

STANDING COMMITTEE REPORT NO. CC- SCR-04-13

DATE: June 13, 2022

RE: Proposal Nos. 04-14, 04-29, 04-44, 04-49, and 04-17

The Honorable Redley Killion
President
Fourth Constitutional Convention of the
Federated States of Micronesia
Palikir, Pohnpei FM 96941

Dear Mr. President:

Your Committee on Government Structure and Function, to which was referred Delegate Proposal Nos. 04-14, 04-17, and 04-44, and Delegation Proposal Nos. 04-29 and 04-49, has drafted its own Committee Proposal, entitled;

TO AMEND ARTICLE XII, TO ADD A NEW SECTION 4 TO THE FSM CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA TO CREATE AN OFFICE OF INDEPENDENT PROSECUTOR

begs leave to report as follows:

The intent and purpose of the proposal is to create the Office of Independent Prosecutor, that will be an independent agency of the national government. The main task of the Independent Prosecutor is to investigate and prosecute individuals, governments, and entities that receive and misuse public funds from the national government, and to investigate and prosecute certain national government officials for national offenses involving public corruption.¹ While currently, the FSM Department of Justice has prosecutorial authority over these offenses, your Committee is of the opinion that, given the political process by which the DOJ Secretary is appointed and re-appointed, the Department of Justice may not always have the degree of independence and insulation from political pressure to effectively investigate and prosecute anyone for offenses involving the misuse of national funds or national officials for corruption offenses. The intent of your Committee is to propose the establishment of an Office of Independent Prosecutor which will be clothed with the necessary degree of independence and insulation from political pressures to freely undertake such prosecutions.

Under your Committee's Proposal the Office of the Independent Prosecutor is insulated from political pressure by the two political branches of government. Insulation from political pressure will allow the Independent Prosecutor to investigate and prosecute misuse of national government funds by anyone receiving such funds and corruption by high level officials of the national government. Such investigation and prosecution provides transparency and

¹ See definitions of national funds and national officials below.

accountability which is of critical importance to the economic and political development of our nation.

While there may be concern that an additional constitutional officer will add to the cost of operating the government, it is envisaged that the national government could actually save money by reducing the amount of public funds being misused. The new Office of Independent Prosecutor will work with the Public Auditor and prosecute those individuals who have been identified as misusing government funds. To emphasize the relationship between the Independent Prosecutor and the Public Auditor, the Committee Proposal adds a new Section 4 in Article XII, which immediately follows the section creating the Public Auditor.

The provisions of the Committee Proposal are as follows:

Subsection (a) creates the Office of Independent Prosecutor.

Subsection (b) establishes the appointment and confirmation process. Similar to other constitutional officers such as the Justices of the FSM Supreme Court and the Public Auditor, the Independent Prosecutor will be appointed by the President and confirmed by a 2/3 vote of Congress. Because of the importance of the Independent Prosecutor and because it is a new office, your Committee felt that it was important that the President appoint an Independent Prosecutor in a timely manner. Thus, subsection (b) sets one hundred eighty (180) days as the time period within which the President must appoint the Independent Prosecutor. Your Committee deemed it prudent to use days for measurement, rather than months, because days can be counted more precisely, and the specific date by which the President must appoint the Independent Prosecutor can be easily identified. Your Committee felt that it was important to clearly place the responsibility of timely nominating the Independent Prosecutor with the President.

Subsection (b) also sets a term limit for the Independent Prosecutor to 6 years with no possibility of reappointment for a consecutive term. The Independent Prosecutor's term is longer than the terms of the President and Congress who appointed and confirmed him and thus, the Independent Prosecutor's continued employment is not dependent upon keeping those who put him in office happy. Similarly, the Independent Prosecutor's term is limited to one 6-year period so that the Independent Prosecutor's employment is not dependent upon those who can extend his term of office. The limit of years and term limit were chosen to keep the Independent Prosecutor independent from the government officials he will be investigating and prosecuting and to insulate the Independent Prosecutor from political influence.

Subsection (c) provides an alternative mechanism by which the Independent Prosecutor can be appointed if the President fails to act within the 180-day period set out in subsection (b). Your Committee felt that it was important that an Independent Prosecutor be appointed. Without an alternative mechanism to appoint the Independent Prosecutor, and in the event that a President refused to appoint an Independent Prosecutor, the position would remain unfilled and the constitutional mandate for an Independent Prosecutor thwarted. Subsection (c) empowers the Chief Justice to immediately appoint an acting Independent Prosecutor on day 181, if the President has not yet appointed an Independent Prosecutor. Appointment by the Chief Justice is

the same mechanism that is used to fill a vacancy for the Public Auditor. See 33 FSMC § 505(6). An Independent Prosecutor appointed by the Chief Justice would serve in an interim capacity until the President nominates and the Congress confirms the Independent Prosecutor.

Your Committee discussed that when the Chief Justice appoints an Independent Prosecutor, the Chief Justice will not be able to preside over the cases filed by the individual he appointed. Your Committee, however, determined that the FSM Supreme Court has sufficient mechanisms in place to handle conflicts of interest, and that the Court has experience in implementing these mechanisms.

Subsection (d) establishes the authority of the Independent Prosecutor. Your Committee believes that the authority granted to the Independent Prosecutor should be “exclusive” in order to clearly demarcate the jurisdiction of the Independent Prosecutor and jurisdiction of the Department of Justice. Your Committee is aware that neighboring jurisdictions have experienced problems because the authority granted to their Independent Prosecutor overlaps with the jurisdiction of their Office of Attorney General. By making the authority of the Independent Prosecutor “exclusive” over the areas listed in subsections (d)(i)-(iii), the FSM will avoid any inter-department battles over jurisdiction.

Subsection (d)(i) grants the Independent Prosecutor the authority to “investigate and prosecute any person or entity, whether private or public, or any official of the national, state, or local government for the commission of any national offense relating to national funds.” This grant authorizes the Independent Prosecutor to investigate and prosecute the misuse of public funds by anyone who receives national funds.

Official of the national government means the President, Vice President, FSM Senators, FSM Justices, heads and deputy heads of FSM departments, and heads of offices, agencies, and public corporations of the national government, and the head or person in charge of any other agency or instrumentality of the national government.

National funds means (1) those funds appropriated by the FSM Congress from the FSM Treasury or FSM Trust Fund; (2) COMPACT sector funds or COMPACT trust funds, but does not include those sector funds specifically earmarked for the States; (3) foreign aid, including grants and loans, irrespective of who the grantee, borrower, or beneficiary is, if the national government is a guarantor or, by the terms of the grant or loan, the national government is responsible for managing or monitoring the use of the funds, or accountable for the use thereof; (4) funds held by corporations and other entities created by a statute duly enacted by the FSM Congress; and (5) all funds appropriated by Congress to the States for whatever purposes, except those funds appropriated by Congress to the States as the shares of the States under a revenue-sharing provision of the FSM Constitution. Further, funds appropriated by Congress into the General Funds of the States with the intent that they become state funds lose character as national funds once deposited into state treasuries. Your Committee deems that funds held by the FSM Development Bank (FSMDB), as a national statutory corporation, are national funds for purposes Subsection (d)(i); however, FSMDB funds will lose character as national funds once distributed to and received by the borrower. Conversely, loan repayments from borrowers

achieve character as national funds within the context of Subsection (d)(i) once they are paid to FSMDB.

Subsection (d)(ii) grants the Independent Prosecutor the authority to “investigate and prosecute any official of the national government for the commission of any national offense involving public corruption.” This grant authorizes the Independent Prosecutor to investigate and prosecute public corruption offenses as defined by Title 11 of the FSM Code, and includes offenses where there is corruption, but no misuse of national funds.

The grant of authority in subsection (d)(ii) is limited to the investigation of national government officials. As stated above, official of the national government means the President, Vice President, FSM Senators, FSM Justices, heads and deputy heads of FSM departments, and heads of offices, agencies, and public corporations of the national government, and the head or person in charge of any other agency or instrumentality of the national government.

Your Committee discussed whether the grant of authority should be to investigate all national government employees but determined that it was appropriate for the investigation and prosecution of higher level policy making officials to be done by the Independent Prosecutor who is insulated from political influence. The prosecution of public service system employees is to remain with the Department of Justice, because public service system employees do not have the power to exercise undue influence over the Department of Justice’s determination to file criminal charges.

Your Committee also discussed whether the grant of authority to the Independent Prosecutor should be to prosecute all national crimes committed by any official of the national government. After reviewing the definition of national crime in Title 11 of the FSM Code, 11 FSMC § 104(7), your Committee determined that the authority to be granted should be limited. Your Committee then debated as to whether the authority should be limited to “white collar crimes” or “public corruption crimes.” “White collar crimes” are “non-violent crime usually involving cheating or dishonesty in commercial matters [or otherwise involving pecuniary motivations]. Examples include fraud, embezzlement, bribery, and insider trading.” Black’s Law Dictionary (11th ed. 2019). “Public corruption crimes” include those crimes identified in Subchapter III of Title 11 of the FSM Code and include official oppression; speculating or wagering on official action or information; bribery in official and political matters; threats and other improper influence in official and political matters; retaliation for past official conduct; gifts to public servants by persons subject to their jurisdiction; compensating public servant for assisting private interests in relation to matters before him; and selling political endorsement. 11 FSMC §§ 514 *et seq.* Your Committee determined that the Independent Prosecutor’s authority should include “public corruption crimes,” which will allow the Independent Prosecutor to investigate and prosecute bribery, the acceptance of gifts, the use of information obtained in an official capacity to gain a personal benefit, and corruption crimes which are not covered by subsection (d)(i) because the public corruption crimes do not necessarily involve misuse of national government funds, but are offenses which harm the public’s trust in the national government.

With respect to investigations and cases pending on the effective date of this amendment, the Secretary of Justice and the Independent Prosecutor should consult and determine which cases should be transferred to the Independent Prosecutor and which cases should remain with the Department of Justice.

Subsection (d)(iii) grants the Independent Prosecutor the authority to “investigate and prosecute any person for any offense of obstruction or perjury committed in connection with an investigation or prosecution of the Independent Prosecutor.” This grant authorizes the Independent Prosecutor to investigate and prosecute anyone who obstructs or interferes with the investigations and prosecutions conducted pursuant to subsection (d)(i) or (d)(ii). Your Committee felt that it was appropriate for the Independent Prosecutor to prosecute these crimes as it will be the Independent Prosecutor who will know who interfered with his investigation and will have the evidence of the obstruction or perjury. Moreover, not vesting in the Independent Prosecutor the authority to prosecute obstructions or perjury designed to thwart or impede the Independent Prosecutor’s investigation or prosecution can undermine the efficacy of his office.

The **last paragraph of subsection (d)** establishes a mechanism for appointing a special counsel when the Independent Prosecutor or staff of the office has a conflict of interest and is unable to prosecute. For consistency with subsections (c) and (g), the Chief Justice is authorized to appoint the special counsel. The appointment is for only those cases “that are affected by the conflict of interest.”

Subsection (e) grants the Independent Prosecutor the power to subpoena witnesses to give testimony, to subpoena documents, to obtain a search warrant, and to exercise the powers needed to investigate the crimes identified in subsection (d)(i)-(iii). Subsection (e) allows Congress to grant the Independent Prosecutor additional powers by statute. The power granted to Congress to grant the Independent Prosecutor additional powers is consistent with the power granted to Congress in Section 3(b) of Article XII, which grants Congress power to create “additional duties” for the Public Auditor.

Subsection (e) also allows Congress to establish the qualifications of the Independent Prosecutor. Your Committee believes that it is more appropriate to establish the qualifications by statute to provide flexibility to address to changing circumstances. Your Committee does, however, believe that, at a minimum, the Independent Prosecutor should be a licensed attorney who has been admitted to the FSM bar or is eligible to be admitted to the FSM bar. The Independent Prosecutor must be able to file charging documents with the FSM Supreme Court and to appear in Court to prosecute the subject of the investigation; someone who is not a licensed attorney cannot fulfill these duties.

Subsection (f) establishes mechanism to protect the independence of the Independent Prosecutor by (1) requiring that Congress adequately fund the Office of the Independent Prosecutor, (2) ensuring that Congress and the President are prohibited from reducing the power, capability, or independence of the Independent Prosecutor, and (3) preventing the compensation of the Independent Prosecutor and his staff from being reduced during the Independent Prosecutor’s term. Compensation includes both salary and benefits. The mechanisms for independence are

similar to the mechanisms used for the Justices of the Supreme Court and the Public Auditor. See FSM Const., Art. XI, Sec. 5; FSM Const., Art. XII, Sec. 3(c).

Subsection (f) also requires the Independent Prosecutor to report to the President and Congress at least once a year. See also FSM Const., Art. XII, Sec. 3(c) (“The Public Auditor shall . . . report at least once a year to Congress.”).

Subsection (g) establishes the mechanism by which the Independent Prosecutor can be removed. Although it is important for the Independent Prosecutor to be independent and insulated from political pressure, there must be some mechanism by which to remove an Independent Prosecutor who is abusing this power, is incompetent, incapacitated, or has otherwise violated the terms of his contract or FSM law.


In order to maintain the Independent Prosecutor’s independence but also to allow removal of the Independent Prosecutor when necessary, the Independent Prosecutor may only be removed “for cause.” Your Committee debated whether termination should be for “good cause,” “just cause,” or “for cause.” Your Committee determined that “just cause” was not the appropriate term because “just cause” is more commonly used in international law. Your Committee determined that “good cause,” which has been interpreted by the FSM Supreme Court to mean “legally sufficient,” *Heirs of Benjamin v. Heirs of Benjamin*, 17 FSM R. 621, 627 (App. 2011), is too broad and would not protect the independence of the position. Your Committee determined that “for cause” was the appropriate term, providing insulation from political pressure and still allowing a non-functioning or abusive Independent Prosecutor to be removed.

“For cause” means that the Independent Prosecutor cannot be removed for purely political reasons, caprice, or because his ideas and actions are unorthodox or unpopular. Rather he can be removed only for conduct which is contrary to law or the Constitution or for failing to perform his duties as required by law or by this Constitution. Incompetence by itself is sufficient reason to remove the Independent Prosecutor “for cause.” Removal “for cause” is consistent with the removal provision for the Public Auditor. See FSM Const., Art. XII, Sec. 3(d) (“Congress may remove the Public Auditor from office for cause by 2/3 vote.”).

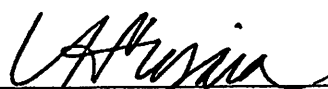
Subsection (g) also establishes a mechanism to fill a vacancy. If the Independent Prosecutor is removed for cause or there is a vacancy in the position, then the Chief Justice has the power to immediately appoint an acting Independent Prosecutor who will serve until the President can appoint and Congress can confirm a new Independent Prosecutor. By placing this power with the Chief Justice, the Committee’s Proposal is both internally consistent (see subsections (c) and (d)) and consistent with the constitutional provisions for filling a vacancy for the Public Auditor. See FSM Const., Art. XII, Sec. 3(d) (“In [the event the Public Auditor is removed for cause], the Chief Justice shall appoint an acting Public Auditor until a successor is confirmed.”).

For the reasons stated herein, your Committee on Government Structure and Functions is in accord with the intent and purpose of the committee proposal attached hereto and recommends its passage on First Reading, and that it be placed on the Calendar for Second Reading for review by your Committee of the Whole, then placed on the Calendar for Final Reading after review by your Committee on Style and Arrangement.

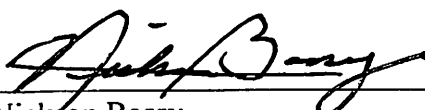
Respectfully submitted,



Victor Nabeyan, Chairman



Akillino Susaia, Vice Chairman




Nickson Bossy

Myron Hashiguchi

James Naich


Marcus Samo

Roger Arnold




Canney Palsis


Yoslyn Sigrah



Ricky Cantero



Tendy Liwy



Berney Martin

Andrew Yatilman

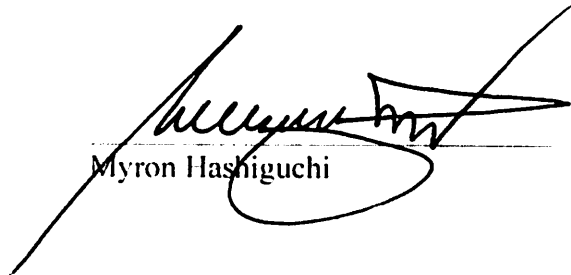
For the reasons stated herein, your Committee on Government Structure and Functions is in accord with the intent and purpose of the committee proposal attached hereto and recommends its passage on First Reading, and that it be placed on the Calendar for Second Reading for review by your Committee of the Whole, then placed on the Calendar for Final Reading after review by your Committee on Style and Arrangement.

Respectfully submitted,

Victor Nabeyan, Chairman

Akillino Susaia, Vice Chairman

Nickson Bossy



Myron Hashiguchi

James Naich

Marcus Samo

Roger Arnold

Canney Palsis

Yoslyn Sigras

Ricky Cantero

Tendy Liwy

Berney Martin

Andrew Yatilman

ARTICLE _____

“Section 4.

(a). The Office of the Independent Prosecutor is hereby established.

(b). The President shall appoint an Independent Prosecutor, with the advice and consent of 2/3 of the members of Congress, to serve for a term of six (6) years and until a successor is appointed and confirmed. The Independent Prosecutor shall not be reappointed to a consecutive term. The President shall appoint the first Independent Prosecutor within one hundred eighty (180) days of the effective date of this section.

(c). If the President does not appoint the Independent Prosecutor within the one hundred eighty (180) days, the Chief Justice shall immediately appoint an acting Independent Prosecutor to serve until a successor is appointed by the President with the advice and consent of Congress.

(d) The Independent Prosecutor has the exclusive authority to:

(i). investigate and prosecute any person or entity, whether private or public, or any official of the national, state, or local government for the commission of any national offense relating to national funds;

(ii). investigate and prosecute any official of the national government for the commission of any national offense involving public corruption; and

(iii). investigate and prosecute any person for any offense of obstruction or perjury committed in connection with an investigation or prosecution of the Independent Prosecutor.

In the event of a conflict of interest inhibiting the prosecutorial capability of the Independent Prosecutor or his office, the Chief Justice shall appoint special counsel to investigate and prosecute the specific cases that are affected by such conflict of interest.

(e). The Independent Prosecutor may compel witness testimony and production of documents by subpoena, effect lawful search and seizure, and exercise such other powers as may be necessary to his investigation or prosecution. The powers and qualifications of the Independent Prosecutor may be prescribed by statute.

(f). The Office of the Independent Prosecutor is independent of administrative control, shall be adequately funded by Congress, and no statute, regulation, or directive shall be enacted or enforced which has the effect of reducing or eliminating the independence, power, or

capability of that office; nor shall the compensation of the Independent Prosecutor and his staff be reduced during his term in office. The Independent Prosecutor shall report at least once a year to the President and Congress.

(g). The Independent Prosecutor may be removed from office for good cause by the President with a 2/3 vote of the members of Congress. Upon removal of the Independent Prosecutor or vacancy in the position, the Chief Justice shall immediately appoint an acting Independent Prosecutor to serve until a successor is appointed by the President with the advice and consent of Congress.”

Date: June 14, 2022

Offered by: Committee on Government Structure and
Functions