REPORT

ON THE

JUDICIAL SYSTEMS CONFERENCE

FOR THE

FEDERATED STATES OF MICRONESIA

Joy Island

Pohnpei

September 29-30, 1986

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Introduction

The Federated States of Micronesia is an independent nation-state operating since late 1986 as a freely associated state affiliated with the United States of America under a Compact of Free Association.[1] It is governed by a Constitution drafted by the Micronesian Constitutional Convention in 1975 which creates a government of three branches (executive, legislative, and judicial) similar in its broad outlines to the government of the United States. There are four states in the Federated States of Micronesia (FSM) -- Kosrae, Pohnpei, Truk, and Yap -- each with its own government and its own sovereign powers; the power and autonomy of the states and their relation to the national government of the FSM are again similar in their broad outlines to that of the states in the United States, although certain significant differences exist.

The "federal" system that was created by the 1975 Constitutional Convention reflected the diversity of the island communities of Micronesia which are separated from each other by hundreds or even thousands of miles. Each state has evolved in its own way and the residents of each community have developed their own unique customs and community relationships. Although

they sought to work together for common economic and political goals, they also sought to retain their separate status with regard to issues that are local in nature.

Because the population of each state is small, the number of states are few, and the customs of the island communities are so uniquely their own, the U.S. model has not always fit easily on this new nation-state. Although the 1975 Constitution does not explicitly require separate state and national court systems, it does permit such a dual system and Pohnpei, Truk, and Yap do have court systems that operate quite independently from the national court system. The relationship between the state and the national judiciaries has been awkward at times. The national FSM Supreme Court, with jurisdiction over national laws, diversity cases, and "major" crimes, has been staffed by two judges who have had extensive experience and service in Micronesia but are U.S. citizens. The judicial branch of the national government thus stands in contrast to the other branches of the national government--and to the state governments and their judiciaries--all of which are controlled and staffed virtually exclusively by Micronesians.

During the summer of 1986, Chief Justice Edward C. King announced that he wished to retire as of early 1988 so that a

Micronesian could become Chief Justice. At that same time, he identified a series of problems that had surfaced during his six years of service as Chief Justice and suggested that the period of transition was an appropriate time to address these problems and consider strategies to resolve them.

In response to this initiative, President Tosiwo Nakayama convened a Judicial Systems Conference, which was held on Joy Island, Pohnpei, on September 29 and 30, 1986, to discuss a series of interrelated questions concerning the future of the judiciary in the Federated States of Micronesia. This report is a summary of the topics discussed and the views expressed at this Conference. In general, the views are not attributed to specific speakers because the participants were encouraged to speak frankly with the understanding that they would not be quoted directly.

In addition to President Nakayama and Chief Justice King, the participants were Bailey Olter, Vice-President; Richard Benson, Associate Justice of the FSM Supreme Court; Ieske Iehsi and Eliaser Rospel, from the President's office; Senator Donald Jonah, from the Kosrae Legislature; Harry Skilling, Chief Justice of Kosrae; Resio Moses, Governor of Pohnpei; Edwel Santos, Chief Justice of Pohnpei; Reece Halpern, from the Pohnpei Attorney General's office; Gideon Doone, Governor of Truk; Fritz Hartman, Speaker of the Truk State Legislature; Machime O'Sonis, attorney for the Truk Legislature; Soukichi Fritz, Chief Justice of Truk; Petrus Tun, Special Consultant to the Governor of Yap

and former Vice President of the FSM; Joseph Ayin, Speaker of the Yap State Legislature; Cyprian Manmaw, Attorney General of Yap; Clement Mulalap, Assistant Attorney General of Yap; and John Tharngan, Chief Justice of Yap.

Jon Van Dyke, Professor of Law at the University of Hawaii School of Law, served as moderator during the conference, and Peter Haynes, Professor of Justice Studies at the Arizona State University and Executive Director of the Arizona Criminal Justice Commission, served as a resource person.

The Goals of the FSM Judiciary

Judicial Independence and Issues of Judicial Administration

The participants agreed that the Constitution of the Federated States of Micronesia was designed to create an independent judiciary, modeled on the system that exists in the United States. Those participants who had been delegates to the 1975 Constitutional Convention pointed out that most of the delegates had been trained in the United States and had the U.S. system in mind when they built a judiciary for Micronesia. The judiciary was designed, therefore, to be independent in all matters relating to the trial of cases and the rendering of judicial opinions. The participants reaffirmed the importance of this goal in light of the role an independent judiciary can play in providing the stability and predictability needed for economic development.

The delegates to the 1975 Constitutional Convention had specifically sought to avoid the problems associated with the old Trust Territory court system, including the problems of judicial administration. It was agreed that the Trust Territory judges were not independent, because they were appointed by the U.S. Secretary of the Interior, who supervised U.S. policy in Micronesia, and the Trust Territory judges served at his pleasure. Some participants emphasized that developing administrative expertise in the operation of judiciaries is important in its own right in addition to being a tool for preserving judicial independence. The participants discussed the ability of their courts to obtain the finance, personnel, and equipment needed without inappropriate executive or legislative controls. They also discussed court personnel (judges and staff), equipment and other staff functions, together with case management responsibilities, and administrative support of judicial decisionmaking.

The participants differed on the extent to which judicial independence should extend to areas such as finances, procurement, and personnel. At the present time, the national judiciary's funds are administered by, and ultimate control over the judiciary's personnel are placed in, the executive branch. The national judiciary acknowledges that the executive branch officials in charge of finance and personnel matters have generally been quite cooperative. The national judiciary has, however, encountered some practical problems in obtaining funds

and approvals of personnel decisions in a timely and appropriate fashion. The national judiciary's principal concern is not on these practical administrative problems but on the judiciary's vulnerability to less cooperative executive branch officials in the future. Thus, the national judiciary's focus is on structural issues of judicial independence, not on solving current administrative problems.

The state judiciaries, on the other hand, have developed a level of autonomy under their state constitutions, and the state judiciaries develop their own budgets and seek their own appropriations through the state legislatures. Each state system is somewhat different, but they all appear to have greater independence than does the federal judiciary. Truk's judiciary has the autonomy to make independent personnel decisions but works through the state administration with regard to the purchase of supplies. Requests to draw upon guaranteed local sources of funds sometimes meet resistance. Yap's judiciary works through the state's Department of Personnel in hiring, but has never faced any obstacles in making the hiring decisions it has desired. The budget request for the Yap judiciary is a line item in the governor's budget which he cannot change; the judiciary testifies directly in support of its budget request. Yap's judiciary has had some difficulties with financial matters because of personality conflicts, but does not view these as structural problems. Pohnpei's judiciary has autonomy under its state constitution, and Kosrae's judiciary is also able to control its budget and recruitment.

When financial resources have been appropriated to the state courts, they have generally been able to obtain these funds. In Pohnpei, for instance, the Chief Justice has purchased items within the budget allocation using executive forms and writes "not applicable" when the form requests external approval. This approach has not been permitted at the national level. The FSM Supreme Court has complained about interference and delay in approving purchases. The President has interpreted the national fiscal management act to place financial control in umbrella agencies which serve all three branches of government. President Nakayama expressed surprise that this approach created problems for the courts and suggested that this apparent conflict developed from misunderstandings which could be resolved through the Micronesian tradition of compromise. He agreed that his administration should take another look at this problem.

The inability to obtain needed personnel was a common problem. An attempt by the national judiciary to establish separate administration of its personnel system has not succeeded.

Although the state courts have been able to hire their own personnel, they frequently involve the state personnel agencies in some capacity, such as in making the announcements of the position (Truk), or in its classification (Yap and National). Clerk positions have tended to be classified without consideration of their special responsibilities in the judicial branch. Management of court employees has been problematic.

Court employees are not always perceived to be effective in their appointed roles and the participants expressed interest in utilizing probation officers, in particular, more effectively.

A number of states have adopted court rules (Kosrae is an exception), but the participants indicated that these rules are not always understood by court participants and not always followed, and some suggested that simplification might be in order to promote better understanding. The states of Truk and Yap have adopted the FSM rules, with minor modifications, which in turn are based on the rules of the U.S. District Courts. Some participants favored uniform rules that would apply in all courts, state and national, but others felt it perfectly appropriate to force counsel to learn the idiosyncracies of each jurisdiction.

State supreme courts have assumed some administrative responsibility for the municipal courts in each state. In Truk, the state supreme court is supplying training for local judges in record keeping, finance, due process, preparation of statistics, and so on. In Pohnpei, funds have been requested to train local judges. Language problems exist in some courts, particualrly with regard to the preparation of transcripts for appeal. The court reporter in Yap, for instance, does not speak Yapese.

The participants differed on how precisely the responsibilities should be divided to ensure that the resources of the federal government are used in a way that is both efficient and also serves to protect the independence of the judiciary. They also differed on how the provisions of the FSM

Constitution should be interpreted and applied to this controversy. The national judiciary contends that Article XI, Section 9 assures the judiciary control of its own administrative function by naming the Chief Justice as "the chief administrator of the national judicial system" and stating explicitly that he "may appoint an administrator who is exempt from civil service." Article XI, Section 9(f) gives broad powers to the Chief Justice to "provide for the administration of the national judiciary." Article IX, Section 2(n), on the other hand, gives the Congress the power "to establish and regulate a national public service system." The national judiciary does not object to being included within the national public service system legislation but argues that it is inappropriate for the executive branch to administer the personnel legislation as it applies to the judiciary. The judiciary raises somewhat similar questions concerning administration of judiciary finances.

The national judiciary has persistently attempted to persuade the other two branches of the merits of its interpretation of the constitutional provisions rather than resort to litigation. This approach is no doubt attributable in great part to the practical difficulties inherent in any effort to resolve these issues through litigation. Who would sit on the court if the FSM Chief Justice sought to challenge the withholding of funds by the Secretary of Finance or the imposition by the Personnel Officer of obstacles thwarting the hiring of personnel? Could the lone Associate Justice of the FSM Supreme Court sit on the case on the theory that he is not

directly involved in budgetary matters, or would he also be viewed as having an appearance of a conflict of interest on this issue? Is there any way an impartial panel could be assembled? Would it be better to solve the matter in the Micronesian way, without a confrontational lawsuit? Should these issues be settled before the next President is elected, or should they be set aside until a new President and a new Chief Justice take office and can address the issues?

Most participants felt that it would be best to solve these problems as soon as possible, but no consensus emerged on what the best solution would be. Several participants suggested that it is most efficient to share a single government-wide system for personnel and purchasing, but agreed that no one should reject requests made by the judiciary if funds are available. Others felt that the judiciary needed complete autonomy to hire and buy supplies, although recognizing that the judiciary would have to work within an established budget and the framework of national public service system legislation.

Customary Law

The participants all agreed that the preservation of customary practices was a second major goal of the judicial system created by the 1975 Constitutional Convention. Dispute resolution in both the state and national courts does reflect customary considerations, but the extent and manner of introducing customs into judicial proceeding varies substantially

among the court systems. In general, customary considerations are limited to individual cases. They are introduced through judicial notice and judicial awareness, or less frequently by evidence offered by older residents of the community. It is relatively unusual to present these matters on the record where they can be codified to create customary case law and to thus preserve a uniquely Micronesian jurisprudence.

Customary law issues affect substantive and procedural issues as well as the question of sanctions. The participants disagreed over who should weigh these matters -- the judge or prosecutor -- and on whether the adversary system replaced or supplemented customary practices.

The participants from some states felt that custom had only limited relevance to their circumstances. Those from Kosrae, for instance, felt that customary law had existed at one time but then had disappeared and is now remembered only by older people. Strict rules for land inheritance by the oldest son, for instance, have been modified so that other male children and even women can now inherit. The courts there do, however, respond to the informal needs of the community. Existing court rules, for instance, allow 30 days to obtain settlement, but this period is extended to allow reconciliation, so necessary for a small community; the judge reviews agreements to guarantee fairness.

Some customary practices in Pohnpei (such as those involving land ownership) may not be truly traditional, but rather reflections of practices introduced by Germans, Japanese, and

Americans. The participants felt that the trial judge is ultimately the best judge of local custom. The municipal judges are certainly equipped to recognize customs, and the state supreme court judges also feel comfortable in understanding the appropriate custom to apply in individual cases.

In Truk, the role of custom is especially strong in the state's numerous municipal courts. The Truk Supreme Court uses the pretrial period to seek an agreement that reflects traditional concerns. Extending sufficient time to allow reconciliation is also important.

Custom is used more extensively in Yap. Most cases are heard in the municipal courts which are presided over by chiefs who are members of the two chief's councils. One council consists of chiefs of the central lagoon area who serve full time. The other council represents the outer islands and meets only occasionally.

Yap's judges attempt to remand all cases involving customary issues to the villages and municipal courts to be resolved using mediation. Issues involving land or traditional values are generally resolved outside the court. Only the few cases that cannot be resolved reach the state supreme court. Once there, they are usually resolved using testimony by elders or through judicial notice as to custom. Few go to trial and therefore no records are made.

This method of considering custom works against establishing a written record. It reflects the Micronesian oral tradition,

but complicates the establishment of broad principles of law. Several participants suggested that improvement in this area would allow differences between regions of a state to be reconciled. A few participants, however, argued that making a record could work to prevent needed changes in custom. Certain participants also expressed concern that changes in the state courts to facilitate development of written records, in the context of the adversary system, might conflict with, and undercut, traditional apologies and retribution arrangements. This might result in an increase in trials and appeals, which is not desirable.

The state courts are issuing few written opinions in individual cases at this time, but many participants recognized the value of publishing opinions, similar to the practice of the Trust Territory courts. Such an effort could demonstrate the extent of the use of private apologies and forgiveness ceremonies. No case has yet been appealed from a state supreme court to the FSM Supreme Court so no case law on customary practice has yet developed through this route. Written case law reflecting customary law has thus far been developed almost exclusively through cases heard and appealed through the FSM Supreme Court.

<u>The Division of Responsibilities Between the State and National Courts</u>

The participants who were at the 1975 Constitutional Convention remembered that a unitary court system had been

proposed (along the lines of the Trust Territory court system), but this approach was ultimately not adopted because the delegates felt that local (state) courts would be better able to interpret and apply the customs and traditions, which vary from state to state. Three of the states have now developed their own complete court system. The Constitution does not spell out in detail, however, the relationship betwen the state and national courts, and thus leaves open a number of issues about how the two judicial systems should allocate their functions and responsibilities. Article XI, Section 7, for instance, specifically permits the FSM Supreme Court to hear appeals on all issues from the state courts, if the state constitution permits. Kosrae's Constitution currently authorizes such appeals and in fact names the FSM Supreme Court as Kosrae's appellate court. This approach has led to a great deal of cooperation between the two courts. Article XI, Section 10 calls for the national Congress to provide financial assistance to the state judiciaries. Moreover, the national and state judiciary acts call for the judiciaries to support each other and cooperate administratively. Certain participants who had been delegates to the 1975 Con Con stated that they had felt that they had created essentially a unitary system in which there would be more direct appeals to the FSM Supreme Court. The system that has evolved, however, has created awkward conflicts between the state and federal systems with uncertainties and overlapping jurisdictions.

Conflicts have also arisen over seemingly minor matters. The purchases of equipment and law books have not been pursued according to common standards, and attempts to coordinate and share these items between the national and state supreme courts have not worked, except in Kosrae where extensive cooperation does take place. Disagreements have arisen, for instance, over sharing the resources of the law library in Truk. The state courts have resisted allowing the FSM Supreme Court to play any significant role in local administrative matters.

Certain services of the FSM Supreme Court are, however, generally recognized as valuable, and participants expressed concern that they not be abandoned as a consequence of personnel changes. The maintenance of the FSM Supreme Court's reporter, digest, and updater services was identified as critical, and participants discussed the possibility of country-wide standards for law libraries and computer equipment. The participants expressed appreciation for the availability of training seminars for judges and court staff, but expressed some desire for more state involvement. Several participants supported the idea of creating a Micronesian Legal Institute to continue the law seminars, in coordination with the University of Hawaii Law School. It was suggested that services not be restricted to law but include judicial administration and business skills as well.

The participants discussed a wide range of possible approaches to the problem of lack of coordination and sporadic conflict between the state and national courts:

The Definition of "Major Crimes"

One central topic of discussion was the definition of "major crimes." Article IX, Section 2(p) gives the Congress power "to define major crimes and prescribe penalties, having due regard for local custom and tradition." The current statute implementing this provision defines "major crimes" as any crime that carries a potential sentence of three years or longer. Under this definition, the national courts have jurisdiction over a significant group of criminal matters, although it was pointed out that the national crime cases constitute fewer than five per cent of the criminal cases filed in state courts. This provision also has significant implications for the administration of justice, because--under the present system--state police officers enforce the national "major crimes." Awkward problems arise as to how such enforcement should be paid for, how potential liability problems should be resolved, and how lines of authority should be structured. If, for instance, a state police officer were to commit police brutality in the course of making an arrest for a violation of a "major crime," would the state or national government be liable to the victim of the brutality? Another example of the awkward situation created is that of overlapping jurisdiction; Kosrae, for instance, lists "murder" as one of its state crimes, and assigns persons convicted of this crime a sentence of 35 months (which is the maximum permitted within the state system).

A number of the participants referred to the resolution recently adopted at the State and National Leadership Conference held in Kosrae recommending that the definition of "major crimes" be altered to give the state courts greater jurisdiction. Several participants commented that they felt that the "three-years-or-more sentence" definition had been adopted by the Congress because it was similar to the definition used by the Trust Territory Courts (which had a "five-years-or-more sentence" cutoff), and Congress wanted the national system to take over jurisdiction from the Trust Territory courts. Several participants also felt that there had been an understanding that this jurisdiction would eventually be returned to the states. Other participants added that the delegates to the 1975 Constitutional Convention had some concerns whether the state courts were prepared to handle major crimes and wanted to ensure that such cases were handled by judges who were "learned in the law" and by courts that had adequate capacity to prepare records for appeals. These participants stated that the responsibility was thus given to Congress to monitor the development of the state courts and determine whether they might become able to accept more jurisdiction.

As the participants discussed this problem, it became apparent that differences of opinion exist on the related question whether the Declaration of Rights in Article IV of the FSM Constitution applies to the states and their judicial systems. Some of the participants felt strongly that the

Declaration of Rights applies throughout the nation and to all levels of government. Others were less sure of this, however, and argued that the state's bill of rights should govern within state courts, in order to recognize the special role the states have within the federal system and to discourage forum-shopping among litigants. One participant asked, "If the Declaration of Rights applies to the states, why have state bills of rights (unless you want to provide more protection to individuals in your state)? The U.S. Bill of Rights was applied to the states because of widespread discrimination against minority groups in parts of the United States. Do we need those protections in Micronesia?"[2] This same participant later stated: "Of course if the Declaration of Rights does apply to the states, then we need not be as concerned about whether the state judges are 'learned in the law' with regard to giving them jurisdiction over the 'major crimes,' because appeals could then go from their trials to the FSM Supreme Court on a broad range of questions, and their rulings on procedural issues could be reviewed."[3]

The participants also commented that the formality required by the notion that judges must be "learned in the law" could be reduced if more emphasis were placed on traditional Micronesian techniques for resolving disputes such as mediation and discussions among family members. A number of participants felt that the rules used in the courts were unnecessarily sophisticated and that these rules should be changed to be more suitable for the people and culture of the islands. The hearsay

rule was identified as one example of an inappropriate rule, particularly in light of the absence of juries in the Micronesian court system. Complicated rules were forced upon the Micronesian courts, some suggested, by the U.S. Department of the Interior, which wanted a system that would be similar to that used in the United States.

The participants who are now judges in the state court system all stated that they felt they could sit on cases that involved more serious and more complicated matters. Other participants pointed out that the state courts already have jurisdiction over all land disputes--which certainly involve complicated matters--and that if one is thinking about the important customs of the community, the state court judges are more "learned in the law" than any U.S. lawyer could be. It is important, therefore, according to this view, to maintain the central role of the state courts. Only in Kosrae, where many of the customs and traditions have been lost, has the decision been made to allow appeals in all cases to the FSM Supreme Court.

National Trial Courts

Some participants took a different point of view and suggested that the way (1) to maintain the important role of the state court judges, (2) to ensure an efficient handling of judicial matters, and (3) to protect the rights of all litigants is to establish a system of "national trial courts" whereby the chief justices from each of the state courts would serve as trial judges for the FSM Supreme Court as "nationalized" judges on a

regular but temporary basis on selected cases that fall within the jurisdiction of the national courts. This idea would help solve several existing problems:

(A) It would ensure that the local approach to customs and traditions would be understood in each case, because the trial judge would always be from the state in which the incident occurred.

(B) It would solve the awkward appeal process that now exists within the federal system, whereby one of the two FSM judges must sit as trial judge and an appellate panel must then be assembled consisting of the other FSM judge plus two judges from outside the FSM. This system is awkward (1) because the two FSM judges alternate in reviewing each other's opinions and may acquiesce too easily in accepting the other's decision or alternatively develop sharp antagonism toward each other, and (2) because each FSM appeal panel consists of more non-FSM judges than FSM judges, thus inhibiting the development of a true Micronesian jurisprudence.

(C) It would ensure that the individual procedural rights of all litigants would be protected because (1) the trial judges would be operating in a system equipped to prepare transcripts and records for appeal and (2) the judges on the appellate panel would have formal law training and could review the trials to determine if they were conducted with appropriate attention to all the procedural protections in the Declaration of Rights.

(D) It would ameliorate the tension arising from the double filing so often done now.

(E) It would amerliorate the tension arising from the general belief now held that there is concurrent jurisdiction between state and national courts in diversity cases.

(F) If a state law were involved in the case in the national court, there would be state input (through the presence of the judge presiding) which would be desirable in itself, and would lessen tension now occurring in cases in which an FSM Supreme Court justice rules on a state law.

This proposal was received with interest and discussed as an idea with some merit. The participants did, however, point out problems that needed some consideration:

1. Would the "national trial court judge" be serving two masters and be inadequately sensitive either to state or national concerns?

2. Would this violate those state constitutions that prohibit state judges from having any other jobs?

3. Would the requirement in Article XI, Section 3 of the FSM Constitution that "Justice serve during good behavior" (i.e., that their appointments are normally lifetime ones) apply? The state constitutions limit their judges to specific term appointments (Pohnpei--12 years, Kosrae--6 years, Yap--6 years). In other words, what would happen to the state chief justice's status as "national trial court judge" once he ceases being the state chief justice?

4. What about the other requirement in Article XI, Section 3 that all federal judges be confirmed by the Congress? Suppose the Congress refused to confirm a state chief justice? Suppose, alternatively, that a state somehow allows an incompetent person to become chief justice who should not be permitted to serve in the national system?

5. Could problems #3 and #4 be eliminated if these individuals were called "assessors" or "special masters" who did not hold a formal national title but did serve to handle trials on assignment from the FSM Supreme Court?

6. How, if at all, should the national trial court justice be compensated? Should he receive compensation in addition to that he is already receiving from the state court system?

7. What about true diversity cases (between citizens of two different states)? Should not the judge in those cases be a "true" national judge? (These cases tend, on the other hand, to be ones that the state judges want to participate in because state law is involved.)

During the course of these discussions, a number of the participants recognized that some appellate panels of the FSM Supreme Court have contained judges from the state courts in the affected state. It was thought that this practice helps ensure adequate attention to local customs and traditions. One participant suggested that the designated judges should in any event come from within Micronesia if at all possible so they have

some understanding of Micronesian traditions. Other participants suggested that judges from other Pacific countries with common law traditions, such as Papua New Guinea or even New Zealand, might be acceptable.

Although the notion of the "national trial court justice" was received and discussed in a sympathetic fashion, a number of the participants felt they needed more time to think about the matter and would like to see the proposal in writing. One participant thought it might be considered at the next Constitutional Convention, which is now under discussion.

The Next Chief Justice for the FSM Supreme Court

On the second day of the Conference, the participants focused on the question of what type of person should be looked for to be the next Chief Justice, in light of Chief Justice King's expressed wish to step aside in favor of a Micronesian chief justice early in 1988. The discussion on this issue also involved questions related to the proper size for the FSM Supreme Court, how the transition from one Chief Justice to the next should be handled, when the appointment of a new Chief Justice should be made, and--again--questions related to national-state affairs.

Several participants emphasized the contributions Judge King had made to the Judiciary and some asked whether it might be appropriate to urge Judge King to remain as Chief Justice longer. Judge King explained his views that the new nation would best be

served by a Chief Justice from within Micronesia and that this time was not inappropriate to move in that direction. He also stated that he wanted to ensure a proper transition and would be willing to consider retaining part-time judicial duties in the future. He also said he would be happy to assist during a one-to-three year period after the new Chief Justice is selected to help write the bar exams and maintain the reporter system, the digests and updater, the training programs, and so on.

Some participants pointed out that one way of smoothing the transition period would be to appoint one or more associate justices now to allow them to work with Chief Justice King. This associate justice (or one of them, if more than one is appointed) might then be elevated by the new President to become Chief Justice in 1988. Having several associate justices would also enable greater representation from more of the states. Some participants felt that eventually each state should be represented on the FSM Supreme Court.

The participants did not think it was necessary to arrange the appointment so that the Chief Justice and President came from different states. It was pointed out that the terms of the two offices were different, and thus circumstances would change with time in any event. In addition, the Chief Justice's position was viewed as above individual state interests and introducing such a consideration was thought to be inappropriate.

Considerable time was spent on the question whether the next Chief Justice must have had formal law school training. The

current requirements are in Section 107, Title 4 of the FSM Code, which states that a person without a law degree can be selected as a judge if the person is "of equivalent and extraordinary legal ability obtained through at least five years of experience practicing law." Most of the participants felt that this was an appropriate standard, because one can obtain the necessary reasoning ability without formal law training.

Some participants asked whether another category of persons might also be considered--a "statesmen's class" consisting of persons who had been active in building the nation. The participants expressed views both for and against this type of person. Some felt such a nation builder who had been active in the executive or legislative branches might have considerable skill in building the judicial framework as well. Others wondered whether a person with no legal training or prior judical experience could maintain the respect of the practicing bar and the community at large. The practical problem of gaining the advice and consent of the Congress was also mentioned.

Many of the participants stressed the qualities of high moral integrity, impartiality, common sense, proper judicial temperament, and patience. The Chief Justice must be able to unite the judiciary and the nation.

The participants discussed the role of training in light of the possibility that the new Chief Justice may not have had formal legal training. Some argued against the notion of "on-the-job training" and felt that the person selected should

already have the necessary qualifications for the job. All agreed, however, that some continuing training for both judges and lawyers is useful and necessary to keep up with changing developments, and a number of participants expressed the hope that the University of Hawaii Law School would continue to assist with such training programs.

The Conference ended by focusing on issues related to the timing of this decision. A number of the participants expressed a reluctance to make a decision as awesome as a lifetime appointment in haste and many expressed the desire to postpone the decision until the next President is selected--or even beyond that time. Other participants stressed the value in having a Micronesian on the FSM Supreme Court and returned to the idea of adding one or more Micronesians as Associate Justices at this time to evaluate their work. Obvious potential candidates to become Associate Justices (in addition to the nine Micronesian-citizen lawyers) would be the four state court chief justices.

Conclusion

The issues raised during this Conference are significant not only because of the importance of a Chief Justice in protecting the culture, traditions, and diversity of a nation but also because of the role of the Judicial Branch in providing the assurance of predictability and stability that is so essential to investment and economic development. The Judiciary of the

Federated States of Micronesia has functioned well during this nation's early years, with important innovations introduced, such as bar exams, a reporting system, digests, and regular judicial training programs, and has worked to develop a system of jurisprudence to meet the needs of Micronesia. Nonetheless, awkward conflicts have occurred between the state and national courts. The judicial system consisting of both national and state courts has not always been efficient. The felt need to be sensitive to the cultural roots of each island community makes Micronesians wary of moving too quickly toward a unitary system. The occasion for selecting a new Chief Justice provides an opportunity to address some of these concerns.

Among the specific ideas suggested at this Conference were (a) to amend the definition of "major crimes" to expand state court jurisdiction or (b) to create "national state court judges" to ease the tension between state and national judges. All the participants agreed on the importance of an independent judiciary, and agreed that efforts should be made to reduce the potentiality for conflicts on matters related to finances and personnel. All the participants also agreed that it is important to determine how best to preserve the customs and informality of the Micronesian way while at the same time maintaining a sound judicial system that would provide the predictability and stability that outside investors require. And on the issue of finding a new Chief Justice, many (but not all) participants were sympathetic to a gradual transition in which one (or more)

Micronesians would be appointed as Associate Justice(s) now, with one being elevated later to be Chief Justice if his work appeared to warrant this assignment.

Almost all the participants felt that the selection of the next Chief Justice for the Federated States of Micronesia should be made only after careful discussion and deliberation, and should be a product of the consensus approach to decision making that characterizes the Micronesian way. Many of the participants seemed to feel that it might be preferable to delay moving in that direction for several more years. Although all the participants agreed that a Micronesian should become Chief Justice sometime in the future and almost all favored the idea of appointing a Micronesian to serve as an Associate Justice on the FSM Supreme Court now, most seemed to think that it is not yet the time for a new Chief Justice to take charge of the country's judicial branch, and that it would be best if Chief Justice King postponed his resignation for the time being.

- Jon Van Dyke and Peter Haynes

Footnotes

1. Compact of Free Association Between the Goverment of the United States of America and the Governments of the Marshall Islands and the Federated States of Micronesia, Pub. L. 99-239 (1986).

2. Most provisions of the U.S. Bill of Rights were in fact made applicable to the states before the civil rights period in the 1960s. The U.S. Supreme Court felt that the people of the United States had determined when they adopted the Fourteenth Amendment in 1868 (which states that no state shall deny to any person "life, liberty, or property without due process of law") that each state must treat its citizens in accordance with those fundamental principles of fairness that are implicit in the concept of ordered liberty. Palko v. Connecticut, 302 U.S. 319, 325 (1937). The Court has subsequently found that one central source in identifying these fundamental principles of fairness are the first eight amendments of the U.S. Constitution (the Bill of Rights). All the states in the United States also have Bills of Rights.

3. Some uncertainties were also traced to the fact that, in addition to the Declaration of Rights in the national Constitution, the state constitutions also have bills of rights (Truk does not yet have a constitution), and similar provisions can also be found in the municipal constitutions in Pohnpei. This situation makes forum shopping feasible and seemed to some participants to be unnecessarily complicated. It was pointed out that nonfrivolous appeals stemming from such conflicts could lead to convicted defendants being released pending hearings on their appeals.