Auditor-General, Attorney-General and Senators on the Public Accounts Committee should be scheduled in the wake of the publication of the Auditor-General's reports.
- That Public hearings should be held, concerning the reports of the Public Accounts Committee, at least twice a year.
- That an Ombudsman be created by Act of Parliament and empowered to play an investigative role in regards to administrative matters by a ministry, department or other statutory authority in respect of which a complaint has been made to the Ombudsman or at his or her own instigation. The Ombudsman should report to parliament on any such investigations and should provide an annual report to parliament.
- Provisions regarding the appointment of chairs to the Standing Committees. By convention, the Chairperson on the committees is not a cabinet member, but the Vice-Chairperson is a minister. This should be formalized.
- The Speaker should play a more active role in fulfilling his obligations under sections 37 (2) of standing orders – namely that 'if in his opinion the work of the committee is not being properly and expeditiously carried out he may cancel the appointment [of the Chair] and make a fresh appointment'.
- The Speaker should play a more active role in fulfilling his obligations under sections 35 (5) of standing orders regarding the cancellation of appointments of members of the committee, particularly where members are regularly absent. The Nitijela should also note its own responsibilities in this respect, since section 35 (5) is explicit that the Speaker's decision is 'subject to any order of the Nitijela'.

6. Assessment of Existing Human Resource Constraints

The Marshall Islands, like many Pacific Island countries, faces serious difficulties owing to its small human resource pool and, historically, under-resources education system.

Constitutional provisions encouraged expenditure of Compact-related funds on expanding the size of the public sector ['bearing in mind the conditions of employment in the public service are a major element in the general well-being' of the country', (Con. Art. VII, sect. 11 (c))], but with little regard to transforming the state into a more efficient, and meritocratic, outfit. Large-scale out-migration over the last decade has resulted in a brain-drain, although, in some areas, a trickle of returning overseas educated citizens has proved an important asset. It is important that such skilled returnees are able to move rapidly up the ladder. The country also suffers from serious imbalances, for example between areas where Compact-funding has permitted contracting out on lucrative terms and areas that have had to rely only on local resources.

Given small population size, employment of expatriates in certain key positions will be necessary for the foreseeable future. Indeed, few towns of 50,000 people in the US or western Europe would be expected to rely strictly on their own home-grown human resources.

6.1. Offices of the Clerk & Speaker

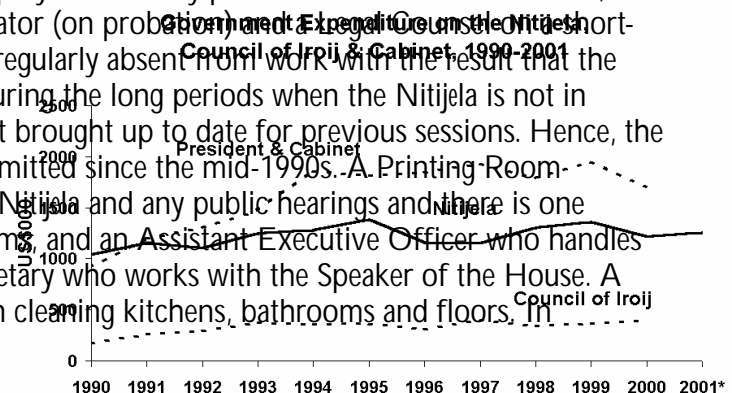
The Clerk of the Nitijela is a public servant and is responsible for 'a) preparing the business and keeping a record of the proceedings of the Nitijela and publishing that record ... b) arranging for the signing of documents and giving of certificates by the Speaker ... and keeping a record of all documents and certificates so signed and given; and c) arranging for the performance, with respect to the Speaker and to the other members of the Nitijela, of such secretarial and other functions as may be required' (Con. Art. IV. S. 14).

The Rules and procedures of the Nitijela further specify that the Clerk 'shall direct the activities of the staff of the Nitijela' (R&P. S. 13).

At present, the Offices of the Clerk are not operating effective support services for the Nitijela. Work is not carried out in a timely or efficient manner and absenteeism is endemic.

The Journal of the House is months, or even years, behind. Bound volumes containing the Bills and resolutions of the Nitijela for particular sessions used to be assembled at the end of each session, but this is no longer the case. Sessions are taped both on audio cassette and reel-to-reel tape recorder. The Records Office (or storeroom) is thoroughly disorganised and located in a non-air-conditioned room. In a tropical environment, this will result in rapid deterioration of existing records. There exists no library for the Nitijela.

The offices of the Clerk has fifteen employees. The key positions are those of the Clerk, Assistant Clerk, a recently hired Translator (on probation), and a Legal Counselor (on short-term contract). Two Journal Clerks are regularly absent from work with the result that the journal is frequently not completed. During the long periods when the Nitijela is not in session, the writing of the journal is not brought up to date for previous sessions. Hence, the journal has been very incompletely submitted since the mid-1990s. A Printing Room Technician records the sessions of the Nitijela and any public hearings and there is one Receptionist. There is a Sergeant-at-Arms, and an Assistant Executive Officer who handles purchase orders and an Executive Secretary who works with the Speaker of the House. A 'Custodian' apparently works mainly on cleaning kitchens, bathrooms and floors.



addition, three hourly paid 'Page Girls' are employed on a casual basis at \$3.50 per hour only for the duration of each session of the Nitijela. Expenditure on the Nitijela has remained roughly constant since 1990 (see figure 2).

Bills are initially printed in English, with only the title translated. There used to be five translators, and there are plans to hire an additional Translator. Bills are translated where there is a public hearing or when they go to the Council of Iroij, where elders require a version in the vernacular. Bills that fall on the first Nitijela reading are not normally translated.

Employees in the Offices of the Clerk are hired by the Public Service Commission. However, the Nitijela is notorious for ministerial interference obstructing efforts to remove, transfer or suspend employees. The Offices of the Clerk badly need a shake-out, and redeployment of resources. There is scope for greater flexibility in employment and for the introduction of performance-related pay. The office needs a major overhaul.

An indication of the inability of the Nitijela offices to secure crucial material covering the operations of parliament during the mission was this consultant's inability to obtain directly via that office any records of constitutional conferences held in 1978, 1990 and 1994, any electoral data covering the six elections since 1979, or any data covering government employment. Clearly, senators seeking such materials would face similar, if not worse, problems.

6.2. The Parliamentary Records Office

There is no parliamentary library for the Nitijela. The Parliamentary Records office would be more accurately described as a disorganised store-room. Copies of the journal and collections of session records (comprising Bills and resolutions) are stacked randomly in a non-air-conditioned room. Important documents were impossible to locate. More thorough record-keeping occurred until the mid-1990s. Since the 'Reduction in Force' programme, these important tasks have simply been abandoned. The single person designated as 'Custodian' at the Nitijela in fact works largely as a tea lady and cleaner.

There is scope for greater flexibility in Nitijela employee job descriptions, so as to require that attention be given to strengthening the production and storage of parliamentary documents. Performance-related pay, coupled with extending the supervisory roles of the Clerk and Deputy Clerk, would also be likely to improve record-keeping.

There were ambitious plans in 1996 for an extension to the Capitol Building, housing a library and a lounge for Senators. These were shelved under the former President. Such facilities are urgently required, but such a large addition to the parliamentary infrastructure would require, first, an improvement in the carrying out of basic functions, such as timely completion of the journal, and improved record-keeping, by the staff of the Nitijela.

Recommendations

- That the offices of the Clerk be thoroughly re-organised and strengthened to play the role of an independent parliamentary secretariat, and should provide legal advice and skilled background research for senators and committees, as well as facilitating the making available of records and technical resources to Senators and committees.
- That key resource personnel be appointed capable of fulfilling research roles for the committees and senators, and assisting in the drafting of private member's Bills.
- That comprehensive job descriptions be introduced for all positions in the Offices of the Clerk
- That the appointment of any appointee in the Offices of the Clerk who is a close relative of any Minister or Senator be accompanied by a report from the Clerk and/or Speaker detailing why this appointee is qualified to hold the post and demonstrating that the appointment is not the result of undue influence being exerted.
- That performance-related pay should be used for those employed in the typing of the journal of the house, and that these staff be required to prepare the Journal of the House and Bills and Resolutions of the Nitijela within a specified period of time.
- As regards performance targets, it should never be the case that a new session of the Nitijela has to commence before the completion of records covering the previous session.
- That the position of 'Custodian' be converted to that of record-keeper/Librarian and that the occupant be a trained librarian.⁶⁶
- That a shake-up in the production of records of parliamentary business and storing and record-keeping be viewed as a pre-requisite for the establishment, in the not-too-distant future, of a parliamentary library for the Nitijela.
- That libraries of deposit be established for all government publications (including all statistical abstracts, electoral records, Auditor-General's reports and General Purpose Financial statements and legal documents). These libraries of deposit should include the Nitijela's own records office, the Alele Archives, the College of the Marshall Islands Library and the University of the South Pacific library.
- That the Speaker's training exercises for new members on role and duties of parliamentarians be expanded to include coverage of parliamentary procedure (written and oral questions, points of information and order, and roles while participating in committees).

7. Review of Women's Participation and Representation

⁶⁶ Grants are available from the US Institute of Museum and Library Services (ILMS) for the training of librarians.

There is currently only one female Nitijela senator (Abacca Maddison, Senator for Rongelap), and only one of the 22 Mayors is a woman. Five of the twelve Council of Iroij members are women. Although the Marshall Islands is a matrilineal society, and women can occupy high chiefly titles (Leroij, as distinct from the male Iroij), traditionally their male relatives were responsible for public speaking, representation and the management of estates.

A strong women's organisation, called 'Women United Together in the Marshall Islands' (WUT/MI) exists, with 24 chapters representing the various atolls and with several distinct women's groups often affiliated to a single chapter. They are engaged in training and public awareness activities, income-generating activities and church groups. WUT/MI's charter sets out the organisations objectives as follows:

1. unite Marshallese women nationally in common goals and through their strength in numbers and unity of action influence urban and rural changes within the Republic;
2. provide a forum which will give women a strong voice in local and national issues;
3. help cultivate women's roles in family enrichment, health, nutrition, education, business and self employment;
4. create a power group , which will identify and prioritize regional needs and concentrate on meeting those needs through planned strategies to be carried out by all participants;
5. establish links with other national women's organizations in the Pacific, as well as third world countries throughout the world, building resource and idea exchange on a regular basis;
6. encourage traditional Marshallese values, integrating them with all social and economic development;
7. promote women's awareness of self worth as they work for personal and national goals of self reliance; and
8. other related objectives as made from time to time⁶⁷.

WUT/MI holds a bi-annual Executive Board meeting and an annual general assembly of the membership. The Executive Board consists of all the 12 Leroij (woman high chiefs) and elected members from the 24 chapters⁶⁸. WUT/MI has recently been involved in pushing the Nitijela to ratify CEDAW, pressing for international women's day to be declared as a national holiday and issues connected with overseas adoptions and rape.

In the past, controversies have dogged efforts to create a vibrant women's movement. In the early 1990s, disagreement flared over a pre-election poster, borrowed from one of the Fiji Women's groups, saying 'don't vote for candidates who abuse their spouses, neglect children or abuse public funds'. This stirred up an uproar, with opponents claiming that 'people's problems should remain in the closet'. It was widely viewed as an implicit criticism of the incumbent government. Following that incident, the then government encouraged chapters to relate directly to the Ministry of Internal Affairs. People became afraid to be associated with the national organisation.

⁶⁷ Charter of Women United Together in the Marshall Islands.

⁶⁸ 'The Executive Board will consist of all elected officers, Leroij, immediate past president and presidents of local chapters or their designated representative present in Majuro at the time of the Executive Board Meetings' WUT/MI charter, p7.

WUT/MI has only recently been revived under the current administration, with new elections for officers coordinated and supported by the Minister for Internal Affairs.

A 'women in politics' committee had earlier been established in the run up to the 1999 elections, with support from UNIFEM. The group gave support to women candidates in preparation of posters, fund-raising and organising meetings. The election, however, was strongly polarised along government/opposition lines, with women's issues being put on the backburner. According to the WUT/MI Majuro Chapter President, family ties also proved stronger than alignments around improving women's participation in politics.

In 2001, WUT/MI proposed to make International Women's Day a national holiday. This was opposed by the Council of Iroij on the grounds that it went against Marshallese custom. The Bill was passed by the Nitijela, after a public hearing. But, following rejection by the Council of Iroij and a joint sitting of the House, attended both by Senators and members of the Council of Iroij, the Bill was returned to the committee and has not been acted upon.

During the period of the consultation, International Women's Day meetings and celebrations took place, both at the Outrigger Hotel and at the open-air grounds next to the weather station in Majuro. The President and several other ministers attended the opening celebrations, but few other senators.

One issue raised by WUT/MI - the weak state of criminal legislation against rape - has raised some serious difficulties.

The Marshall Islands law codes define rape as 'sexual penetration by force', rather than the more usual international definition involving 'lack of consent'. According to the Chief Justice of the High Court, the 'force' element should be eliminated to bring the RMI into line with international practices. Still more problematic is the provision for jury trial in such cases, given the reluctance of Marshallese women to take part in jury panels where such cases are heard. Customarily, women cannot discuss sexual issues when older male relatives are present. In two recent rape cases, the result was that all jurors were male. If the victim was alone with the defendant, male juries tend to dismiss charges on the grounds that this indicates consent. Judges can require that their jury panel comprises 50% women, but not that the jury itself be so composed. It would require a constitutional amendment to insist on equal numbers of men and women on juries hearing such cases or to eliminate trial by jury for such cases.

Despite the lack of advancement in female membership of the Nitijela, women have become increasingly involved in key positions in the upper echelons of the civil service. Some of the more important recent reforms in the civil service, and in particular MISSA and the Finance Ministry, have been spearheaded by women. Women now occupy the positions of Secretary for Finance, Secretary for Education and Secretary for Foreign Affairs. The position of secretary is roughly equivalent to that of 'permanent secretary' in many other Pacific Island countries.

Recommendations

- That the Nitijela carry through its international human rights commitments, for example by ratifying CEDAW
- That the Nitijela pay particular attention to drawing local and national women's organizations into involvement in its legislative program, including involvement of representatives at the initial stages of framing legislation and public hearings arranged to discuss proposed legislation, where these are issues that are clearly of concern to the women's movement.
- That the Ministry of Internal Affairs recognise and acknowledge the independence of WUT/MI, and its role as a genuine NGO
- That steps be taken at the next election to encourage a greater number of women candidates, both for national and local polls, and that voter education programs be devised to challenge negative stereotypes regarding women's involvement in politics.
- Potential & existing women's leaders should be assisted in building skills, confidence & opportunities through training and other support activities.
- Bills introduced into parliament should include a gender impact analysis.

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APPENDIX A: CONSULTATION PROGRAMME

Thursday 28th February

Joe Riklon, Clerk of Parliament.

Filimon Manoni, Legislative Counsel

Friday 1st March

Nuclear Victims Remembrance Day Celebrations, Weather Station, Majuro.

Litokwa Tomeing, Speaker of the Nitijela & Senator for Wotje

William F. Roberts, General Manager, Marshalls Energy Company

Saturday 2nd March

Giff Johnson, Editor, Marshall Islands Journal..

Monday 4th March

Dr Irene Ta'afaki, Centre Director, University of the South Pacific, Majuro.

Joseph Jorlang, Supervisor of Elections, Elections Office, Majuro.

Tuesday 5th March

Litokwa Tomeing, Speaker of the Nitijela & Senator for Wotje, Joe Riklon, Clerk of Parliament & Elson Helkena, Deputy Clerk of Parliament.

Attari Elbon, News Reporter, V7AB, National Marshall Islands Radio Station.

Jeffrey Zebedy, Elections Officer, Elections Office, Majuro.

Maxine Becher, College of the Marshall Islands, Director of Library Services, Majuro.

Marie Maddison, Secretary, Foreign Affairs Ministry, Capitol Building, Majuro.

Wednesday 6th March

Mike Senko, U.S. Ambassador, Marshall Islands

Jeffrey Zebedy, Elections Officer, Elections Office, Majuro.

Thursday 7th March

President Kessai Note, President of the Marshall Islands

Nitijela Session, Capitol Building, Majuro (Introduction of consultant in parliament).

Lucas Dosung, RMI National Librarian, Alele Library & Archives, Majuro.

Moses Gago, Acting Attorney General & former temporary Legal Counsel to the Nitijela & Chair of the Task Force on Accountability.

Friday 8th March

International Woman's Day Commemorations

Elson Helkena, Deputy Clerk, Nitijela.

Dave Strauss, Private Attorney & member of the Task Force on Accountability
& Jack Niedenthal, Bikini Trust Liaison Manager & MISSA Board member.

Fred Pedro, Special Advisor to the President.

President Kessai Note, President of the Marshall Islands

Saturday 9th March

Carmen Bigler, First Secretary W.U.T.M.I. and President Majuro Chapter, W.U.T.M.I.

Monday 11th March

Minister Michael Konelous, Finance Minister & Senator for Maloelap.

Saeko Shonibar, Secretary, Ministry of Finance.

Charles Henry, Chief Justice, High Court, Marshall Islands.]

Jean-Murray Tonyokwe, Auditor-General, Marshall Islands.

Senator Helkena Anni, Chair Standing Committee on Public Accounts & Senator for
Mejit.

Abacca Maddison, Senator for Rongelap.

Tuesday 12th March

Jefferson Butuna, Director of Planning & Statistics, Marshall Islands Government, Majuro.

Nitijela Standing Committee on Health, Education and Social Affairs, Public Hearing
(including MISSA Board and College of the Marshall Islands representatives).

Justin DeBrum, Senator for Ujae.

Wednesday 13th March

Tony DeBrum, former Senator for Majuro & former Foreign Minister & Minister of Finance.

Dany Lee Munro, President, Majuro Chamber of Commerce, Vice-President Micronesian Sales Company.

Nitijela Standing Committee on Resources & Development, Public Hearing.

Joe Riklon, Clerk to the Nitijela.

APPENDIX B: TERMS OF REFERENCE FOR THE MARSHALL ISLANDS LEGISLATIVE NEEDS ASSESSMENT

I. BACKGROUND

1. The Parliament of Marshall Islands

The 1979 Constitution of Marshall Islands provides for the supremacy of the Legislature (the Nitijela) as the highest organ of State power and the supreme legislative body of the country. The laws and other resolutions of parliament enabled not only the Government of Marshall Islands to govern but to also allocate resources effectively, formulate development policies, strategic plans and development programmes to meet peoples' needs. The Nitijela has one chamber and consists of 33 members, elected by the citizens entitled to vote on the basis of universal, free and direct suffrage by secret ballot. The Nitijela enacts and amends

laws and appoints, replaces or removes the President and other Ministers. The Nitijela has to concur also by resolution (of a simple majority) before the Auditor-General, The Attorney General, the Public Service Commission, Members of the Judiciary, Ambassadors and Members of the Nuclear Claims Tribunal are appointed.

The President promulgates the Nitijela and may dissolve it if a motion of no confidence in the Cabinet has twice been carried and has twice lapsed, and no other President has held Office in the interval between the two votes of no confidence: or no Cabinet has been appointed within 30 days after the date on which the Nitijela proceeded to elect a President for any reason other than the tender of President's resignation from office following a vote of no confidence. Alternatively, the Nitijela can be dissolved by any other 5 members of the Nitijela who are not members of the Cabinet by endorsing and presenting a vote of no confidence in the whole house. The 33 Members of Nitijela representing all 24 atolls in the Marshall Islands:

Arno Atoll	-	2 members
Majuro Atoll	-	5 members
Ailinglaplap Atoll	-	2 members
Ebeye Atoll	-	3 members
Jaluit Atoll	-	2 members

All other Atolls have 1 member each

There are no political parties in the Nitijela but sometimes new parties establish themselves during national elections. Therefore a government is formed by the majority group of MPs. Each Member of Nitijela joins a political group (either those forming the Government or those in the opposition) for personal or communal reasons, not on political ideologies. Since all MPs are independent from one another, there are no restrictions on their movements in crossing the floor to join or form another political group.

Legislative elections in the Marshall Islands has always been peaceful and conclusive. The current demographic situation in the country – about 45 % of the population is over the age of 18 -- creates a favourable context for active citizen participation in the political elections and for broad participatory procedures for the law- and decision-making processes.

2. The structure of the Nitijela

The Nitijela exercises its powers through its sessions, standing committees and ad-hoc committees, and the Office of the Speaker. Regular sessions of the Parliament are convened at least 2x within 12 months as provided for in the Constitution. The first session begins on the first Monday in January and remains in session for 50 sitting days. While the second session starts in August and sits for 20 days and is usually the budget session. Special sessions of the Nitijela may be convened if the President due to inevitable circumstances stipulated in law.

The Nitijela establishes standing committees and ad-hoc committee to carry out its activities and determines their scope of responsibilities, organisation/structure and procedures. To

date, the Parliament has seven standing committees. Most members of the standing committees are members of the governing party. The established standing committees of the Nitijela are:

- Appropriations Committee
- Health, Education and Social Welfare (HESA) Committee
- Ways and Means Committee
- Public Accounts Committee
- Judiciary and Government Relations Committee
- Resources and Development Committee
- Foreign Affairs and Trade Committee

The Speaker of Nitijela with his support staff carries out the overall management of the Nitijela. The Clerk to Nitijela is responsible for the day-to-day management of Nitijela and the organisation of standing committee meetings.

3. The Legislative Process

Draft laws (Bills) need to be introduced in Nitijela three times, and therefore it needs to be approved each time it is introduced, before it is forwarded to the Council Iroij to assent to it making it law. The legislative process indeed starts with the submission of the draft law to the Speaker of Parliament for its first reading. The Parliament then debate the Bill and if it passes through its first reading then the Bill will be referred to a standing committee for study and consideration before it is reported back to the Nitijela for its second reading. The Standing committee may arrange for public hearings on the draft Bill.

The debate on the second reading of a Bill will be a reflection of the findings of the Standing committee. The third reading of the Bill is required so as to accommodate any amendments arising out of its second reading. Following passage of the Bill in the Nitijela, the Bill will be referred to the Council of Iroij for its opinion in relation to customary law or traditional practice or land tenure. Within seven days of transmittal from the Nitijela to the Council of Iroij, the Chairperson of the Council shall record and communicate the Council's opinion to the Speaker who will either certify the Bill as an Act of the Nitijela or ask the the Nitijela to reconsider the Bill.

II. ON-GOING INITIATIVES

The need to strengthen the role of Nitijela in Marshall Islands stems from the commitment of the Government of Marshall Islands to implement principles of good governance. The Government has made a firm commitment, through the Forum process, to implement eight principles of accountability, i.e. the Forum's Eight Principles of Accountability. A stock-take assessment on the capacity of Marshall Islands to implement the principles revealed that the role of the Nitijela has to be strengthened if it is to fulfil its constitutional functions and to effectively practice and demand for accountability and transparency. The need to reinvigorate the role of Nitijela and to strengthen its core functions of legislating, oversight and representation has been identified for Marshall Islands.

The Speaker of the Nitijela and other Speakers of Parliaments from Forum Island Countries (FIC) have also agreed during their meeting in Nadi, March, 2000 to support the initiative of FIC Leaders, through the Forum process, to implement the Forum's Eight Accountability Principles. (Attached are, i) the Statement from the above-mentioned Conference; and ii) the record of the resolutions of the Speakers' retreat made during the same Conference). Most recently the Forum Economic Ministers Meeting, which was held in Niue, July 2000, commended the initiative of Pacific Speakers to the Forum Heads of Government meeting this year and further resolved for the Forum Secretariat and UNDP to develop key principles of widely accepted best practices for Pacific legislatures.

As agreed with Speakers and Clerks of Parliaments, few Pacific legislatures will be selected as pilot parliaments. A comprehensive needs assessment will be carried out in the selected pilot legislatures and the result of each studies to be the basis of a support programme to strengthen legislative functions in that country. Marshall Islands has been selected as one of the pilot countries. The findings of the same assessment carried out in all the pilot parliaments will then be collated with the view to generate key and generic principles of best practices for Pacific legislature based on the notions of parliamentary democracy, participation, equity, accountability, transparency, efficiency, representation, integrity and fair elections.

III. AREAS FOR INSTITUTIONAL AND CAPACITY STRENGTHENING

The major challenge for Marshall Islands and its democracy is to sustain the democratic changes in society and to maintain continued support for reforms among its governance institutions. Capacity- and institution-building support to the Nitijela will be of great value for strengthening parliamentary democracy on the one hand, and for enhancing legislative-parliamentary, parliamentary oversight and parliamentary-constituency relations, on the other.

Marshall Islands legislature are weak in their knowledge and skills required for undertaking a sound professional analysis of draft laws prepared by Government agencies, particularly on such critical issues as budget preparation, market economics, aid co-ordination and aid management, the role of state in a modern democracy, decentralisation, etc. The existing human resource constraints in the Nitijela limit the effectiveness of members in performing their mandated tasks and make difficult the practical implementation of weak and vaguely formulated laws. There is a need for technical expertise to provide support to all MPs on various issues to help them scrutinise proposed legislation and contribute effectively to legislative debates. Technical expertise is also needed so that proposed laws can be harmonised with existing ones.

It is important that parliament-constituency relationships are enhanced by introducing appropriate mechanisms to improve members' accountability vis-à-vis their constituents. This mechanism should enable the electorate to assess the effectiveness of MPs in representing their aspirations in the public decision-making processes, as well as their ability to explain the importance of decisions made and laws adopted by the Nitijela.

Most important to be improved is the Legislative oversight role. The Legislature needs to consider whether it is now appropriate to establish other oversight committees of Parliament. The role of the Public Accounts Committee has to be strengthened in accordance with the changes in emphasis of the National Budgets, where resources are now allocated based on achievable targets. The Committee needs to have the appropriate powers to demand disclosure and prompt accountability from any government agency, public enterprise and any other entity, including NGOs, who received public funding.

Legislating procedures of the Nitijela needs to be reviewed to determine whether there are sufficient mechanisms for the inclusion of people in the legislative process. The Rules of Procedures of the Nitijela needs to adequately provides for peoples' views on proposed legislation, even if a Government certified a proposed legislation as urgent. Regulatory provision should also be sufficient to allow for all parliamentarians to have adequate understanding of proposed legislation before parliamentary debate.

Many members recognise a need for reviewing the Law on the Legal Status of Members of the Nitijela and their codes of conduct. The training needs and a "codes of conduct" for all parliamentarians should strengthen the performance of MPs and the sanctity and integrity of the Nitijela.

IV. OBJECTIVES OF THE NEEDS ASSESSMENT STUDY

1. Assess the existing national legislation related to the Nitijela and its Members;
2. Review the existing mechanisms for legislative-parliamentary, parliamentary oversights and parliamentary-constituency relations;
3. Conduct a needs assessment to address the gender imbalance in legislative representation and legislative consideration;
4. Based on the above three objectives, develop a report with the recommendations on a concrete set of initiatives to be implemented by the Nitijela.

V. THE CONSULTANT & REQUIRED QUALIFICATIONS

An expert on governance with gender background and familiar with the capacity and institutional needs of Pacific legislatures will carry out the assessment mission. The expert will have the following minimum qualifications:

Master Degree or equivalent in Law, Public Administration, Sociology/Gender Studies, Political Sciences, or relevant field;

Professional experience in addressing the issues related to parliaments, legal/institutional framework and gender;

Work experience in assisting parliaments/parliamentarians in Pacific legislatures. Experience with other parliaments strengthening programmes in other countries will be an asset.

VI. TASKS & RESPONSIBILITIES

The assessment mission, under the over-all direction of the Regional Programme Manager of UNDP (GOLD) will:

Conduct a review of the existing key legal documents, including the Constitution of Marshall Islands, Electoral Laws, and Rules and Procedures of the Nitijela, to assess if the legal framework is adequately contributing to effective law making process in Marshall Islands. In this effort, consultations with members of the Standing Committee, present and former Members of the Nitijela, representatives of the Executive Branch, the Judiciary, civil society organisations (including women NGOs), and the media will be undertaken. As a result of this assessment, the concrete recommendations on how to improve the current legal and institutional system will lay the groundwork for a solid proposal on a technical assistance to the Nitijela.

Assess the existing parliament-constituency relationship to suggest better mechanism aimed at strengthening legislative members' accountability vis-à-vis their constituents. This mechanism should enable the electorate to assess the effectiveness of MPs in representing their aspirations in the public decision-making processes, as well as their ability to explain the importance of decisions made and laws adopted by the Legislature.

Assess the law-making procedures of the Nitijela and recommend ways in which this process might be improved. The improved process should maximise the participation of all constituents in the legislative process. The new proposed mechanisms (if any) of this improved process should provide people the opportunity to articulate their comments on proposed legislation in a timely manner.

Assess the oversight role of the Nitijela and the effectiveness of the Public Accounts Committee in holding users of public funds to account. Recommend ways in which this function might be improved, including the role of the Auditor General and the relevant powers required by oversight committees to impose consequences for non-compliance by government agencies with their accountability deadlines.

Assess the existing human resource constraints that limit the effective functioning of the Nitijela and its members, in order to develop a comprehensive strategy/plan for addressing the current needs of legislatures' to improve their professional capacity.

Review the current policies and, what is more important, practices of the Nitijela, other fractions, and NGOs aimed at moving from 'de jure' to 'de facto' equality and strengthening women's participation in political leadership, in general and women's representation, in particular. This review will be undertaken through existing policy documents as well as active discussions with present and past MPs, heads of women NGOs and other civil society organisations.

Recommend ways in which potential and existing women leaders will be assisted in building skills, confidence and opportunities through training and other support activities; advocacy through media and gender sensitive surveys/researches to address problems relating to social relations and attitudes which perpetuate gender inequality. Emphasis should be placed on involving both women and men throughout of the design and implementation of a support programme for the Nitijela.

VII. EXPECTED OUTPUTS

Upon completion of the assessment mission and discussions with key stakeholders, the consultant is expected to deliver a report with the recommendations on concrete initiatives to be implemented by the Nitijela.

VIII. INDICATIVE TIMETABLE

The proposed assessment mission will take place in the last week of February and will last up to three weeks. The mission findings will be in the form of concrete activities to be implemented by the Nitijela with funding support from the donor community. The consultant's final report should be submitted to the Regional Programme Manager, UNDP (GOLD) Programme for the Pacific, not later than three weeks after his/her visit to Marshall Islands.

APPENDIX C: REPORT OF THE TASK FORCE ON ACCOUNTABILITY

INTERIM REPORT NO. 1 (A) TASK FORCE ON ACCOUNTABILITY

TAX EVASION BY INDIVIDUALS, BUSINESSES, OR EMPLOYEES OF THE REPUBLIC OF THE MARSHALL ISLANDS

On March 13, 2000, the Cabinet approved and established a five-member task force known as the Task Force on Accountability ("Task Force"). Cabinet Minute C.M. 161 (00) states, in part, that the Task Force shall, from time to time, file reports, which shall include findings of facts and recommendations with the Cabinet and the Attorney General. In this regard, the Task Force shall:

Inquire into instances of tax evasion by individuals, business, or employees of the Republic;

Review government contracts to ensure that the person has complied with all RMI laws and the terms of each contract or entity awarded the contract.

BACKGROUND

The Task Force's review disclosed matters related to the application of The Income Tax Act of 1989 (48 MIRC, Chapter 1), as amended, which provides for the imposition of tax on wages and salaries, gross revenue of corporate and unincorporated businesses, income on immovable property, gross income of non-residents, tax on daily room rate on hotel and resort facilities, and for matters connected therewith and incidental thereto which we believe needed to be addressed.

REVIEW OF PAYMENTS AND COLLECTION OF TAXES ON WAGES AND SALARIES, GROSS REVENUE, NON-RESIDENT GROSS INCOME, HOTEL/RESORT ROOM RATE, AND LAND LEASE

1 Introduction:

1.1 The Task Force's objectives were to evaluate the performance of the Ministry of Finance in managing its inventory of tax debts; whether all entities doing business in or related to the Republic are paying taxes as required by law; and whether all taxes are assessed, levied, collected, and paid in accordance with the law. This entailed review of (i) applicable laws, including tax, financial management, and foreign investment business license laws (ii) operational practices at the Ministry of Finance; (iii) available records, (iv) audit reports; and (v) reports of various component units of the government. 1.2 Article VIII, section 1(1) of the Constitution provides as follows:

"No taxes shall be imposed or other revenue raised and no public money shall be expended unless authorized by law".

1.3 The Income Tax Act 1989, as amended, 48 MIRC, Chapter 1, authorizes the Secretary of Finance to collect the following taxes:

1.3.1 Income Tax on Wages and Salaries:

The income tax rate on wages and salaries is 8% upon the first \$10,400 and 12% upon the amount over \$10,400, to be deducted and withheld from an employees' wages or salary, except as provided for in subsections (2) and (3) of the Section (Income Tax Act, Section 103(1)); there is a \$1,040 exemption to all employees whose gross annual wages and salaries are less than \$5,200 per year (Income Tax Act, Section 103(3)).

The Income Tax on Wages and Salaries is collected through deductions from employee's earnings. Every employer is required to deduct and withhold the tax imposed and to make a full, true and correct return showing all wages and salaries paid to employees during the preceding 4-week period. All taxes withheld by such employer shall be held in trust for the

Government for payment to the Secretary of Finance within two weeks following the preceding 4-week period. Failure by an employer to deduct, withhold, or file a full, true and correct return subjects such employer to criminal prosecution and civil penalties. Additionally, the tax due from the employer on behalf of the employee shall form a lien on the employer's entire assets "having priority over all other claims and liens.". (Income Tax Act, Sections 103-106, 140-141). Finally, any employee who has had an incorrect amount of tax deducted and withheld from any wages and salaries, and has received a benefit from the incorrect deduction, shall be jointly and severally responsible together with the employer, for payment of any tax shortfall amount as may be assessed. (Income Tax Act, Section 104(2)).

1.3.2 U.S. Contractor Personnel Tax:

The U.S. contractor personnel tax rate is 5% on all wages and salaries received by the United States qualified contractor personnel; (Income Tax Act, Section 103(2)).

1.3.3 Gross Revenue Tax:

The gross revenue tax rate is \$80 per year on the first \$10,000 per year of gross revenue earned by every business, and 3% on the gross revenue earned per year in excess of \$10,000 (Income Tax Act, Section 109);

The Gross Revenue Tax must be paid by every qualifying entity on or before the last day of the month following the close of each quarter (i.e. on or before April 30, July 31, October 31 and January 31), pursuant to a full, true and correct return showing all gross revenue received during that quarter. Failure by such entity to pay, or file a full, true and correct return subjects such entity to criminal prosecution and civil penalties. (Income Tax Act, Sections 109-110, 140-141).

1.3.4 Immovable Property ("Land Lease") Tax:

The immovable property tax rate is 3% on the gross income from immovable property leased, exclusive of buildings and other improvements on land (Income Tax Act, Section 116).

The Immovable Property Tax on the gross income from leased immovable property is to be deducted and withheld by the tenant (lessee) of such property when the rent is paid. The tenant must pay the tax on or before the last day of the month following the close of each quarter (i.e. on or before April 30, July 31, October 31 and January 31), pursuant to a full, true and correct return showing all rents paid, pay orCHK, and description and location of the property. Failure by such tenant to pay, or file a full, true and correct return subjects such tenant to criminal prosecution and civil penalties. (Income Tax Act, Sections 116, 140-141).

1.3.5 Non-Resident Gross Income Tax:

The non-resident gross income tax rate is 10% on the gross income earned by every non-resident in respect of services provided or performed relating to any client in the Marshall Islands (Income Tax Act, Section 117).

The Non-resident Gross Income Tax is to be deducted or withheld from fees paid by a client to a non-resident person (any person or body not permanently resident in the Republic or business not registered in the Republic and who does not pay income tax on wages and salaries or gross revenue tax) at the time the fees are paid to such non-resident person. The client must pay the tax on or before the last day of the month following the close of each quarter (i.e. on or before April 30, July 31, October 31 and January 31), pursuant to a full, true and correct return showing all such fees paid to the non-resident person. Failure by such client to deduct, withhold, or pay the tax, or file a full, true and correct return subjects such client to criminal prosecution and civil penalties. While the client is personally liable to pay such tax, nothing in the act relieves the non-resident person from paying the tax. (Income Tax Act, Sections 117-118, 120, 140-141). Additionally, a non-resident person who fails to pay the tax due shall not be permitted to practice or appear before or participate in any proceedings before any court, tribunal, or other government agency of the Republic. Finally, where such person has a license to practice any profession in the Republic, such license shall be canceled by the relevant issuing authority. (Income Tax Act, Section 119).

1.3.6 Hotel Room Tax:

The hotel/resort room tax rate is 8% of the daily room rate on hotel and resort facilities (Income Tax Act, Section 153).

The Hotel Room Tax is to be collected by the owner of the hotel or resort room and paid on a monthly basis. (Income Tax Act, Section 153). An owner who fails to collect and pay such tax is subject to civil penalties. However, Section 153 is deficient in that (i) it does not require the owner to file a full, true and correct return, and (ii) it does not make the failure to comply with the provisions of the section a criminal offense.

1.4 Criminal Penalties:

Every person or business committing an offence under the provisions of the Income Tax Act shall, upon conviction, in addition to civil penalties imposed, be liable to a fine not exceeding \$1,000 or, if a natural person, to a term of imprisonment not exceeding one year, or both. (Income Tax Act, Section 140).

1.5 Civil Penalties:

The several civil penalties that may be imposed by the Secretary of Finance for failure to comply with certain provisions of the Act are (Income Tax Act, Section 141(a-f)):

(a) if a taxpayer fails to file a required return by its due date, 1% of the tax due (or \$5, whichever is greater) shall be added to the tax for every 30 days, or fraction thereof, until the date the required return is filed;

(b) any employer who does not provide each employee with a written statement at least every 4 weeks showing the wages paid and taxes deducted shall pay a \$5 penalty for each such failure;

(c) after demand, where the taxpayer fails to file a return and pay the tax and the Secretary of Finance makes the return and assesses the tax, a penalty of 25% of the tax assessed, in addition to the 1% for each 30 days penalty, is assessed;

(d) if any part of any deficiency is due to fraud, with intent to evade any portion of the tax, 50% of the total amount of such deficiency, in addition to the penalties in (a) and (c) shall be assessed and added to the deficiency amount;

(e) if any tax or penalty imposed is not paid on or before the date prescribed, interest on the unpaid balance of the tax principal at the rate of 0.5% per month shall be added to the assessment from the due date until the date it is paid;

(f) any person required to collect, truthfully account for, and pay over any tax who willfully fails to collect the tax, or willfully attempts to evade or defeat the payment of such tax, shall, in addition to all other penalties, be liable to a penalty equal to the total amount of the tax evaded, not collected, or not accounted for and paid over.

1.6 The Foreign Investment Business License Act of 1990, as amended, 10 MIRC, Chapter 5, provides that any non-citizen who does business in the Republic without first obtaining a business license, or who after obtaining a license does business not authorized by the license, is subject to criminal prosecution. (Foreign Investment Business License Act, Section 512).

2 Findings and Observations:

Upon consideration of relevant documents and interviews of witnesses, the Task Force makes the following findings and observations:

2.1 The RMI finds itself in the same position as many other developing nations: in order to demonstrate fiscal responsibility by balancing its budget, it must decrease expenditures and/or raise revenues. The RMI, for whatever reason, has shown a reluctance to decrease expenditures. Therefore, the temptation is great for the RMI to simply raise revenues by raising taxes. In fact, this is often the course of action recommended to the RMI by a series of off-island consultants, including the Asian Development Bank. The Task Force believes that such a course of action is premature, and, therefore, inappropriate. The raising of revenue by increasing tax rates would further penalize the tax-paying entities and further reward the tax-evading entities, which is an unacceptable result. The RMI's revenues from taxes are not low because of low tax rates; the RMI's revenues from taxes are low because of lack of enforcement of the various tax laws. In this time of concern over deficits and debts, it is important to ensure that all individuals and businesses pay their required share of tax.

2.2 The Ministry of Finance is dysfunctional. It has continuously failed to implement and enforce the tax and financial management laws of the Republic, and, as it is currently organized and staffed, has neither the will nor the ability to do so.

2.3 Successive Ministers and Secretaries of Finance have failed to perform the duties and comply with the responsibilities of their positions or to provide the leadership necessary to correct the numerous serious deficiencies in the Ministry.

2.4 The Ministry has no written policies or procedures regarding the maintenance and operation of tax assessment, collection and receipt, or the method of implementation and enforcement of the tax laws.¹

2.5 All the relevant financial management and tax laws of the Republic provide for the promulgation of Regulations by the Minister or Secretary of Finance, as appropriate, for the purpose of carrying out and giving effect to the provisions of the respective laws. The Task Force was unable to discover any Regulations made by the Ministry of Finance for the purpose of carrying out and giving effect to the provisions of the Income Tax Act, Tax Collection Act², Import Duties Act or the Financial Management Act.

2.6 The Ministry has no enforcement division to conduct investigation and follow up in instances of tax evasion or delinquency. Additionally, the Ministry has no means of even determining the amount of taxes owed by each delinquent taxpayer. The Ministry has depended solely on whatever information was submitted by the complying taxpayer on the filed return, and it appears that only a few law-abiding persons and businesses have "faithfully" filed the required returns and paid the required taxes.³

2.7 The Ministry has developed an entirely passive stance in regard to collection of taxes, simply hoping and waiting for the taxpayer to come forward, file a return, and make payment. The passivity of the Ministry does not and cannot meet the challenges of desired progressive development and economic growth in the Republic.

2.8 The various laws regarding tax collection provide for punitive criminal and civil penalties against delinquent taxpayers. Top Ministry officials, though aware of the failure of numerous entities to file returns or pay taxes, were unaware of even a single instance when such non-complying entities were referred to the Office of the Attorney General for criminal or civil prosecution. There is almost a complete disregard of these requirements by consultants and non-resident persons and businesses.

2.9 The Ministry does not keep or maintain proper, organized and systematic records of taxes paid, or taxpayers, in order to even determine whether all required taxes are being declared and collected. In this regard, the Ministry does not even maintain a Tax Roll and, therefore, is unable to determine how many, and whether all entities doing business in the Republic are actually filing and paying their required taxes when due. The Ministry cannot properly control or record the receipt of tax returns when they are filed, nor has it developed a system to ensure regular and timely notification to taxpayers who fail to file tax returns or are delinquent in their payment.

2.10 Available tax records at the Ministry are inadequate and unorganized. The Task Force requested the Ministry to provide a schedule of all taxpayers who filed returns and paid taxes, and those who did not file returns and pay taxes, for FY1998-FY2000. The Task Force reviewed the available records on almost 300 "taxpayers." The Task Force determined that the information provided by the Ministry was inaccurate. Accordingly, the Task Force

attempted to perform alternative procedures in order to ascertain the reliability of the information by comparing the information with two different reports generated from the ADS System which was requested from the RMI Auditors. The Task Force confirmed that the information previously provided by the Ministry was incomplete for various reasons. For example, the total gross revenue and withholding taxes according to the Cash Journal report and the Accounts Receivable report do not agree with the total on the information provided by Ministry. The Task Force's review of the Cash Journal and the Account Receivable report, in itself, was limited because, on numerous entries, the taxpayer's name was not correctly keyed in, thereby making it difficult to identify which entity made the tax payments.

2.11 The inadequacy of the records kept by the Ministry is further evidenced by the fact that the Ministry was unable to produce a complete listing of all the delinquent taxpayers and the actual amount owed by each, for FY 2000. No records were made available by the Ministry for FY 1998 and FY 1999. Ministry officials and the EDP Consultant stated that such a listing could not be generated from the current accounting system because the aged trial balance of accounts receivable were purged by the former Secretary of Finance. In order to arrive at a more reasonable and accurate number of entities doing business in the Republic, the Task Force compared a list of those entities having MALGov business licenses, a list of entities provided by MISSA, and compared both lists with the telephone directory for Majuro and Ebeye. The Task Force identified a substantial number of individuals and entities that were not on the listing provided by the Ministry. While it is probable that some of these identified entities are no longer doing business in the Republic, it is more probable that many of them still are, yet have not been identified by the Ministry for tax collection purposes.

2.12 A key deficiency is the weaknesses in the Ministry's information systems, which hamper its ability to generate performance information, to enhance operational efficiency, and to assess whether current collection procedures and practices are effective in achieving desired results. The tax and taxpayer information is not properly managed electronically. As a result the Ministry does not have readily available lists of current taxpayers or delinquent taxpayers.

2.13 The Ministry's failure to maintain any records other than a file for each taxpayer has resulted in a complete breakdown in the control over the filing of returns and follow-up for non-filers and delinquent taxes. The Task Force attempted to obtain or establish an estimate of the amount of unpaid taxes due from the non-filers or under-payers, but there are insufficient records and information from which a reliable estimate can currently be made. The Task Force also notes that most tax-delinquents are repeat offenders.

2.14 There is no systematic review by the Ministry of entities applying for various local business licenses. Therefore, the Ministry is unable to determine if those entities have a tax number, are employers, or receive revenue within the Republic. There is absolutely no cooperation or coordination between the Ministry and the various local governments with respect to the issuance of business licenses by, and revenues derived from, the local governments. In fact, the Ministry was unaware of the number or identities of all operating businesses. The effect of this is that taxpayers are able to avoid the payment of taxes.⁴

2.15 Likewise, there is no cooperation or coordination between the Ministry and MISSA in order to share data with regard to RMI taxpayers and MISSA contributors. The Task Force found many instances where entities consistently failed to pay either required taxes to the RMI or required contributions to MISSA. A sharing of information between the Ministry and MISSA would greatly improve the identification of tax delinquents for each.

2.16 In some instances where tax returns were filed, false returns were filed in order to reduce the tax liability of the taxpayer.⁵ In this regard, the Task Force was unable to discover a single instance where an assessment, lien, levy, or examination of records was performed by any of successive Secretaries of Finance. (Income Tax Act, Sections 125-127, 129).

2.17 It is a criminal offence for a non-citizen, or an entity in which a non-citizen owns an equity interest, to do business in the Republic without first obtaining a Foreign Investment Business License ["FIBL"] (Foreign Investment Business License Act of 1990, Sections 503, 512). However, there is currently no requirement that an entity list the identities and citizenships of its equity interest holders, so the Ministry of Finance and Office of the Attorney General are unaware of which entities require the issuance of an FIBL. The Task Force notes that some of the same entities that failed to file required tax returns or pay required taxes also failed to obtain the required FIBL prior to doing business in the Republic. The Task Force was unable to discover a single instance where such a entity was criminally prosecuted by the Office of the Attorney General.⁶

2.18 Senior staff of the Ministry claim that one reason for the relaxed policy, system, and attitude on tax collection is low morale among the Ministry's staff. These persons believe that they are long overdue for salary increases. The lack of action by successive Ministers and Secretaries of Finance in addressing this issue has caused long-term instances of "quick fix" practices to get more money by some of the staff, including payroll and overtime irregularities, which will be addressed in a subsequent Interim Report. There have been no meetings within the Ministry itself to discuss their grievances.

2.19 One of the most detrimental effects of the Ministry's failure to enforce the tax laws, other than the obvious lack of revenue for the government, is the resultant effect on honest taxpaying businesses. The practice whereby a Bidding Committee awards a government contract to an individual or entity that has not complied with required tax obligations causes great economic harm to other businesses. An entity that is delinquent on its tax obligations is obviously in a position to submit a lower bid than a competing entity that complies with its tax obligations. For example, an entity that imports construction materials without paying import tax, or that regularly fails to pay gross revenue tax, withholding tax, or MISSA contributions, can submit a lower bid than an entity that is paying all of these taxes. The law-breaking tax-delinquent then wins the contract at the expense of the law-abiding tax-payer that necessarily has a higher bid. This practice serves as an incentive to taxpaying businesses to not pay their taxes, since it is of no concern to the RMI whether or not its taxes are paid, or just not bother with submitting an honest bid.

2.20 The 3% tax on immovable property, with very few exceptions, is only deducted from government lease payments. Almost no taxes are being paid in respect to private land leases. This is due to lack of monitoring of private leases by the Ministry. While the tenant bears the burden of deducting and paying the tax, the Ministry has developed no system to list tenants or to track and remedy any violations. Most leases are filed with the Clerk of Courts and are capable of being monitored. However, there currently is no requirement that a land lease be filed with the Clerk of Courts or other Registry. Therefore, it is not possible for the Ministry to catalog all leases, even if it had attempted to do so.⁷

2.21 Ministry of Finance records indicate that, of all the hotels and resort facilities in the Republic, only RRE pays the hotel tax of 8% of the daily room rate as required by Section 153 of the Income Tax Act.⁸

2.22 The Ministry of Finance is not reviewing, evaluating or analyzing the withholding tax returns. The Task Force noted instances where employers reported wages paid to Marshallese in amounts below the Minimum Wage. In addition, the Task Force noted that certain employers were providing false reports. For example, one company operating a taxi service, car rental, and garage was understating the number of employees in its withholding reports. At least two of these businesses were operated by non-citizens.

2.23 Audit reports for certain component units of the RMI, including local governments, disclosed that they have liabilities to the RMI on Wages and Salaries, Import Duties, Hotel/Resort Room Tax, and MISSA. Additionally, the Task Force became aware that local governments or local distribution authorities have not complied with their duties to deduct and withhold the non-resident gross income tax as required by Sections 117 and 118 of the Income Tax Act. The Task Force was unable to discover a single instance in which a government subdivision or local government was held accountable for the taxes due or was placed in a receivership by the Cabinet after having its operations suspended, despite such action being authorized upon a finding of any fiscal irregularity, mismanagement or failure to comply with the law in the conduct of the affairs and operations of the local government following audit and inquiry by the Minister of Internal Affairs. (Local Government Act, Sections 140-142).

2.24 Numerous and successive audit reports have detailed issues of financial mismanagement, including tax-related issues. Each year, relevant officials have indicated that such issues would be remedied. However, successive administrations have, for the most part, failed to remedy the identified problems. It appears that the Cabinet and Nitijela do not adequately review or do not fully understand the findings of the various audit reports.

2.25 Successive Secretaries and Ministers of Finance have not complied with the Financial Management Act 1990, generally, and Part VI, of the Act, entitled "Recovery of Money Owed to the Government", specifically. This part, in sum, requires that (i) payment in the final settlement on any government contract shall be withheld until the Secretary of Finance certifies that all taxes accrued and all debts due from the contractor have been paid; and (ii) the government shall setoff (a) any debt due an agency against any payment due a debtor;⁹ and (b) any debt due a claimant agency by any officer, agent, employer, or other person in the service of the government, against any salary, wages, or

other compensation due such person. Additionally, the Secretary of Finance is permitted, by regulation, to provide for the recovery of debts due public corporations in the same manner as is provided for the recovery of debts due a claimant agency. (Financial Management Act, Sections 156, 157, 161, 163, 164).

2.26 Despite the fact that numerous employees of the Ministry of Finance have not fulfilled their duties or complied with the laws of the Republic, the Task Force was unable to find even a single instance where the Public Service Commission disciplined or terminated the employment of such persons.¹⁰ <>

3 Recommendations:

In our view, the findings contained above raise a number of issues that need to be addressed, including the lack of written policies and regulations; lack of organized and easily accessible records, including returns; lack of an electronic information base; and lack of an enforcement division, all of which have resulted in the accumulation of substantial undeclared and unpaid taxes. The Ministry of Finance must be able to fully discharge its duties and responsibilities as set forth by law. In regard to the foregoing findings and observations, the Task Force hereby makes the following recommendations:

3.1 The Ministry of Finance necessarily requires a drastic and immediate re-organization and re-staffing with qualified personnel able to introduce new information systems and procedures and to train others in their use. The Task Force is not qualified to re-organize the Ministry of Finance. Therefore, the Task Force recommends that the RMI seek a technical assistance grant from the Asian Development Bank, United Nations, or, preferably, the U.S. Department of the Treasury or Internal Revenue Service through the U.S. Department of the Interior to assist in the re-organization.

3.2 As part of the re-organization, the Task Force recommends that the equivalents of an Enforcement Division or a Collection/Enforcement Division be adequately staffed and trained. The primary duties of this/these divisions should include compiling relevant data, issuing notices of reminder or demand, investigating and examining suspicious filings, and referring delinquent taxpayers to the Office of the Attorney General for criminal and civil prosecution. An increase in tax revenue was noted during the period when the position of Tax Auditor was emphasized. Therefore, the re-organization of the Ministry may include the re-establishment of that position. Criminal prosecution is the responsibility of the Office of the Attorney General. Civil suits for the recovery of taxes, penalties, and interest may be conducted by the Office of the Attorney General, by an in-house Revenue & Taxation attorney, or by the use of local attorneys on a case-by-case or retainer basis.

3.3 In regard to the staffing of the Ministry, the Task Force does not make any specific personnel recommendations. However, the Task Force notes that most, if not all, of the Ministry of Finance staff, including present and former Ministers, and former Secretaries, and Acting Secretaries, apparently did not read, did not understand, or did not elect to comply with the various laws setting forth the many duties and responsibilities of the Ministry in regard to tax collection or financial management.¹¹ <>

3.4 The Ministry of Finance has been without a Secretary of Finance for over a year. This is inexcusable. The Secretary of Finance is the most important position in the Ministry and must be a person capable of providing the leadership necessary to effect the required immediate and drastic changes.¹² < >

3.5 The Minister of Finance must be a person unrelated to the current and previous finance ministries and, therefore, untainted by their deficiencies. The Minister of Finance must be able to bring the fresh and creative views necessary to effect the required improvement of the Ministry.

3.6 The Secretary of Finance should ensure that there is better communication and coordination between all the divisions of the Ministry of Finance. There should also be a synchronized effort to coordinate and monitor tax collection efforts of various entities, including the periodic exchange of lists of contributors, taxpayers, and licensees in order to establish or consolidate a relevant Tax Roll among MISSA, MALGov and other local governments, and the Registrar of Foreign Investment.

3.7 Re-staffing of the Ministry should occur with the consultation of the Secretary of Finance. The performance of the Secretary and the Ministry necessarily depends on the competence of the staff. The Secretary should be able to recommend competent persons for the various staff positions.

3.8 Upon re-organization, the Ministry of Finance should establish manuals and written procedures for the overall management and operation of its various divisions. The Ministry, in concert with the Office of the Attorney General, should promulgate relevant Regulations for carrying out and giving effect to the various provisions of the revenue collection laws. The Ministry of Finance should only employ persons that have read, understood, and sufficiently learned the contents of the manual, written procedures, Regulations, and the various laws that apply to the Ministry. This may require the passage of a written test prior to employment or continuation of employment with the Ministry. Seminars should be held for training purposes and monthly Ministry meetings should be held to discuss common problems and ensure that the personnel are updated on changes in the laws, regulations, and procedures of the Ministry.

3.9 The Ministry of Finance must modernize its data base and information and collection support systems. Tax returns should be electronically scanned and systematically stored for ease of access. There should be an automatic mechanism to ensure timely notice to taxpayers, track and detect outstanding tax notices, and list delinquent taxpayers for prosecution. A review of the adequacy of the Ministry computer system, both hardware and software, and its possible replacement should be part of the previously mentioned technical assistance grant. While there are many computers in the Ministry, they do not appear to be properly utilized.

3.10 All laws concerning the Ministry of Finance and its duties, including, but not limited to the Income Tax Act, Import Duties Act, Tax Collection Act, Financial Management Act, Government Liability Act, Government Borrowing Act, General Fiscal Matters Act, Over-Expenditure and Over-Obligation of Appropriated Funds Act, and Government Indebtedness Act) should be consolidated for ease of reference, either

in the next update to the Marshall Islands Revised Code or informally by staff of the Ministry of Finance. Inapplicable laws should be amended or repealed as the case may be.

3.11 Entities should be required to file separate tax returns for each operation or place of business, rather than simply consolidating all revenues into one return. Withholding taxes may be filed on a single return provided the employees are properly grouped and identified with each specific operation or place of business on the return. For example, RRE would be required to file separate gross revenue tax returns for the Long Island Grocery Store, Uliga Grocery Store, Ace Hardware, Office Rental, Gas Station, etc. RRE would be allowed to file a single withholding tax return, provided the employees of the Long Island Grocery Store were grouped together on the return and identified as employees of that store, the employees of the Uliga Grocery Store were grouped together on the return and identified as employees of that store; etc.

3.12 The RMI and its various subdivisions should take corrective action to address the relevant issues raised in previous audit reports instead of just saying that they will take corrective action. This action should include termination of employment and criminal prosecution of certain non-complying employees. The Nitijela should carefully review the audits. Public hearings, translated into Marshallese, should be held in the Nitijela in regard to the audits, and a representative of the auditing firm should be present to highlight those portions of the audits that indicate problem areas.

3.13 The Income Tax Act should be amended¹³ <> to (i) better organize its contents; (ii) increase the punishments available for corporations and persons¹⁴ <> ; (iii) hold officers, directors, partners, and certain employees of business entities and the Mayor and Executive Committee members of local governments jointly criminally and civilly liable with the respective business entity or local government for violations of any provisions of the Act; (iv) consistently provide for the filing of returns and the payment of taxes on similar dates, where possible; (v) provide that the failure to file any return or pay any tax as required by the Income Tax Act is an offense;¹⁵ <> and (vi) simplify the confusing penalty provisions.

3.14 The Income Tax Act should be further amended to clarify that the responsibility of withholding, collecting, filing, and paying the 10% non-resident income tax is a joint responsibility of the client and the non-resident entity and that both are criminally and civilly liable for non-compliance.

3.15 The Foreign Investment Business License Act should be amended to reflect the following:

3.15.1 In addition to the payment of the application fee for an FIBL, it should be required that the applicant open a tax account with Revenue & Taxation which should provide the applicant with a set of information explaining all of the tax requirements of the Republic. The applicant should be required to sign under oath that he understands and will comply with the relevant laws. The Registrar of Foreign Investment should only release the license upon written confirmation from Revenue & Taxation that the applicant has established a tax account and has given the oath. The tax account would be made permanent and part of the Tax Roll upon the granting of the license by the Registrar. Denial of the license would void the tax account.

3.15.2 All licensees should file an Annual FIBL Report with the Registrar of Foreign Investment by March 15 of each year. This report should include presentation of Tax Clearance Certificates obtained from Revenue & Taxation and MISSA,16 <> showing that the licensee has filed all tax returns and paid all taxes due to the Republic and MISSA, for the previous calendar year. Any licensee operating under an FIBL that does not comply with these requirements by the due date would be subject to payment of a substantial late fee or revocation of its license by March 10. The burden should be placed entirely upon the licensee that is granted the privilege of doing business in the Republic. This provision will ensure that an entity which has been granted a license will pay its required taxes to the Republic, and should also "weed out" a dormant or inactive entity which has acquired an FIBL with no resultant benefit to the Republic.

3.15.3 The conviction of any licensee for a violation of the Income Tax Act or Import Duties Act should cause the revocation of the FIBL.

3.15.4 Any person or entity convicted of a violation of the Income Tax Act, Import Duties Act, or Foreign Investment Business License Act should be ineligible to apply for an FIBL for a period of 3 years from the date of conviction. The term "conviction" should include a plea of guilty or a finding of guilt.

3.16 The Associations Law should be amended to require all applicable entities earning revenue in or from the Republic to file an Annual Corporate/Partnership Report with the Registrar of Corporations, by March 15 of each year. Any corporation or partnership that does not comply with this requirement by the due date would be subject to payment of a substantial late fee or dissolution proceedings. This report should include the following:

3.16.1 attachment of Tax Clearance Certificates obtained from the Ministry of Finance and MISSA, showing that the entity has filed all tax returns and paid all taxes due to the Republic or MISSA, for the previous calendar year; and

3.16.2 a current listing of the names, ages, addresses, and citizenship of all of its Directors, Officers, Shareholders, and Partners, and any changes in ownership status during the previous year.

3.17 The non-payment of land lease taxes might be remedied by amending Section 11817 <> of the Real and Personal Property Act and/or the Income Tax Act to require that all leases be filed with the Clerk of Courts or some other Registry and the Ministry of Finance by the tenant.

3.18 It should be made unlawful for any contractor or sub-contractor to be awarded a bid or to receive any funds from the government without showing previous compliance with the tax laws of the Republic. Prior to the submission of any bid on any government project, the bidder should provide to the bid review committee Tax Clearance Certificates from the Office of the Attorney General, Ministry of Finance, and MISSA indicating that (i) there has been no tax-related conviction within the previous 3 years, and (ii) all required returns have

been filed and all required taxes have been paid for the previous 8 quarters. The existence of a Promissory Note should have no effect upon these requirements. Additionally, the bidder should identify his sub-contractors and should present similar Tax Clearance Certificates in regard to each sub-contractor. Any contractors, sub-contractor or member of the bid review committee who fails to comply with this law, or any person who authorizes a false or inaccurate Tax Clearance Certificate should be subject to serious criminal penalty.

3.19 A survey should be conducted to determine the identity and number of persons, businesses, and non-resident entities doing business in the Republic. The survey should include the identity and number of churches and other non-profit entities that are actually conducting business. The survey should include a review of relevant records of the Clerk of Cabinet, Office of the Attorney-General, Ministry of Finance, Ministry of Foreign Affairs, various local governments, and on-the-ground inspection.

3.20 Because a problem in the assessment of taxes is the correctness of the returns filed by the taxpayer, it should be required in the tax enforcement Regulations, or elsewhere, that all entities maintain invoices and receipts of daily sales and other relevant documents for examination for a period of 18 months.

3.21 Consideration should be given to quarterly public notification (publication in the Marshall Islands Journal and broadcast on V7AB) of delinquent taxpayers (filers) of their failure to comply with the tax laws . Their continued failure to comply after a certain time period should cause a referral to the Office of the Attorney General for criminal prosecution.

3.22 The Minister of Internal Affairs must comply with all provisions of the Local Government Act, especially those provisions that concern fiscal irregularity, mismanagement or failure to comply with the law in the conduct of the affairs and operations of the local governments. In such cases, the Minister of Internal Affairs should recommend to the Cabinet that the operation of the local government be suspended and an Administrator-Receiver be appointed. Even in the absence of such a recommendation by the Minister of Internal Affairs, the Cabinet should proceed with such suspension and appointment when the operation, administration or financial condition of the local government endangers the health, safety, or economic well-being of the local government area. Certainly, if the local government is unable or unwilling to comply with its financial obligations, including its tax obligations, its financial condition endangers its economic well-being. However, the Cabinet must also be aware of instances in which a previous corrupt or mis-managed local government has been replaced by a new administration.

3.23 Those entities that have repeatedly failed to file returns or pay required taxes or obtain an FIBL, as will be subsequently identified on the Task Force list, should be criminally and civilly prosecuted and should be properly punished so as to deter them and other entities from similar behavior.

3.24 Non-citizens who repeatedly violate the tax laws should be deported. Additionally, the Division of Immigration and Naturalization should strictly enforce the immigration laws and regulations. All aliens entering the Republic for employment purposes should be tracked to ensure compliance with the relevant tax laws.

3.25 The Ministry of Finance should comply with the Financial Management Act and (i) withhold payment due contractors until the receipt of certification that all taxes and debts have been paid by the contractor; and (ii) off-set debts due the government against payments due the debtors. The Task Force recommends that the language in Part VI of the Financial Management Act be simplified and made more consistent.

4 Conclusion:

The Ministry of Finance has the most duties and responsibilities of any ministry. The inability or unwillingness of the Ministry of Finance to fulfill its duties and comply with its responsibilities has resulted in a failure of the tax collection system in the Republic. In order for the Ministry of Finance to implement and enforce the various tax laws, the Ministry must be immediately re-organized and re-staffed.

Respectfully submitted this 15th day of February, 2001:

Moses S. Gago, Chairman

Jean M. Tonyokwe, Member

David M. Strauss, Member

Phillip Kabua, Member

George Lanwi, Member

ENDNOTES:

1 While prescribing the classes of taxes to be collected, the Income Tax Act accords the Secretary of Finance with wide and sweeping powers to collect such taxes, including the following:

(a) To demand that the delinquent taxpayer file a return and pay the tax due and, if the taxpayer fails to do so within 30 days, the Secretary of Finance may make a return for the person or business from any information and records obtainable, and then levy and assess an appropriate amount of tax payable. (Income Tax Act, Section 125).

(b) To file a lien against the property of the person or business obligated to pay the taxes and then collect the taxes due by way of judicial foreclosure, public sale, and/or the appointment of a receiver. (Income Tax Act, Section 126).

(c) To levy upon all property and rights of property of the delinquent taxpayer by means of distraint and seizure. Levy may be made upon the accrued salary or wages of any officer,

employee, or elected official of the Republic, or any agency or instrumentality of the Republic. (Income Tax Act, Section 127).

(d) To examine any relevant books, papers, records or other data; to summon the person liable to pay tax or required to perform the act, or the employee of such person or person having possession, custody, or care of the relevant books, papers, records or other data; and to take testimony of the person concerned, under oath, as may be relevant or material to such inquiry, for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any tax, or collecting such liability. The District and High Courts have jurisdiction to compel such attendance, testimony, or production. (Income Tax Act, Section 129).

2 The Tax Collection Act, 48 MIRC 3, is almost useless since it imposes and authorizes no taxes, creates no offenses, and does not prescribe penalties for violations of its provisions. Perhaps, the Act should be reviewed in order to make it a more effective tool for tax collection.

3 A subsequent report to be submitted to the Cabinet and Office of the Attorney General will identify a list of delinquent taxpayers.

4 <> For instance, a well-known woman non-citizen has only one Foreign Investment Business License. However, she operates numerous businesses on the basis of various Business Licenses issued by MALGov. Without investigation, or communication from MALGov, the Ministry of Finance cannot know of the existence of these other businesses for the purpose of collecting taxes. When the Task Force attempted to inquire from the taxpayer, she quickly alleged that the businesses in question all belonged to her husband who had purchased Marshallese citizenship. However, it is clear that she, not he, is operating the various businesses.

5 <> For example, a Majuro business, operated by a woman non-citizen, submitted false GRT returns in respect of the gross revenue received from the sale of 68 automobiles, thereby underpaying the gross revenue tax due by an amount ranging from \$11,000 to \$26,000. The Chief of Revenue and Taxation wrote a letter to the company requesting the amount of GRT due from at least the first installment payments on the vehicles, but, to-date, the amount is still due and owing. Additionally, a gas station operator understated his gross revenue and underpaid his GRT. The Task Force compared his claimed gross revenues with the number of gallons of gas delivered by Mobil. The gross revenue of the entire operation claimed by the business was far less than the gross revenue that would have been received from only the sale of the gas.

6 <> A subsequent report to be submitted to the Cabinet and Office of the Attorney General will identify a list of entities doing business in the Republic in violation of the FIBL Act.

7 <> The Land Lease Commission Act 1993 has never been implemented.

8 <> A subsequent report to be submitted to the Cabinet and Office of the Attorney General will identify a list of hotels/resorts not paying the Hotel/Resort Room Tax.

9 <> The Task Force became aware of an article in the Marshall Islands Journal in which KADA complained that the Ministry of Finance distributed to KADA a sum that was less than that to which KADA was entitled. The Task Force notes that apparently KADA owes back taxes to the RMI in an amount much greater than the sum complained of. Actually, the Ministry of Finance is violating the Financial Management Act by making any payment to KADA until such time as all debts due the government by KADA have been set-off.

10 <> The Task Force notes that one high-ranking employee is derisively called "Minister" and "Assistant Minister" because he is notorious for frequently being absent from work, yet collecting full pay.

11 <> The Task Force was able to locate only a single copy of the Marshall Islands Revised Code in the entire Ministry (Budget Office) - and this copy had not been updated since it was first issued in 1988.

12 <> The Task Force was recently informed that Seiko Shoniber was appointed to the position of Secretary of Finance, so these concerns have been alleviated. However, it remains to be seen whether the Secretary of Finance will receive the support necessary from the Cabinet and Public Service Commission to effect the required drastic and immediate changes in the Ministry.

13 <> The Ministry may, in conjunction with the Office of the Attorney General, review the entire provisions of the Income Tax Act and make recommendations of the relevant Sections for amendment.

14 <> Currently, the most severe criminal punishment that a corporation may receive for violation of the Income Tax Act is a \$1,000 fine.

1 <> 5 This will necessarily ensure that the failure to file or pay the hotel/resort tax is a criminal offense.

16 <> Revenue and Taxation and MISSA may each charge a nominal fee (i.e., \$25) to provide two certified copies each of the Tax Clearance Certificate, which will also be required of any corporation or partnership.

17 <> Section 118 of the Real and Personal Property Act, in any event, needs to be amended as an entire line has been omitted from the code. Additionally, Section 118 could be amended to address the validity of leasehold interests.

APPENDIX D: LEGAL RULINGS IN THE CASE ON THE SPEAKER'S
DECLARATIONS OF CONFLICTS OF INTERESTS IN THE DEBATE ON
THE 'GAMING ACT'.

IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

IMATA KABUA, PHILIP MULLER)
And TONY de BRUM,)
)
Plaintiffs,)
)
V.)

CIVIL ACTION NO. 1998-091

)	ORDER
KESSAI NOTE in his official)	
Capacity as Speaker of the)	
Nitijela and JOE RIKLON in)	
His official capacity as)	
Clerk of the Nitijela,)	
)	
Defendants.)	
-----)	

APPEARANCES:

For the Plaintiffs: David Lowe, Esq.
 For the Defedants: David Strauss, Esq.

On July 21, 1998, the parties appeared by their respective counsel David Lowe on behalf of the plaintiffs and David M. Strauss on behalf of the defendants. Upon consideration of the pleadings and submissions of counsel, this Court finds as follows:

On May 15, 1998, the three plaintiffs, all duly elected members of the Nitijela, filed a complaint for declaratory judgement and injunctive relief against the defendants, the Speaker and the Clerk of the Nitijela. On June 5, 1998, defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to MIRCP 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to MIRCP 12 (b)(6). MIRCP 23 requires that these motions be filed prior to the filing of an answer to the complaint.

There are two types of Rule 12 (b)(1) motions - those that attack the complaint on its face, and those that attack the existence of subject matter jurisdiction in fact. It is clear that defendants have brought their Rule 12 (b) (1) motion on the ground that there is no subject matter jurisdiction in fact that would allow this Court to hear the complaint. It is therefore necessary for this Court to determine the subject matter of the complaint.

This intra-parliamentary dispute involves the March 25, 1998, passage of Public Law 1998-64 (originally Bill No. 114 ND-2 [the "Bill] and hereinafter the "Gaming Act") which prohibits gambling activities in the Republic. Plaintiffs d not complain about the passage of the Gaming Act, per se. Plaintiffs complain about the defeat of a previous motion to file the Bill during which their votes were disallowed by the Speaker, who had declared that the plaintiffs had conflict of interest and could not vote. In sum, plaintiffs complain about the procedure by which the Speaker declared they had a conflict of interest and disallowed their votes on the motion to file the Bill.

Plaintiffs also complain that the certification by the defendants that the Bill was passed in accordance with the Constitution and Rules of the Nitijela is false. In sum, plaintiffs complain that this certification is invalid.

Therefore, the subject matter of the complaint is the procedure whereby the Speaker/Clerk disallowed plaintiffs' votes on a motion to file the Bill due to a conflict of interest, and validity of the certification of the Bill given by the Speaker pursuant to Article IV, Section 21 of the Constitution.

The Court now considers the question of whether it has subject matter jurisdiction to hear these two matters. Article IV, Section 16 (3) of the Constitution provides in relevant part:

Neither the Speaker not any officer of the Nitijela in whom powers

are vested for the regulation of procedure or the conduct of business or the maintenance of order shall, in relation to the exercise of any of those powers, be subject to the jurisdiction of any court; but this shall not be taken to preclude the exercise of judicial power under section 7 of Article II or judicial review, in an action against the Clerk of the Nitijela as nominal defendant, pursuant to Section 9 of this Article.

This Article expressly recognizes that there are some circumstances in which the Courts should be able to supervise the internal proceedings of the Nitijela and other matters which might otherwise have been regarded as under its exclusive control. However, none of these circumstances arises in the present case.

The judicial power under Article II, Section 7 is expressly preserved. This is the provision of the Bill of Rights guaranteeing the availability of the writ of habeas corpus for the benefit of any person held in custody. The courts are therefore entitled to question the validity of any purported sentence of imprisonment for contempt of the Nitijela. Under Article IV, Section 15 (12), such a sentence may be imposed only on a person who is not a member of the Nitijela, under an Act defining offences relating to contempt of the legislature and making provision for their trial and punishment by the High Court.

The immunity of the Speaker and officers of the Nitijela from the jurisdiction of the courts in relation to the exercise of their powers does not preclude judicial review in an action against the Clerk of the Nitijela as nominal defendant, pursuant to Article IV, Section 9. This section reads as follows:

Any question that arises concerning the right of any person to vote at an election of a member or members of the Nitijela, or to be or to remain a member of the Nitijela, or to exercise the rights of a member, or concerning the conduct of any person in relation to any election of a member or members of the Nitijela, shall be referred to and determined by the High Court.

The reference in Article IV, Section 9 to the jurisdiction of the High Court to determine the right of a person "to exercise the rights of a member" of the Nitijela concerns the question whether any member has been validly suspended, under Article IV, Section 15 (12) of the Constitution, for being in contempt of the Nitijela. The suspension must be imposed by resolution, must be for no longer than 10 sitting days, and must be authorized under the Rules of the Nitijela or an Act. It is for the High Court, not the Nitijela, to determine whether those requirements have been met.

Therefore, insofar as the subject matter of the complaint is concerned, with the exercise of the power of the Speaker to regulate the procedure, conduct the business, or maintain the order of the Nitijela, it is clear that Article IV, Section 16(3) of the Constitution specifically and explicitly prohibits the Speaker from being subjected to the jurisdiction of this Court in this case.

Plaintiffs' complaint regarding the validity of the certification by the defendants that the Gaming Act was lawfully and constitutionally passed is specifically and explicitly prohibited from being heard by this Court due to Article IV, Section 16 (1) of the Constitution which provides in relevant part:

The validity of any proceeding in the Nitijela...and the validity of any certificate duly given by the Speaker under Section...21 of this Article...shall not be questioned in any court; but this shall not be taken to preclude judicial review of the validity of any Act...of the Nitijela under this constitution.

The Court has jurisdiction to hear matters in which the substantive terms of an Act are alleged to violate the Constitutional provisions. See *Marbury v Madison* (1 Cranch 137).

However, as the complaint does not allege that there are any substantive provisions of the Act which may violate the Constitution, and insofar as the subject matter of the complaint is concerned, with validity of a proceeding in the Nitijela which is the defeat of the motion to file the Bill and the passage of the Gaming Act and the validity of the certificate duly given by the Speaker under Section 21 relative to the Gaming Act as passed in accordance with the Constitution and Rules of the Nitijela, it is clear that Article IV, Section 16(1) of the Constitution specifically and explicitly prohibits this matter from being subjected to the jurisdiction of this Court in this case.

These constitutional prohibitions are consistent with the enrolled bill doctrine which was developed relative to the British Parliament and is applied to acts of Parliament, acts of Congress, and acts of the legislatures in several of the states. This doctrine holds that when an act of the legislature or parliament has been properly enrolled or authenticated by the signatures of the proper officials affixed thereon, as the Speaker has done pursuant of Article IV, Section 21, it is conclusively presumed by the courts to have been properly passed. The doctrine precluded inquiring into the legislative procedures preceding the enactment of a statute which is properly signed and fair upon its fact, as is the Gaming Act, and the passage of the act can not be impeached by resort to the journals of the legislative body or to extrinsic evidence of any sort. See *Marshall Field & Co. v. Clark*, 143 US 649, 36 Led 294, 12 Sct 495 (1892), at 676; *Lycons v. Woods*, 153 US 649 (1894); *Parkinson v. Jones*, 117 p 1057 (1911) at 1059; *People v. Camp*, 183 P 845 (1919); *Capitol Distribution Co. v. Redwine*, 57 SE2d 578 (1950); *Beaufort County v. Jasper County*, 68 SE2d 421 (1951); *Schwarz v. State*, 531 P2d 1280 (1975) at 1282; *Citizens Council Against Crime v. Bjork*, 529P2d 1072 (1975, Footnote 1 at 1076; *Wilson v. Ledbetter*, 389 SE2d 771 (Ga.App. 1989); *United States v. Munoz-Flores*, 495 US 385, 110 Sct 1964, 109 Led2d 384 (1990) at 406-407.

At issue in the 12 (b) (1) motion is the trial court's jurisdiction, being whether or not the Court has the power to hear the case. There is substantial authority that the trial court is free to hear evidence and rule on the jurisdictional issue prior to trial. No presumptive truthfulness attaches to plaintiffs' allegations, and the plaintiffs have the burden of proof in establishing that subject matter jurisdiction does in fact exist. Furthermore, the existence of jurisdiction must be tested as of the time the complaint was filed. *Interdigital Technology Corp. v. OKI America, Inc.*, 845 F. Supp 276 (E.D.Pa. 1994) at 281; *Augustine v. United States*, 704 F.2d 1074 (1983) at 1077; *Mortensen v. First Federal Sav. And Loan Ass'n*, 549 F2d 884 (3rd Cir. 1977).

This Court has reviewed evidence in the form of affidavits from the plaintiffs and defendant Note. The plaintiffs, by affidavit, state that all three of them voted in favor of the motion to file the Bill, but their votes were disallowed. The Speaker, by affidavit, states that he disallowed the votes of Imata Kabua and Philip Muller and that Tony de Brum did not vote. This disputed fact is immaterial since any one vote would have been sufficient to pass the motion to file the Bill. This Court thus finds no material disputed facts and further finds that the plaintiffs have not met their burden of proof in establishing that subject matter jurisdiction does in fact exist. To the contrary, for the reasons stated previously, this Court finds that even if it assumes all of the material factual allegations of plaintiffs' complaint to be true, the defendants have proved by clear and convincing evidence that subject matter jurisdiction does not exist in this case.

This Court is also justified in dismissing this complaint under MIRCP 12 (b) (6) for failure to state a claim upon which relief may be granted. Even if all of the factual allegations in the complaint are taken as true and viewed in the light most favorable to plaintiffs, the complaint must be dismissed because the plaintiffs' claims are not subject to relief from the Court, due to the specific and explicit constitutional prohibitions of the aforementioned Article IV, Section 16(3), and Article IV, Section

16 (1) of the Constitution, for the same reasons as discussed previously. Additionally, plaintiffs request that the Court issue a preliminary and permanent injunction against the defendants, enjoining and restraining them from enforcing the Gaming Act. Clearly such relief can not be granted. This Court cannot enjoin and restrain defendants from enforcing the Gaming Act as defendants do not have any authority to enforce the Gaming Act. Article VII, Section 3 of the Constitution provides that the Attorney General is empowered with enforcing the laws, and the Attorney General has not been named as a party herein.

Because of the Court's dismissal of this matter as previously described, there is no need for the Court to further address the issues raised by defendants concerning the constitutional provision of legislative immunity and the political question doctrine.

Plaintiffs believe that notwithstanding the constitutional prohibitions on jurisdiction pursuant to Article IV, Section 16 (1) and (3), this Court has jurisdiction to hear this matter because the Speaker violated the plaintiffs' constitutional rights. Plaintiffs' contentions are unpersuasive. It is instructive to subject these claims to a brief analysis.

Plaintiffs claim that they were wrongfully, unlawfully and unconstitutionally denied their right to vote on a question put to the Nitijela, and that their constituents were thereby unconstitutionally denied representation in the Nitijela by their elected representatives. The right of every qualified person to participate in the electoral process, whether as a voter or as a candidate for office, is directly protected by Article II, Section 14 (2) of the Constitution, a provision of the Bill of Rights. There is no suggestion that this provision has not been complied with. The Constitution contains no express right of citizens to be represented through the votes of their representatives in the Nitijela.

Nevertheless, the argument that citizens have such a right is supported by Article 4, Section 15 (4) of the Constitution which states: "Unless, pursuant to an Act or to the rules of the Nitijela, a member is required to abstain from voting on any matter in which he has a personal interest, every member present when any question is put to the Nitijela shall vote thereon." Subject to the exception concerning conflicts of interest, this provision gives every member present when any question is put to the Nitijela not merely the right, but the duty, to vote on it.

On the other hand, the express recognition that, pursuant to an Act or to the Rules of the Nitijela, a member may be required to abstain from voting on any matter in which he has a personal interest reflect the right of the people of the Marshall Islands to ethical government, declared in Article II, Section 16 of the Constitution. To that extent, the duty, and underlying right, of members of the Nitijela to vote on matters before it and the implicit right of citizens to be represented through their participation in every vote, is constitutionally qualified.

To implement the right of the people of the Marshall Islands to ethical government, the Nitijela has enacted the Ethics in Government Act (3 MIRCP 17). Section 1704 (6) states:

Public officials and Government employees shall give due disclosure of any conflict of interest such official or employee has or may have in the performance of his or her duties and recuse himself or herself of any involvement on the matter in his or her capacity as such an official or employee...

Plaintiffs do not claim that any provision of this Act has been infringed by the defendants.

The only requirements on members of the Nitijela to abstain from voting on matters in which they have a personal interest are those contained in the Ethics in Government Act and Rule 29 of the Rules of Procedure of the Nitijela.

Article 4, Section 15(1) of the Constitution provides:

Subject to this section and any Act, the Nitijela may from time to time make rules for the regulation and orderly conduct of its proceedings and the despatch of its official business.

Article 4, Section 15 (2) of the Constitution provides:

The Rules of the Nitijela shall ensure that, in the conduct of its official business, there is an opportunity for all points of view represented in the Nitijela to be fairly heard.

Although the plaintiffs claim that the defendants acted in violation of Article 4, Section 15(2), that provision is directed to the content of the Rules, not the actions of the Speaker and the Clerk of the Nitijela in applying them. There is no suggestion that Rule 29 is inconsistent with Article 4, Section 15(2). It is hard to see how it could be in view of the provisions of Article 4, Section 15(4) referred to above. Nor is there any suggestion that Rule 29 is inconsistent with any other provision of the Constitution or with the Ethics in Government Act or any other Act.

Plaintiffs also claim that the defendants violated Article 4, Section 15 (3) of the Constitution which reads as follows:

Except where this Constitution otherwise provides, every question before the Nitijela shall be decided by a majority of the votes of the members present and voting at a meeting of the Nitijela.

The introductory words of exception foreshadow the provisions of Article XII, Section 3 of the Constitution which requires amendments to the Constitution to be approved on the second and third readings by at least two-thirds of the total membership of the Nitijela (unless they are amendments of a type required to be approved by Constitutional Convention and Referendum in accordance with Article XII, Section 4. The reference to members "present and voting" (emphasis added) excludes members required to abstain from voting under Rule 29, as expressly contemplated by Article 4, Section 15(4). The question whether the defendants could be said to have violated Article 4, Section 15 (3) of the Constitution turns solely on whether or not they correctly applied the Ethics in Government Act, Rule 29, and other relevant Rules of the Nitijela. Even then, it is not clear that any misapplication of the Rules should be regarded as necessarily giving rise to a violation of the constitutional provision.

Finally, plaintiffs claim that the defendants also violated Article 4, Section 8 (1) and (2) of the Constitution. Those provisions read as follows:

(1) The Speaker shall preside over any meeting of the Nitijela at which he is present and shall have the other functions conferred on him by this Constitution or by or pursuant to Act or to the Rules of the Nitijela.

(2) The Speaker shall be responsible for ensuring that the official business of the Nitijela is conducted in compliance with

this Constitution and the Rules of the Nitijela, and shall exercise his functions impartially.

Again, the claim that the defendants acted in breach of those provisions rests on the doubtful proposition that a violation would automatically result from any misapplication of the Nitijela's Rules of Procedure, if, in fact, that occurred.

If plaintiffs were allowed to continue with this care, every bill, whether it was passed by a close margin or defeated by a close margin would find itself likewise the subject of review by the court. If the Speaker found a member had a conflict of interest and disallowed his vote, he or any persons supporting his position for the bill's defeat could file a court challenge to the bill's passage. Likewise, if the Speaker did not find that a member had a conflict of interest and allowed his vote, those persons supporting the defeat of the bill could file a challenge to the bill's passage.

As the court stated in Citizens Council Against Crime, if the enrolled bill were not taken as conclusive evidence that it was regularly and constitutionally enacted, it would be practically impossible for the courts even to determine what was the law, and would render it absolutely impossible for the average citizen to ascertain that of which he must at his peril take notice. Also, as Justice Scalia stated in United States v. Munoz-Flores, mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at fact value.

For these reasons stated herein, plaintiffs' complaint is dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Dated this 22 day of July, 1998

FILED

JUL 22 1998

Signed.
HAROLD VAN VOORHIS

Acting Chief Justice, High Court
Republic of the Marshall Islands

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IMATA KABUA, PHILLIP MULLER and
TONY DE BRUM,

S.CT.CIVIL NO.98-03
(High Ct. Civil No. 1998-091)

Plaintiffs-Appellants,

-v-

KESSAI NOTE in his official capacity as
Speaker of the Nitijela and
JOE RIKLON in his official capacity as
Clerk of the Nitijela,

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

SEPTEMBER 17, 1999

FIELDS, C.J.

GOODWIN, A.J. pro tem⁶⁹ and KING, A.J. pro tem⁷⁰

SUMMARY:

The Supreme Court affirmed the High Court's ruling dismissing plaintiff-appellants' complaint, which sought to have the courts review internal proceedings of the Nitijela with respect to the passage of an Act.

DIGEST:

1. NITIJELA - Rules - Conflicts of Interest:: Pursuant to Rules 8 and 29 of Nitijela Procedure, the Speaker is authorised to raise and rule upon a question of conflict of interest.
2. NITIJELA - Rules - Certification of Acts: Pursuant to Rule 8 of the Nitijela Rules of Procedure, the Speaker is authorised to certify passage of a legislative enactment.
3. COURTS - Jurisdiction - Nitijela Proceeding Non-justiciable: The process by which an Act of the Nitijela becomes a law is within the sole province of the Nitijela not subject to judicial review.

OPINION OF THE COURT BY KING, A.J.

Defendant Speaker Kessai Note and Defendant Clerk Joe Riklon of the Nitijela certified that Nitijela Bill No. 14 ND-2 had been passed by the Nitijela in accordance with the Constitution of the Republic of the Marshall Islands and the Rules of the Nitijela. This legislative bill thus became Public Law 1998-64.

Plaintiffs were and are three voting members of the Nitijela. They are President Imata Kabua, Minister of Foreign Affairs Phillip Muller, and Senator from Majuro Tony de Brum. Their votes were not counted in connection with the passage of Nitijela Bill No. 114 ND-2. They seek in this action to go behind the certification of passage in order to prove that, if any of their votes had been counted, the bill would not have passed.

The dispute arose during the consideration on March 25, 1998, by the Nitijela, of two companion bills, Bill 113 and Bill 114. Bill 113 provided for a repeal of the so-called Gambling Act. Bill 114 provided for the prohibition of gambling activities, including gambling machines, within the Republic.

When these bills came up for consideration, Defendant Note raised the issue of the impropriety of members voting on matters in which the members had a pecuniary interest. He referenced the Ethics in Government Act and Section 29 of the Rules of Procedure of the Nitijela.

⁶⁹ Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation by the Cabinet

⁷⁰ Honorable Samuel P. King, Senior Judge, United States District Court for the District of Hawaii, sitting by designation by the Cabinet

Defendant Note stated that he was aware of conflicts of interest of certain members because of their pecuniary interest in gambling machines in the Republic, that he expected members to declare their conflict of interest and not vote on these bills, and if they did not declare their conflict of interest he would declare it, subject to appeal to the Nitijela. (Affidavit of Defendant Note).

According to Defendant Note's affidavit, all three plaintiffs refrained from voting the Bill 113.

When Bill 114 came up for a vote, a motion to file the bill was made by Plaintiff Kabua (Ex. B1 to the Complaint). Plaintiffs argued that they did not have a conflict of interest when voting on the motion to file because this was a procedural matter not directly related to gambling. Defendant Note rejected that argument and declared that the plaintiffs did have a conflict of interest in relation to the motion to file. (Affidavit of Defendant Note).

In the event, the Speaker did not count the "aye" votes of the three plaintiffs. (Affidavit of Defendant Note). (Defendant Note states that Tony de Brum did not vote on the motion to file. Tony de Brum in his affidavit, Exhibit B3 to the complaint, states that he did. In either case, his vote was not counted.)

Plaintiffs allege that: "This issue, as prejudged by the Speaker was not put to the Nitijela as the rules required." The record before the court does not indicate whether any attempt was made to appeal this ruling to the full body.

The Rules of Procedure of the Nitijela provide in Section 27 that three members may request a vote by call of the roll. According to Defendant Note, the voting on the motion to file was by roll call. The first count was 13 to 13 (not counting plaintiffs' votes). Another Senator's vote which had not been included in the first count was declared to be a "nay" vote making the final result 14 against and 13 for. (There are 33 members of the Nitijela. Three members were absent.)

There was another vote on passage at which Plaintiff Kabua was not present. He left before the vote to attend to other business. (Affidavit of Plaintiff Kabua, Exhibit B 1 to the complaint). The record before the court is silent as to whether the other two plaintiffs attempted to vote on passage of Bill 114.

It is not argued that each of the plaintiffs does not have an interest in gambling machines in the Republic.

Plaintiffs seem to be arguing that (1) the Speaker's application of the conflict of interest rule to the motion to file was an error, either because (a) he had no authority to make such a decision, or (b) he was wrong, or (c) he was not sustained by the vote of the whole body, or (2) his action was "wrongful, unlawful and unconstitutional."

Plaintiffs seek declaratory and injunctive relief as follows:

- (1) An order requiring the defendants to count the vote cast by each plaintiff in favor of the motion to file Bill 114 and declaring that the motion to file had carried.
- (2) An order declaring that Public Law 1998-64 is null and void.
- (3) A preliminary injunction enjoining "the defendants, together with their employees, agents and servants," from enforcing Public Law 1998-64.
- (4) A permanent injunction against the same persons prohibiting the enforcement of Public Law 1998-64.

The motion for preliminary injunction was denied earlier.⁷¹

We adopt the excellent analysis by Acting Chief Justice Harold van Voorhis set forth in the Order dated July 22, 1998, and repeat here only the main principles that guide our decision.

Section 29 of Rules of Procedure of the Nitijela provides: "A member shall not vote on any matter in which he has a distinct, individual, pecuniary interest, or in which his individual conduct is involved."

This rule was adopted pursuant to Article IV, Section 15 (1) of the Constitution which provides: "Subject to this Section and to any Act, the Nitijela may from time to time make Rules for the regulation and orderly conduct of the proceedings and the despatch of its official business."

Thus Section 29 of the Rules of Procedure of the Nitijela is clearly authorised by this provision of the Constitution and the further provisions of Article II, Section 16 of the Constitution relating to Ethical Government,⁷² and of Section 1704 of the Ethics in Government Act of 1993.⁷³

Section 8 of the Rules of Procedure of the Nitijela specifies the functions of the Speaker, among which are the duty to be "responsible for ensuring that the official business of the Nitijela is conducted in compliance with the Constitution and these Rules,"⁷⁴ and to "authenticate by his signature and cause to be sealed with the official seal of the Nitijela official acts and papers of the Nitijela."⁷⁵

[1,2] Thus, Speaker Note was clearly authorised to raise and rule upon a question of conflict of interest and to certify passage of a legislative enactment, and Clerk Riklon was clearly authorised to countersign documents signed by the Speaker.

The case then reduces to a question of whether the Speaker and Clerk appropriately and lawfully carried out their duties with respect to the proceedings of the Nitijela on March 25, 1998.

Article IV. Section 16 states in relevant part:

- (1) The validity of any proceeding in the Nitijela... and the validity of any certificate duly given by the Speaker under Section....21 of this Article... shall not be

⁷¹ Among other difficulties with the motion is the fact that it is directed to the wrong persons. Enforcement of the gambling laws is the province of the executive. The same difficulty applied to the prayer for a permanent injunction.

⁷² The Government of the Republic of the Marshall Islands recognises the right of the people responsible and ethical government and the obligation to take every step reasonable and necessary to conduct government in accord with a comprehensive code of ethics."

⁷³ To ensure that every citizen can have complete confidence in the integrity of the Government, each public official and government employee shall respect and adhere to the fundamental principles of ethical conduct set forth below... ..

"(6)Public officials and Government employees shall give due disclosure of any conflict of interest such official or employee has or may have in the performance of his or her duties and recuse himself or herself of any involvement on the matter in his or her capacity as such an official or employee...(underline added)

....
"(12) Public officials and Government employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards set forth in this Chapter...."

⁷⁴ Subsection (1)(b). Also Article IV, Section 8(2) of the Constitution.

⁷⁵ Subsection (2)(g). See also Article II, Section 8(6) of the Constitution, requiring the countersignature of the Clerk of the Nitijela.

questioned in any court; but this shall not be taken to preclude judicial review of the validity of any Act ... of the Nitijela under this constitution.

- (2) Neither the Speaker nor any officer of the Nitijela in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance or order shall, in relation to the exercise of any of those powers, be subject to the jurisdiction of any court, but this shall not be taken to preclude the exercise of judicial power under Section 7 of Article II or judicial review, in an action against the Clerk of the Nitijela as a nominal defendant, pursuant to Section 9 of this Article.

[3] We note that the provision of Public Law 1998-64 are not at issue, but only the process by which it became a law. Since the process detailed above was within the sole province of the Nitijela, this court is without jurisdiction to review the official actions of the Speaker and Clerk regarding the proceedings of the Nitijela with respect to Public Law 1998-64.

Brown v. Hansen 973 F.2d 1118, 1122 (3d Cir. 1992), states the general rule that "If defendants' conduct here did not violate any constitutional or statutory provision, the question whether the legislature violated its own internal rules is nonjusticiable."

Marshall Field & Co. v Clark, 143 U.S. 649, 672 (1892), in holding that federal courts will not inquire into whether an enrolled bill was the bill actually passed by Congress, stated:

The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable... The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

This statement was quoted and cited with approval by Justice Scalia in *United States v Munoz-Flores*, 495 U.S. 385, 408 (1990).

The Constitution and judicial holdings lead to the conclusion that the courts have not jurisdiction to decide the issues raised in the complaint.

The decision and order of the High Court dismissing the complaint is affirmed.

APPENDIX E: LEGAL OPINION IN CASE ON THE SPEAKER'S CALL FOR A
SECRET BALLOT IN THE NO-CONFIDENCE MOTION AGAINST THE
IMATA KABUA GOVERNMENT

IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

CIVIL CASE NO: 1998-214
&1998-215
(consolidated)

In the Matter of the 19 th)	OPINION AND CECLARATORY
Constitutional Regular Session)	JUDGEMENT
Interpretation of Constitution)	
And Rules of Procedure of the)	
Nitijela)	
By Attorney General,)	
(ex parte))	

-----)
In the Matter of the 19th)
Constitutional Regular Session)

By Litokwa Tomeing in his official)
Nitijela)

Appearances: _____)
Gerald M. Zackios, Attorney General, for RMI
David Strauss, Esq., for Litokwa Tomeing

This matter is before the court on motions for expedited consideration of Complaints for Declaratory Judgement.

1. PROCEDURAL BACKGROUND.

The procedural background is as follows:

On Wednesday, September 23, 1998, the Attorney General filed an "ex parte" Complaint seeking declaratory relief. (H/C Civ. No.: 1998-214).

Several hours later, on the same day, Litokwa Tomeing, in his official capacity as a Senator of the Nitijela, also filed a Complaint for Declaratory Relief (H/C Civ. No.: 1998-215).

Both actions request expedited consideration.

The court finding common issues of fact and law are raised by both complaints ordered both actions consolidated.

A status conference was held on Thursday, September 24, 1998. At the time counsel for both parties stipulated to waive oral argument and submit briefing by close of business on Monday, September 28, 1998. Further pleading is not required and the case is at issue.

II. FACTUAL BACKGROUND

The essential facts are not disputed.

On September 2, 1998, pursuant to Article V, Sec.7(1) of the Constitution, six members of the Nitijela, who were not members of the Cabinet, gave notice of their intent to make and did make a motion of no confidence in the Cabinet.

On September 7, 1998, a procedural dispute arose whether the vote on the motion of no confidence would be by secret ballot or roll call. (The particulars of the dispute are not relevant to the issues decided by this court and the court will not repeat those facts here). The Speaker ordered the vote to be by secret ballot whereupon the President called for a walkout and a majority of the members of the Nitijela then in attendance left the Nitijela chamber and refused to return for the vote on the motion of no confidence.

Certain members of the Nitijela continued a "workout or boycott" of the Nitijela meetings so that a quorum has not yet been reached and the vote on the motion of no confidence has not occurred. The 10 day time frame set forth by Art. V, Sec. 7(2) for conducting the vote expired. No business of the Nitijela has been conducted since September 7, 1998 due to the lack of a quorum.

III. DISCUSSION

A. The Motion for Vote Of No Confidence Does Not Lapse If Not Voted Upon Within The 10 Day Time Frame.

1. Constitutional interpretation requires the making of "value judgements" and is not strictly governed by technical rules of statutory construction.

In a modified parliamentary system, such as that created by the RMI Constitution, a motion of no confidence is one of the most crucial motions to be considered by the Nitijela.⁷⁶

The crucial nature of a motion of no confidence is evidenced by the requirement that the motion shall be voted on not less than 5 days and not later than 10 days after giving notice of the motion⁷⁷ and that the Nitijela session shall not terminate until the 10 day period has expired.⁷⁸

The only apparent reason or purpose of the time limitation is to assure that the President and the Cabinet are not taken by surprise and that the vote on the motion will not be unduly delayed.⁷⁹

The main issue in this case is whether a failure of the Nitijela to vote on a motion of no confidence with the 10 day period causes the motion to "lapse" and/or be "rendered moot and ineffective."

The government, pointing to Clanton v. Riklon, 1 MILR 101 (1989), would have the court strictly interpret Art. IV< Sec 11 (1)(b) and Art. V, Sec/ 7(2), giving effect to the "plain and obvious meaning" of those provisions.

All parties agree that the "plain and obvious meaning" of these constitutional provisions is that the motion be voted on within the 10 day period. The disagreement centers around the effect of the Nitijela's failure to perform that duty.

The government argues that since the Nitijela failed to deal with the motion within the specified time frame, the motion "lapses" or is "rendered moot and ineffective." This step in reasoning is fallacious as it can not be said that the "plain and obvious meaning" of those provisions is that the motion "lapses" or is "rendered moot and ineffective" if not acted upon within the 10 days. Those provisions do not address what occurs upon a failure to comply. Without the citation of any authority and the Constitution being silent on the issue, it is hard to conclude that the "plain and obvious meaning" of the Constitution is that the motion "lapses" upon failure of the Nitijela to comply with the time limit. Indeed, if the government would have the court apply strict rules of statutory construction to the interpretation of the Constitution, it appears well settled that a failure to comply with a time limit does not relieve the duty to act and/or render subsequent action void where the statute or rule does not provide for consequences upon a failure to comply. See, e.g., Simpson v. Attorney General, (1955) NZLR 271 (cited by Tomeing); see also, Brock v. Pierce County, 476 U.S. 253, 262, 106 S.Ct. 1834, 1842, 90 L.Ed.2d 248 (1986)⁸⁰; Idaho Farm Bureau Federation v. Bruce

⁷⁶ The crucial importance of a no confidence motion has been recognised by other countries which utilise a parliamentary type system. "Perhaps the most crucial motions considered by the House of Representatives are those which express a want of confidence in, or censure of, a Government as it is an essential tenet of the Westminster system that the Government must possess the confidence of the lower (representative) House... The importance of such motions or amendments is recognised by the rule that any motion of which notice has been given or amendment which expresses a censure of, or want of confidence in, the Government... takes precedence of all other business until disposed of." Commonwealth of Australia, House of Representatives Practice, pg. 417, 1980 Ed.

⁷⁷ Art. V, Sec. 7(2) provides: Any such motion (of no confidence) shall be voted on a meeting of the Nitijela held not earlier than 5 days nor later than 10 days after the date of the giving the notice.

⁷⁸ Art. IV, Sec. 11(1) (b) provides: (I)Whenever, during any session of the Nitijela, notice is given of a motion of no confidence in the Cabinet, that session of the Nitijela shall not terminate and no recess shall be held before the expiration of 10 days after the date of the giving of the notice, unless that motion has been sooner voted upon.

⁷⁹ This interpretation is certainly reasonable and there has been no alternative explanation for the time limitation offered by the government.

⁸⁰ "We hold that CETA's requirement that the Secretary "shall" take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time." Pierce, 11 1842.

Babbitt, 94-35164 (9th Cir., June 29, 1995)⁸¹ ; Gottlieb v. Pena, 41 F.3s 730 (D.C. Cir. 1994)⁸²; National Cable v. Copyright Royalty, 724 F.2d 176, 189 n. 23 (1983)⁸³.

This court submits that the proper analysis is not to fall prey to the "mandatory-directory" dichotomy of strict statutory construction but rather to construe the Constitution according to neutral and common values which must be upheld by those charged with the responsibilities of government and to give effect to the apparent intent of the framers.

2. A "value" or "duty" based analysis: A constitutional mandate may not be avoided by unconstitutional means.

The Constitution should be construed so as to give effect to the intent of the framers and the people who adopted it. See generally, 16 C.J.S., Constitutional Law, Sec. 20.

In arriving at the intent and purpose of a Constitutional provision the construction should be broad, liberal, or equitable, rather than technical. Id.

In construing the Constitution, the court should make "value judgements" rather than apply strict, technical rules of statutory construction.

The very nature of constitutional interpretation calls more for the making of value judgements than for the application of specific rules, principles, conceptions, doctrines or standards. Zeller v. Donegal School District, 517 F. 2d 600 at 604 (3rd Cir. 1975) citing to Pound, Hierarchy of Sources & Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482-486 (1933).

A "value" which must be shared by all charged with the administration of government is that one faithfully perform his or her duties as set forth by the Constitution and rules designed to effectuate constitutional intent.⁸⁴

In this case, there has been a failure to discharge a mandatory duty created by the Constitution.

It is an established general rule that constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest. See, generally, 16 C.J.S., Constitutional Law, Sec. 52 (pg. 135 text).

⁸¹ "Although the statutory term "shall" suggests that the limits are mandatory, failure of an agency to act within a statutory time frame does not bar subsequent agency action absent a specific indication that Congress intended the time frame to serve as a bar."

There is nothing in the Constitution which indicates the framers intended the motion to lapse or be time barred if the Nitijela neglected its duties to vote within the specified time frame.

⁸² Proper remedy for a party aggrieved by a delay that violates a statutory deadline is to apply for a court order compelling agency action.

⁸³ Requirement in statute that tribunal "shall" render decision within one year does not make later decision void.

⁸⁴ Indeed, every member of the Nitijela takes an oath that he or she will "accept the responsibilities and obligations of that office" and to "discharge those responsibilities and obligations." Rules of Procedure of the Nitijela, Sec. 19(1). One of the responsibilities and obligations of a Nitijela member is to attend sittings of the Nitijela unless excused. Sec. 21 (1) provides: "... a member must not be absent from the Nitijela unless excused by the Speaker....". The obvious purpose of Sec. 21 is to ensure attendance so that a quorum is obtained and the necessary business of government attended to. It would, therefore, seem that a walk out, strike or boycott to prevent a quorum is a breach of one's oath to "discharge those responsibilities and obligations" of office.

The use of the word "shall", as used in a constitutional provision, is usually imperative or mandatory. Id. at pg. 137.

The use of the mandatory word "shall" creates an affirmative duty to act. A failure to perform a required act is a violation of the intent of the Constitutional provision and is not permissible.

"Mandatory Constitutional provisions are binding on all departments of government and disobedience or evasion of a constitutional mandate is not permissible." Id. at pg. 138.

The work 'shall' is mandatory and the word "may" is permissive... The declaration that "shall" is mandatory merely states a required act and means that the particular provision does not permit of alternative or permissive procedures. The party who fails to perform an act which the rules declare "shall" be performed is acting in violation of the rules... [emphasis added], In Re: Lamonica H., 220 Cal. App. 3d 634, 643 (Ca. 1990).⁸⁵

"Constitutional provisions that designate in express terms the time or manner of doing particular acts and that are silent as to performance in any other manner are mandatory and must be followed." 16 C.J.S., Constitutional Law, Sec. 52, at 138.

Art. V, Sec. 7(2) by use of the word "shall" creates a mandatory duty to vote on a motion of no confidence within the specified 10 day period. This Constitutional provision does not permit of alternative or permissive procedures; it is silent as to any manner of compliance other than by conducting the vote.

The Constitution does not provide that a motion for vote of no confidence can be overcome or dealt with by a "walkout, strike, or boycott." The government points the court to no authority which authorizes a "strike", walkout or boycott" as a constitutionally or legally permissible means of addressing and/or disposing of the motion for vote of no confidence.

It is clear to this court that the framers of the Constitution intended the motion to be voted upon within the given time frame. It is also clear, however, that the framers did not contemplate an orchestrated and intentional failure to comply with this constitutional mandate by a "strike, walkout, or boycott."

It is clear that the framers did not intend the motion to "lapse"; the only provision for a 'lapse' is after the motion has been voted on and the Nitijela has been unsuccessful in electing a new president. Art. V, Sec. 7(4). If the framers intended the motion to "lapse", they could have made it clear (as they did in Sec. 7(4) that the motion would "lapse" if not voted on within the 10 day period.

It is undisputed that a "walkout, strike or boycott" was orchestrated with the purpose of preventing a vote within the 10 day time limit. It is also undisputed that those participating in the "walkout", strike or boycott" were not excused from attendance at scheduled meetings of the Nitijela. In order to evade or frustrate the mandatory constitutional duty to hold the vote within 10 days, the members participating in the boycott had to violate their duty to attend meetings unless excused by the Speaker (RPN 21 (1)) and violate their oath of office (RPN 19 (1)). The "value judgement" the court must make is whether such tactics have a proper place in a constitutional form of government.

⁸⁵ Although this case dealt with the interpretation of a "Rule" with administrative purposes, the underlying principles (1) that the creation of a mandatory duty does not permit of alternative procedures and (2) the failure to perform the duty is a violation of the rule should be the same when applied in a Constitutional context.

It is generally held that a constitution will not be so construed as to permit an evasion of it. See generally, 16 Am. Jur. 2d, Constitutional Law, Sec. 89 (pg. 415 text, 1979 ed.).

The court has already found that the framers of the Constitution intended the vote on the motion to occur within 10 days of the date of giving notice. That constitutional intent has been evaded or frustrated by the "strike, walkout or boycott." The walkout, strike or boycott" is not authorised by the Constitution and, in that sense, the "walkout, strike or boycott" is unconstitutional.⁸⁶

To hold that the motion has "lapsed" or is "rendered moot and ineffective" because the vote did not occur within the 10 days would permit the evasion of a mandatory Constitutional duty by unconstitutional means. Such a holding would send the message that public officials can ignore constitutional imperatives, as well as the obligations, duties and responsibilities of their office. The framers of the Constitution surely did not intend such a result.

The court holds the motion for vote of no confidence did not lapse under the circumstances presented in this case and, in order to effectuate the performance of a mandatory duty; the court further holds that the Nitijela session does not terminate until the vote is had. The proper remedy in this particular "crisis" is to hold that the vote should occur on the first day a quorum is obtained.

B. The Court Should Abstain From Rendering An Opinion Regarding How The Nitijela Should Conduct The Vote.

The court finds that the issue of whether the vote should be by roll call or by secret ballot, whether a ruling by the Speaker declaring a secret ballot pursuant to RPN Sec. 26 violates Art. IV, Sec. 15(5) of the Constitution, and whether the Speaker's ruling is appealable to the full Nitijela pursuant to RPN Sec. 113, are concerned with the internal operations of the Nitijela, are, therefore, political questions, and the court abstains under the doctrine of separation of powers.

An issue is nonjusticiable under the separation of powers or political question doctrine if "prominent on the surface" of that issue one finds a textually demonstrable constitutional commitment of the issue to a coordinate political department; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due co-ordinate branches of government. See, generally, Baker v. Carr, 369 U.S. 186 (1962).

The Rulemaking Clause of the Constitution (Art. IV, Sec. (1)) which provides that the Nitijela may make rules for the regulation and conduct of its business is a "textually demonstrable constitutional commitment" to the Nitijela of the power to make and interpret its own rules of procedure. The court abstains from interpreting Nitijela Rules.

Furthermore, the intrusion by the court into the political question of whether the vote should be by secret ballot or by roll call would be a lack of respect due the Nitijela. The court should steer clear of telling the Nitijela how to conduct its internal proceedings.

IV. CONCLUSION

For the reason set forth above, the court answers each of the parties' questions posed in their respective complaints by declaring and adjudging:

⁸⁶ "Unconstitutional" is defined as "that which is contrary to or in conflict with a constitution." Blacks Law Dictionary, 6th Ed. The boycott and intentional evasion of the mandatory duty to vote within 10 days is contrary to the spirit and intent of the Constitution.

1. The motion of no confidence has not "lapsed" and has not been "rendered moot or ineffective" because it was not voted on within the 10 day time frame specified by Art. V, Sec. 7(2);
2. The "boycott", "walkout" or "strike" by certain members of the Nitijela of the meetings called for the purpose of voting on the motion of no confidence is in violation of the directives of Art. V, Sec. 7(2) of the Constitution (it is also a violation of the duty to attend meetings of the Nitijela unless excused by the Speaker and is, therefore, a violation of the oath of office);
3. The vote on the motion of no confidence should occur on the first day on which a quorum is obtained;
4. Under the circumstances presented by this case, the Nitijela does not terminate in view of Art. IV, Sec. 11(1)(b) until such time that the motion of no confidence is voted upon;
5. The court declines to answer the question whether the speaker's ruling is appealable to the full Nitijela pursuant to Section 113 of the Rules of Procedure of the Nitijela on the grounds that it is a "political question" and the concept of separation of powers requires abstention;
6. The issue of whether the vote shall be by secret ballot or roll call is a matter to be decided pursuant to the Rules of Procedure of the Nitijela and the court declines to answer based on the principal of separation of powers.

Dated this 29th day of September, 1998.

FILED

Sep 29, 1998

.....
ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS.

signed:_____

Daniel Cadra
Chief Justice, High Court

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In The Matter of the 19th Nitijela
Constitutional Regular Session

S.Ct. CIVIL NO. 1998-004
(High Ct. Civil No.1998-215)
(High Ct. Civil No. 1998-214)

By

Litokwa Tomeing in his official
Capacity as Senator of the Nitijela,

Petitioner

And

In the Matter of the 19th Nitijela
Constitutional Regular Session

By
Attorney General , Ex Parte
Petitioner.

APPEAL FROM THE HIGH COURT

SEPTEMBER 8, 1999

FIELDS, C.J.
GOODWIN, A.J. pro tem⁸⁷ and KING, A.J. pro tem⁸⁸

SUMMARY:

The Supreme Court affirmed the High Court's ruling that Members of the Nitijela are constitutional required to vote on motion of no-confidence and the attempts to boycott such votes are illegal.

DIGEST:

1. COURTS - Jurisdiction - Nitijela Proceeding Non-justiciable: Procedural matters, as distinguished from legislative acts, are committed to the discretion of the Nitijela are not subject to judicial review.
2. CONSTITUTION - Construction - rules of Interpretation: In the absence of some textual or logical support, the Supreme Court will not read into the Constitution a provision not contained therein.
3. CONSTITUTIONAL LAW - Nitijela - Vote of No-Confidence: Members of the Nitijela are under an obligation to vote on a motion of no confidence once noticed. The language of Article 1,§2(2) that requires the vote to be held not earlier than 5 days not later than 10 days is not permissive and suggests that prompt action by the Nitijela is not only recommended but required.
4. COURTS - Jurisdiction - Nitijela Proceeding Non-justiciable: Internal matters of voting and procedure (i.e. voting by secret ballot or roll call) appear to be easily resolvable by the Nitijela according to its own procedural rules, without the assistance of the Court, and indeed, considerations of separation of powers leaves the matter exclusively in the hands of the Nitijela.

OPINION OF THE COURT BY GOODWIN, A.J.

Petitioners appeal the judgement of the High Court (Chief Justice Cadra, presiding) which essentially denied declaratory relief to the petitioners in a controversy among Senators after six members of the Nitijela brought a motion of no confidence against the President. Before a vote was taken, a number of Senators walked out of the session, at the direction of the President, and refused to return. This

⁸⁷ Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation by the Cabinet.

⁸⁸ Honorable Samuel P King, Senior Judge, United States District Court for the District of Hawaii, sitting by designation by the Cabinet.

resulted in less than a quorum remaining. In the absence of a quorum, the ten day voting period, specified by the Constitution for a vote on such a motion expired.

The parties sought relief by way of declaratory judgement before the High Court, which accepted jurisdiction and entered judgement against petitioners on September 29, 1998. We have jurisdiction, and for the reasons which appear below, dismiss the appeal.

The Controversy

As noted, six members of the Nitijela, including Senator Tomeing, brought a motion of no confidence in the Cabinet, pursuant to Article V, § 7(1) of the Constitution. A contemporaneous motion demanding a secret ballot was filed. Members opposed to the no confidence motion demanded a roll call vote. The Speaker ruled that the vote would be by secret ballot and called a recess so that ballots could be distributed. No appeal was taken from this ruling. Instead of appealing the ruling of the Speaker, Senators loyal to the President walked out of the session and refused to return.

The Constitution provides that the Nitijela cannot transact without a majority of the senators being present Article IV, Sec. 15(8). The walkout of the Senators loyal to the President left less than a quorum and thus prevented the Nitijela from considering any business, including the motion of no confidence. The Constitution explicitly states that a motion of no confidence "shall be voted on at a meeting of the Nitijela held not earlier than 5 days nor later than 10 days after the date of the giving of the notice." Art V, Sec. 7 (2).

After the 10-day voting period had passed, the Senators loyal to the President claimed that the motion had "lapsed" and was therefore moot. The Senators who brought the motion disagreed, claiming that the motion was still pending and had to be voted upon by the Nitijela before any further business could be transacted.

The Complaint for declaratory judgement asked the High Court to decide whether the vote on the motion should be by roll call or by secret ballot, and whether the motion had "lapsed". The High Court declined to answer the question of the method of voting on the ground that it was an internal procedure question which the Nitijela should answer by following its own rules of procedure. The court answered the collateral question by holding that the motion had not "lapsed", but the Court did not dispose of the controversy.

While the parties do not agree on the characterisation of the issues we are asked to decide, the following questions are presented by the record:

- (1) Is there a judicial remedy for Nitijela's failure to act on the motion of no confidence within the 10-day time frame specified by the Constitution?
- (2) Did the motion lapse, or is it still pending?
- (3) Did the High Court correctly refuse to issue an advisory opinion on voting procedure?

Discussion

The Constitution of the Marshall Islands does not speak directly to the issues presented in this case, and the briefs of the parties and the opinion of the High Court reveal little relevant case law from the Marshall Islands. We begin with the proposition that we have a duty under The Constitution, Article VI, Section 1, to review a judgement of the High Court that declares unconstitutional an act of the Nitijela, or that enforces an act of the Nitijela over the protest of an appellant who asserts that the act is unconstitutional. Obviously, neither constitutional issue is presented in this appeal. The legal, as distinguished from constitutional, questions remaining for judicial review after the High Court

declined to rule on the internal housekeeping questions that were presented in the Complaint for Declaratory Judgement, are essentially legislative procedural questions rather than substantive questions arising under the constitution and laws of the Republic.

A. Constitutional Provisions

Article IV, Section 13 provides, in part:

- (1) The President may, by writing signed by him, dissolve the Nitijela if:
 - (a) a motion of no confidence in the Cabinet has twice been carried and has twice lapsed, and no other President has held office in the interval between the two votes of no confidence....

Article V, Section 7 provides:

- (1) At any meeting of the Nitijela, any 4 or more members...may give notice of their intention to make a motion of no confidence in the Cabinet
- (2) Any such motion shall be voted on at a meeting of the Nitijela held not earlier than 5 days nor later than 10 days after the date of the giving of the notice.
- (3) If the motion of no confidence is carried by a majority of the total membership of the Nitijela, the President shall be deemed to have tendered his resignation from office.
- (4) If the Nitijela has not elected a President at the expiration of 14 days after the date on which the President is so deemed to have tendered his resignation from office, the vote of no confidence and the tender of the President's resignation shall lapse.
- (5) In any case where a vote of no confidence has lapsed, notice of intention to make a motion of no confidence in the Cabinet may not again be given until the expiration of 90 days after the date on which that vote of no confidence lapsed, unless there has sooner been an appointment of the members of the Cabinet, following the election of a President.

B. Opinion of the High Court

The High Court began by asserting that "Constitutional interpretation requires the making of 'value judgements' and is not strictly governed by technical rules of statutory construction." {Opn p.1} The court also noted the "crucial nature of a motion of no confidence" in the parliamentary system of government. With this background, the court went on to consider whether the failure of the Nitijela to vote on the motion within the 10-day period provided in Article V, Sec. 7(2) caused the motion to lapse or to be rendered moot and ineffective, as the government argued. Considering the "plain and obvious meaning" of the Constitutional provisions, the court found that the government's position was unsupported because it "appears well settled that a failure to comply with a time limit does not relieve the duty to act and/or render subsequent action void where the statute or rule does not provide for consequences upon a failure to comply." [Opn. P.5].

The court went on to examine the constitutional provisions "so as to give effect to the intent of the framers and the people who adopted it" by using a "broad, liberal or equitable" analysis. [Opn.p.7]. The court determined that the legislature's duty to vote on the motion of no confidence within 10 days was mandatory by virtue of the use of the word "shall", ("Any such motion shall be voted on...", Art V, Sec. 7(2), and therefore determined that the legislature's evasion of its responsibility was contrary to the constitutional mandate. The court also observed that "[t]o hold that the motion has 'lapsed' or is 'rendered moot and ineffective' because the vote did not occur within the required 10 days would permit the evasion of a mandatory Constitutional duty by unconstitutional means... The framers of the Constitution surely did not intend such as result." [Opn.p.10].

The court then concluded that: "...the motion for vote of no confidence did not lapse under the circumstances presented in this case and, in order to effectuate the performance of a mandatory duty, the court further holds that the Nitijela session does not terminate until the vote is had. The proper remedy in this particular 'crisis' is to hold that the vote should occur on the first day a quorum is [obtained]." *Id.* The court went on to find that the other issues presented by the parties (i.e., whether the vote should have been conducted by secret ballot or by roll call, and whether the Speaker's determination was appealable to the full Nitijela) were political decisions committed to the discretion of the Nitijela by the Constitution, and were therefore inappropriate for judicial review under the doctrine of separation of powers. [Opn.p.11]. We agree.

C. Analysis

Appellants do not present any argument addressing directly the judgement of the High Court, but rather contend that the court should have addressed the two issues presented in the complaint (i.e. the constitutionality of the Speaker's ruling and whether the ruling was appealable under Nitijela procedural provisions).

[1] The Appellees ("the Senators") contend that the questions not addressed by the High Court are indeed political in nature and should be resolved internally by the Nitijela. Specifically, Article IV Sec 15(1) of the Constitution states that "the Nitijela may from time to time make rules for the regulation and orderly conduct of its proceedings and the despatch of its official business." Furthermore, Sec 16(3) provides that the "validity of any proceeding in the Nitijela...shall not be questioned in any court; but this shall not be taken to preclude judicial review of the validity of any Act or resolution of the Nitijela." The Senators and the High Court take this as a firm commitment of procedural matters, as distinguished from legislative acts, to the discretion of the Nitijela. We agree.

Although the Government contends that the motion of no confidence "lapses" after ten days, the word "lapse" appears to have a specific and narrow meaning when considered in context. In Article V, Sec 7(4), "lapse" refers to a situation in which a vote of no confidence is carried, but the Nitijela fails to elect a new President within 14 days. On its face, this provision seems designed to preserve the Presidency - one could easily imagine a situation in which the Nitijela ousts an incumbent President but its members cannot agree on the selection of a new President. In that event, the former President would resume his or her responsibilities, and the country would not be without a President for more than 14 days.

[2] The provisions concerning the timing of the vote seem to serve entirely different purpose. The High Court surmised that the five to ten day window set forth in Article V was designed to ensure that the vote on a motion of no confidence would be timely (not delayed more than ten days) but not so soon that the President would be surprised (less than five days). In contrast to 7(4), there is no mention of a "lapse" - it is simply assumed that the Nitijela will perform its duty to vote on the motion in a timely fashion. Also, there does not seem to be any reasonable purpose served by reading in a lapse provision. Indeed, providing for a lapse on the motion of no confidence would facilitate the obstruction to orderly process by allowing a minority of the Nitijela to cause a loss of a quorum and prevent the body from fulfilling its constitutional duty to vote. We believe it would be counter-productive to read in a "lapse" provision in the absence of some textual or logical support for such an interpretation. The High Court decided this question correctly.

[3] While we do not adopt the full text of the High Court's opinion, we agree that the members of the Nitijela are under an obligation to vote on the motion. The language of the provision is not permissive, and the limited time frame suggests that prompt action by the Nitijela is not only recommended but required. Therefore, those senators who obstructed the vote were behaving

unlawfully. See Article, Sec 2(2). However, the Constitution does not explicitly provide a remedy or penalty for legislative conduct. The result of this silence is to leave the matter with the Nitijela for the enforcement of its existing rules of procedure, or the amendment of them if they are deemed by the Nitijela to be incomplete or inadequate.

[4] As to the questions the High Court declined to address, these internal matters of voting and procedure appear to be easily resolved by the Nitijela according to its own procedural rules, without the assistance of the Court, and indeed, considerations of separation of powers leaves the matter exclusively in the hands of the Nitijela.

We therefore do not reach the question whether the ruling of the speaker pursuant to Section 26 of the Nitijela Rules of Procedures do not require that the no confidence vote be conducted by secret ballot. The general provision states that "[w]hen any question is put to the Nitijela, any member may call for a roll-call vote thereon, unless this Constitution requires that vote to be by secret ballot." Article IV, Sec 15(5). Accordingly, while the Speaker's actions may have been subject to an appeal by aggrieved senators, we need not express a judicial view of the matter. The procedural rules of the Nitijela provide that a vote may be had by secret ballot upon request by three or more Senators, unless a roll-call vote has been requested pursuant to Rule 27(1). Rule 27(1) does not require any particular form for the roll-call vote request. Moreover, the Constitution does not suggest that any particular remedy is required. Pursuant to Rule 113(2), the ruling by the Speaker (that the vote would be by secret ballot) was subject to appeal to the membership as it did not involve an interpretation of the Constitution.

Conclusion

The Nitijela's procedural rules govern the conduct of votes and allow for removal of a Speaker if a majority so votes. We find nothing in this record to suggest that the internal rules of the Nitijela are not adequate to provide for the orderly conduct of legislative business. Accordingly, the judgment of the High Court remains in effect. The appeal is dismissed for want of a Constitutional question.

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APPENDIX F: CONSULTANT

Dr Jon Fraenkel is a lecturer in the History/Politics Department at the University of the South Pacific, Suva, Fiji. He was previously employed at Birkbeck College, London, and at the University of Essex, Colchester, UK. Dr Fraenkel has over six years experience in the Pacific. He is The Economist's South Pacific correspondent, and appears regularly as a Pacific expert on the BBC, Radio Australia and Radio New Zealand. He is also a contributor to academic journals, such as Journal of Commonwealth and Comparative Politics, Australian Journal of Politics and History and Journal of Pacific History.