

ANJUA LOEAK, Petitioner
v.
THE NITIJELA, Respondent
Civil Action No. 7-79
Trial Division of the High Court
Marshall Islands District
March 9, 1979

Order resulting from noncompliance with Writ of Mandamus directing Nitijela to seat a duly elected representative. Trial Division of the High Court, Hefner, Associate Justice, held that charter of the Nitijela gave it the right to determine qualifications of its members, but not the arbitrary right to exclude a member his rightful seat in the legislature on political grounds, and therefore noncompliance with Writ of Mandamus by Nitijela terminated its existence as a duly constituted legislative body, and all acts and business conducted by the Nitijela were declared null and void, until the duly elected representative was seated.

1. Legislature—Nitijela—Determination of Membership In

Article of the Charter of the Nitijela which gives that legislative body the right to determine the qualifications of its members does not give the Nitijela the arbitrary and capricious right to exclude those minority members who do not agree with the majority. (Charter of the Nitijela, Article III, Section 3)

2. Legislature—Nitijela—Determination of Membership In

Once the legislature goes beyond Charter provisions which prescribe qualifications, it does not have the authority or power to exclude a duly elected member. (Charter of the Nitijela, Article III, Section 3)

3. Legislature—Nitijela—Determination of Membership In

When Nitijela, after being advised of the judicial determination of status of petitioner as duly elected representative, and after being served with a Writ of Mandamus, refused to comply with Writ of Mandamus and did not allow petitioner to be sworn in as a duly elected representative, legal existence of the Nitijela terminated and all further purported actions it took were null and void and of no effect.

HEFNER, Associate Justice

On February 15, 1979, this Court issued a Writ of Mandamus which directed the Nitijela, the legislative body for the Marshall Islands, to seat *Iroi j lablab* Anjua Loeak at its session on February 15, 1979.

A few days thereafter, certain affidavits were filed by plaintiff's counsel which indicated that the Nitijela did not comply with the directions indicated in the Writ of Mandamus.

A hearing was held on February 22, 1979, to ascertain what occurred in the Nitijela on the 15th of February. The plaintiff produced various witnesses. The defendant submitted to the Court the journal of the proceedings of the Nitijela for the 15th.

Several facts are clear and not disputed. The petitioner, Anjua Loeak, presented himself to the Nitijela on February 15, 1979, to be sworn in. Attempts by a small minority of the members of the Nitijela to have the petitioner sworn in were completely unsuccessful. Even the request to take the matter up was ignored by the Speaker and the majority of the members present.

The bailiff for the Court testified that he served each member of the Nitijela (except one member who was absent) with a copy of the Writ of Mandamus before the session began on February 15, 1979.

Thus, there is no dispute that the members of the Nitijela attending the session of February 15, 1979, knew of the Writ of Mandamus and effectively refused to seat Anjua Loeak.

At the February 22, 1979, hearing, counsel for the Nitijela made the position of the Nitijela clear. It is asserted that pursuant to Article III, Section 3, of the Charter of the Nitijela it has sole and exclusive authority to determine the qualifications of its members and once it refuses to seat an elected member, no Court or law supersedes that determination.¹ It is further asserted that the Nitijela need not

¹ Article III, Section 3, reads:

"Section 3. *Removal of Members.* The Nitijela alone shall determine the qualifications of its members. The Nitijela may by an affirmative vote of its members expel a member for cause."

have any basis whatsoever for its refusal to seat an elected member.

A review of the prior proceedings is enlightening.

The core of the instant problem began in the resolution of the case of *Loeak v. Loeak*, Civil Action No. 53-77. Anjua Loeak was duly elected from District No. 4 in the general election held in November of 1976. His credentials were submitted to the Nitijela in early 1977, at the first session of the Legislature.²

However, another claimant to the position of *Iroi j lablab* for the islands included in District No. 4 (Melon Loeak) presented himself to the Nitijela, and though Melon Loeak had no election credentials or semblance of authority to sit in the Nitijela, the Credentials Committee of the Nitijela refused to certify Anjua Loeak for membership.

Anjua Loeak proceeded to file Civil Action 53-77 in September of 1977. The initial defendant was the Credentials Committee, but after a pre-trial hearing, the Credentials Committee was dismissed as a defendant.³ By a First Amended Complaint, Melon Loeak and the Nitijela were added as defendants.

On May 6, 1978, a hearing was held on the motion of the Nitijela to be dismissed from the action. From a prior hearing held by Associate Justice Brown, on December 9, 1977, a letter signed by the counsel for the Nitijela was referred to at the May 6, 1978, hearing. A copy of that letter is appended as App. A, and is self-explanatory. No question of genuineness of that letter has been raised.

The issue was further presented squarely to counsel for the Nitijela by the Court on May 6, 1978, and a partial

² Article III, Section 2 of the Charter provides:

“Section 2. *Certification of Members.* Each Legislator shall present credentials in the form of a statement from the District Administrator certifying his election.”

³ The Credentials Committee of the Nitijela is only a temporary committee which is formed and acts only when needed. By the time of the hearings in 1978, the committee had been disbanded.

transcript of that hearing is attached as App. B. The transcript speaks for itself.

After the hearing, the Court proceeded to dismiss the Nitijela as a defendant in Civil Action 53-77. The dismissal was granted on the basis that all that need be done is to have a judicial determination of who the *Iroi j lablab* was and that this was an issue only between Anjua Loeak and Melon Loeak. The case proceeded to trial and on June 15, 1978, judgment was entered declaring Anjua Loeak to be the *Iroi j lablab*.

On February 9, 1979, the current Credentials Committee of the Nitijela reported to the Speaker that Anjua Loeak should be seated. However, since no action was taken by the Speaker or the Nitijela, the petitioner applied for the Writ of Mandamus, which the Court issued on February 15, 1979, directing the Nitijela to seat Anjua Loeak as the first order of business.

As noted above, the Nitijela has now taken a completely contrary position than that professed in the earlier hearings. That it had little intention of doing what it said it would do in 1978 is now clear. That it was only a disinterested party waiting for a judicial determination of the petitioner's status is a fallacy.⁴

After piercing all the veils shrouding the Nitijela, the conclusion is inescapable. The Nitijela has intentionally

⁴ It is not lost on the Court that after the Nitijela was dismissed from Civil Action 53-77, it continued to attempt to remain in the action. Counsel for the Nitijela, on the day of trial, moved to appear as *amicus curiae* but subsequently withdrew his motion. Yet, at the start of the trial, the Nitijela's counsel was sitting at counsel table for Melon Loeak and in fact began entering objections on behalf of Melon Loeak. (P. 3, Tr. Civil Action 53-77.) The court rejected any further attempt by the Nitijela to reinsert itself in the lawsuit.

In addition to the above, counsel for Melon Loeak, Hemos Jack, was at that time an employee of the Nitijela.

On one occasion during the trial, the Court had to admonish counsel for the Nitijela from signaling Mr. Jack and assisting him.

On May 9, 1978, counsel for the Nitijela once more attempted to enter the lawsuit by filing a "Petition to Present Oral Argument as *Amicus Curiae*." This last attempt was also denied by the Court.

and blatantly refused to seat Anjua Loeak without any legal or justifiable reason.

It is further concluded that the Nitijela has denied Anjua Loeak his rightful seat in the legislature on solely political grounds.⁵

In short, the majority or controlling members of the Nitijela have exercised discrimination of the worst kind in the context of a democratic system. It has effectively silenced a minority voice and, of more importance, has effectively disenfranchised the hundreds if not thousands of voters who chose Anjua Loeak to represent them.

The sole excuse or reason given for the action of the Nitijela is its reliance upon the one sentence in Article III, Section 3, to wit: "The Nitijela alone shall determine the qualification of its members."

There is no further pretense whatsoever that Anjua Loeak has not met the qualifications specified in Article II, Section 5.⁶

The only response given by the Speaker and one other member of the Nitijela, Amata Kabua, is that the Courts can't tell the legislature what to do.

This, of course, shows how far the Nitijela has misconceived its role in the three-branch government system which has been in effect in the Marshall Islands for many years.

It also demonstrates the attempted revocation of an established doctrine of a democratic system. That system is a government of laws, not of men.

[1] What the controlling members of the Nitijela propose to do is to have the arbitrary and capricious right to exclude those minority members who do not agree with

⁵ After the majority of the Nitijela refused to even consider sitting Anjua Loeak, the minority members who attempted to have the matter brought on the floor of the legislature walked out of the session of the Nitijela.

⁶ This section specifies citizenship, residence, election, age and absence of criminal record requirements.

the majority. Article III, Section 3, does not, by any stretch of the imagination, give the majority that right.

To hold otherwise grants the power to a small majority so that a democratic system of government is abolished and an oligarchy is established.

The only basis for the position of the Nitijela in this regard is the Department of Interior Secretarial Order 3027, effective October 1, 1978. Counsel for the Nitijela argues that this Order gave complete legislative control to the Nitijela and justifies the action of the Nitijela.

A reading of the Secretarial Order does not and cannot lead to the conclusion that the Secretary intended to establish an oligarchy with the controlling members of the Nitijela.

Nor does the Secretarial Order set aside or extinguish the bill of rights of the Trust Territory. Nor does the Order eliminate the basic concept of a three-branch government with its checks and balances.

The action of the Nitijela has violated the basic provisions for due process and equal protection. 1 TTC §§ 4 and 7. The Nitijela has denied to a large number of residents and voters of the Marshall Islands a voice in the legislature.

If the Nitijela argues, as it seems to, that Article III, Section 3, of the Charter is a law above all else, it runs afoul of 1 TTC § 1, which guarantees freedom of speech and assembly.

As pointed out in the Writ of Mandamus, this is a unique case. The only similar type of proceeding counsel have referred to is the case of *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944 (1969).

In the *Powell* case, the Supreme Court brushed aside the assertion that the legislative body, the U.S. Congress, is immune from all judicial review of legislative acts. The Court went to the heart of the issue which was whether the Congress had to seat Congressman Powell who had been

duly elected to the Congress. The Supreme Court held that the Courts had jurisdiction over the subject matter of the action to determine the propriety of a member-elect's exclusion from his seat in the House of Representatives (at 89 S. Ct. 1957). The Court went on to determine that the House of Representatives did not have the authority to exclude Congressman Powell on grounds other than those expressed in the U.S. Constitution. Apparently in the interim, the 91st Congress had sworn in Powell, and he was seated. Therefore, the confrontation between the judicial branch and legislative branch, which has occurred in this case, did not occur in the *Powell* case.

The close analogy to the *Powell* case and that of Anjua Loeak is apparent, except that the basis for the action of the Nitijela in this case is of much less substance—if any does exist. In *Powell*, the reasons for the Congress's failure to seat the member-elect was his involvement in a civil suit (in which he had been held in contempt) and “matters of alleged official misconduct”

As shown above, the Nitijela has refused to seat Anjua Loeak for no other reasons than he is politically unacceptable to the majority.

[2] The message in *Powell* is clear. Once the legislature goes beyond Constitutional (Charter) provisions which prescribe qualifications, it does not have the authority or power to exclude a duly elected member. Such is the case here.

It must be noted that Article I, Section 5(1) of the U.S. Constitution grants to each House “unqualified” authority to judge the qualifications of its members.⁷ The provision in the Charter relied upon by the Nitijela is prefaced “REMOVAL OF MEMBERS” and some question arises as to

⁷ Article I, Section 5(1), in part states:

“Each House shall be the Judge of the Election, Returns and Qualifications of its own Members”

whether the Nitijela even has the authority it professes it has. Since it has been determined that the Nitijela has no authority to do what it did whatever reading is given to Article III, Section 3, the full intent of the section need not be gone into here. Suffice to say, that with unequivocal wording in the U.S. Constitution the Supreme Court was not restrained from ruling as it did.

It is also important to note that the title of *Iroi* is not a qualification under Article II, Section 5. The status of the petitioner, Anjua Loeak, is important only in reference to Article II, Section 1 of the Charter.⁸

Therefore, in the final analysis, the qualifications, per se, of Anjua Loeak are not an issue and never were. Only the status of the petitioner as a title bearer was in doubt and that was resolved in Civil Action 53-77. Consequently, even if the Court were to construe Article III, Section 3, as argued by the Nitijela, that is of no moment since the status of Anjua Loeak and not his *qualifications* was the only question about his right to be seated. And, of course, the electorate already made that choice and as evidenced in Civil Action 53-77, the people in the islands encompassed in District 4 recognize Anjua Loeak as the *Iroi lablab*.

The Court has been cited no case which deals with the instant problem. This is not surprising as the doctrine of separation of powers and checks and balances are such that once a Court has ordered a legislative body to seat a member-elect, the legislative body complied.

Thus, the question which must be resolved is what is the effect and remedy for the legislature's failure to comply with the Writ of Mandamus.

⁸ Article II, Section 1 states:

"Section 1. *Membership*. The Marshall Islands Nitijela . . . , shall be composed of twenty-four legislators of which two *Iroi lablab* and four *Kajur* (commoners) shall be elected by the electors of each election district."

Counsel for the petitioner has asked that the Speaker and member Amata Kabua be held in contempt of court and incarcerated. For two basic reasons, this course is not followed.

First and foremost, the Writ of Mandamus was directed to the Nitijela as a whole and there is no showing that two of its members can be held in contempt while the majority, who are equally culpable, go off without any punishment.

Secondly, at this point in time, finding two members of the Nitijela in contempt does not solve the basic problem confronting the Court.

The basic duty of the legislative branch is to enact laws. The executive branch is to carry out and administer the laws. The judicial branch interprets the law.

Considering all of what has transpired in this case, the applicable provisions of the Trust Territory Code, the Charter of the Nitijela and the Secretarial Orders, it is concluded that from the moment the Nitijela refused to comply with the Court's Writ of Mandamus, which was the first part of the February 15th session, it was not a duly constituted legislative body.

Article I of the Charter acknowledges that the Nitijela derives its power under the laws of the Trust Territory. Implicit in the very formation of the Nitijela is compliance with Trust Territory law. 1 TTC § 101 (5).

As seen above, the action of the Nitijela has not complied with the due process and equal protection provisions of Title I nor the provisions of Article II, Sections 1, 2 and 3 of its Charter.

[3] The Nitijela, after being advised of the judicial determination of petitioner's status and being served with the Writ of Mandamus, had to seat the petitioner to be a properly constituted body under the laws of the Trust Territory. Since it failed to do so, its legal existence terminated

and all further purported actions are null and void and of no effect.

The fact that the petitioner is only one of the 24 legislators does not alter the fact that the legislative body is not properly constituted.⁹ The failure to seat the petitioner taints the entire body. The petitioner may be only one person, but his constituents represent hundreds if not thousands. If each of the four election districts are fairly apportioned, a full 25 percent of the population of the Marshall Islands is denied a voice in the Nitijela by the failure to seat the petitioner. Election District 4 is entitled to its full complement of legislators. Once this is denied its residents, the Nitijela is not properly established.

The fact that the entire electorate is now without a legislative body is indeed a grave result. But the choice between that and to continue with a legislature that deprives a member-elect his seat and right to represent a substantial number of the people of the Marshall Islands is an even graver, if not intolerable, result.

This Order was delayed for the receipt of the translated version of the journal of the Nitijela for February 15, 1979, but that document has still not arrived on Saipan.

Consequently, it is not known what actions of the Nitijela are affected by this Order.

To enable clarification of any question in the minds of the representatives of the executive branch as to the effect and import of this Order, a hearing will be held as hereinafter specified.

In the interim, if the executive branch has control of any funds for salaries or expenses of the Nitijela, it shall forthwith comply with this Order.

⁹ Although Article II, Section 1 of the Charter allows for only 24 legislators, Secretarial Order 3027 provided that the Senators and Congressmen from the Congress of Micronesia would be seated as members at large. Therefore, as of October 1, 1978, the Marshalls delegation became members of the Nitijela. On February 15, 1979, the total membership of the Nitijela was 31.

One last matter needs to be mentioned.

The bailiff of the Court was ordered to serve the Writ of Mandamus on the members of the Nitijela. He performed that function. He was subpoenaed to appear at the hearing on February 22, 1979, and he so testified. After the hearing of this matter, it was reported to the Court that a person or persons threatened the life of the bailiff if he testified. This matter will be referred to the Attorney General's Office for investigation and prosecution if it so merits.

Accordingly, it is ORDERED as follows:

1. All acts and business conducted by the Nitijela on February 15, 1979, and thereafter are null and void and of no effect. Any payments for salaries and expenses allocated to the Nitijela and held and controlled by the executive branch shall forthwith be terminated.

2. A hearing will be held at 9:00 a.m., March 22, 1979, at the High Court, Majuro, Marshall Islands to determine if the District Administrator, any member of his staff or the executive branch has any question as to the intent and import of this Order.

3. A copy of this Order shall be served on the High Commissioner or his representative, the Attorney General or his representative, the District Administrator, Marshall Islands, or his representatives, and counsel for petitioner and the defendant by 1600 hours, March 16, 1979.

This Order is without prejudice for the Nitijela to reconvene in special session for the purpose of seating Anjua Loeak and, if properly passed, to enact the measures, if any, passed on February 15, 1979.

5. This Order is without prejudice to a subsequently elected Nitijela and which comports with Trust Territory law and this Order.

APPENDIX A

June 21, 1977

Mr. Benjamin M. Abrams
ARRIOLA & CUSHNIE
Citicorp Building—P.O. Box X
Agana, Guam 96910

Dear Ben,

I have received your letter of May 27, 1977 concerning the seating of Anjua Loeak in the Nitijela. The case is simple, in a sense, Anjua is or is not an Iroij. If he is, he will be seated. If he is not, the seat will probably pass on to an Iroij who received the highest number of votes in the election in which Anjua was apparently elected (assuming of course, that there was another qualified Iroij in that election).

Apparently, Melon Loeak another contender at that election, also an alleged Iroij, has raised the question as to whether or not Anjua is an Iroij.

The Credentials Committee and the Nitijela took the position that they were not going to involve themselves in the Iroij question since that subject is properly resolved traditionally; i.e., all the Alab in the family decide who among the pretenders should be or is by descent, an Iroij. Even if this matter went to court, I'm confident it would be resolved by the Alab.

Our concern here in the Nitijela is that it be resolved soon. If filing suit will expedite the matter, I think it will be done promptly. If sworn statements can be obtained from all of the Alab, I suspect that too, would help conclude this matter.

In any event, I believe the Nitijela will keep the seat vacant until Anjua establishes, by judicial action or by agreement of all the Alab, whether or not he is an Iroij.

Beyond this meager information, I have nothing more with which to enlighten you or to resolve the matter.

I hope you can get this matter resolved before the next regular legislative session.

Sincerely,
Paul J. Knapp
Legislative Counsel

APPENDIX B

(After argument by Mr. Knapp and Mr. Abrams, the following proceedings were heard by the Court.)

MR. KNAPP: Objection, your Honor. Counsel is now getting into evidence which is not in evidence. If he has evidence—if he has an affidavit of that—maybe he should present it first before arguing evidence.

MR. ABRAMS: I wasn't going to do it at this time, but if Mr. Knapp wants—

THE COURT: Let me see if I can advise both counsel as to where the Court stands in this matter. We had a hearing on this in March, and as I understand it, Mr. Knapp, that if there was a jurisdictional determination as to who the *Iroi**j* was—that is, as to litigation between Anjua and Melon—and the Court determined one or the other, then that jurisdictional determination would be used by the Legislature to sit that successful party in litigation. I think you stated in the affirmative, is that right?

MR. KNAPP: Not exactly. What I said was that the Nitijela will undoubtedly honor the Court's finding as to who is the—not who is so much, but whether or not Anjua Loeak is *Iroi**j lablab* or not. That is the issue. Not who is the *Iroi**j lablab* but whether Anjua Loeak is *Iroi**j lablab*. If this Court found Anjua Loeak is an *Iroi**j lablab*, then the Charter qualification is established, and the Legislature has little choice but to honor that, that finding of the Court; and if that were the finding of the Court, my instruction, my advice and recommendation—urgent advice and recommendation—to the Nitijela would be that on that score, on that qualification, “you have no choice. If that is the only reason you are not seating Anjua Loeak—because he is not established as an *Iroi**j lablab*—the Court has decided that question, the Court has decided he is an *Iroi**j lablab*, and you have no choice but to accept it.”

(Whereupon argument was heard from Mr. Abrams.)

THE COURT: Okay. I was hoping we could shortcut matters. Let's go to the motion to dismiss the Credentials Committee. We will go step by step by step.

(Whereupon argument was heard from Mr. Abrams.)

THE COURT: As to the first motion, the motion to dismiss the Credentials Committee will be granted. Go to the second motion.

(Whereupon argument was heard from Mr. Knapp.)

THE COURT: Let me ask you a question, Mr. Knapp.

MR. KNAPP: Yes, sir.

THE COURT: In *Powell*—

MR. KNAPP: Yes, sir.

THE COURT: —or let's use that as a background. Let's say there is a jurisdictional determination that one or the other claimants have this position as the *Iroi j lablab*. Now, can the Legislature still say "we don't want to sit either one of them"?

MR. KNAPP: If they have different grounds—not on that issue, no. I think it's *res judicata*. If the Court says this fellow is the *Iroi j lablab*, that legislative body is bound to accept that. It's not within their province. After a Court has ruled on it to make a determination—they could have made that determination before we appeared on this day at the Court because there has been no judicial determination of that. If they chose to go their own way and make their own finding as to who is and is not—and particularly whether or not Anjua Loeak is *Iroi j lablab*—they have that right; and having done it, the Court would be in an awkward position trying to undo it. But they didn't do it. They left it to the customary way of doing it and locked themselves into your judgment on that point.

THE COURT: According to the affidavit, the one and sole reason the Nitijela did not sit Anjua was because he couldn't prove to their satisfaction he was the *Iroi j lablab*?

MR. KNAPP: That is correct.

THE COURT: Not that he was a Gilbertese citizen or over ten years of age?

MR. KNAPP: This is the position of the Nitijela. Every legislator elect to come before that body, present his credentials, and the burden is upon him to convince that legislative body that he is a qualified member under the Charter to take his seat. If he doesn't—if he can't convince them under the Charter that he is qualified—they don't have to seat him. And that's exactly what

they did. They not only refused to seat him—and gave him the opportunity for himself a full year to present the evidence—but at the end of that year they said “we will wait no more; you are excluded.” That was the ruling at the end of the first session of the Nitijela on January 13th of this year.

THE COURT: So at this point the Nitijela is not satisfied as to either claim?

MR. KNAPP: That’s right. But it is a constitutional or Charter requirement. The Charter does require that from every election district, this particular district, there be one *Iroiĵ lablab* and two *Kajur*—two *Kajur* being the common person, other than the *Iroiĵ lablab*, which doesn’t preclude an *Iroiĵ lablab* from sitting on that seat. We do not have a clear indication of who the *Iroiĵ lablab* is there. That is where the problem is. Now, counsel talks about the *Powell* case, and the *Powell* case was one in which the Supreme Court did say to the Congress “you have got to seat Mr. Powell.” But the reason they said that to the Congress was because, because the Congress went beyond the Constitutional qualifications for a Congressman. What they tried to do was because of Mr. Powell’s peccadilloes in Bimini and other events that took place in New York State added supposedly qualifications concerning his emotional character and his behavior, and they tried to use that to exclude him from the Congress; and the Supreme Court said “you cannot do that,” and they would not permit it. Mr. Powell was seated as a result of that. But they did say that if the Congress limited itself to ruling on the Constitutional qualifications of Mr. Powell—as to his age, as to his residence, citizenship; those Constitutional requirements that are found in the United States Constitution—if they ruled on those and were not satisfied that he was qualified on any one of those, the Congress had the absolute right to exclude him—by simple majority vote at that. Now, once they swear him in, and he takes that oath, he’s a member. At that point in time it is a totally different ball game. . .