

FILED

MAR 13 2014

ASST. CLERK OF COURTS  
REPUBLIC OF MARSHALL ISLANDS

IN THE HIGH COURT  
OF THE  
REPUBLIC OF THE MARSHALL ISLANDS

IN RE: THE MATTER OF 35<sup>TH</sup> NITIJELA ) CIVIL ACTION NO. 2014-047  
CONSTITUTIONAL REGULAR )  
SESSION, INTERPRETATION OF )  
CONSTITUTION, )  
 ) JUDGMENT  
By )  
 )  
DONALD F. CAPELLE, in his capacity as )  
THE SPEAKER OF THE NITIJELA, )  
 )  
Petitioner. )  
\_\_\_\_\_ )

TO : Legislative Counsel Divine Waiti, counsel for petitioner  
Acting Attorney General Jack Jorbon, appearing as counsel for the President and  
Cabinet, respondents

This case revolves around the definition of “recess” for the purposes of applying the constitutional prohibition on holding a recess once a motion for no confidence has been introduced and before it has been resolved.

**I. BACKGROUND**

On March 10, 2014, a vote of no confidence was introduced in the Nitijela. The Speaker (petitioner in this case) ruled the Nitijela would reconvene the next day and not recess until the motion was disposed. The Speaker interpreted this to mean the Nitijela would convene, take roll call and then end the business for the day, returning the next day. Past practice, including the practice followed by the Speaker in November of 2013 in a motion of no confidence, was to recess for a period of days after the notice of the motion and then reconvene for consideration of the motion. Respondents, the President and Cabinet, objected to the ruling of the Speaker, and

the Speaker filed this Petition for Declaratory Relief, *ex parte*, on March 11, 2014, accompanied by a motion for expedited hearing.

After the filing of the petition, the court ordered the petitioner to serve a copy of the petition on the Office of the Attorney General, and set a status conference for the morning of March 12, 2014. At the status conference it was determined the proper parties were now in front of the court, with the Attorney General representing the respondents, the President and Cabinet. It was further agreed by the parties that of the issues presented in the petition, the constitutional question of the definition of recess was appropriate for court consideration, while other matters were more properly left to the Nitijela for resolution. Respondents waived written response, and hearing was set for late in the afternoon of March 12, 2014.

## **II. APPLICABLE LAW**

Article I, Section 3 of the Constitution:

### **Section 3. Interpretation and Application of this Constitution.**

(1) In interpreting and applying this Constitution, a court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Republic of the Marshall Islands, but shall not be bound thereby; and, in following any such decision, a court shall adapt it to the needs of the Republic, taking into account this Constitution as a whole and the circumstances in the Republic from time to time.

(2) In all cases, the provisions of this Constitution shall be construed to achieve the aims of fair and democratic government, in the light of reason and experience.

Article IV, Section 11(1)(b) of the Constitution:

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 sooner been voted upon.

Section 1(2) of the Rules of Procedure of the Nitijela:

The Nitijela is said to recess when, during a session, it ceases to sit, until later in the day, until the next day or until later in the session, or at the call of the Speaker, or otherwise.

### III. ANALYSIS

While respondents are in the position of challenging the Speaker's ruling to meet every day briefly to satisfy the "no recess" rule, both sides make compelling arguments that "recess," for the purposes of Article IV, Section 11(1)(b), should not be defined consistent with the definition in the Rules of Nitijela Procedure. Neither party believes that once the motion of no confidence has been noticed, the members of the Nitijela should be required to remain sitting in the Nitijela chamber with no break, with no recess, for ten days and nights or until the motion is voted upon. Such a result would be impractical and absurd. It goes far beyond the "great inconvenience" which was asserted by respondents in *In the Matter of the 30<sup>th</sup> Nitijela Constitutional Regular Session, Interpretation of Constitution*,<sup>1</sup> and serves no reasonable purpose. The Speaker has noted "these similar controversies has been raised over and over again and causing impasse to the smooth proceedings of the Nitijela."<sup>2</sup>

Nonetheless, the Constitution provides that once notice of the motion of no confidence has been given, "that session of the Nitijela shall not terminate and *no recess shall be held*" (emphasis added) until the motion has been voted upon or ten days have elapsed. Applying the Nitijela Rules definition of "recess," any break from sitting, even if only until later the same day, would be forbidden during this period. Under this definition, the past practice of recessing for a period of days to allow both sides to prepare to address the motion would run afoul of the

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<sup>1</sup>Civil Action No. 2009-088, p. 7, filed April 17, 2009.

<sup>2</sup>Affidavit in Support, by Donald F. Capelle, attached to Petition for Declaratory Relief.

constitutional prohibition. Even the procedure adopted by the Speaker, as challenged by respondents, of meeting every day for a brief period, requires a “recess,” as defined in the Nitijela Rules, to the following day.

The Constitution instructs: “In all cases, the provisions of this Constitution shall be construed to achieve the aims of fair and democratic government, in the light of reason and experience.”<sup>3</sup> It has been said that “a constitution, or a provision thereof, should receive a reasonable and practical interpretation in accord with common sense.”<sup>4</sup> Further, a court “will not construe a constitutional provision to arrive at a strained, impractical, or absurd result, and constitutional provisions should be interpreted so as to avoid absurd consequences and not produce public mischief.”<sup>5</sup>

The Constitution allows reference to decisions in other countries for guidance.<sup>6</sup> In the United States, for the purpose of “recess appointments,”<sup>7</sup> a distinction has been made between “**intra-session**” recesses (those that occur during a legislative session) and “**inter-session**” recesses (those that occur between legislative sessions.)<sup>8</sup> Recognizing this distinction for the

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<sup>3</sup>Article I, Section 3(2).

<sup>4</sup>16 C.J.S. Constitutional Law § 56

<sup>5</sup>Ibid.

<sup>6</sup>U.S. Constitution, Article I, Section 3(1).

<sup>7</sup> “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Constitution. Art. II, s 2, cl. 3.

<sup>8</sup>see, e.g. Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204 (1994); see also *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 497 (D.C. Cir. 2013) cert. granted, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (U.S. 2013)

purpose of defining “recess” in Section 11(1)(b) would remove the impracticality and absurdity that results from the application of the Nitijela Rules definition of “recess,” (which relates only to intra-session recess, as it explicitly refers to an action taken “during a session.”) If “recess,” for the purposes of Article IV, Section 11(1)(b), were defined as “inter-session” recess, i.e., that period *between* sessions, when the Nitijela is not sitting, a much more reasonable condition results, one consistent with the Constitutional directive that the provisions of the Constitution be construed “in the light of reason and experience.”

Support for this interpretation may be found in the language of Article IV, Section 11(1)(b) itself. Focusing on the structure of this provision, the condition that the Nitijela session not terminate is followed by the condition that no recess shall be held. These two conditions, read together, imply the second as a consequence of the first. That is, because the session must continue, there must necessarily be no *inter-session* recess. An inter-session recess can only occur between the end of one session and the start of the next. The two conditions relate to each other and support each other. They represent two sides of the same coin. The session may not end and an inter-session recess may not begin. The second condition (no inter-session recess) reinforces the first (no termination of session.) Reading “recess” as an “intra-session” recess (consistent with the Nitijela Rules definition) makes no sense and lacks the structural connection to the condition that the session may not terminate set out in the language of the constitution.

Defining “recess” as “inter-session recess” for the purposes of Article IV, Section 11(1)(b) is consistent with the constitutional goal to address the motion of no confidence in a timely manner. By prohibiting the termination of the session and prohibiting the holding of an inter-session recess, the constitutional goal of holding the vote within 5 to 10 days after the

notice of the motion of no confidence is strengthened. The intent of the constitutional drafters with this language is to avoid impediments to a prompt resolution of the motion of no confidence. Allowing termination of the session and entering an inter-session recess would endanger the constitution goal of holding the vote in a prompt and certain manner, by encouraging members to disperse and attend to personal matters. Allowing intra-session recess, as has been done in the past and as has been done by the Speaker in the present case, does not threaten the goal of timely resolution of the no confidence motion. Because of the importance of the no confidence motion in our system of government<sup>9</sup>, and the support this interpretation gives to the process, the interpretation of “recess” as “inter-session recess” for the purpose of Article IV, Section 11(1)(b) is consistent with the Constitutional directive to construe the provisions of the Constitution so as to “achieve the aims of fair and democratic government.” Of course, any intra-session recess taken following the notice of the motion of no confidence, may not be allowed to stall or hinder the constitutional mandate that the vote be taken no earlier than 5 and no later than 10 days after the day the motion is introduced.

Adopting this definition of recess addresses the concerns of both parties.

1. It is practical, it does not lead to the impractical result of mandatory 24/7 seating of the Nitijela for a period of up to 10 days.
2. It is consistent with past practice, where the Speaker would recess during the days leading up to the vote, but holding the vote within the constitutional time frame.

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<sup>9</sup>“ . . . a motion of no confidence is one of the most crucial motions to be considered by the Nitijela.” *In the Matter of the 19<sup>th</sup> Nitijela Constitutional Regular Session, High Court CA Nos. 1998-214 and 1998-215* (consolidated), Opinion and Declaratory Judgment, p. 3.

3. It is consistent with the Speaker's ruling in the present case to recess on a day to day basis to insure senators are present and to aid in computation of the calendar days.
4. It provides flexibility to allow proper preparation by all parties.

#### **IV. CONCLUSION**

While the courts will generally look to the plain language of the text in constitutional interpretation, the court will not construe such language to lead to an impractical or absurd result. Such is the case here. While the definition of "recess" in the Nitijela Rules is consistent with common usage and makes sense for the general operation of the Nitijela, it leads to impractical and absurd results if applied to Article IV, Section 11(1)(b).

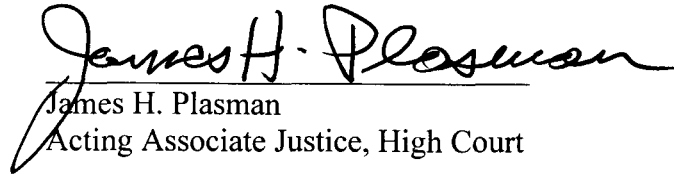
These results may be avoided, and the concerns of the parties addressed, by defining "recess" for the purpose of Article IV, Section 11(1)(b) as "inter-session recess," that is, the period of time between sessions when the Nitijela is not sitting. Such a definition is consistent with the constitutional goal of prompt and expeditious resolution of the no confidence motion. It is consistent with the structure of the constitutional provision at Article IV, Section 11(1)(b). It is consistent both with past practice and with the Speaker's ruling challenged by respondents.

The petition asked the court to determine whether the Nitijela should go on recess or not. In answer, the Nitijela may not go on inter-session recess and it may not go on intra-session recess that would threaten the constitutional mandate to vote on the motion of no confidence no earlier than 5 days and no later than 10 days after the motion is noticed.

To the extent that the respondents have appealed the Speaker's ruling, the appeal must fail, based upon the facts relied upon at hearing. The Speaker's ruling addresses only "intra-session" recess. As such, it is consistent with the prohibition of "inter-session" recess. It has not been shown to hinder or obstruct the constitutional mandate that the vote be taken no earlier than 5 and no later than 10 days after the day the motion is introduced.

As noted above, the other issues raised in the petition, as matters dealing with the internal operations of the Nitijela, are left to the Nitijela, as stipulated by the parties.

Date: March 13, 2014.

  
James H. Plasman  
Acting Associate Justice, High Court