

**FEDERATED STATES OF MICRONESIA**  
**SUPREME COURT TRIAL DIVISION (Pon.)**  
Cite as FSM v. Sylvester Oliver, 3 FSM Intrm. 469 (Pon. 1988)

[3 FSM Intrm. 469]

**FEDERATED STATES OF MICRONESIA,**  
**Plaintiff,**

v.

**SYLVESTER OLIVER,**  
**Defendant.**

FSM CRIM. NO. 1988-562

**MEMORANDUM DECISION**

Before Edward C. King  
Chief Justice  
November 2, 1988

**APPEARANCES:**

For the Plaintiff: Steve Pixley  
Chief of Litigation  
Office of the Attorney General  
Federated States of Micronesia  
Kolonia, Pohnpei 96941

For the Defendant: Michael Powell  
Chief Public Defender  
Federated States of Micronesia  
Kolonia, Pohnpei 96941

\* \* \* \*

**HEADNOTES**

**Constitutional Law - National/State Power**

Powers not expressly delegated to the national government nor prohibited to the states are state powers. FSM Const. art. VIII, § 2. FSM v. Oliver, 3 FSM Intrm. 469, 473 (Pon. 1988).

**Constitutional Law - National/State Power**

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. FSM v. Oliver, 3 FSM Intrm. 469, 473 (Pon. 1988).

### **[3 FSM Intrm. 470]**

#### **Statutes**

All of title 23, chapter one of the FSM Code, including section 105(3), must be regarded as state law. FSM v. Oliver, 3 FSM Intrm. 469, 474 (Pon. 1988).

#### **Statutes**

It may not simply be assumed that a reference in a carryover statute to the district administrator always translates directly to governor, or that high commissioner always means president. FSM v. Oliver, 3 FSM Intrm. 469, 475 (Pon. 1988).

#### **Constitutional Law - Transition Clause**

The underlying principle of the transition clause of the FSM Constitution, FSM Const. art. XV, § 1, is that "a new constitution ought to bring with it no greater changes than are necessary to effectuate its terms." SCREP No. 28, II J. of Micro. Con. Con. 808. FSM v. Oliver, 3 FSM Intrm. 469, 476 (Pon. 1988).

#### **Constitutional Law - Transition Clause**

That a carryover statute covers topics that now fall into areas both state and national responsibilities is not a sufficient ground for reducing the reach of the statute or allowing it to fall short of its originally intended scope. FSM v. Oliver, 3 FSM Intrm. 469, 477 (Pon. 1988).

#### **Constitutional Law - Transition Clause**

If neither state nor national powers alone are sufficient to carry out the original purposes of a carryover statute, or if state and national powers are invoked, then the statute is enforceable as both state and national law. FSM v. Oliver, 3 FSM Intrm. 469, 477 (Pon. 1988).

#### **Constitutional Law - Judicial Guidance Clause**

The judicial guidance clause, FSM Const. art. XI, § 11, is intended to insure, among other things, that this Court will not simply accept decisions of the Trust Territory High Court without independent analysis, SCREP No. 31, II J. of Micro. Con. Con. 821. FSM v. Oliver, 3 FSM Intrm. 469, 478 (Pon. 1988).

#### **Statutes**

Congress intended that the prohibitions of 23 F.S.M.C. 105 extend throughout all the waters of the FSM. FSM v. Oliver, 3 FSM Intrm. 469, 478 (Pon. 1988).

#### **Constitutional Law - National/State Power**

Regulatory power beyond twelve miles from island baselines lies with the national government. FSM v. Oliver, 3 FSM Intrm. 469, 479 (Pon. 1988).

#### **Statutes**

23 F.S.M.C. 105(3) is national law, at least as it applies beyond the twelve mile limit. FSM v. Oliver, 3 FSM Intrm. 469, 479 (Pon. 1988).

### **[3 FSM Intrm. 471]**

#### **Criminal law and Procedure**

The burden of proof beyond a reasonable doubt is on the government as to all essential elements of a crime charged. FSM v. Oliver, 3 FSM Intrm. 469, 479 (Pon. 1988).

### **Statutes**

As a general proposition, the Court will not lightly assume that 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. FSM v. Oliver, 3 FSM Intrm. 469, 480 (Pon. 1988).

### **Constitutional Law - Legislative Power**

While Congress may have the power to prohibit the taking of 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. FSM v. Oliver, 3 FSM Intrm. 469, 480 (Pon. 1988).

### **Statutes**

Nothing in the language of the statute, 23 F.S.M.C. 105, or in the legislative history, indicates that Congress made an affirmative determination to enact national legislation applicable within twelve miles of prescribed baselines. Therefore, 23 F.S.M.C. 105 gives the national government regulatory power only outside the twelve mile zone. FSM v. Oliver, 3 FSM Intrm. 469, 480 (Pon. 1988).

\* \* \* \*

## **COURT'S OPINION**

**EDWARD C. KING**, Chief Justice:

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

**[3 FSM Intrm. 472]**

### **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 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 FSM 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 FSM 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.

### **[3 FSM Intrm. 473]**

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. Pohnpei*, 3 FSM Intrm. 350, 355 (Pon. 1988) (footnotes omitted). The novel question decided in this case is whether a particular carryover 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. FSM Const. art. IX, § 2. Powers not expressly delegated to the national government nor prohibited to the states are state powers. FSM Const. art. VIII, § 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 FSM Intrm. 350, 356 (Pon. 1988).

The Journal of the Constitutional Convention confirms that the framers anticipated that the states would play the principle 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

**[3 FSM Intrm. 474]**

fishery resources beyond 12 mile of an island ought to rest in the national government.

SCREP No. 33, II 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 FSM 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. 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 FSM 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 FSM Code, relate to matters consigned to the states under the FSM 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 FSM Congress or by state legislatures. 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." SCREP No. 28, II J. of Micro. Con. Con. 808.

As expedient, desirable and even necessary as the transition clause is,

**[3 FSM Intrm. 475]**

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. Cf. *Lonno v. Trust Territory*, 1 FSM Intrm. 53, 61-62 (Kos. 1982).

More troublesome is the fact that carryover 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 FSM Intrm. 67, 73 n.5 (Pon. 1985). The carryover 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 one 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 district 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. §§ 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 carryover 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

### **[3 FSM Intrm. 476]**

the lawmaker as state or national is hidden from those who today construe carryover 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 FSM Code, especially those traceable to orders of high commissioners, eventually may be deemed "inconsistent" with the Constitution or "amended or repealed." FSM Const. art. XV, § 1. Already, the Court has declined to require adherence to several provisions or entire statutes on grounds that they have been repealed by implication by subsequent statutes 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, or because the substance of the provision was contrary to constitutional principles. 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.

It is conceivable that some statutes or particular provisions will have to be set 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 FSM 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." SCREP 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 carryover statutes as possible, maintaining the breadth of coverage originally intended at the time of enactment.

Since Trust Territory statutes envisioned a unitary system of

### **[3 FSM Intrm. 477]**

government and made no distinction between what we now define as state and national roles, it is inevitable that some of the carryover 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 carryover statute, or if state and national powers are invoked, then the statute is enforceable as both state and national law.

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 FSM 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.

**[3 FSM Intrm. 478]**

This suggests that the statute was intended to apply beyond the twelve-mile zone. This inference is confirmed by the one decision found interpreting 23 F.S.M.C. 105(3). In *Kodang v. Trust Territory*, 5 TTR 581, 585-86 (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.

The Constitution's judicial guidance clause, FSM Const. art. XI, § 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. SCREP No. 34, II J. of Micro. Con. Con. 821; *Semens v. Continental Airlines, Inc.*, 2 FSM 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 FSM 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 carryover statutes in the FSM Code, it presumably intended for those provisions to have the same meaning they were given under the Trust Territory's jurisdiction. See *Andohn v. FSM*, 1 FSM 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.

**[3 FSM Intrm. 479]**

Regulatory power beyond twelve miles from island baselines lies with the national government. FSM Const. art. IX, § 2(m). The prohibitions against 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 can not 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. FSM*, 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 government has power to enforce this statute, constituting state law, within the 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 FSM 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, art. VI, § 161. 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. § 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 FSM, 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. Cf. *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.

### **[3 FSM Intrm. 480]**

However, a determination to assert national government powers in areas which fall primarily within the range of state powers will necessarily involve a delicate weighing 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 out 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 endeavor. The judiciary, intended as it is to be insulated from many of the political forces to which the other two coordinate branches are expected to be most sensitive, is not well suited to perform this kind of essentially political policymaking function. See *Semens v. Continental Air Lines Inc. (II)*, 2 FSM 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.

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, 511-13, 74 S. Ct. 695, 697-98, 98 L. Ed. 898, 902-03 (1954) (footnote omitted).

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 FSM 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

**[3 FSM Intrm. 481]**

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.