

FSM SUPREME COURT TRIAL DIVISION

PACIFIC FOODS AND SERVICES, INC. ,) CIVIL ACTION NO. 2009-001
)
Plaintiff,)
)
vs.)
)
NATIONAL OCEANIC RESOURCE MANAGEMENT)
AUTHORITY, FEDERATED STATES OF)
MICRONESIA, CONGRESS OF THE FEDERATED)
STATES OF MICRONESIA, and BERNARD)
THOULAG, in his official capacity as Executive)
Director of NORMA,)
)
Defendants.)
)

ORDER DISPOSING OF PENDING MOTIONS

Ready E. Johnny
Associate Justice

Rehearings: March 18, May 6, 2010
Decided: June 25, 2010

APPEARANCES:

For the Plaintiffs: Ron Moroni, Esq.
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For the Defendants: Lorrie Johnson-Asher, Esq. (motions & opposition)
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HEADNOTES

Civil Procedure – Motions

Failure to oppose a motion is generally deemed a consent to the motion, but even if there is no

opposition, the court still needs good grounds before it can grant the motion. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 186 (Pon. 2010).

Civil Procedure – Pleadings

Under Civil Procedure Rule 12(f), the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 186 (Pon. 2010).

Civil Procedure – Pleadings

Since an allegation that a Congressman who signed the congressional committee report recommending that Congress reject the plaintiff's successor access agreement had a conflict of interest because he or his relatives own a competing agency on Pohnpei, is immaterial and impertinent to the question of a statute's constitutionality and may also be scandalous, that allegation will be stricken. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 186 (Pon. 2010).

Separation of Powers – Legislative Powers

If a congressman has a conflict of interest and did not take steps to avoid that conflict, that is an ethical lapse that Congress, not the court, has the authority to consider and, if proper, impose sanctions or discipline on the congressman. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 186 n.2 (Pon. 2010).

Constitutional Law – Case or Dispute; Separation of Powers

When the Constitution contains a textually demonstrable commitment of an issue to a coordinate branch of government, it is a nonjusticiable political question not to be decided by the court because of the Constitution's requirements for the separation of powers. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 186 (Pon. 2010).

Separation of Powers – Judicial Powers; Statutes – Construction

The Constitution unmistakably places upon the judicial branch the ultimate responsibility for interpretation of the Constitution and for determining the constitutionality of statutes. It is the special province and duty of the courts, and the courts alone, to say what the law is and to determine whether a statute is constitutional. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 187 (Pon. 2010).

Constitutional Law – Supremacy Clause; Separation of Powers – Judicial Powers

While all public officials are sworn to uphold the Constitution, the Constitution places upon the courts the ultimate responsibility for interpreting the Constitution. The court is forsworn by the Supremacy Clause from enforcing national laws or treaties contrary to the Constitution itself. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 187 (Pon. 2010).

Separation of Powers – Judicial Powers; Statutes – Construction

The question of a statute's constitutionality is not a nonjusticiable political question textually reserved to Congress. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 187 (Pon. 2010).

Civil Procedure – Dismissal – Before Responsive Pleading

When the plaintiff has standing, the court has jurisdiction over the plaintiff's challenge of a statute's constitutionality which thus states a claim for which the court may grant relief if the plaintiff's contentions are correct. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 187 & n.3 (Pon. 2010).

Separation of Powers – Executive Powers

Once a public law is enacted, the responsibility for the execution and implementation of the law rests with those who have a duty to execute and administer the law. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 188 (Pon. 2010).

Marine Resources; Separation of Powers – Legislative Powers

When Congress enacted Title 24 and engaged in an executive function by formally inserting itself into the execution and implementation of a portion of that act by vesting in itself the power to control how the law regarding fishing access agreements is executed when more than nine vessels are involved, this was impermissible under the separation of powers doctrine since negotiated access agreements are not approved and licenses are not issued until Congress acts (and the parties to the negotiations presumably know this and adjust their behavior accordingly) and since negotiation and approval of commercial transactions is ordinarily an Executive power. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189 (Pon. 2010).

Separation of Powers

The separation-of-powers concept is inherent in the FSM Constitution's structure and any power exercised by a government branch that is beyond that which the Constitution grants to that branch violates the Constitution and is null and void. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189 (Pon. 2010).

Marine Resources; Separation of Powers – Legislative Powers

When, if the section of Title 24 requiring congressional approval of access agreements for more than nine vessels is struck down, that section is easily severed from the rest of Title 24, which would function perfectly well without it; that is, it would function just as it already does for access agreements for nine or fewer vessels, then that section is not so vital to the whole Title 24 regulatory scheme that it cannot be severed from the rest of Title 24. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189 (Pon. 2010).

Marine Resources; Separation of Powers – Legislative Powers

If Congress feels that the current Title 24 statutory requirements for access agreements are too loose or are not in the nation's best interests and should be tightened, it can enact further and stricter requirements or it can provide for that review by creating a mechanism for further review in the executive branch, since Congress, through its investigatory powers, can always keep itself informed on the Executive's execution of the laws, and enact remedial legislation when it feels that the Executive needs further guidance in executing national policy that Congress has enacted. But Congress may not execute the laws itself. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189 (Pon. 2010).

Marine Resources; Treaties

An "access agreement" is a treaty, agreement or arrangement entered into by the Authority pursuant to Title 24 in relation to access to the exclusive economic zone for fishing by foreign fishing vessels. But a fishing access agreement is usually not a treaty because treaties are compacts or agreements between sovereign nations and most fishing access agreements are commercial agreements between the FSM national government and a commercial enterprise. They are business deals – not treaties. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189 (Pon. 2010).

Treaties

A treaty is a compact made between two or more independent nations with a view to the public welfare. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 189-90

(Pon. 2010).

Marine Resources; Separation of Powers – Legislative Powers; Treaties

Since the Constitution specifically delegates to Congress the power to ratify treaties but does not grant Congress the power to approve or reject fishing access agreements, ruling unconstitutional the statute that requires congressional approval for fishing access agreements for more than nine vessels would not impair Congress's ability to ratify treaties and to advise and consent to presidential appointments. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 190 (Pon. 2010).

Marine Resources; Treaties

Since approval of commercial fishing agreements is not a power that the Constitution confers on Congress, but a power that Congress has conferred upon itself by statute, the court's conclusion that that statute is unconstitutional does not have any effect on access agreements that are actually negotiated and concluded as treaties between sovereign nations because, just like any other treaty, the President would continue to submit those to Congress for ratification. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 190 (Pon. 2010).

Statutes – Construction

While the court is mindful that a practice which has been engaged in by a branch of the government for a long period of time is entitled to great weight in establishing the constitutionality of that practice, the passage of time does not automatically make a practice (or a statute) constitutional. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 190 (Pon. 2010).

Marine Resources; Separation of Powers – Legislative Powers

The court's conclusion that requiring Congress to approve or reject fishing access agreements is unconstitutional has no effect on Congress's constitutional treaty-ratification and advice and consent powers. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 190 (Pon. 2010).

Marine Resources

Since a government act in conflict with the Constitution is invalid to the extent of conflict, Congress's rejection of a successor access agreement was invalid because 24 F.S.M.C. 405 is in conflict with the Constitution. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 190 (Pon. 2010).

Civil Procedure – Dismissal – Before Responsive Pleading

When, in response to its query about what relief the plaintiff sought against defendant Congress, the only answer the court received was that the court should determine that the law was invalid and when a liberal reading of the complaint could give rise to a claim that Congress rejected the plaintiff's successor agreement for an improper reason, the court will, unless the plaintiff specifies what other relief its complaint seeks against Congress, grant the motion to dismiss for failure to state a claim upon which the court can grant relief because neither a claim that Congress voted in a certain way for an improper reason nor a claim that a statute Congress enacted is unconstitutional present a claim against Congress for which a court can grant relief. Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181, 191 (Pon. 2010).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On March 19, 2010, and again on May 6, 2010, this came before the court in hearing the following pending motions: 1) Plaintiff's Motion for Partial Summary Judgment, filed February 9, 2009, with Affidavit of Pedrus I. Fhsa; 2) Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment; Motion to Strike; and Motion for Partial Summary Judgment, filed February 20, 2009; 3) Additional Brief in Support of Defendants' Motion for Summary Judgment, filed by Congress February 20, 2009; 4) Defendants' Motion to Dismiss Pursuant to FSM Civil Procedure Rule 10(b)(1) and (6), filed March 6, 2009; and 5) Plaintiff's Opposition to Defendants' Motion to Dismiss, filed March 23, 2009.

The defendants' motion to strike is granted and their motion to dismiss is denied. The plaintiff's partial summary judgment motion is granted and the defendants' partial summary judgment motion is denied. The court's reasons follow.

I. BACKGROUND

In 2004, the plaintiff, Pacific Foods and Services, Inc. ("PF&S"), an FSM corporation owned by Pohnpei citizens, entered into a two-year fishing access agreement with defendant National Oceanic Resource Management Authority ("NORMA"), which was approved by Congress and required by 24 F.S.M.C. 405. Under the agreement PF&S acted as agent for foreign fishing vessels and obtained NORMA permits for those vessels to fish in the FSM Exclusive Economic Zone ("EEZ"). The agreement expired in November, 2006, but on November 6, 2006, PF&S and NORMA concluded a one-year successor agreement and promptly submitted it to Congress.

Under 24 F.S.M.C. 405, if Congress does not approve or reject the successor agreement before the pre-existing agreement expires then the pre-existing agreement remains in effect until Congress either approves or rejects the successor agreement. The 2004 agreement thus remained in effect until, on September 26, 2007, Congress passed a resolution rejecting¹ the PF&S successor agreement. NORMA then canceled the fishing permits that had been issued to PF&S-represented vessels. Those vessels then terminated their relationship with PF&S and entered agency agreements with PF&S competitors.

PF&S filed suit on January 6, 2009. It seeks: 1) a declaratory judgment that 24 F.S.M.C. 405 unconstitutionally encroaches on the other branches' powers; 2) a declaratory judgment that the "resolution" rejecting PF&S's successor agreement was invalid because it violated constitutional requirements that bills must go through two readings, must contain an enacting clause, and must be presented to the President for his approval or disapproval; 3) a writ of mandamus ordering NORMA to reinstate its fishing access agreement; 4) a judgment that NORMA refund the fishing access fees PF&S

¹ The reason given for the rejection was PF&S's financial condition and a \$150,000 FSM Supreme Court judgment against it held by National Fisheries Corporation. SCREP No. 15-47, 15th Cong., 2nd Reg. Sess. (2007). Fishing boats and fishing boat owners are banned from applying for or obtaining EEZ fishing licenses if there are unsatisfied FSM Supreme Court judgments against them of over \$25,000. FSM Pub. L. No. 13-86, § 2, 13th Cong., 5th Reg. Sess. (2005) (to be codified at 24 F.S.M.C. 122). There is no similar statutory ban for access agreement agents, such as PF&S. PF&S's financial condition was not the reason NORMA gave for negotiating a one-year successor agreement instead of a two-year agreement. SCREP No. 15-47 at [unnumbered] 2, 15th Cong., 2nd Reg. Sess.

paid for licenses that NORMA canceled after Congress rejected the successor access agreement; and 5) a judgment for lost (business and) profits.

On February 9, 2009, PF&S moved for partial summary judgment that: 1) Title 24, section 405 is unconstitutional and can be severed from the rest of Title 24, and 2) Congress's rejection of the PF&S fishing access agreement was invalid. On February 20, 2009, the defendants moved: 1) to strike PF&S's allegation that a Congressman who signed the committee report recommending rejection of PF&S's successor access agreement had a conflict of interest in that he or his relatives own a competing agency; 2) to dismiss the case on the ground that the court lacks jurisdiction because the case presents a non-justiciable political question and because the complaint fails to state a claim for which the court can grant relief; and 3) for partial summary judgment that section 405 is constitutional and is a constitutional exercise of Congress's treaty-ratification power.

II. ANALYSIS

A. *Motion to Strike*

The defendants move to strike PF&S's allegation that a Congressman who signed the congressional committee report recommending that Congress reject PF&S's successor access agreement had a conflict of interest because he or his relatives own a competing agency on Pohnpei. PF&S did not file a written opposition to the motion to strike and did not oppose it orally.

Failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d), but even if there is no opposition, the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994). Under Civil Procedure Rule 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The allegation is immaterial and impertinent to the question of 24 F.S.M.C. 405's constitutionality. It may also be scandalous.²

The motion to strike is accordingly granted and any allusions or implications in PF&S's pleadings alleging a congressman's conflict of interest are hereby stricken.

B. *Motion to Dismiss*

The defendants contend that the court lacks jurisdiction over this case because it presents a non-justiciable political question and thus fails to state a claim for which the court can grant relief. The defendants assert that since treaty ratification is a Congressional power and that since fishing agreements involve foreign affairs, the conduct of which is left to the non-judicial branches of government, this is a political question over which the court has no jurisdiction. PF&S asserts that the case does not involve a political question since its fishing access agreement is not a treaty and does not involve the conduct of foreign affairs.

When the Constitution contains a textually demonstrable commitment of the issue to a coordinate branch of government, such as Congress being the sole judge of the elections of its members, it is a nonjusticiable political question not to be decided by the court because of the Constitution's requirements for the separation of powers. Aten v. National Election Comm'r (III), 6 FSM

² If a congressman had a conflict of interest and did not take steps to avoid that conflict, that is an ethical lapse that Congress, not the court, has the authority to consider and, if proper, impose sanctions or discipline on the congressman.

Intrm. 143, 145 (App. 1993). For example, whether Congress did (or should) ratify a treaty would likely be a nonjusticiable political question because Congress has the expressly delegated power to ratify treaties, FSM Const. art. IX, § 2(b), and while conduct of foreign affairs and the implementation of international agreements are properly left to the non-judicial branches of government, the judicial branch has the power to interpret treaties, In re Extradition of Jano, 6 FSM Intrm. 93, 103 (App. 1993).

This case does not involve the conduct of foreign affairs. It involves the interpretation of a statute and whether that statute is constitutional. The Constitution unmistakably places upon the judicial branch the ultimate responsibility for interpretation of the Constitution and for determining the constitutionality of statutes. Suldan v. FSM (II), 1 FSM Intrm. 339, 343 (Pon. 1983). It is the special province and duty of the courts, and the courts alone, to say what the law is and to determine whether a statute is constitutional. See People of Kapingamarangi v. Pohnpei Legislature, 3 FSM Intrm. 5, 8-9 (Pon. S. Ct. Tr. 1985). It is the FSM Supreme Court's duty to review any national law in response to a claim that the law violates constitutional rights, and if any provision is contrary to the Constitution, which is the supreme law of the land, then that provision must be set aside as without effect. Samuel v. Pryor, 5 FSM Intrm. 91, 98 (Pon. 1991). Thus, the FSM Supreme Court has the power to review Congressional legislative enactments and their implementation, and it has the responsibility to set aside any statute to the extent that it violates the Constitution. FSM v. Udot Municipality, 12 FSM Intrm. 29, 47 (App. 2003); Constitutional Convention 1990 v. President, 4 FSM Intrm. 320 (App. 1990). Furthermore, "[w]hile all public officials are sworn to uphold the Constitution, the Constitution places upon the courts the ultimate responsibility for interpreting the Constitution. [The court is] forsworn by the Supremacy Clause from enforcing national laws or treaties contrary to the Constitution itself." Udot Municipality, 12 FSM Intrm. at 47.

This is not a nonjusticiable political question textually reserved to Congress. This is a question of a statute's constitutionality. The court has jurisdiction to determine whether 24 F.S.M.C. 405 is unconstitutional.³ The court thus has jurisdiction over the case and therefore PF&S's challenge of the statute's constitutionality states a claim for which the court may grant relief if PF&S's contentions are correct. The motion to dismiss is accordingly denied.

C. Cross Motions for Partial Summary Judgment

1. Parties' Contentions

PF&S seeks summary judgment that Title 24, section 405 is unconstitutional, that section 405 can be severed from the rest of Title 24, and that Congress's rejection of the PF&S fishing access agreement was invalid. PF&S contends that it should be granted summary judgment because: 1) the court has the power, in a case or dispute, to rule a statute unconstitutional; 2) NORMA was established to negotiate, conclude, and implement fishing access agreements and issue fishing permits for vessels to engage in commercial fishing in the FSM EEZ; 3) 24 F.S.M.C. 405 requires Congressional approval for fishing access agreements for ten or more vessels; 4) this section 405 requirement is unconstitutional because it violates the separation of powers principle by, in PF&S's view, allowing Congress to exercise executive powers and be involved in executing laws that it has passed; 5) it also violates (relying on U.S. constitutional case law) the separation of powers principle because it constitutes an impermissible "legislative veto" over the executive's administration of laws; 6) section 405 is also unconstitutional because it does not require access agreement approvals to go through two readings as the Constitution requires, FSM Const. art. IX, § 20, or to contain an enacting clause, FSM

³ Although not contested, since PF&S was directly affected by Congress's exercise of the Section 405 congressional review, it has standing to bring this suit.

Const. art. IX, § 21, and or to be presented to the President for his approval or disapproval, FSM Const. art. IX, § 22; 7) and Congress unconstitutionally implemented section 405 because it did not go through these processes.

The defendants seek summary judgment that section 405 is constitutional. They contend that: 1) section 405 only requires approval or rejection by resolution; 2) under the FSM Constitution (unlike the U.S. Constitution) there is no requirement that resolutions go through two readings, or contain an enacting clause, or be presented to the President for his approval or disapproval; 3) if this resolution process were declared unconstitutional it would affect or strike down Congress's power to ratify treaties and to advise and consent to Presidential appointments, both of which are done by resolution; 4) Congress, in the defendants' view, is not involved in any negotiation or decision-making process of whether a fishing permit should be issued, but merely reviews an access agreement already negotiated and either approves it or rejects it; and 5) that section 405, in their view, is so important that it cannot be severed from the rest of Title 24, so therefore ruling it unconstitutional would rule all of Title 24 unconstitutional which the court should not do since the EEZ fishing resources are too vital to the nation.

2. Section 405's Constitutionality

The court concludes that FSM controlling precedent, FSM v. Udot Municipality, 12 FSM Intrm. 29 (App. 2003), provides adequate guidance to resolve these cross motions. The Udot appellate court ruled that

Once a public law is enacted, the responsibility for the execution and implementation of the law rests with those who have a duty to execute and administer the law, and Senators can have no further role in its execution.

.....

The basic constitutional principle involved is that the execution and implementation of the laws is an executive rather than a legislative function. The language of the challenged public law specifically provided that a Congressional delegation must be consulted on the most appropriate usage of the funds before an obligation could occur. This means that if the Congressional delegation was not consulted, then no obligation could be made.

This requirement runs afoul of the Constitution because it empowers the Congressional delegation to engage in an executive function by formally involving itself in executing and implementing the appropriation. Congress cannot pass laws and vest in itself or its Members the power to control how that law is executed.

The Constitution affords the Congress great latitude in making policy decisions through the process of enacting legislation. However, once Congress enacts legislation, its role ends: Congress can thereafter formally affect the execution of its enactment only by enacting appropriate new legislation. While Congress may inform itself on how legislation is being implemented through the normal means of legislative oversight, public hearing, and investigation, it cannot directly insert a Congressional delegation into the process of executing and implementing the law.

Udot Municipality, 12 FSM Intrm. at 50.

Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth.
17 FSM Intrm. 181 (Pon. 2010)

The defendants contend that Congress is not involved in Title 24's administration because it only "reviews"⁴ the access agreements after NORMA has negotiated them. This is not true. Under section 405, negotiated access agreements are not approved and licenses are not issued until Congress acts (and the parties to the negotiations presumably know this and adjust their behavior accordingly). Negotiation and approval of commercial transactions is ordinarily an Executive power. Congress has enacted Title 24 and engaged in an executive function by formally inserting itself into the execution and implementation of a portion of that act by vesting in itself the power to control how the law regarding fishing access agreements is executed when more than nine vessels are involved. This is impermissible under the separation of powers doctrine.

The concept of separation of powers is inherent in the FSM Constitution's structure and any power exercised by a government branch that is beyond that which the Constitution grants to that branch violates the Constitution and is null and void. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 508, 512 (Pon. 2009); Pohnpei Cmty. Action Agency v. Christian, 10 FSM Intrm. 623, 630 (Pon. 2002). Section 405 unconstitutionally vests executive power in Congress.

The defendants contend that section 405 must be constitutional because section 405 is so vital to the whole regulatory scheme in Title 24 that it cannot be severed from the rest of Title 24 and that, if section 405 is struck down, it would render all of Title 24 invalid with grave consequences for the FSM EEZ. This is false. Section 405 is easily severed from the rest of Title 24, which would function perfectly well without section 405; that is, it would function just as it already does for access agreements for nine or fewer vessels. NORMA would still negotiate and conclude fishing access agreements that must comply with Title 24's statutory requirements and everything would function the same as before except that fishing agreements for more than nine vessels would not be presented to Congress for Congress to approve or reject. All access agreements would follow the procedures currently used without any difficulty for agreements for nine or fewer vessels.

Congress, at one point, stated that section 405 adds an extra layer of review necessary to see that the fishing access agreements that are adopted are in the nation's best interest. If Congress feels that the current Title 24 statutory requirements for access agreements are too loose or are not in the nation's best interests and should be tightened, it can enact further and stricter requirements. If Congress feels that another layer of review is needed to protect the nation's interests, Congress can provide for that review by creating a mechanism for further review in the executive branch. If Congress feels that access agreement agents, as well as fishing boats and vessel owners, should not be permitted to contract with NORMA if they have outstanding fisheries-related judgments against them, Congress can enact such guidelines into law. And Congress, through its investigatory powers, can always keep itself informed on the Executive's execution of the laws, and it can enact remedial legislation when it feels that the Executive needs further guidance in executing national policy that Congress has enacted. But Congress may not execute the laws itself and under section 405 it does just that.

Congress claims that section 405 must be constitutional since it is a function of its treaty ratification powers. In support of this contention, the defendants point to the statutory definition of access agreement. "'Access agreement' means a treaty, agreement or arrangement entered into by the Authority pursuant to this act in relation to access to the exclusive economic zone for fishing by foreign fishing vessels" 24 F.S.M.C. 102(1). But a fishing access agreement is usually not a treaty. Treaties are compacts or agreements between sovereign nations. A treaty is "[a] compact

⁴ The review in this case consisted of a committee investigation and report, which duplicated NORMA's activities but which came to a different result, perhaps because by the time Congress acted the \$150,000 judgment against PF&S had been entered. *See supra* note 1.

made between two or more independent nations with a view to the public welfare." BLACK'S LAW DICTIONARY 1346 (5th ed. 1979). PF&S's fishing access agreement cannot be considered a treaty or an international agreement. The access agreement in this case was between a Pohnpei corporation and the national government and involved (mostly foreign) fishing vessels in a commercial enterprise. Even if the access agreement had been between the national government and a foreign corporation it still would not have been a "treaty." Most fishing access agreements are commercial agreements between the FSM national government and a commercial enterprise. They are business deals – not treaties. They fall under the "agreement or arrangement" portion of the access agreement definition in 24 F.S.M.C. 102(1), not the treaty portion. Furthermore, there is no logical legal reason why, if the defendants' contention were correct that access agreements involve Congress's treaty ratification powers for agreements that involve more than nine vessels, Congress would not also be required to approve or reject all access agreements for nine vessels or less as well.

The Constitution specifically delegates to Congress the power to ratify treaties. FSM Const. art. IX, § 2(b). It does not grant Congress the power to approve or reject fishing access agreements. Congress asserts that ruling section 405 unconstitutional would impair its ability to ratify treaties and to advise and consent to presidential appointments. This is false. Congress is expressly delegated those two powers in the Constitution, FSM Const. art. IX, § 2(b) (ratify treaties); FSM Const. art. X, § 2(d) (advice and consent to appointments). Holding Section 405 unconstitutional will have no effect whatsoever on Congress's power to ratify or reject treaties submitted to it by the President, FSM Const. art. IX, § 4, or on its power to advise and consent to nominations submitted to it by the President, FSM Const. art. X, § 2(d). Those powers are enshrined in the Constitution. Approval of commercial fishing agreements, however, is not a power that the Constitution confers on Congress, but a power that Congress has conferred upon itself by statute. The court's conclusion that 24 F.S.M.C. 405 is unconstitutional also does not have any effect on access agreements that are actually negotiated and concluded as treaties between sovereign nations. Just like any other treaty, the President would continue to submit those to Congress for ratification.

The defendants also contend that since Congressional approval or rejection of access agreements is a "time-honored procedure" of Congress, the court should consider it to be constitutional. While the court is mindful that a practice which has been engaged in by a branch of the government for a long period of time is entitled to great weight in establishing the constitutionality of that practice, the passage of time does not automatically make a practice (or a statute) constitutional. In this case, it has not.

Accordingly, there being no genuine issue of material fact, PF&S is granted summary judgment, as a matter of law, on its request for a declaratory judgment that section 405 is unconstitutional since it violates the separation of powers doctrine. The court's conclusion that 24 F.S.M.C. 405 is unconstitutional has no effect on Congress's constitutional treaty-ratification and advice and consent powers. Since section 405 is unconstitutional on separation-of-powers grounds there is no reason for the court to consider whether the section 405 resolution process would violate the Constitution's two-reading, enactment clause, and presentment-to-the-President requirements.

3. September 26, 2007 Rejection

Since "[a]n act of the Government in conflict with th[e] Constitution is invalid to the extent of conflict," FSM Const. art. II, § 1, Congress's September 26, 2007 rejection of PF&S's successor agreement was invalid because, as discussed above, 24 F.S.M.C. 405 is in conflict with the Constitution. That successor agreement, if it had not been rejected, would have expired by now. Whether PF&S would have been successful in negotiating a further access agreement is unknown (and unknowable). The matter of relief is not now before the court but is left to further proceedings.

D. Claims against Congress

During the hearing the court inquired of PF&S what relief it sought against defendant Congress. The only answer the court received was that the court should determine that the law (section 405) is invalid. A liberal reading of the complaint could give rise to a claim that Congress rejected PF&S's successor agreement for an improper reason. Neither a claim that Congress voted in a certain way for an improper reason nor a claim that a statute Congress enacted is unconstitutional present a claim against Congress for which a court can grant relief. Accordingly, if PF&S does not, within twenty days of this order, specify what other relief its Complaint seeks against Congress, the court will grant a motion to dismiss for failure to state a claim upon which the court can grant relief for defendant Congress only.

E. Possible Interlocutory Appeal

The court realizes the importance of today's ruling on 24 F.S.M.C. 405's constitutionality. The court is therefore willing to entertain a motion that the court make the statement required by Appellate Rule 5(a) that would permit a party to afterward ask the appellate division for permission to make an interlocutory appeal. Any such motion should be filed in the trial division within twenty days of this order.

III. CONCLUSION

The defendants' motion to strike from PF&S's pleadings its allegation that a Congressman has a conflict of interest is granted. The defendants' motion to dismiss is denied since the case is a nonjusticiable political question but involves the court's determination whether a statute is constitutional, an issue completely within the court's purview. Because 24 F.S.M.C. 405 is unconstitutional, an issue completely within the court's purview. Because 24 F.S.M.C. 405 is unconstitutional, the plaintiff's motion for partial summary judgment is granted and the defendants' motion for partial summary judgment is denied, and 24 F.S.M.C. 405 is declared unconstitutional. It is unnecessary to rule on the plaintiff's constitutional challenges to section 405's validity and to the procedure Congress used to reject PF&S's successor agreement. Since PF&S appears not to be seeking relief from Congress, the motion to dismiss for failure to state a claim will be granted only as to defendant Congress unless PF&S shows a good cause otherwise within twenty days.

IV. SCHEDULE

The following schedule is hereby set: 1) the parties must make all their discovery requests by September 15, 2010; 2) all discovery must be completed by October 11, 2010; 3) all pretrial motions must be filed by November 1, 2010; and 4) if needed, a date for hearing pretrial motions will be set after the motions have been filed.

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