FSM SUPREME COURT APPELLATE DIVISION

CONGRESS OF THE FEDERATED STATES OF MICRONESIA, Appellant, vs. PACIFIC FOOD AND SERVICES, INC., NATIONAL OCEANIC RESOURCE MANAGEMENT AUTHORITY, FEDERATED STATES OF MICRONESIA, and the EXECUTIVE DIRECTOR of NORMA, in his official capacity, Appellees.	APPEAL CASE NO. P3-2010 Civil Action No. 2009-001

OPINION

Argued: January 12, 2011
Decided: June 20, 2011

APPEARANCES:

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HEADNOTES

Appellate Review – Standard of Review – Civil Cases

Trial court decisions concerning questions of law are reviewed de novo. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 545 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Summary Judgment – Grounds

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. An appeals court will apply the same standard in reviewing a trial court's grant of summary judgment as that applied by the trial court. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 545 (App. 2011).

Marine Resources; Separation of Powers – Legislative Powers; Statutes

A statute that purports to allow Congress to step around the bill-making process and approve

fishing access agreements by resolution, is surely unconstitutional because under the Constitution, Congress may make law only by statute, and may enact statutes only by bill. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 546 (App. 2011).

Marine Resources; Separation of Powers – Legislative Powers

Congress's decision to approve or disapprove fishing access agreements is legislation that must be enacted by the bill-making process. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 547 (App. 2011).

Treaties

In order to ratify a treaty, two-thirds of the members of Congress must vote in favor of ratification. Ratification may not be done by the resolution process where only eight votes are necessary. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 547 & n.1 (App. 2011).

Separation of Powers

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. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 548 (App. 2011).

Separation of Powers – Executive Powers; Separation of Powers – Legislative 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, 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 Constitution affords the Congress great latitude in making policy decisions through the process of enacting legislation, but once Congress enacts legislation, its role ends: Congress can thereafter formally affect the execution of its enactment only by enacting appropriate new legislation. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 548 (App. 2011).

Marine Resources; Separation of Powers – Executive Powers

Because an access agreement does not give exclusive rights either to negotiate permits on behalf of all foreign vessels or to exploit the FSM's EEZ, it is more properly a permit or license. Administration of a permit or license scheme is, by its nature, administrative, and thus an executive branch function. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 549 (App. 2011).

Marine Resources; Separation of Powers – Legislative Powers

If Congress is truly concerned by the amount of debt carried by proposed agents, it may be more specific by creating new minimum requirements for eligibility. But once Congress delegates power to the executive, it cannot have it both ways – it cannot then take back that power or modify the extent of that delegation without amending the statute through the bill-making process. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 550 (App. 2011).

Statutes – Construction

If a statutory provision is unconstitutional and can be severed from the rest of the legislative act, only that provision will be struck down. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 551 (App. 2011).

Statutes – Construction

A legal conclusion that a statute is unconstitutional implies that it may be judicially tailored to make the statute otherwise workable. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542,

551 (App. 2011).

Marine Resources; Statutes – Construction

Under 24 F.S.M.C. 121, all of the Marine Resources Act's components are severable. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 551 (App. 2011).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This is an appeal from the FSM Supreme Court Trial Division's order disposing of pending motions on June 25, 2010. [Pacific Foods & Servs., Inc. v. National Oceanic Res. Mgt. Auth., 17 FSM Intrm. 181 (Pon. 2010).] Specifically, defendant-appellant Congress of the Federated States of Micronesia ("Congress") appeals from the trial court's grant of partial summary judgment in favor of plaintiff-appellee Pacific Foods and Services, Inc. ("PF&S"), on the question of the constitutionality of 24 F.S.M.C. 405, ruling that section unconstitutional on separation-of-powers grounds. We follow a slightly different analysis, but affirm the lower court in holding that the section is unconstitutional.

I. BACKGROUND

The material facts are not in dispute. In 2002, Congress passed and the President signed into law FSM Pub. L. No. 12-34, entitled the Marine Resources Act of 2002 ("MRA"), which set forth a comprehensive scheme for licensing fishing boats within the exclusive economic zone ("EEZ") of the Federated States of Micronesia ("FSM"). The MRA, as subsequently amended, is codified as Chapters 1 through 9 of Title 24. The MRA established the National Oceanic Resource Management Authority ("NORMA"), and granted NORMA the power to negotiate and enter into access agreements for fishing in the FSM's EEZ, 24 F.S.M.C. 402, but reserved to Congress the authority to approve such agreements, 24 F.S.M.C. 405 ("Section 405"). Specifically, Section 405 provides that:

> To take effect within the exclusive economic zone, an access agreement involving ten or more vessels shall be submitted to the Congress of the Federated States of Micronesia for approval by resolution. If the Congress does not approve or reject an access agreement before a pre-existing access agreement, if any, expires, then the pre-existing access agreement shall be deemed to be revived and in force from the date on which the access agreement is submitted to Congress and shall be deemed to remain in force until Congress approves or rejects the access agreement submitted for consideration.

24 F.S.M.C. 405.

In 2004, PF&S and NORMA entered into a two-year fishing access agreement, which Congress then approved. Under the agreement, PF&S acted as agent for foreign fishing vessels and obtained permits for those vessels to fish in the EEZ. The access agreement expired in November 2006, at which time PF&S and NORMA concluded a one-year successor agreement and submitted it to Congress. Pursuant to a committee report recommending the rejection of the successor agreement on the grounds that there was a judgment against PF&S in the amount of $150,000, Congress passed a resolution rejecting the successor agreement in September 2007, until which time the agreement had remained in force pursuant to Section 405. The judgment did not exist in November 2006, when PF&S and NORMA concluded the successor agreement.

In January 2009, PF&S filed Civil Action No. 2009-001, seeking a declaratory judgment that Section 405 was unconstitutional, a writ of mandamus requiring NORMA to put the successor agreement into effect, restitution of fees paid to NORMA for fishing permits that were canceled when Congress rejected the successor agreement, and damages for lost business and profits. In February 2009, PF&S moved for partial summary judgment on the constitutionality of Section 405 and the consequent validity of the successor agreement. Congress joined other defendants to move for partial summary judgment on the same issues. On June 25, 2010, the trial court resolved the competing motions for summary judgment on the issue of constitutionality in favor of PF&S. In the same order, the trial court also granted Congress's motion to dismiss for failure to state a claim, reasoning that PF&S did not appear to be seeking relief from Congress. On July 30, 2010, the trial court amended the June 25 Order to include language which would enable Congress to appeal what is otherwise an interlocutory order. On August 19, 2010, we granted permission to appeal.

II. Issues Presented

Congress asserts the issues presented for review thus:

1. 24 F.S.M.C. is a legitimate exercise of Congress's constitutional mandate to regulate the exploitation of national marine resources.
2. 24 F.S.M.C. does not violate separation of powers principles because the approval of fishing access agreements is a legislative function that has not been delegated to NORMA.
3. Severance of 24 F.S.M.C. would thwart Congress's intent and frustrate the exercise of its constitutional mandate.

PF&S presents the following issues for review:

1. Is PF&S entitled to summary judgment on any basis?
2. Assuming Section 405 is unconstitutional, is that section severable from the remainder of the MRA or must the entire regulatory scheme be invalidated and all existing fishing agreements voided?

Combining the two parties' presentations, the issues presented are as follows:

1. Is Section 405 an unconstitutional violation of the principle of separation of powers?
2. If Section 405 does not violate the principle of separation of powers, does it nevertheless offend the Constitution?
3. If Section 405 violates the Constitution, is it severable from the rest of the MRA?

III. Standards of Review

We review trial court decisions concerning questions of law *de novo*. Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995). A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 284 (Pon. 1986). Thus, an appeals court applies the same standard in reviewing a trial court's grant of summary judgment as that applied by the trial court. Tafunsak v. Kosrae, 7 FSM Intrm. 344, 347 (App. 1995).

IV. Analysis

The trial court declared Section 405 unconstitutional on separation of powers grounds. At oral

argument, the parties focused their arguments on the method by which Congress approves access agreements. We review the issues in the following order: (1) the constitutionality of the method by which Congress approves access agreements; (2) separation of powers implications for Section 405; and (3) severability.

A. *Method of Congressional Approval of Access Agreements*

At oral argument, the parties quickly agreed that Congress is within its powers to approve access agreements. The parties also agreed that Congress could approve access agreements by enacting law. The major point of contention revolved around what constituted the law that was enacted to approve access agreements. Congress argued that the entire edifice of Title 24 constitutes the enactment that approves each access agreement. Yet Title 24 regulates the negotiation of access agreements, even creating NORMA for the sole purpose of conducting the negotiations on behalf of the National Government. For their part, PF&S argued that because Title 24 regulates the negotiation of access agreements, and because Congress evidently wished to retain the power to approve access agreements when and only when such an agreement involves ten or more vessels, each grant of approval must be enacted separately through the bill-making process under FSM Const. art. IX, §§ 20-22.

In our view, PF&S has the better argument. If both parties are agreed that approval of access agreements must be done by enacting law, then Section 405, which purports to allow Congress to step around the bill-making process and approve access agreements by resolution, is surely unconstitutional: under the Constitution, Congress may make law only by statute, and may enact statutes only by bill. FSM Const. art. IX, § 21(a). At oral argument, in addition to insisting that enactment of Title 24 in 2002 satisfies the enactment requirement for all subsequent approvals and disapprovals of access agreements, Congress argued that it had all the right in the world to choose the manner in which it lawfully approves an access agreement. However, in conceding that approval of an access agreement is done by enacting law, Congress cannot then claim an exemption from constitutional rules governing the enactment of laws; it must abide by the constitutional requirements for making law.

It is possible that Congress had not meant to make such a concession–that is, it is possible Congress meant to ask us to distinguish approval of access agreements from lawmaking. PF&S argued that the Constitution provides for three explicitly legislative functions for Congress: making law, ratifying treaties, and approving judicial nominations. FSM Const. art. IX, §§20-22, § 4, art. XI, § 3 respectively. Congress points to a Michigan case, Taxpayers of Mich. Against Casinos v. State, 685 N.W.2d 221 (Mich. 2004), for two propositions: (1) negotiations of contracts are a legislative function, or at least not necessarily an executive function; and (2) the power to *review* the negotiation of a contract with a Native tribe was a legislative function. We reserve the first of these propositions for discussion under separation of powers, but discuss the second proposition here.

Congress in its reply brief asserted that Taxpayers stood for the proposition that, where a constitution only requires the approval of legislation by bill, but is silent regarding the approval of contracts, such approval may be made by legislative resolution. 685 N.W.2d at 231. Assuming that Congress had not meant to concede that approval of access agreements is, in fact, an act of legislation, as it did at oral argument, we studied the Taxpayers case, because the holding Congress urges from that court touches directly on the question that Congress conceded. In studying Taxpayers, however, we found that the facts do not at all suit the present case.

Taxpayers involved the constitutionality of using resolutions to approve Tribal-State compacts for Indian casinos, but also involved intricacies of American law that do not exist in the FSM. Indeed, the Taxpayers court prefaced its sketch of the background thus: "Knowledge of the underlying federal law is necessary to understand the factual posture of this case." Taxpayers, 685 N.W.2d at 224. In

response to a U.S. Supreme Court ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 107 S. Ct. 1083, 1087, 94 L. Ed. 2d 244, 253-54 (1987), the U.S. Congress passed the Indian Gaming Regulatory Act (IGRA). The IGRA divided gaming into classes. The class at issue in Taxpayers provided, *inter alia* and in relevant part, that in order for that class of gaming to be lawful on Indian lands, such gaming had to be lawful in the particular State, and must be conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d). The compacts at issue were first signed in 1997, subject to endorsement by the Governor and concurrence in that endorsement by the Michigan Legislature. The compacts were modified and re-executed in December 1998, and the Legislature approved the compacts by resolution, HCR 115. 685. N.W.2d at 225. The Michigan Supreme Court concluded that HCR 115 was not "legislation" because, in its view, the compacts were contracts. The court observed that, "[i]n order to understand the contractual nature of the compacts, it is essential to understand the state's limited role under federal law generally, as well as IGRA." *Id.* at 227. In the United States, only Congress may limit the sovereignty of the Indian tribes, and only the federal government or the tribes themselves can subject the tribes to suit. Thus, although under IGRA, Indian gaming is lawful only if conducted in conformance with a Tribal-State compact, "that does not mean the states have any authority to regulate class III gaming activities in the absence of a compact." *Id.*

In the instant case, Congress is the highest legislative body of the FSM, and not a state legislature in a federal system. PF&S is neither a Native tribe nor some other foreign sovereign. Congress may enact legislation that unilaterally binds agents such as PF&S. Even approval or disapproval of an access agreement does not require the consent of the agent, and is therefore unilateral. Thus, even under the analysis of the Michigan Supreme Court, the access agreements are not contracts, and Congress's decision to approve or disapprove one is legislation that must be enacted by the bill-making process.

Congress has also not specifically argued that access agreements are treaties, but we address it here. The MRA itself defines an "access agreement" as "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, and includes bilateral and multilateral instruments applicable at the national, regional, or international level." 24 F.S.M.C. 102(1). Of these definitions, only the term "treaty" presents a possible source of legislative authority, as the power to ratify treaties is among the powers expressly delegated to Congress. FSM Const. art. IX, § 2(b). In order to ratify a treaty, two-thirds of the members of Congress must vote in favor of ratification. FSM Const. art. IX, § 4. There is no indication that ratification may be done by the resolution process which Congress urged at oral argument.[1] Indeed, in one more difference between this case and Taxpayers, where the Michigan law requires that the Governor provide his endorsement before the Legislature concurs in the endorsement, here, although Congress conceded at oral argument that NORMA is an executive agency, Section 405 nevertheless does not even present the President an opportunity to endorse the fruits of negotiations carried out by NORMA.

Thus, whether Congressional approval or disapproval of access agreements is legislation or a treaty, the 8-vote resolution process violates Constitutional requirements. We hold that such actions require legislation, and accordingly, we hold that Section 405 as it currently stands is unconstitutional.

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[1] When asked how many votes are necessary to approve a resolution, counsel for Congress replied that only eight votes were necessary, whereas ten votes were necessary to pass a bill. Because a treaty is ratified by ⅔ of the members of Congress, which is also required to pass the first reading of a bill, the 8-vote requirement for passing resolutions does not satisfy the Constitutional requirements for ratifying treaties.

B. *Separation of Powers*

The trial court based its underlying ruling on a violation of separation of powers, citing specifically FSM v. Udot Municipality, 12 FSM Intrm. 29 (App. 2003). Further, the parties briefed this issue. Therefore, although the parties did not spend much time arguing this point at oral argument, we address the separation of powers issue here.

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).

In relevant part, the Udot court held 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.
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> . . . .
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> The basic constitutional principle involved is that the execution and implementation of the laws is an executive rather than a legislative function. . . . .
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> 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.

[Udot Municipality, 12 FSM Intrm. at 49-50.]

Congress argues, citing only U.S. law, that "[o]nly where the potential for disruption is present must [an appellate court] then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Appellant's Br. at 7 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443, 97 S. Ct. 2777, 2790, 53 L. Ed. 2d 867, 891 (1977)). Congress's reliance on Nixon is misguided. Nixon involved a statute which provided the U.S. Congress, through the Administrator of General Services, a way to control materials relating to the Watergate incident. 433 U.S. at 430-33, 97 S. Ct. at 2784-86, 53 L. Ed. 2d at 883-85. The U.S. Supreme Court declined to find a violation of separation of powers because the Administrator of General Services was himself an officer of the Executive Branch, and because the statute had been enacted to counter attempts by the Nixon Administration to evade the system of checks and balances that is the foundation for separation of powers in an attempt to prevent disclosure of incriminating materials. *Id.* at 441-43, 97 S. Ct. at 2789-90, 53 L. Ed. 2d at 890-91.

Here, Congress has not and does not allege that the President has sought or will seek to evade the system of checks and balances. Congress has not and does not allege that the President is hiding behind the principle of separation of powers to further or to cover up conduct evidence of which would be necessary in order for Congress to bring impeachment proceedings under Article IX, section 7 of the FSM Constitution.

Congress also argues that the trial court erred in finding that "negotiation and approval of commercial transactions is ordinarily an Executive power." Appellant's Br. at 7. Congress then proceeds to cite California case law for the proposition that award of contract are legislative in nature. *Id.* at 7-8. Nevertheless, the contracts contemplated in Lindelli v. Town of San Anselmo, 4 Cal. Rptr. 3d 453, 466 (Cal. Ct. App. 2003), are exclusive contracts specifically, an exclusive contract for waste management services.

Here, an access agreement between NORMA and PF&S is not an exclusive contract, but one of potentially many such agreements provided for under Section 405. Because an access agreement does not give PF&S exclusive rights either to negotiate permits on behalf of all foreign vessels or to exploit the FSM's EEZ, it is more properly a permit or license. Administration of a permit or license scheme is, by its nature, administrative, and thus a function of the Executive branch. At oral argument, Congress conceded as much: when asked if NORMA was an administrative agency or a legislative agency, Congress replied that it was an executive agency; when asked if the case involved a licensing or permit scheme, Congress replied that it was a permit scheme; and when asked what branch of government was responsible for administrative and licensing schemes, Congress replied that it was the executive branch, and reaffirmed that NORMA was an arm of the executive branch.

As we noted in section A, above, Congress relied on Taxpayers for the proposition that the negotiation of contracts was a legislative function, or at least not necessarily an executive function. Given that Congress explicitly delegated to NORMA the power to negotiate access agreements, we conclude that Congress misspoke at oral argument, and meant only that Taxpayers stands for the proposition only that review and approval of access agreements was a legislative function, or at least not necessarily an executive function. Because we have already addressed that issue, we will say no more here.

Congress also points to Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979 (3d Cir. 1987) for the proposition that, because Congress had not delegated power of approval to the Executive, its actions in approving or disapproving access agreements by resolution did not constitute execution of the law in constitutional terms. We do not think Ameron stands for what Congress thinks it does.

Ameron involves the Competition in Contracting Act ("CICA"), enacted as part of the 1984 Deficit Reduction Act. 809 F.2d at 982. CICA empowers the Comptroller General to issue recommendations to procuring agencies on protests brought by disappointed bidders for federal contracts, and prohibits execution of awards pending issuance of recommendations. A recommendation is not binding on the procuring agency, but CICA obliged the Comptroller General to report to Congress whenever a procuring agency did not accept a recommendation. *Id.* at 984-85. Ameron, Inc. was such a disappointed bidder: it had bid on a contract with the Army Corp of Engineers ("the Army"), but was rejected even though its bid was the lowest. The Army had justified the rejection on the premise that Ameron did not comply with the requirements in the invitation to bid. Ameron believed it was in compliance, and filed a protest with the Comptroller General. *Id.* at 982. Despite the CICA requirement that the executive stay execution until the Comptroller General issued a recommendation, the Army proceeded with execution anyway, because it believed the stay provisions were unconstitutional. The appeals panel initially held CICA constitutional, ruling that the Comptroller General was not an agent of the legislative branch and that therefore it was permissible for Congress to delegate to the Comptroller General the power to decide when CICA's stay should be lifted. The Army filed a motion to reconsider, which the panel held in abeyance pending the outcome in Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986), where the U.S. Supreme Court ultimately held that the Comptroller General was to be considered a member of the legislative branch of government for separation of powers analysis. Upon rehearing, the appeals court in Ameron held that CICA was still constitutional, as it had not given any substantive power to the executive beyond

the right in certain circumstances to override the 90-day stay or extension thereof which the Comptroller General might impose. In determining the extent of the delegation of power to the executive, the panel wrote:

> If Congress gives the President only a few general instructions, and allows the executive to "fill up the details," then the scope of executive power is great. If, on the other hand, Congress chooses to specify a great number of details concerning how it wants the executive to proceed, such as specifying what it wants the executive to procure, the legislature is entirely free to take that course.

809 F.2d at 993 (citations omitted).

First, the facts of Ameron are different from the present case. The matter before us does not rise from a disappointed bidder for an exclusive contract–in fact, as we discussed under the previous section, the access agreements do not represent an exclusive contract–who has filed a protest to a legislative agent alleging that the executive has violated strict statutory guidelines provided by Congress. Here, no party alleges that the Executive through NORMA has violated strict guidelines governing the approval process for access agreements. And here, it is the disappointed applicant, PF&S, and not the body that rejected the application, Congress, that challenges the constitutionality of Section 405.

Moreover, it is far from clear that the legal holding of Ameron supports Congress's position. Here, Congress has not specified "a great number of details" concerning approval and disapproval. Its only reference to approvals provides that, so long as the proposed agent represents nine or fewer foreign vessels, NORMA had sole discretion as to approval. At oral argument, Congress insisted that nothing NORMA does is valid until Congress approved, but when pressed as to situations involving nine or fewer foreign vessels, Congress replied that then NORMA's agreements are valid. When asked why Congress chose to carve out or retain power of approval in situations involving ten or more foreign vessels, Congress's counsel replied that "ten or more" would represent a bigger agreement which would substantially impact the nation. This reply is unpersuasive, not least because its connection with the reason for Congress's rejection of the successor agreement is tenuous. PF&S asserted in its briefs and at oral argument that the only reason brought forth by the committee report which had recommended rejection was that PF&S owed money to the National Fisheries Corporation in the amount of $150,000. Appellee's Br. at 7; Appellant's App. at 53. The MRA does not require that an agent be free of debt, much less prescribe a maximum level of indebtedness. If Congress is truly concerned by the amount of debt carried by proposed agents, it may retain its power by being more specific in the MRA, possibly by creating a new section which determines minimum requirements for eligibility. Nevertheless, once Congress delegates power to the executive, it cannot have it both ways–*i.e.*, it cannot then take back that power or modify the extent of that delegation without amending the statute through the bill-making process.

C. *Severability*

Congress also argues that Section 405 cannot be severed from the MRA without undermining the entire architecture of the MRA, quoting Buckley v. Valeo, 424 U.S. 1, 108, 96 S. Ct. 612, 677, 46 L. Ed. 2d 659, 739 (1976), which in turn quotes Champlin Ref. Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 234, 52 S. Ct. 559, 565, 76 L. Ed. 1062, 1078 (1932), for the proposition that "if it is evident that the Legislature would not have enacted those provisions which are within its power, independently of the section which is not, then the entire act must be invalidated." Appellant's Br. at 13 (quotations and citations omitted). This misstates the holding in Champlin Ref. Co.:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

286 U.S. at 234, 52 S. Ct. at 565, 76 L. Ed. at 1078. *See also* Alabama Power Co. v. United States Dep't of Energy, 307 F.3d 1300, 1308 (11th Cir. 2002) ("A provision is further presumed severable if what remains after severance is 'fully operative as a law.'" (quoting Champlin Ref. Co., 286 U.S. at 234, 52 S. Ct. at 565, 76 L. Ed. at 1078)); United States v. Booker, 453 U.S. 220, 280-81, 125 S. Ct. 738, 777, 160 L. Ed. 2d 621, 673 (2005) (citing Champlin Ref. Co. for the proposition that a holding that certain specific provisions are unconstitutional need not necessitate invalidating the entire statute).

Besides the misstatements of U.S. law, Congress seems to have overlooked pertinent Micronesian case law. At the state court level, severability has been upheld in Chuuk State Supreme Court v. Umwech (II), 7 FSM Intrm. 630, 632 (Chk. S. Ct. Tr. 1996). At the national court level, severability has been upheld in MGM Import-Export Co. v. Chuuk, 10 FSM Intrm. 42, 44 (Chk. 2001) ("If a statutory provision is unconstitutional and can be severed from the rest of the legislative act, only that provision will be struck down."). Indeed, a legal conclusion that a statute is unconstitutional implies that it may be judicially tailored to make the statute otherwise workable. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 12 (Chk. 2003).

Further, as PF&S argues in its brief, the MRA announces all of its components to be severable:

> Severability. If *any* provision of this title or amendments or additions thereto, or the application thereof to any person, thing, or circumstances is held invalid, the invalidity does not affect the provisions or application of this title or the amendments or additions that can be given effect without the invalid provisions or application, and to this end the provisions of this title and the amendments and additions thereto are severable.

24 F.S.M.C. 121 (emphasis added).

V. Conclusion

In summary, we hold that Section 405 of the MRA, 24 F.S.M.C. 405, is unconstitutional, for the reasons stated above, namely, that it violates the constitutional requirement that Congress enact law through the bill-making process, and that it violates separation of powers, and we hold that Section 405 can and must be severed from Title 24.

WE HEREBY AFFIRM the ruling of the lower court.

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