Federated States of Micronesia v. Sylvester Oliver

Supreme Court (Pon.)
King C.J.
2 November 1988

Constitutional law—national/state powers—territorial sea—no express delegation of state powers to national government—state control of territorial sea marine resources. Criminal law—national law prohibiting taking of sea turtles—no evidence of whether alleged violation was beyond the twelve-mile zone of state jurisdiction—burden of proof.

The defendant sought dismissal of criminal charges concerning the killing of five sea turtles brought against him by the national government. The relevant legislation extended throughout all the waters of the F.S.M., but there was no express indication by Congress that the national government should enforce the law within the twelve-mile zone nor a delegation of enforcement power to the state government in respect of that zone. The novel question in this case is whether a statute carried over from the former Trust Territory administration may be enforced as both state and national law simultaneously.

HELD:

Defendant's motion to dismiss charges granted.

(1) Under the F.S.M. Constitution any powers not expressly delegated to the national government nor prohibited to the states are state powers. The Constitution expressly vests control in marine resources beyond the twelve-mile zone in the national Congress and omits to provide for ownership and use of marine resources within that area. This strongly indicates state control over such matters.

(2) The constitutional transition provisions seek to ensure the continued validity of existing laws unless inconsistent with the Constitution. Thus whilst most of the provisions in the Code concerning marine species preservation relate to inshore species within state control, the section concerning sea turtles calls for the exercise of national powers. Regulatory power over the twelve-mile zone lies with the national government.

(3) The national government's authority to enforce the Code beyond the twelve-mile zone does not empower it to carry out enforcement within zones over which states have primary control. International treaty obligations relevant to the protection of sea turtles may point to the need for national government enforcement within the range of state powers but resolution of such sensitive issues is essentially a political endeavour which the judiciary is not well suited to perform.

(4) The defendant asserts that the actions complained of occurred within the twelve-mile zone and the Government admits that it is unable to establish that they took place outside that zone. The burden of proof as to all the

"While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure" ([1937] A.C. 326, 354).

KING C.J.

Judgment:

The national government charges defendant Sylvester Oliver with killing five sea turtles during the period between 1 June and 31 August 1988 in violation of 23 F.S.M.C. 105(3),[1] a statutory provision originally promulgated by a Trust Territory High Commissioner sometime before 1960.[2] The Court dismissed the case on 18 October. This memorandum is filed to explain the Court's reasoning.

I. Background

The defendant filed a motion seeking dismissal of the case on grounds that the actions complained of occurred within the marine space of Pohnpei less than twelve miles from island baselines, that under the Constitution the regulation of marine resources within that twelve-mile area falls within state rather than national powers, and that 23 F.S.M.C. 105(3) should therefore be construed as authorizing national government enforcement only outside the twelve-mile limit.

The Court concludes that 23 F.S.M.C. 105(3) is a law of the Federated States of Micronesia and, during the designated times, prohibits the killing of sea turtles throughout all marine space within the Federated States of Micronesia. However, since Congress has not indicated any intention that the national government should enforce section 105(3) within the twelve-mile zone, the provision is construed as national law only as it applies beyond twelve miles from island baselines. Within the twelve-mile area, the statute is enforceable only by the states, as state law.

The national government confesses itself unable to prove that the alleged actions in this case took place beyond the twelve-mile area.

Thus, there can be no showing that the defendant has violated national law and this case must be dismissed.

II. Legal Analysis

The threshold questions are whether 23 F.S.M.C. 105 is national law and, if so, whether it authorizes national government law enforcement efforts throughout all marine space of the Federated States of Micronesia or only in marine space more than twelve miles from island baselines.

This is yet another statutory provision carried over from the Trust Territory Code demanding analysis to determine whether the provision is to be given effect within the framework of constitutional self-government of the Federated States of Micronesia and, if so, how.

When the FSM Constitution went into effect on May 10, 1979, all Trust Territory

1 The statute, 23 F.S.M.C. 105(3), provides as follows: "No sea turtle of any size shall be taken or killed from the first day of June to the thirty-first day of August inclusive, nor from the first day of December to the thirty-first day of January inclusive".

2 This is apparent from the fact that the provision appeared as section 781 in the 1960 Trust Territory Code, before establishment of the Congress of Micronesia in 1965.

essential elements of the crime charged is on the Government. To establish violation of a national law in this instance requires that it be proved to have occurred beyond the territorial sea. This the Government is unable to do.

Other cases referred to in judgment:
Alaphoriso v. *F.S.M.* 1 F.S.M. Intrm. 209 (App. 1982)
Andohn v. *F.S.M.* 1 F.S.M. Intrm. 433 (App. 1984)
Edwards v. *Pohnpei* 3 F.S.M. Intrm. 355 (Pon. 1988)
In re Otokichy 1 F.S.M. Intrm. 183 (App. 1982)
In re Raitoun 1 F.S.M. Intrm. 561 (App. 1984)
Ishizawa .v *Pohnpei* 2 F.S.M. Intrm. 67 (Pon. 1985)
Kodang v. *Trust Territory* 5 T.T.R. 581 (Truk, 1971)
Lonno v. *Trust Territory* 1 F.S.M. Intrm. 53 (Kos. 1982)
Missouri v. *Holland* 252 U.S. 416, 40 S.G. 382, 64 L. Ed. 641 (1920)
Rauzi v. *F.S.M.* 2 F.S.M. Intrm. 8 (Pon. 1984)
Semens v. *Continental Airlines Inc.* 2 F.S.M. Intrm. 131 (Pon. 1985)
Semens v. *Continental Airlines Inc. (II)* 2 F.S.M. Intrm. 200 (Pon. 1986)
U.S. v. *Gilman* 347 U.S. 507, 74 S. Ct. 695, 98 L. Ed. 2d. 898 (1954)

Legislation referred to in judgment:
T.T.C. (1960), sections 770–774, 781–783, and 874
23 F.S.M.C., sections 105–114, and 116
52 T.T.C., sections 52–54
16 U.S.C., section 1531
F.S.M. Constitution, articles VIII, IX, XI, and XV

Other sources referred to in judgment:
Compact of Free Association, article VI
S.C.R.E.P. No. 28, II Journals of Micro. Con. Con. 808
S.C.R.E.P. No. 33, II Journals of Micro. Con. Con. 813, 819
S.C.R.E.P. No. 34, II Journals of Micro. Con. Con. 821

Counsel:
S. Pixley for the plaintiff
M. Powell for the defendant

Editorial Observation:
The Court referred to *Missouri* v. *Holland* (supra) as authority for the principle that a central government in a federal system can overcome a lack of legislative *vires* in a particular subject matter area by entering into a treaty, or convention, with foreign states and then legislating pursuant to the foreign affairs power. *Missouri* v. *Holland* and *Commonwealth* v. *Tasmania* (the *Tasmanian Dam* case) (1983) 158 C.L.R. 1; 57 A.L.J.R. 450 are authority for that principle in the United States and Australia, respectively.

Attorney-General Canada v. *Attorney-General Ontario (Labour Conventions)* [1937] A.C. 326, 354 is authority for the contrary. The Privy Council there found it *ultra vires* the Canadian Parliament to legislate pursuant to ratification of certain International Labour Organisation conventions when that legislation affected provincial property and civil rights powers. In Lord Atkin's memorable phrase,

> statutes except those inconsistent with the Constitution became laws of governments within the Federated States of Micronesia by virtue of the transition clause. *In re Otokichy* 1 F.S.M. Intrm. 183, 187 (App. 1982). Statutes which related to matters that now fall within the legislative powers of the national government became national law. *Lonno* v. *Trust Territory* 1 F.S.M. Intrm. 53, 72 (Kos. 1982). The other Trust Territory statutes which remained in effect presumably became law of each of the states at the same time. Obviously, laws enacted in Trust Territory days were not designed with an eye toward distinctions between state and national powers. Determinations as to whether a statute is a state or national law must be made on a statute-by-statute, or a section-by-section, basis. (*Edwards* v. *State of Pohnpei* 3 F.S.M. Intrm. 355 (Pon. 1988); footnotes omitted)

The novel question decided in this case is whether a particular carry-over statute or section may be enforced as both state and national law simultaneously.

A. *State Law*

The Constitution expressly vests in the national Congress control over marine areas beyond twelve miles from island baselines, but is silent about the area within the twelve-mile zone (F.S.M. Constitution, article IX, section 2). Powers not expressly delegated to the national government nor prohibited to the states are state powers (F.S.M. Constitution, article VIII, section 2). Thus, the fact that control over marine areas within the twelve-mile zone is not mentioned in the Constitution is a strong indication that the framers intended the states to control ownership and use of marine resources within that area (*Edwards* v. *Pohnpei* 3 F.S.M. Intrm. 350, 356 (Pon. 1988)).

The Journal of the Constitutional Convention confirms that the framers anticipated that the states would play the principal role in regulating marine resources within lagoons and in reef areas. The Constitutional Convention's Committee on Governmental Functions proposed the division of powers between state and national governments along lines ultimately accepted by the convention. The committee's report proposed the twelve-mile limit as an appropriate division between state and national control of marine resources:

> Your Committee carefully considered the questions related to the regulation of offshore living and mineral resources. Mindful of the fact that Micronesian custom generally recognizes family, clan or island ownership of fishery resources within lagoons and for several miles beyond reefs, your Committee concluded that the state governments ought to regulate the ownership and use of such resources. However, equally cognizant of the fact that the developing law of the sea is likely to recognize Micronesian resources jurisdiction up to 200 miles beyond the reefs and of the fact that exploitation of those resources will involve nationals of other countries and that a rational, organized plan of regulation of the offshore area requires consistency and uniformity among the states, your Committee has recommended vesting regulatory authority of offshore resources in the national government. Your Committee feels that regulatory authority over both mineral and fishery resources beyond 12 miles of an island ought to rest in the national government. (S.C.R.E.P. No. 33, 2 J. of Micro. Con. Con. 813, 819)

The statutory prohibitions against taking turtles must be read against this

constitutional background. It is therefore significant that the prohibitions appear in a chapter of the F.S.M. Code, entitled "Marine-Species Preservation". Other provisions in that chapter prohibit the use of explosives, chemicals, and poisons to kill marine life, and control the taking of sponges, mother-of-pearl oyster shell, and trochus.[3] These latter species are commonly found only within lagoons or in reef areas, practically all of which lie within twelve miles from island baselines.

The above constitutional analysis and the emphasis of the statute at hand on protecting subjects that practically always exist within twelve miles of F.S.M. baselines, together establish that all of title 23, chapter one, including section 105(3) under which the defendant was charged, must be regarded as state law.

B. *The Transition Clause*

Having concluded that 23 F.S.M.C. 105(3) is enforceable by the states and that most of the set of laws with which it was enacted, and with which it now appears in chapter one of title 23 of the F.S.M. Code, relate to matters consigned to the states under the F.S.M. system of federalism, we must consider whether this compels the conclusion that the section is not enforceable as national law.

To address this question we turn to the transition clause of the Constitution which allows statutes of the Trust Territory to remain in effect without action by the F.S.M. Congress or by state legislatures.[4] The Constitutional Convention's Committee on General Provisions proposed this provision as "necessary in order to provide a smooth and orderly transition from the old to the new" (S.C.R.E.P. No. 28, II J. of Micro. Con. Con. 808).

As expedient, desirable and even necessary as the transition clause is, there are inherent difficulties in attempting to salvage and apply in this new nation legislation adopted in Trust Territory times. For one thing, there is no legislative history to assist the Court in determining the intent of laws promulgated by Trust Territory High Commissioners (c.f. *Lonno* v. *Trust Territory* 1 F.S.M. Intrm. 53, 61–62 (Kos. 1982)).

More troublesome is the fact that carry-over statutes typically refer to officials "who either do not exist now, *e.g.*, district administrator, or who no longer carry out the functions with which they are identified in the statute, *e.g.*, high commissioner and Trust Territory High Court" (*Ishizawa* v. *Pohnpei* 2 F.S.M. Intrm. 67, 73 n. 5 (Pon. 1985)). The carry-over statutes assume a governmental structure in which the chief executives of what we now call states work under the direction of the chief executive of the nation. They assume as well the existence of a national legislative body that may direct chief executives of the states and the nation.

Chapter 1 of title 23, in which the prohibition against killing turtles appears, is typical of this syndrome. This chapter allows the "high commissioner" to authorize the taking of sea turtles and their eggs for scientific purposes (23 F.S.M.C. 105(4)), to permit the taking or molestation of artificially cultivated sponges (23 F.S.M.C. 106), and to authorize the taking for scientific purposes of any size black-lip mother-of-pearl oyster shell (23 F.S.M.C. 107). On the other hand, the statute gives

3 These provisions now in title 23, chapter 1 of the F.S.M. Code presumably were all promulgated at the same time. They appeared together in substantially the same form in the 1960 Trust Territory Code at sections 781 (turtles), 780 (explosives and poisons), 782 (sponges), 783 (mother-of-pearl oyster shells), and 770 to 774 trochus). They also appeared as a set in both subsequent Trust Territory Codes. See 45 T.T.C., sections 1–53 (1970) and 45 T.T.C., sections 1–53 (1980).

4 "A statute of the Trust Territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed . . . " (F.S.M. Constitution, article XV, section 1).

administrators the power to authorize removal, transportation, and replanting of trochus to permit underwater operations or to introduce trochus to other areas (23 F.S.M.C. 114). District administrators also may designate trochus seasons or prohibit harvesting throughout the year, but only with the advice and consent of the high commissioner (23 F.S.M.C., sections 110 and 113).

To say the least, it is not immediately obvious how these official titles should be interpreted today. Plainly, we may not simply assume that district administrator always translates directly to governor, or that high commissioner always means president. Such equivalency would be awkward, if not impossible, in this federal system. No single legislative body now has general authority routinely to mandate or authorize actions of the chief executives of the nation and states. Therefore, the very same words, especially official titles and authorizations to act, may be given different meanings, depending on whether the statute being interpreted is viewed as state or national law. For instance, if title 23, chapter 1, is interpreted as a state statute, the references to the high commissioner would not likely be read as referring to the president because state legislatures lack legal capacity to authorize or instruct the president to act. Reference to the high commissioner in a statute construed as state law would more likely be read as referring to the governors of the states.

A separate but perhaps more fundamental problem is that interpretation of a carry-over statute requires the unusual exercise of determining whether the statute was intended to be state or national law. Normally that is not an issue because the identity of the legislative body that enacts a statute reveals that statute as either state or national. Here, even the identity of the lawmaker as state or national is hidden from those who today construe carry-over statutes. In truth, of course, when high commissioners ordered and the Congress of Micronesia legislated, they gave no thought to whether the statutes they passed should be considered state or national law. This is understandable, since they operated within the centralized and unitary Trust Territory system of government, not the federal system of current day Federated States of Micronesia self-government.

Given the passage of time and changes of circumstances, some provisions carried over from the Trust Territory to the F.S.M. Code, especially those traceable to orders of high commissioners, eventually may be deemed "inconsistent" with the Constitution or "amended or repealed" (F.S.M. Constitution, article XV, section 1). Already, the Court has declined to required adherence to several provisions or entire statutes on grounds that they have been repealed by implication by subsequent statutes[5] or that their application to present-day institutions would be inconsistent with the Constitution, either because the statute was plainly intended to apply to the specific activities of a particular Trust Territory institution such as the Trust Territory High Court,[6] or because the substance of the provision was contrary to constitutional principles.[7] Still other provisions have been rejected as national law on grounds that the subject of the law of which they were a part fell exclusively within the domain of state powers[8].

It is conceivable that some statutes or particular provisions will have to be set

5 *Ishizawa* v. *Pohnpei* 2 F.S.M. Intrm. 67, 73 n. 5 (Pon. 1985).
6 *In re Raitoun* 1 F.S.M. Intrm. 561 (App. 1984); *Semens* v. *Continental Airlines Inc. II* 2 F.S.M. Intrm. 200, 204 (Pon. 1986).
7 *Rauzi* v. *F.S.M.* 2 F.S.M. Intrm. 8 (Pon. 1984).
8 *Edwards* v. *Pohnpei* 3 F.S.M. Intrm. 350, 354–59 (Pon. 1988).

aside simply because they are so wedded to the former Trust Territory unitary system of government that they cannot be adapted to the current institutions of F.S.M. constitutional self-government and federalism. In terms of the Constitution's transition clause, such statutes are "inconsistent with this Constitution".

That having been said, the Court must keep in mind that the purpose of the transition clause is to provide "continued validity of existing laws" (S.C.R.E.P. No. 28, *supra* at 808). The underlying principle of the clause is that "a new Constitution ought to bring with it no greater changes than are necessary to effectuate its terms" (*id.*). Faithfulness to that purpose and principle demands that the Court strive to uphold as many of the carry-over statutes as possible, maintaining the breadth of coverage originally intended at the time of enactment.

Since Trust Territory statutes envisioned a unitary system of government and made no distinction between what we now define as state and national roles, it is inevitable that some of the carry-over Trust Territory statutes will cover topics that now fall into both state and national responsibilities. The instruction of the transition clause is that such dual coverage is not of itself sufficient grounds for reducing the reach of such statutes or allowing them to fall short of their originally intended scope. If neither state nor national powers alone are sufficient to carry out the original purpose of a carry-over statute, or if state and national powers are invoked, then the statute is enforceable as both state and national law.[9]

A summary. The provision upon which the government relies in this prosecution, 23 F.S.M.C. 105(3), appears in chapter 1 of title 23 of the F.S.M. Code. It is part of a statutory package predominantly concerned with the regulation of marine resources in areas that are now under state control. All of the chapter, including this provision, is state law.

However, this does not preclude the possibility that the provision is also national law. Since the basic purpose of the transition clause is to prevent unnecessary change in the law, if state powers fall short of the originally intended reach of a law, then that law must also be upheld as a national law in order to achieve the statute's full, intended effect.

C. *National Law*

It remains then to determine whether 23 F.S.M.C. 105(3) calls for the exercise of national powers.

An exhibit filed by the Government in this case shows that sea turtles may swim great distances and do not reside exclusively within twelve miles of island baselines. Adequate protection of such wide-ranging marine life against unregulated taking or killing presumably cannot be accomplished by prohibitions limited to the twelve-mile zone. This suggests that the statute was intended to apply beyond the twelve-mile zone.

9 An alternative approach would be to give continued effect only to those portions of the Trust Territory Code which fit neatly within the powers of either the national, or state, governments. This could produce more orderly applications of those statutes which do remain viable, and might also reduce the potential for conflict between state and national officials. However, the approach would leave far more gaps in the law and could produce quite unanticipated results. In any event, this alternative approach would be contrary to the underlying principle of the transition clause and is thereby precluded. It is hoped, however, that Congress and state legislatures will recognize that the path marked by the transition clause has a few pitfalls of its own. It would therefore be helpful for legislative bodies to review the carry-over laws with an eye toward the responsibilities of their respective governments, and to make any

This inference is confirmed by the one decision found interpreting 23 F.S.M.C. 105(3). In *Kodang* v. *Trust Territory* 5 T.T.R. 581, 585–586 (Truk, 1971), the Trust Territory High Court held that the prohibition upon taking turtles was not limited to territorial waters of the Trust Territory, but instead governed the conduct of Trust Territory citizens wherever they might go, in any part of the world.[10]

The Constitution's judicial guidance clause (F.S.M. Constitution, article XI, section 11) is intended to assure, among other things, that this Court will not simply accept decisions of the Trust Territory High Court without independent analysis (S.C.R.E.P. No. 34, II J. of Micro. Con. Con. 821; *Semens* v. *Continental Airlines Inc.* 2 F.S.M. Intrm. 131, 137–40 (Pon. 1985)). In this case, however, the *Kodang* opinion should be followed, without regard to the quality of its reasoning, because it establishes the meaning of the statute when the F.S.M. Constitution went into effect. The transition clause requires that the statute be given the same breadth now that it had before the Constitution went into effect.

Other modes of analysis point to the same result. When Congress included the carry-over statutes in the F.S.M. Code, it presumably intended for those provisions to have the same meaning they were given under the Trust Territory's jurisdiction[11] (see *Andohn* v. *F.S.M.* 1 F.S.M. Intrm. 433, 441 (App. 1984)). This in turn calls for the conclusion that Congress intended to accept the *Kodang* result, so that the prohibitions of 23 F.S.M.C. 105 extend throughout all the waters of the Federated States of Micronesia.

Regulatory power beyond twelve miles from island baselines lies with the national government (F.S.M. Constitution, article IX, section2(m)). The prohibitions against the taking or killing of turtles, reaching as they do beyond the twelve-mile zone, are an invocation of this national power. It follows that 23 F.S.M.C. 105(3) is national law, at least as it applies beyond the twelve-mile zone.

This, however, is not the end of the inquiry in this case. The defendant asserts that any actions of his involving sea turtles took place within an area twelve miles from Pohnpei Island baselines. The Government concedes that it cannot establish where the taking occurred. The burden of proof beyond a reasonable doubt is on the Government as to all essential elements of the crime charged (*Alaphonso* v. *F.S.M.* 1 FSM Intrm. 209 (App. 1982)). If a showing that the wrongful act occurred outside the twelve-mile zone is essential to the establishment of a national crime, it is clear that the Government cannot meet that burden and that this case must be dismissed.

This last point leads to the final issue at hand, namely, whether the national

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10 When the provision was originally promulgated, the Trust Territory claimed territorial waters only three miles from prescribed baselines. Trust Territory Code section 874(c) (1960). There was no claim of more extensive jurisdiction until the Congress of Micronesia enacted Pub. L. No. 7–71, asserting an exclusive fishery zone twelve miles seaward of baselines, and an extended fishery zone 200 miles seaward of baselines (52 T.T.C., sections 52–54). That legislation became effective on 30 June 1979, roughly coinciding with the initiation of constitutional self-government of the Federated States of Micronesia.

11 There is one other indication that Congress views title 23, chapter 1 as national law. In 1986 a new section, 23 F.S.M.C. 115, prohibiting the taking of marine mammals was added to the chapter (Pub. L. No. 4–71 (4th. Cong., 1st Reg. Sess. 1985)). That statute renumbered, as 23 F.S.M.C. 116, the penalty provision applicable to violation of "any of the provisions of this title for which a different penalty is not otherwise provided". A review of the title reveals that the 23 F.S.M.C. 116 penalty applies only to chapter 1 violations, specifically to 23 F.S.M.C., sections 105–114.
This indicates an intention, or at least an assumption, of Congress that the provisions of title 23, chapter 1, including 23 F.S.M.C. 105(3) — prohibitions against the taking of sea turtles during the period from June through August — are to be enforced as national law.

government has power to enforce this statute, constituting state law, within twelve-mile zones over which states have primary control. Even when the Constitution assigns primary lawmaking powers to the states, the national government may be empowered to act pursuant to its other general powers (*Edwards* 3 F.S.M. Intrm. at 359). In this case, the national government points out that it is obligated under the Compact of Free Association between the Federated States of Micronesia and the United States to "develop standards for environmental protection substantially similar to those required of the Government of the United States" and to "enforce those standards" (Compact of Free Association, article VI, section 161).[12] The Government also contends that turtles of the kind allegedly taken by the defendant are a protected species under United States laws (16 U.S.C., section 1531 *et. seq.*).

Thus, the national government asserts that it may be obligated by treaty to assure that the taking or killing of turtles is carefully regulated or prohibited throughout the waters of the F.S.M., including waters within the twelve-mile area.

If such were indeed the case, it is quite possible, although the Court does not decide the issue here, that the Constitution gives the national government, as a corollary to its power to enter into treaties, whatever powers are necessary and proper to fulfill this nation's obligations under those treaties (c.f. *Missouri* v. *Holland* 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920)). This could conceivably include the power to enact national law to assure protection of turtles within the twelve-mile area.

However, a determination to assert national government powers in areas which fall primarily within the range of state powers will necessarily involve a delicate weighting of conflicting duties. To determine the national role concerning the taking of turtles within the twelve-mile zone will require weighing the national interest in carrying our international treaty commitments against principles of federalism calling for states to control marine resources within the twelve-mile area. Resolution of sensitive issues through such a balancing of interests is essentially a political endeavour. The judiciary, intended as it is to be insulated from many of the political forces to which the other two co-ordinate branches are expected to be most sensitive, it is not well suited to perform this kind of essentially political policy-making function (see *Semens* v. *Continental Airlines Inc. (II)* 2 F.S.M. Intrm. 200, 207 (Pon. 1986)).

What the United States Supreme Court has said in similar circumstances is true as well for the Federated States of Micronesia in this case:

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which the Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised.
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> That function is more appropriately for those who write the laws rather than for those who interpret them. (*United States* v. *Gilman* 347 U.S. 507, 512–13, 74 S. Ct. 695, 697–98, 98 L. Ed. 2d. 898 (1954))

12 The Compact of Free Association was adopted by the Congress of the Federated States of Micronesia by Congressional Resolution No. 4–60 (4th Cong., 2nd Spec. Sess. 1986) and by the United States Congress in United States Public Law 99–239.

As a general proposition, then, the Court will not lightly assume that the Congress intends to assert national powers which may overlap with, or encroach upon, powers allocated to the states under the general scheme of federalism embodied in the Constitution. While Congress may have the power to prohibit the taking and killing of turtles within the twelve-mile area as a matter of national law, it should lie with Congress, and not the Court, to determine whether the power should be exercised.

Here, the Government has based its prosecution on a weakly offered assertion that it may be obligated by treaty to protect sea turtles within twelve miles of F.S.M. baselines. That is not enough to justify a conclusion that Congress intended to assert its power in an area the Constitution assigns primarily to the states. Moreover, nothing in the language of the statute or in the legislative history indicates that Congress made an affirmative determination to enact national legislation applicable within the twelve-mile area. For these reasons, there is no basis for departing from the constitutional norm.

The Court concludes that 23 F.S.M.C. 105 gives the national government regulatory power only in waters outside the twelve-mile zone.

III. Conclusion

The Government admits that it is unable to establish that the alleged taking or killing of turtles occurred outside the twelve-mile area. Such a showing is necessary to the establishment of a violation of national law. It is therefore clear that the Government is unable to establish a violation of national law. If any prohibited taking or killing of turtles occurred within the twelve-mile area, that was a violation of state, not national, law.

This Court therefore has no jurisdiction over the claim and the defendant's motion to dismiss has been granted.

Reported by: D. V. W.