IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

JOHN MARTIN NIEDENTHAL (a/k/a Jack Niedenthal), Plaintiff -v- ROBSON YASILO ALMEN, in his capacity as Chief Electoral Officer, Defendant	Civil Action Number 2014-263 **ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF JACK NIEDENTHAL**

Jack Niedenthal was born in the United States of America, but has been a citizen of the Republic of the Marshall Islands since 2000. He wants to stand for election to the Nitijela. The Government, through its Chief Electoral Officer (CEO), disqualified him from filing as a candidate. Niedenthal requests the court declare that he is qualified to stand as a candidate for election to the Nitijela. The parties agreed that there are no issues of material fact precluding the court from entering summary declaratory judgment.

The Undisputed Facts

Niedenthal is a 57 year old Marshallese citizen. He is also a registered voter, has never been certified to be insane, and has never been convicted of a felony. He resides in the Republic and possesses land rights.[1] The CEO disqualified him from filing for a candidate for a seat on the Nitijela because he does not have a mother or father of Marshallese descent with customary jowi.

The Question

Resolution of this dispute is controlled by the Constitution of the Republic of the Marshall Islands, and addresses a very important issue for the People of the Republic: what power does the Nitijela have to limit the constitutional rights of Marshallese citizens? More specifically, do the People have the right to decide who will represent

[1] The issue of which electoral district Neidenthal is entitled to vote in, and, if qualified to be a candidate, which district he would have the right to be a candidate in, is not before this court, and will not be further discussed.

them in the Nitijela, or does the Nitijela have the right to decide who may represent the People?

The specific question here is whether eligibility to be a candidate for election as a member of the Nitijela is governed by the Constitution, Article IV, § 4(1), under which Niedenthal is qualified, or by the Elections and Referenda Act 1980 (the Act), 2 MIRC Ch.1, §145(5) and §145(6), under which he is not.[2] To answer this question, the court must determine whether the requirements in § 145(6) were constitutionally enacted and, if so, whether they are constitutional.[3] As the court concludes that the Nitijela did not have the power to prescribe the eligibility qualifications in § 145(6) of the Act, it need not address whether the qualifications themselves are constitutional.

The Constitution

The Constitution of the Republic of the Marshall Islands is a very concise and readable document. It was created by the People of the Republic to provide the legal framework for governance of the Republic.[4] As opposed to many legal documents, it very clearly says what it means, and means what it says.[5] As with any legal document, all of its parts must be read and interpreted as part of the whole.[6] Where interpretation of its meaning may be questionable, the Constitution directs its readers to other sources to

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[2]Sections 145(5) and 145(6) of 2 MIRC are identical except for the words "or outside of the Republic," that are included in § 145(6). No evidence was presented to explain this variance, and the parties' arguments demonstrate that the distinction is not relevant for purposes of this ruling. Therefore, for the sake of ease, the court will refer to §145(6) only.

[3] Niedenthal argues that requirements in § 145 discriminate against him on the basis of his national origin and family status or descent in violation of his right to equal protection and freedom from discrimination guaranteed under Article II, § 12 of the Constitution. The Government argues § 145 does not discriminate, but merely makes a permissible distinction between naturalized citizens and "God-created" Marshallese who have "Marshallese blood," which distinction furthers a compelling interest of limiting those who are eligible to serve in the Nitijela to those who are "real" Marshallese.

[4] Constitution Preamble.

[5] Our Supreme Court has made the same observation concerning statutory construction. *Lekka v. Kabua, et al.*, 3 MILR 168, 172 (2013)("The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there").

[6] The court must read all provisions of the constitution together and harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 119 (2009). In construing a constitution, the court must lean in favor of a construction that will render every word operative, rather than one which will make some words idle or nugatory. *Id.* at 120.

assist in its interpretation.[7] But under no circumstances may the Constitution be interpreted to contain language or provisions that it does not contain.[8]

The Constitution is the supreme law of the Republic,[9] and no act of any of the legislative or executive branches of the government has the force of law unless made pursuant to the Constitution;[10] any law that is inconsistent with the Constitution is void;[11] and any action that is inconsistent with the Constitution is unlawful.[12]

Article II of the Constitution sets forth the Bill of Rights, which, as with the U.S. Bill of Rights,[13] guarantees individual liberties and limits the government's power. Section 14 of the Bill of Rights provides Marshallese citizens the right to participate in the electoral process, whether as a voter or as a candidate for office.[14]

Article IV of the Constitution provides that the legislative power of the Republic is vested in the Nitijela, which power is exercised by Act.[15]

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[7] Article I, § 3(1) mandates that the courts of the Marshall Islands, in interpreting and applying the Constitution, look to the decisions of courts of countries having constitutions similar in the relevant respect. *RMI v. Sakaio*, 1 MILR (Rev.) 182, 184 (1989). In the event that the constitutions of other countries are not sufficiently similar in relevant respect to provide guidance, the court may consider provisions of constitutions of states that are part of a federation that has adopted common law, if those constitutional provisions are similar in relevant respect to the Constitution of the Republic of the Marshall Islands. *Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 251 (1991). Under Article I, § 3(1) of the RMI Constitution, the Court may look to court decisions of the United States as well as generally accepted common law principles for guidance. *In the Matter of P.L. No. 1995-118*, 2 MILR 105, 109 (1997).

[8] The duty and function of a court is to construe, not to rewrite, a constitution. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 120 (2009). In the absence of some textual or logical support, the Supreme Court will not read into the Constitution a provision not contained therein. *In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 140 (1999). In examining constitutional provisions, the court's task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language. If the language of a provision is unambiguous, it must be given its literal meaning and there is neither the opportunity nor the responsibility to engage in creative construction. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 118 (2009).

[9] Article I, Section 1(1).

[10] Article II, Section 1(2).

[11] Article I, Section 2(1).

[12] Article I, Section 2(2).

[13] As opposed to the U.S. Bill of Rights, added to the U.S. Constitution by amendment, the RMI Bill of Rights was included in the original RMI Constitution. The RMI Bill of Rights is more expansive than the U.S. Bill of Rights.

[14] Section 14. Access to Judicial and Electoral Processes.

(1) [judicial process]

(2) Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Const and to election regulations which make it possible for all eligible persons to take part.

[15] Section 1. Legislative Power Vested in the Nitijela.

It is with these principles in mind that this court answers the question before it.

The Bill of Rights: Access to Judicial and Electoral Processes

The Attorney General argues that "by virtue of Article II, Section 14(2) of the Constitution, the Nitijela is allowed to add to the qualification requirements [set forth in Art. IV, § 4] by way of regulation/legislation." (Opposition, page 3) In order to determine whether the Nitijela has been granted this power, it is necessary to examine the language, which states:

> Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Constitution and to election regulations which make it possible for all eligible person to take part.

Const., Art. II, § 14(2). To assist in analyzing the pertinent language that relates to participating in the election process as a candidate, it is helpful to break down the sentence into its components and to analyze each.

1. "The Qualifications Prescribed in this Constitution"

The constitutional qualifications referenced in Article II §14(2) are found in the Constitution at Art. IV, § 3 and § 4. Every qualified voter who has attained the age of 21 years is qualified to be a candidate for election as a member of the Nitijela.[16] To be qualified as a voter, one must have attained the age of 18 years, not be certified to be insane, and, if a convicted felon, not be serving a sentence of imprisonment or on probation or parole. It is uncontested that Niedenthal meets these requirements.

The Government, however, argues that the Nitijela has power to modify these qualifications according to its inherent constitutional power to make laws, independent of

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(1) The legislative power of the Republic of the Marshall Islands shall be vested in the Nitijela and shall be exercised by Act.
(2) The power conferred by this Section shall include the power:
  (a) to repeal, revoke or amend any law in force in the Republic; and
  (b) to confer, by Act, the authority to promulgate rules, regulations, orders or other subordinate instruments pursuant to that Act and in furtherance of its stated purposes;
  (c) to make all other laws which it considers necessary and proper for carrying into execution any of its other powers, or any power vested by this Constitution in any other government agency or any public officer.

[16] Art. IV, § 4.

the remaining language in Art. II, § 14(2) concerning election regulations. But the Government points to no legal authority for its position that the Nitijela has any "inherent" constitutional power to make laws, or any power other than that power granted by the Constitution. To determine whether the Nitijela is granted power to modify the qualifications expressly provided for in Art IV, § 4, to which Art II, § 14(2) refers, the court must examine other provisions of the Constitution.

Article IV, § 1 provides that the legislative power of the Republic of the Marshall Islands is vested in the Nitijela. That power includes the power to repeal, revoke or amend any law; to confer, by Act, the authority to promulgate rules, regulations, orders or subordinate instruments to further stated purposes in such Acts; and to make laws that are necessary and proper for carrying into execution any of its other powers, including powers vested by the constitution in any other government agency or public officer.[17] Although invited to do so, the Attorney General was unable to point to any specific language from which the court might find that the Nitijela has power to make laws beyond that which is expressly set forth in Art. IV, §1. Furthermore, the Attorney General provided no authority, either in the form of language from the Constitution or legal precedent, for its claim that the Nitijela has inherent power to expand on its express constitutional grant of power. And the court finds none.

The Supreme Court has made it clear that the courts may not rewrite the Constitution. *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 120 (2009). As the plain language of Art. IV, § 1 is explicit and unambiguous, and the court can give literal meaning to the ordinary meaning of the language, this court may look no further than to the Constitution itself. *Id.*, at 118. The Constitution is silent as to the Nitijela's having power to restrict the candidacy qualifications set forth in the Constitution, and this court may not read that provision into the Constitution. *In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 140 (1999). As the express language of the Constitution grants the Nitijela no authority to add to the constitutional qualifications for candidacy in clear and unambiguous terms, the court must conclude that the "subject only to the

[17] Art. IV, § 1(2).

qualifications prescribed in this Constitution" language found in Art. II, § 14 (2), means just that, and not that the Nitijela has some "inherent" power to amend or modify those qualifications. See, *In the Matter of the Vacancy of the Mayoral Seat*, 3 MILR 115, 118 (2009).

2. *Election Regulations Which Make it Possible for All Eligible Persons to Take Part*

The Government argues that the constitutional language "subject only to . . . election regulations which make it possible for all eligible persons to take part" grants the Nitijela power to "add qualifications for candidates by regulation" (Opposition, page 4) and to further restrict access to the electoral process by enacting election regulations. In this vein, it urges the court to find that § 145(6) of the Elections and Referenda Act 1980 is this type of regulation, and as Niedenthal does not meet the § 145(6) qualifications, he is disqualified from standing as a candidate for the Nitijela. Niedenthal argues not that he meets the qualifications in § 145(6), but that § 145(6) does not disqualify him from candidacy.

The court must therefore determine whether the Art. II, § 14(2) language – placed in a section of the Constitution that grants personal rights and restricts governmental power – gives the Nitijela the power to enact election regulations that restrict the candidacy qualifications set forth in Article IV.[18]

Niedenthal suggests that the easier, and dispositive, question is: Does the Nitijela have the power to enact any regulations? If not, the Government's argument that it may further restrict constitutional qualifications by regulation fails. In support of this argument, Niedenthal claims that regulations are promulgated by the executive branch, not the legislative, whereby the Nitijela does not have power to enact regulations. The Attorney General argues that "the word 'regulations' means an official rule made by a

[18] The issue of whether any other entity might have power to enact this election regulation is not before the court.

Government or some other authority,"[19] and that the Elections and Referenda Act is therefore a regulation. (Opposition, page 2).

Article IV, § 1 expressly provides that the Nitijela's power "shall be exercised by Act." Article IV, §2 grants the Nitijela the power to make, repeal, revoke or amend laws, and to *confer*, by Act, *the authority to promulgate regulations*. It does not grant the Nitijela the power to promulgate regulations itself. However, the court need not determine whether the Nitijela has the power to issue a regulation, as it concludes that the Elections and Referenda Act is not a regulation, whether characterized as an "election regulation," under Art. II, § 14(2), or otherwise.[20]

The short title of 2 MIRC Ch. 1 is the Elections and Referenda Act 1980.[21] The Act provides, at § 198(1), that "The Cabinet may make regulations, not inconsistent with this Chapter, prescribing all matters that are required or permitted by this Chapter to be prescribed by regulations, or that are necessary or convenient to be so prescribed for carrying out or giving effect to this Chapter." And the Cabinet did, in fact, make such regulations: the Elections and Referenda Regulations 1993, promulgated under the authority of the Elections and Referenda Act 1980, 2 MIRC, Ch. 1 as amended.[22]

The court inquired of the Attorney General why, if the Elections and Referenda Act were a regulation, it did not comply with the Administrative Procedure Act. The Attorney General merely responded that compliance was not required. To the contrary, all regulations are subject to the Administrative Procedure Act (APA), 6 MIRC Ch.1,

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[19] The Attorney General cites the Oxford Advance Learners Dictionary, 6th Edition, 2001, for this definition.

[20] As the Attorney General does not argue that the Elections and Referenda Act is an Act, and as the court concludes that the Elections and Referenda Act is not a regulation, it is not necessary to address whether the Elections and Referenda Act makes it possible for all eligible persons to take part in the electoral process, as opposed to making it impossible for certain otherwise eligible persons to take part in that process.

[21] 2 MIRC § 101.

[22] Although the language in the Regulations indicates they were promulgated under the authority of Section 116 of the Elections and Referenda Act 1980, as amended by P.L. 1991-113 and P.L. 1992-9, Section 116 is titled "Functions of Boards of Elections," and does not address the Cabinet's authority to promulgate regulations. As stated above, that is specifically provided for in § 198 of the Act. The court also notes that the Elections and Referenda Regulations do not address candidacy qualifications.

unless expressly exempted from those procedures.[23] Acts are not subject to the APA. It is uncontested that the Elections and Referenda Act did not comply with the APA, but not for the reason stated by the Government.

The court finds absolutely no support for the Government's position that the Elections and Referenda Act is a regulation, and overwhelming support for the conclusion that it is, instead, an Act. And this is not, as urged by the Government, just a matter of semantics. The laws of the Republic make a clear distinction between Acts and regulations. Different entities have the power to promulgate these different instruments, each is subject to different procedural requirements, and each has different substantive effect. The reason the Elections and Referenda did not comply with the APA is that it is an Act, not subject to compliance with the APA, and not a regulation.

The Government's argument that the Elections and Referenda Act, including § 145 of that Act, is a constitutionally authorized regulation of candidacy qualifications, fails.

The Court May Not Look Beyond the Constitution

In its remaining arguments, the Attorney General urges the court infer the Nitijela's power to restrict candidacy qualifications. The court must decline this invitation, as it restricted from resorting to this type of legal analysis. The mandate from the Supreme Court is unequivocal: if the constitutional language is clear, "judicial inquiry must cease." *Lekka v. Kabua, et al.*, 3 MILR 168, 172 (2013)(addressing statutory interpretation), quoting *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012). As stated above, the language of the Constitution is clear and unambiguous. Every person has the right to participate in the electoral process as a candidate for office, subject only to (1) the qualifications prescribed in the Constitution and (2) election regulations that make it possible for all eligible persons to take part. The qualifications prescribed in the Constitution are equally clear: a citizen of the Republic who is at least 21 years of age, not certified to be insane, and not serving any type of sentence for a felony conviction.

[23] 43 MIRC § 413 addresses the Cabinet's authority to make regulations concerning citizenship by registration and naturalization, and expressly exempts those regulations from compliance with the Administrative Procedure Act. No such exemption is included in the similar provision of the Elections and Referenda Act, § 198.

And 2 MIRC § 145, which the Government claims disqualifies Niedenthal's candidacy, is not a regulation. [24] Judicial inquiry must cease here.

Furthermore, the generally recognized rule is that where a constitution lays down specific eligibility requirements for a particular constitutional office, as is the case here, that constitutional specification is exclusive, and the legislature, except where expressly authorized to do so, has no power to require additional or different qualifications for that office. 34 ALR 2d 155, §6.[25] This rule supports the Supreme Court's mandate that the court look no further than to the language of the Constitution. And this rule and the Supreme Court mandate support rejecting the Government's argument that a Marshallese citizen's right to hold public office is ultimately granted by the legislative branch. To the contrary, a Marshallese citizen's right to hold office was granted by People of the Marshallese in their Constitution.

The Framers of the Constitution

The Framers of the Constitution of the Republic of the Marshall Islands knew how to grant the Nitijela specific power to legislate, and how to authorize the Nitijela to limit or expand on qualifications addressed in the Constitution, and they did so in many

[24] As discussed above, the court does not need to address whether a regulation with the language contained in 2 MIRC § 145(6) is a regulation that makes it possible for Niedenthal, who is otherwise eligible to stand for election, to take part.

[25] *See, U.S. Term Limits v. Thornton*, 514 U.S. 779, 827 (1995)(in light of the basic principles of democracy underlying the U.S. Constitution, it was the Framers' intent that neither Congress nor the individual States possess the power to supplement the exclusive qualifications set forth in the text of the U.S. Constitution); *People v. McCormick*, 103 N.E. 1053, 1057 (Ill. 1913)("if the Legislature possesses the power to vary the constitutional qualifications for office by adding new requirements or imposing additional limitations, then eligibility to office and freedom of elections depend, not upon constitutional guaranties, but upon legislative forbearance. If the Legislature may alter the constitutional requirements, its power is unlimited, and only such persons may be elected to office as the Legislature may permit. In our judgment, when the Constitution undertakes to prescribe qualifications for office, its declaration is conclusive of the whole matter, whether in affirmative or in negative form. Eligibility to office belongs to all persons. In our Constitution no other form of stating eligibility to office is found than the declaration that no person shall be eligible who does not possess certain qualifications. The Constitution of the United States is in the same form in this particular, and so are the constitutions of other states. The expression of the disabilities specified excludes others. The declaration in the Constitution that certain persons are not eligible to office implies that all other persons are eligible"); *Gerberding v. Munro*, 949 P.2d 1366, 1375 (Wash. 1998)(the general rule, repeatedly expressed in cases across the United States, is that "where the constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive" and neither the Legislature, nor the people acting in their legislative capacity by means of the initiative process, may amend or supplement the constitutional criteria in any way).

places.[26] The Framers also anticipated that the People may, from time to time, wish to make changes to the Constitution, and they set forth the Constitutional amendment process for doing so.[27] They could as easily have required a candidate for election to the Nitijela to have a parent of Marshallese descent with customary jowi, and included this in the qualifications set forth in Art. IV, § 4 or elsewhere. But they did not.[28]

Conclusion

The Government argues that 2 MIRC § 145(6) does not violate the Constitution, because "to violate is to break, to disregard, to infringe, and no law was broken, disregarded or infringed." The court concludes otherwise. Section 145 does not just disregard a law, it blatantly disregards the supreme law of the land, and in doing so infringes on the constitutional rights of the People.[29]

The citizens of the Republic of the Marshall Islands reserved to themselves the right to choose who will represent them in the Nitijela from among their fellow citizens who are qualified voters, at least 21 years of age, have not been certified to be insane, and are not serving any type of sentence for a felony conviction.[30] They were given that power in their Constitution, and those who they elect to the Nitijela do not have the power to take that from them.

2 MIRC § 145(6) was enacted in violation of the Constitution, and therefore does not have the force of law and is void.[31]

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[26] *E.g.*, Art. XI §§ 2 & 3: to declare, by Act, law regarding citizenship by registration, including the power to disqualify specific class of persons who would otherwise be eligible for citizenship by registration under the constitution; Art X, § 2: to declare, by Act, customary law; Art VI, §1(4): to prescribe, by Act, qualifications for judges, consistent with qualifications provided in the Constitution; Art IV, § 2(3): to amend the number of members of the Nitijela, or electoral districts or their geographic boundaries, or the number of members to be elected form any electoral district.

[27] Art. XII, §1

[28] The court declines to address the Government's argument, unsupported by fact, that the Framers did not act for the People of the Republic in drafting the Constitution, but instead acted only at the behest of ex-patriots.

[29] The People have the power to attempt to limit the qualifications of citizens who may stand for election to the Nitijela to those who have a mother or father by Marshallese descent with customary jowi, and they may amend the Constitution to reflect that limitation. The constitutionality of such a restriction is a question that must be left for another day.

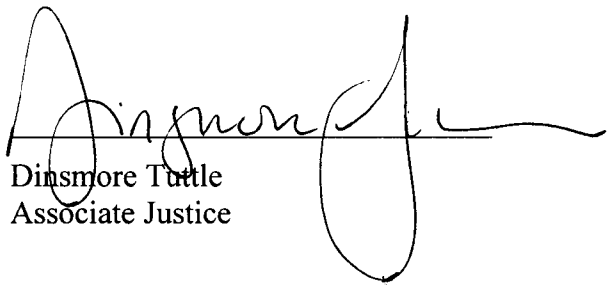
[30] As stated above, at note 1, the issue of which electoral district(s) Neidenthal is entitled to vote and be a candidate in is not before the court, and not addressed in this order.

[31] Const., Art. 1, § 1(2) and § 2(1).

Order

Jack Niedenthal was, at the time he filed his nomination paper, qualified to be a candidate for election as a member of the Nitijela.

Dated: 25 February 2015



Dinsmore Tuttle
Associate Justice