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CLERK, FSM SUPREME COURT**POHNPEI**
TRIAL DIVISION

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IN THE SUPREME COURT OF THE
 FEDERATED STATES OF MICRONESIA
 TRIAL DIVISION - POHNPEI STATE

STATE OF CHUUK, STATE OF YAP,
 STATE OF KOSRAE AND STATE OF
 POHNPEI,

Plaintiffs,

vs.

SECRETARY OF DEPARTMENT OF
 FINANCE OF THE FEDERATED STATES
 OF MICRONESIA, AND THE NATIONAL
 GOVERNMENT OF THE FSM,

Defendants.

CIV. ACTION NO. 1995-085

FSM'S MOTION TO ABSTAIN
 FROM FURTHER REVIEW OF
 POLITICAL QUESTIONS

Defendants, Secretary of Department of Finance of the Federated States of
 Micronesia and the National Government of the Federated States of Micronesia
 (hereinafter collectively the "FSM"), hereby move this court for an order dismissing
 certain of Plaintiffs' claims in this matter as presenting nonjusticiable political questions,
 and ask this court to abstain from any further consideration of those claims. In particular,
 defendants ask this court to deny any further hearing or debate on any matters relating to
 plaintiffs' request for declaratory judgment and damages in connection with plaintiffs'

1 claim that the four plaintiff states are the underlying owners of the living resources in the
2 waters offshore from their land areas and are entitled to a share of the revenue the
3 National Government has received from fishing licenses. Defendants further pray that
4 this court will let stand its previous order dismissing with prejudice the above claims.
5

6 Memorandum of Points and Authorities

7 **I. Statement of the Case**

8 On July 28, 1995, plaintiffs, the four states of the Federated States of Micronesia,
9 filed a complaint seeking declaratory judgment on the proper division of the fishing
10 access fees collected by the defendants, the Federated States of Micronesia National
11 Government, from foreign fishing entities permitted to fish within the Federated States of
12 Micronesia's (hereinafter FSM) Exclusive Economic Zone (hereinafter EEZ). On
13 November 1, 1995, they amended their complaint to include claims for injunctive relief
14 compelling the Secretary of the Department of Finance to pay to the states portions of the
15 previously collected fishing access fees. Plaintiffs' Second Amended Complaint
16 contained the following seven claims for relief:
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- 21 1. For a declaratory judgment stating that the Plaintiff States are the
22 underlying owners of the resources within their marine boundaries and that
23 the Defendants are required by the traditions and customs and by the
24 Constitution of the Federated States of Micronesia to distribute to the
25 Plaintiff States the revenues from fishing licenses, minus reasonable
26 administrative costs; or,
27 2. In the alternative, for a declaratory judgment stating that the revenues
28 received from fishing organizations pursuant to their licenses are "taxes,"
29 and therefore that Article IX, Section 5 of the FSM Constitution requires
that the Plaintiff States receive not less than 50 percent of the revenues
collected from these fishing licenses;

3. For a declaratory judgment that the Plaintiff States are entitled to 50 percent of the revenues from fines and forfeitures for illegal fishing pursuant to 24 FSMC Section 510, and that such distribution should be forthcoming;
4. For an injunction requiring defendants to distribute the revenues received from fishing licenses according to the requirements of the FSM Constitution;
5. For a damage award equal to the amount of revenues the four Plaintiff States should have received in previous years from revenues received from fishing licenses, plus appropriate interest.
6. For a damage award for 50 percent of the revenue received by Defendants from fines and forfeitures for illegal fishing pursuant to 24 FSMC Section 510, plus appropriate interest; and
7. For such other relief as may be deemed appropriate by the Court.

(Plaintiffs' Second Amended Complaint, October 27, 1995). On September 23, 1997, plaintiffs filed a motion for summary judgment. Plaintiffs asked this court to issue a declaratory judgment and injunction and award appropriate damages in favor of the Plaintiffs on two separate grounds:

(1) that the four Plaintiff States are the underlying owners of the living resources in the waters offshore from their land areas and thus that they are entitled to the revenues the National Government has received from fishing licenses minus the administrative costs necessary to service and monitor these licenses, and (2) that the permit fees received by the National Government from fishing licenses are taxes and thus that at least 50% of these revenues must be distributed to the four Plaintiff States.

(Plaintiffs' Motion for Summary Judgment, September 3, 1997). On November 17, 1997, defendants filed an opposition to plaintiff's motion for summary judgment and filed their own cross-motion for summary judgment. On November 24, 1997, plaintiffs filed a reply to defendants' cross-motion. All motions for summary judgment were

1 argued before the court on December 16, 1997, in a hearing that lasted the entire day. On
2 April 8, 1998, plaintiffs filed a notice of supplemental authority.

3 Judgment was entered on July 17, 1998, in favor of the defendants, and the case
4 was dismissed with prejudice. The Judgment and attendant opinion were disseminated to
5 the parties on July 24, 1998. On July 27, 1998, plaintiffs filed a motion entitled
6 "Plaintiffs Motion to Alter or Amend Judgment," in which plaintiffs moved this Court for
7 an extension of time in which to file a motion to reconsider its judgment and opinion.
8 Defendants filed an Opposition to Plaintiffs' Motion to Alter or Amend Judgment on
9 August 3, 1998.
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11 On August 25, 1998, plaintiffs filed a notice of appeal in this matter to the FSM
12 Supreme Court Appellate Division. The following day, August 24, 1998, plaintiffs filed
13 a Motion for Relief from Judgment, a response to which was filed by defendants on
14 September 8, 1998. On December 2, 1998, this court issued an order setting a hearing
15 date of February 2, 1999, for plaintiffs' motions. In that order, this court denied
16 plaintiffs' request for an enlargement of time to further brief legal and factual issues
17 raised in the Motion to Alter or Amend Judgment.
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19 On January 22, 1999, the National Election Director, pursuant to 1 FSMC
20 §702(1)(b), *Methods of Proposing Constitutional Amendments*, transmitted to the
21 President of the Federated States of Micronesia three initiative petitions for amendment to
22 the FSM Constitution. (See attached Affidavit of Max Mallarinc, National Election
23 Commissioner). The proposed amendments are as follows:
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1. To amend Article I of the Constitution

Section 2. Each state is comprised of the islands of each District as defined by laws in effect immediately prior to the effective date of this Constitution. A marine boundary between adjacent states is determined by law, applying the principle of equidistance. Each state has the sovereign ownership over the natural resources within its boundaries pursuant to each state's constitution, including the exclusive economic zone surrounding its islands. State boundaries may be changed by Congress with the consent of the state legislatures involved.

2. To amend Article IX of the Constitution.

Section 5. National taxes shall be imposed uniformly. Not less than 50% 70% of the revenues shall be paid into the treasury of the states where collected.

3. To amend Article IX of the Constitution

Section 23. The Gross revenue derived from the living resources in the exclusive economic zone shall be divided equally between the national government and the state governments.

Id. On or about February 1, 1999, the FSM President directed the National Election

Director to place the proposed constitutional amendments on the ballot for the March 2, 1999 election. Id.

II. Plaintiffs Ask this Court to Resolve Issues Constitutionally Presented to the Electorate for Resolution

The Constitution of the Federated States of Micronesia provides for three methods of proposing an amendment to the Constitution. Article XIV, *Amendments*, provides in relevant part:

Section 1. An amendment to this Constitution may be proposed by a constitutional convention, popular initiative, or Congress in a manner provided by law.

FSM Const., Art. XIV, §1. The procedures and requirements provided by law for constitutional amendment proposals are described in the Constitutional Amendment

1 Procedure Act, 1 FSMC §701, et seq. With regard to proposals by initiative, the act
2 provides:

3 §702. Methods of proposing constitutional amendments.

4 (1) There shall be three methods of proposing amendments to the Constitution
5 of the Federated States of Micronesia: . . .

6 (b) Initiative petition. A constitutional amendment may be proposed
7 by a popular initiative petition signed by no less than ten percent of
8 the registered voters in not less than three-fourths of the States. An
9 initiative petition with the requisite number of signatures shall be
10 transmitted by the election commissioner of each respective State
11 as established in Section 703(4) of this Chapter, without delay to
the President of the Federated States of Micronesia; . . .

12 (2) No proposed constitutional amendment will be placed on the ballot in a
13 general election for Members of the Congress of the Federated States of
14 Micronesia unless it shall have been received by the President no later than 45
15 consecutive days prior to the date of said general election; provided, however, that
16 nothing in this Subsection shall prevent a proposed constitutional amendment
from being placed on the ballot during a special election called by the President
for that purpose.

17 1 FSMC §702. The amendment petitions at issue here were signed by more than ten
18 percent of the registered voters in Kosrae, Pohnpei, and Yap and were filed with the
19 National Election Commissioner's Office more than 45 days before the scheduled
20 congressional election on March 2, 1999. (See Affidavit of Max Mallarme). Because
21 these petitions satisfy the threshold requirements of 1 FSMC §702(1)(b), they must be
22 presented to the citizens of the FSM for a vote, either in the upcoming congressional
23 election, or in a special election called by the President. 1 FSMC §702(2). The President
24 has no discretion in this matter, except to the extent of a determination of which ballot
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1 will bear the proposed amendments¹. That determination has been made. The proposed
2 amendments will appear on the ballot of the next general election, March 2, 1999.

3 Therefore, the issues in question are now, pursuant to Article XIV of the FSM
4 Constitution and the Constitutional Amendment Procedure Act, squarely before the
5 citizenry of the FSM for resolution.
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7 In voting on these proposed constitutional amendments, the citizens of the FSM
8 are performing a legislative function. That is, they are, pursuant to Article XIV, vested
9 with a power of legislation whereby they will accept or reject the proposed changes to the
10 fundamental law of the nation. "In amending the constitution, the voters become the
11 body which finally give vitality to proposed amendments or refuse to make a change by
12 rejecting them. The exercise of this power is as much a step in passing and considering
13 proposed legislation of this character as any the [legislature] must take in passing
14 ordinary laws." People ex. rel. O'Reilly v. Mills Secretary of State, 70 P2d 322, 323 (S.
15 Ct. Colo., 1902).² For a court to "assume jurisdiction to set aside and declare void an
16 amendment of the constitution adopted by the people would be an invasion and
17 usurpation of *the legislative functions of the people*." Renck v. Superior Court of
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23 ¹ "Proposed constitutional amendments which have been received by the President
24 pursuant to Section 702 of this Chapter shall be printed on ballots to be voted on
25 simultaneously by all voters of the Federated States of Micronesia during a general
26 election for the members of the Congress of the Federated States of Micronesia or during
27 a special election called by the President specifically for that purpose, unless the vote is
28 called for at a different date pursuant to law." 1 FSMC §703(1).

29 ² Since this court has not yet specifically addressed this issue, it is appropriate to look at
precedents from other jurisdictions for guidance. Semens v. Continental Air Lines, Inc.,
2 FSM Intrm. 131, 139-140 (Pon. 1985).

1 Maricopa County, 187 P2d 656, 660 (*cited in* 16 Am. Jur. 2d, *Constitutional Law* §56
2 (1985).

3 **III. The Question of Ownership of Living Resources in the FSM EEZ is**
4 **Nonjusticiable**

5 This court should refrain from further consideration of plaintiffs' claim that the
6 living resources of the FSM exclusive economic zone are the property of the four states
7 because it raises a nonjusticiable political question. A political question is not justiciable
8 because of the separation of powers provided by the constitution. This court has
9 previously recognized that the doctrine of the separation of powers is reflected in the
10 FSM Constitution in its provision for distinct roles for each of the branches of
11 government. See In re Sproat, 2 FSM Intrm. 1, 6-7 (Pon. 1985). In addition, this court
12 has previously adopted the findings of United States courts analyzing the justiciability of
13 political questions in light of the separation of powers doctrine. Aten v. National
14 Election Commissioner (III), 6 FSM Intrm. 143 (App. 1993). "It is well established that
15 the federal courts will not adjudicate political questions." *Id.* at 145 (*citing* Powell v.
16 McCormick, 395 U.S. 486, 518, 89 S.Ct. 1944, (1969).

17 Characteristics which are essential to a finding of a nonjusticiable political
18 question include "a textually demonstrable constitutional commitment of the issue to a
19 coordinate political department; . . . or the impossibility of a court's undertaking
20 independent resolution without expressing lack of respect due coordinate branches of
21 government; . . . or the potentiality of embarrassment from multifarious pronouncements
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1 by various departments on one question." Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691,
2 (1962). Implicating any one of these factors renders a question "political" and thus
3 nonjusticiable. United States v. Mandel, 914 F2d 1215 (9th Cir. 1990).

4 Plaintiffs ask this court to resolve an issue, the ownership of the living marine
5 resources in the FSM EEZ, which has been constitutionally committed to a coordinate
6 branch of government. The people of the FSM have been presented with this question for
7 resolution pursuant to Article XIV of the FSM Constitution, and the authority to render
8 this determination regarding the fundamental law of the FSM lies exclusively with them.
9 "The judicial department can no more interfere with such legislation, or the successive
10 steps necessary to be taken to amend the constitution, than it can with the [legislature] in
11 the passage of other laws, because the judicial cannot directly interfere with the functions
12 of the legislative department." People ex. rel O'Reilly, 70 P2d at 323. "The latter, by the
13 constitution is invested with the power of legislation, in the exercise of which it is
14 supreme, and no other branch of government can usurp this authority, or directly prevent
15 the exercise of this power." Id.

16 The question presented to this court was, without doubt, at one time properly
17 before this tribunal. Nevertheless, further consideration or pronouncement by this court
18 on an issue which has been irrevocably placed before the people of the nation for
19 determination would be impossible without indicating a lack of respect for the
20 determination of the issue through the legislative process. The issue of ownership of the
21 living resources is no longer one of constitutional interpretation, but of political will, and
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1 further pronouncement by this court would be an inappropriate intrusion upon the
2 political process. "When laws have been passed, no doubt in a proper case, the inquiry
3 can then be made as to whether or not the requirements of the fundamental law [with
4 regard to the amendment process] have been observed; but in the first instance the body
5 to which has been delegated the power to pass laws must be left untrammelled, to act as its
6 wisdom may dictate." *Id.* Because the issue before the court is nonjusticiable, it would
7 be inappropriate for the court, by expressing any further opinion in this matter, to intimate
8 how the people, as lawmakers, should decide. See McIntyre v. Fallahay, 766 F2d 1078,
9 1081 (7th Cir. 1985).

12 **IV. Conclusion**

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14 The issue of ownership of living resources in the FSM EEZ, presented to this
15 court by plaintiffs' Second Amended Complaint, Motion for Summary Judgment, and
16 Motion to Alter or Amend Judgment, presents a nonjusticiable political question. The
17 question has been constitutionally committed to a political branch of government for a
18 final determination. Therefore, this court should abstain from further review or
19 consideration of the matter. See State of Texas v. United States, 106 F3d 661 (5th Cir.
20 1997).

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22 Wherefore, based upon the foregoing and in the interest of justice, defendants ask
23 this court to deny plaintiffs' request for further consideration of this question, and to let
24 stand this court's previous order dismissing with prejudice plaintiffs' claims for damages
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1 and declaratory relief relating to the question of ownership of the living resources in the
2 FSM EEZ.
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5 Respectfully submitted,
6 EMILIO MUSRASRIK,
7 SECRETARY, DEPARTMENT OF JUSTICE

8 Date: 2-1-95

9 by: Elizabeth M. McCormick
10 ELIZABETH M. MCCORMICK,
11 Assistant Attorney General
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Attorneys for Defendants

IN THE SUPREME COURT OF THE
 FEDERATED STATES OF MICRONESIA
 TRIAL DIVISION - STATE OF POHNPEI

STATE OF CHUUK, STATE OF KOSRAE,)	Civil Action No. 1995-085
STATE OF POHNPEI, and STATE OF YAP,)	
Plaintiff,)	AFFIDAVIT OF MAX MALLARME
)	
vs.)	
SECRETARY OF DEPARTMENT OF)	
FINANCE, FEDERATED STATES OF)	
MICRONESIA and the National Government)	
of the FEDERATED STATES OF)	
MICRONESIA,)	
Defendant)	

The undersigned, being duly sworn and under oath does hereby state:

1. My name is Max Mallarme and I am currently the National Election Director for the Federated States of Micronesia.
2. In my capacity as National Election Director, I received, on or about January 13, 1999, three initiative petitions for amendment to the Constitution of the Federated States of Micronesia.
3. Each of the three initiative petitions was signed by more than ten percent of the registered voters in Yap, Pohnpei and Kosrae states.
4. The proposed amendments read as follows:
 1. To amend Article I of the Constitution

1 Section 2. Each state is comprised of the islands of each District as defined
2 by laws in effect immediately prior to the effective date of this Constitution. A
3 marine boundary between adjacent states is determined by law, applying the
4 principle of equidistance. Each state has the sovereign ownership over the natural
5 resources within its boundaries pursuant to each state's constitution, including the
6 exclusive economic zone surrounding its islands. State boundaries may be
7 changed by Congress with the consent of the state legislatures involved.

8 2. To amend Article IX of the Constitution.

9 Section 5. National taxes shall be imposed uniformly. Not less than 50%
10 70% of the revenues shall be paid into the treasury of the states where collected.

11 3. To amend Article IX of the Constitution

12 Section 23. The Gross revenue derived from the living resources in the
13 exclusive economic zone shall be divided equally between the national government
14 and the state governments.

15 4. On or about January 22, 1999, I transmitted to the President of the Federated States of
16 Micronesia, copies of the petitions, with a request for a determination by the President of which
17 ballot the amendments should be placed on.

18 5. On or about February 1, 1999, I was informed by the President, through the Secretary,
19 FSM Department of Justice, that the proposed amendments should be placed on the ballot for the
20 next general election, March 2, 1999.

21 Date: 2/1/99



served via first-class mail, postage pre-paid, and by facsimile, on the following
individuals, on this 1st day of February, 1999.

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