Fritz v. ROP, 4 ROP Intrm. 264 (Tr. Div.1993)
LTELATK FRITZ, et al.,
Plaintiffs,

v.

REPUBLIC OF PALAU,
Defendant,

and

HILARIA I. LAKOBONG, et al.,
Intervenors.

CIVIL ACTION NO. 481-93

Supreme Court, Republic of Palau
Trial Division

Decision
Decided: November 2, 1993

ARTHUR NGIRAKLSONG, Chief Justice:

Plaintiffs challenge the government's authority to call the November 9, 1993 plebiscite on the Compact of Free Association ("Compact"). For the reasons set forth herein, plaintiffs' complaint seeking to void the Act establishing the plebiscite is dismissed.

According to RPPL 3-76, the-1992 Act which set November 4, 1992 as the date for the vote on the initiative to lower the voting requirement for approval of the Compact, a plebiscite on the Compact cannot be called until the "the Republic of Palau has received a favorable response from the United States on the requested modifications to the Compact of Free Association." See RPPL 3-76 §11(1). On May 12, 1993, when proposing enabling legislation for a plebiscite on the Compact, President Kuniwo Nakamura informed the Olbiil Era Kelulau ("OEK") that he had ⊥265 received a letter from United States Secretary of State Warren Christopher which he considered to be a "favorable response" to Palau's request for Compact modifications.[1] In RPPL 4-9, the "Compact Implementation Act of 1993," the OEK relied on President Nakamura's determination to call the November 9 plebiscite:

The President of the Republic of Palau has held discussions and negotiated with

[1] In his letter, Secretary Christopher provides "assurances"assurances regarding the United States Government'sGovernment's intentions with respect to implementation of certain provisions of the Compact"Compact" by affirming various commitments and obligations the United States has undertaken in the areas of military land use rights, funding for federal programs, communications, civil aviation, the construction of the Babeldaob road, and the nuclear provisions of the Compact.

> the United States regarding modifications to the Compact of Free Association and has received a letter of assurances regarding the Compact from the Government of the United States signed by the Secretary of the State of the United States, dated May 6, 1993 (the "Letter of Assurances"), which assurances the President of the Republic has determined constitute a favorable response by the United States to Palau's request for Compact modifications.

RPPL 4-9 §3(7); see also id. at §8(1).

The gist of plaintiffs' complaint is that Secretary of State Christopher's letter does not constitute a "favorable response" from the United States to Palau's request for Compact modifications. See Complaint 16. Thus, plaintiffs ask the Court to declare RPPL 4-9 void because it does not comply with RPPL 3-76 §11(1).

The Republic of Palau and intervenors filed motions to dismiss. A hearing on these motions was held on October 27, 1993. A day before, plaintiffs filed a motion to amend their complaint. ⊥266 In the amended complaint plaintiffs repeat their request for a declaratory judgment that RPPL 4-9 is void because it fails to comply with RPPL 3-76 § 11(1). Plaintiffs now theorize that those responsible for drafting and enacting RPPL 4-9 have fraudulently induced the people of Palau into thinking that a "favorable response" has been received when none in fact has. Plaintiffs ask this Court to delay ruling on the motions to dismiss until they can conduct depositions to develop their fraud theory.

DISCUSSION

1. PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINT IS DENIED.

The Court recognizes that leave to amend a complaint is normally "freely given." See ROP Civ. Pro. 15(a). However, leave to amend should be denied where the amendment could not withstand a motion to dismiss. See 3 James Wm. Moore, Moore's Federal Practice ¶ 15.08[4] (2d Ed. 1991). That is, leave to amend should be denied if there are no set of facts which could be proved under the amendment which would constitute a valid and sufficient claim. Id.

Plaintiffs make two allegations to support their fraud theory. They first claim that the records of the "Working Group on the Compact" ("Working Group") "reflect that adoption of RPPL 3-76 was a ploy to obtain certain concessions from the United States but was never intended to be used as the legal basis for an actual referendum to amend the Palau Constitution." Plaintiffs do not elaborate on what the records reveal.

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The working group was created in May, 1991 to identify problematic areas [in the Compact] that may be amended in order to bring about approval . . . . by both Palau and the United States." Its seven members included senators, members of the House of Delegates, and representatives from the executive branch. The Working Group submitted its recommended modifications to the President and the leaders of the Senate and the House of Delegates in August, 1991. The joint leadership of Palau forwarded the recommendations to the United States. While the Compact has not been amended, many of the Working Croup's suggestions were

specifically addressed in Secretary Christopher's "letter of assurances."

When one understands the origins and action of the Working Group, then it becomes obvious that plaintiffs' averment regarding its real agenda has no bearing on the matter at hand. The OEK passed RPPL 3-76 one year after the Working Group disbanded. It borders on the nonsensical to suggest that RPPL 3-76 was never intended to be used as enabling legislation for an initiative to amend the Constitution. The Court must let the Act speak for itself. [2] Viewing plaintiffs' complaint in its most favorable light, no amount of collusion on the Working Group's part could in any way affect the relevant inquiry of whether President Nakamura, who was not a member of the Working Group, accurately ⊥268 determined that Secretary Christopher's letter was a "favorable response." To delay a ruling on the motions to dismiss in order to allow plaintiffs to depose the members of the Working Group would be an idle exercise since that group's work, intentions, and designs are simply irrelevant to the legal issues presented here.

Plaintiffs further support their theory that RPPL 3-76 was a fraud on the people of Palau by referring to an August 20, 1992 letter then President Ngiratkel Etpison sent to the OEK when signing RPPL 3-76. President Etpison objected to the OEK's finding in RPPL 3-76 § l (1)(e) that Palau was negotiating for modifications to the Compact. He stated that Palau was not negotiating with the United States and that to imply so "misleads our people on a subject about which they deserve better."

The reason that the OEK's finding in Section 1(1)(e) cannot be used to void the November 4, 1992 vote has to do with RPPL 3-76's procedural posture. The Appellate Division of the Supreme Court has recently upheld the results of the November 4, 1992, and in so doing has held, inter alia, that the initiative provision of the Palau Constitution is self-executing, in other words, citizen-petitioners are able to "exercise their reserved right to amend the constitution by initiative without enabling legislation from the OEK." Gibbons v. Etpison , Civ. App Nos. 19-92 & 4-93, Slip Op. at p.7 (October 30, 1993). As a necessary corollary, the Court also found that "once a valid petition is filed it is constitutionally incumbent on the OEK to enact legislation to facilitate the voter initiative." Id.
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Thus, in RPPL 3-76, the OEK was not creating a right, but merely responding to the citizen's pre-existing, or reserved, right to amend the constitution by initiative. It would be putting the cart before the horse for this Court to void the November 4 vote on the initiative due to improprieties in the legislation meant to facilitate the initiative right. As Gibbons makes clear, the OEK is without power, either through good intentions or bad, to prevent a vote on an initiative brought by citizens through a duly certified petition. For this reason, the Court will not void the November 4, 1992 vote on the initiative because of the OEK's finding in section l(l)(e) of RPPL 3-76 that Palau was negotiating with the United States for Compact modifications.

The preceding paragraphs explain why the Court denies the plaintiffs' motion to amend

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[2] See Field v. Clark, 12 S. Ct. 495, 497 (1892) (After a bill is signed by the speaker of the house and the president of the senate, and after the bill receives the President'sPresident's approval, its authentication as a bill that the national legislature has duly passed shall be deemed "complete and unimpeachable.").

their complaint. In short, there are no set of facts which could be proved under the amendment which would constitute a valid and sufficient claim.

The Court concludes this section by noting while the second amended complaint includes new and unmerited claims of fraud, it ultimately rests on the same legal theory as the original complaint, that is, that Secretary Christopher's letter is not a "favorable response" to Palau's suggested Compact modifications. See Amended Complaint ¶ 13. The Court further notes that both the complaint and the amended complaint rely on this theory to ask for substantially the same relief, namely, a voiding of RPPL 4-9 and of the plebiscite it calls. As explained below, the Court will not address the merits of the "favorable response" argument; it ⊥270 therefore will not void RPPL 4-9. The point of this decision is that the Court will not examine the political branches' motives, or assess the adequacy of their actions in this particular instance. Thus, whether plaintiffs are allowed leave to amend their complaint can be seen as a moot question. The result under either complaint would be the same.

II. PLAINTIFFS' COMPLAINT RAISES A "POLITICAL QUESTION" NOT SUBJECT TO JUDICIAL REVIEW.

This Court is without subject-matter jurisdiction to hear plaintiffs' claim. The issues of whether President Nakamura has accurately determined that he has received a "favorable response" from the United States regarding Palau's requested Compact modifications, and whether the OEK properly relied on the President's determinations, are classic examples of non-justiciable "political questions."

It has long been the rule that courts will not make a judicial determination of purely political questions. See 6A Moore's Federal Practice at ¶ 57.14. In a minute, the court will explain what factors are used to determine when a question is "political." First, though, it is appropriate to examine the doctrine's theoretical and constitutional underpinnings. In this discussion, the Court will turn to analogous precedent from the United States to illuminate the points it makes.

The non-justiciability of "political questions" is a function of the separation of powers between the three branches of government. See Baker v. Carr, 369 U.S. 186, 210, 82-S.Ct. 691, 706 (1962). The theory expressed is that "[t]he Constitution has ⊥271 left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove v. Green , 328 U.S. 549, 556, 66 S.Ct. 1198, 1201 (1946). Thus, in certain circumstances courts give "due regard to the effective workings" of the other branches of government in order to avoid the "political thicket." Id at 1199, 1201. The idea is that there is a certain "appropriateness under [the republican] system of government of attributing finality to the actions of the political departments . . . . " Coleman v. Miller, 307 U.S. 433, 454-55, 59 S. Ct. 972, 982 (1939).

The "political question" doctrine is based on the sound principle that there must be harmony between the branches of government, and that "mutual deference and respect must be

accorded to the prerogatives of each." Moore, supra. The doctrine seeks to maintain the proper balance between the branches, and insures that the judiciary does not impinge on the functions of the legislative or executive branches. In short, then, when a court employs the "political question" doctrine, it defers to the "political" branches of government, and allows their decisions to stand without judgment.

When, then, is a question "political"? The United States Supreme Court formulated the modern test for answering this question in Baker v. Carr , supra. The Court articulated six different ways a case might trigger the application of the "political question" doctrine:
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> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of an issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one issue.

Baker v. Carr, 82 S.Ct. at 710. If any one of these "formulations" is "inextricable from the case" then the case should be dismissed because of the presence of a "political question." Id.

The Court is persuaded by the United States Supreme Court's reasoning, and finds that the test articulated in Baker v. Carr accords with the general principles of Palau's jurisprudence. It will therefore and henceforth apply the test quoted above to determine whether a case presents a non-justiciable "political question." In the present dispute, the Court finds not one but four of the "formulations" expressed in Baker v. Carr as being "inextricable from the case." They will be addressed in turn.

1). A textually demonstrable constitutional commitment of the issue to a coordinate political department. It is in the area of foreign relations that courts are most likely to deter to the decisions of the executive and legislative branches of government. In fact, one can find "sweeping statements to the effect that all questions touching foreign relations are political ⊥273 questions." Baker v. Carr, 82 S.Ct. at 707. As the United States Supreme Court has said,

> The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative--"the political"--departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 311 (1918).

The present dispute deals directly with the conduct of this nation's foreign relations, conduct which is constitutionally committed to the executive and legislative branches. In addition to granting the OEK the power to ratify treaties, see Article IX § 5(7), the Palau Constitution, in Article VIII § 7(2), clearly reserves to the sole authority of the Executive the power to "conduct negotiations with foreign nations." President Nakamura has used this power to discuss and negotiate the Compact modifications with the United States and, in his constitutional capacity as sole negotiator with foreign nations, has received what he interprets to be a "favorable response" from the United States to the suggested modifications. The OEK has accepted the President's determination, and has relied on it in creating RPPL 4-9. In the complicated context of the development and ratification of the Compact, the Court chooses to view the President's interpretation of Secretary of State Christopher's letter as part and parcel of his exclusive Article VIII § 7(2) power to negotiate ⊥274 with foreign nations. Thus, the Court will not question his
conclusion.

2). A lack of judicially discoverable standards for resolving the dispute. If the Court were to address the merits of plaintiffs' complaint, how would it define "favorable response"? This term, its meaning, its application, its boundaries, is far removed from the accepted terms of constitutional discourse, such as equal protection and due process, which lend themselves to ready definition, and which are susceptible to fair and objective application. Were this Court to address the question of what constitutes a "favorable response," it would be forced to engage in precisely the type of extra-judicial second-guessing the "political question" doctrine seeks to circumvent. See Nixon v. United States , 113 S Ct 732, 736 (1993) (After citing a variety of dictionary definitions, Court concluded that the word "try" in the Impeachment Clause lacked "sufficient precision to afford any judicially manageable standard of review "); see also Coleman, 59 S.Ct at 981-82 (Citing the "political question" doctrine, the Court refused to decide what constitutes a "reasonable time" for states to ratify constitutional amendments, noting there were no constitutional or statutory criteria to judicially determine the term's meaning.).

It is well settled that "'[t]he respect due to coequal and independent departments,' and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all the ⊥275 requisite formalities." Baker v. Carr, 82 S. Ct. at 709, quoting Field v. Clark , 12 S. Ct. at 497. Given the absence of identifiable constitutional or statutory standards for determining what constitutes a "favorable response," the Court in this instance is reluctant to inquire whether the legislative and executive branches complied with all the "requisite formalities" when enacting RPPL 4- 9, preferring instead to defer to their judgment on the matter.

3) An unusual need for unquestioning adherence to a political decision already made. As every Palauan knows, "the most important issue now facing the Republic of Palau is our political status." RPPL 3-76 § 3(a). The Court is well aware of and intimately acquainted with the decade long effort to settle the Compact question See RPPL 3(4). The Court also appreciates that RPPL 4-9 "took many months to prepare and required a great deal of time and effort by both the

executive and legislative branches of the Republic's government." Joint Leadership Statement on the Plebiscite Enabling Legislation Given the effort that has gone into the Act and its importance to Palau's future the Court feels this case presents an "unusual need" to defer to the judgment of the political branches of the government.

4). The potentiality of embarrassment from multifarious pronouncements by various departments on one issue. President Nakamura has determined that Secretary Christopher's letter of assurances constitutes a favorable response to Palau's Compact modifications. The OEK has accepted this determination and has promulgated RPPL 4-9 in reliance on it. It would be inappropriate⊥276 for the judiciary to offer a contrary or conflicting opinion. Doing so would "risk embarrassment of our government abroad, [and] grave disturbance at home." Baker v. Carr, 82 S. Ct. at 715. At this time the Court recognizes the "necessity of the country's speaking with one voice." Id at 745 (J. Frankfurter, dissenting).

Having explained why the "political question" doctrine precludes review of the issue in the present case, the Court concludes by noting that, in general, whether the doctrine applies requires a case by case inquiry. Id. at 706. The Court is mindful of its right to review the actions of the legislative and executive branches. In other contexts, the Court will not hesitate to undertake such review in its role as the "ultimate interpreter of the Constitution." Gibbons v. Salii, 1 ROP 333, 336 (1986). [3] But for all of the reasons stated herein, the Court deems it wisest in this instance to accede to the judgment of the "political departments" of the government, out of respect for the delicate balance between the three branches of government
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CONCLUSION

The Court finds the issue presented in plaintiffs' complaint involves a "political question" not open to judicial review.

Accordingly, the motions to dismiss the complaint are GRANTED. The November 9, 1993 plebiscite on the Compact of Free Association can occur as scheduled.

Entered: 11/2/93

Arthur Ngirakelsong
Chief Justice

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[3] Gibbons is distinguishable from the present case because in Gibbons the Appellate Division interpreted the meaning of particular provisions of the Palau Constitution, a task that courts are well suited to perform. The instant case presents no questions of constitutional interpretation. Further, unlike the political question presented in the instant case, the questions the Gibbons court addressed were not ones demonstrably committed to a coordinate political department by the Constitution.