

Salii v. House of Delegates, 3 ROP Intrm. 351 (Tr. Div. 1988)
CARLOS H. SALII, et al.,
Plaintiffs,

v.

HOUSE OF DELEGATES, OEK,
and HERSEY KYOTA, Chief Clerk,
Defendants.

CIVIL ACTION NO. 160-88

Supreme Court, Trial Division
Republic of Palau

Decision, order and declaratory judgment
Decided: June 28, 1988

NGIRAKLSONG, Associate Justice:

This matter came before the court on June 17, 1988 upon defendants' motion to dismiss this lawsuit for lack of justiciability and motion to dismiss all the defendants because of the privileges and immunities of the members of the House of Delegates. Ms. Loretta Faymonville appeared for the defendants and Mr. John Rechucher appeared for the plaintiffs.

The court took the motions under advisement and ordered supplemental brief on whether plaintiff Salii was entitled to a notice and an opportunity to be heard before the House of Delegates expelled him from the membership of that body. The court also invites the parties to suggest judicial remedies in the event plaintiff Salii was denied a notice and an opportunity to be heard due to him before his expulsion. Both sides have filed the supplemental brief.

Further, plaintiffs have filed a motion for summary judgment and defendants have filed a cross motion for summary judgment. Both summary judgment motion and cross motion for summary judgment **L352** and their supporting papers again deal with the issue of alleged violation of plaintiff Salii's right to notice and an opportunity to be heard under the due process clause of the Constitution. The court now rules on the defendants' motions and on the issue of whether plaintiff Salii was entitled to a notice and an opportunity to be heard under the due process clause of the Constitution.

Plaintiff Carlos Salii was elected last general election (1984) from the State of Angaur to the House of Delegates, Olbiil Era Kelulau. His Four-year term, like the term of all members of the OEK, began on June 1, 1985. Plaintiff Salii's term was to end on December 31, 1988. The other plaintiffs in this case are alleged registered voters of the State of Angaur and allegedly voted for plaintiff Salii last general election.

All the defendants, except the Chief Clerk of the House, are members of the House of

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Delegates who voted in adopting House Resolution No. 02-0080-20S expelling, *inter alia*,
plaintiff Carlos Salii from the House of Delegates.

The Speaker of the House of Delegates issued a call for the 20th Special Session of the House of Delegates on May 25, 1988. The call states that the House of Delegates shall consider the following subject matters:

1. Report of House Delegation to U.S. Congress and U.N. Security Council and Trusteeship Council.
2. Such other and further legislative matters that may be submitted to the Olbiil Era Kelulau during the said Twentieth Special **1353** Session by the President of the Republic of Palau and the Presiding Officers of the Olbiil Era Kelulau.

Plaintiffs' Exhibit "A" attached to complaint. The subject of plaintiff Salii's expulsion is not on the call for the Special Session. A copy of the call for this Special Session was placed in the OEK mail box for each delegate. (Defendants' Exhibit "A", Affidavit of Speaker Santos Olikong in support of defendants' motion for summary judgment.)

Further, notice of the Special Session was announced over WSZB Radio Station, Palau's only radio station. A copy of House Resolution No. 02-0080-20S expelling plaintiff Salii was placed upon the desk of each delegate. (It is not established when the copy of the Resolution was placed upon plaintiff Salii's desk. It is not known if it was placed on Salii's desk before the call for Special Session was issued, on the same date the call was issued or on the first day of the session, May 27, 1988, on which the House of Delegates adopted the Resolution.)

It is not disputed that the Resolution was not referred to a committee and "no . . . investigation was conducted in conjunction with, or preparatory to, the introduction of House Resolution No. 02-0080-20S" (*Id.*)

It is undisputed that plaintiff Salii did not receive actual notice of the Resolution before the 20th Special Session convened on May 27, 1988. Convening on May 27, 1988, the House of Delegates without plaintiff Salii and without any debate adopted House **1354** Resolution No. 02-0080-20S expelling plaintiff Salii from the House of Delegates (Plaintiffs' Exhibit "E" in support of their motion for summary judgment.)

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OPINION

WAS SALII ENTITLED TO
NOTICE AND AN OPPORTUNITY TO
BE HEARD

Defendants argue that plaintiff Salii is not entitled to a notice and an opportunity to be heard before his expulsion. They cite the 1905 case of *French v. Senate of California*, 146 Cal. 604 80 p. 1031 in support of their position. That case, however, does not support the defendants' position. The rule of that case is that an expelled member of the California State Legislature has no right to a trial of the charges upon which such member got expelled. Plaintiff Salii has not even claimed that he is entitled to a trial upon the charges contained in House Resolution No. 02-0080-20S. Such right does not exist. (See also ft. note 1. *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944.)

The facts of the French case are also distinguishable. The relevant facts as found by the Supreme Court of California are:

We are therefore bound to take notice that charges were preferred against the petitioners in the Senate and were referred by it to a committee for investigations; that the committee reported that it had made the investigation and that the charges were true, and recommended that the petitioners be expelled; that this report was taken up and considered by the Senate; that the petitioners, being then members, had upon such consideration an opportunity to present, or have presented, arguments in their behalf; and that the resolution expelling them was regularly **L355** offered and adopted by the Senate. There being no direct allegation to the contrary, we must presume that the petitioners had notice of these proceedings, and that they were allowed as members to participate therein...[The court concluded]...[t]here is no constitutional provision giving to the petitioners the right to have a trial and an opportunity to be heard upon the charges made against them in the Senate other than that which they have received.

[EMPHASIS added]. *French, supra*, at p. 1033.

Plaintiff Salii was not given actual notice of House Resolution No. 02-0080-20S and only learned about it after it had been adopted. (Salii's Affidavit in support of motion for Temporary Restraining Order, uncontradicted by defendants). Salii alleges that at the very least, he is entitled actual notice of House Resolution No. 02-0080-20S so that he could appear and object to the adoption of the Resolution or default and acquiesce. Salii bases this claim on Section 6, Article IV of the Palau Constitution which states in part that "[t]he government shall take no action to deprive any person of life, liberty or property without due process of law . . ." This is the same as the due process clause of the 14th Amendment to the United States Constitution. Words then of due process clause may be presumed to have the same meaning as in the United States in applicable situations. *D. Stefano v. D. Stefano*, 6 TTR 312 (1973) and *Ichiro v. Bismark*, 1 TTR 57 (1953).

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The principle governing notice requirement of the due process clause was established in *Mullane v. Central Hanover Bank & L356 Trust Co.*, 339 U.S. 306 70 S.Ct. 652, 657 (1950). There the United States Supreme Court states:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance...

. . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. [all case citations omitted]

Mullane, supra, at p. 657. A copy of House Resolution No. 02-0080-20S delivered to Salii before the Special Session was to convene or a telephone call from the House of Delegates to plaintiff Salii informing him that House Resolution No. 02-0080-20S, seeking to expel him, was to be a subject for the Special Session would have met the requirement of notice and would have involved, but the smallest of efforts.

Koror is a small town. The Legislature Building is within approximately 2 miles from plaintiff Salii's office and even less from his residence. There is no difficulty in finding either Salii's office or his home.

It is the decision of this court that House Resolution No. 02-0080-20S was adopted in derogation of plaintiff Salii's right to a notice and an opportunity to be heard under the due process clause. Accordingly, this Resolution No. 02-0080-20S is declared L357 null and void.

In reaching this conclusion, the court adopts the rule enunciated in the case of *Kilbourn v. Thomas*, 103 U.S. 168, 26 L.Ed. 377, 390 and adopted as well by the case of *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944. The rule states:

Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. 103 U.S. at 199, 26 L.Ed. at 390. *Powell v. McCormack, supra*, at 23 L.Ed. 491 at page 508.

Justiciability and Political Questions

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Defendants argue that this case presents a political question as defined in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962) and should therefore be dismissed because of the doctrine of separation of powers. Defendants identify the presence of three formulations that constitute political question as follows:

First, defendants argue that the question of expulsion of a member of the House of Delegates under (ROP Constitution, Article IV, Section 10) is a “textually demonstrable constitutional commitment” of that issue to the House of Delegates. Defendants argue that this “commitment” of the issue constitutionally to the House of Delegates bars judicial review.

¶358 Had there not been an allegation of constitutional violation by the House of Delegates, this court would have agreed with the defendants. But where as here, plaintiff Salii alleges that House Resolution No. 02-0080-20S was adopted in derogation of his due process right to a notice and an opportunity to be heard, it is the decision of this court that political question does not bar judicial review. *Powell, supra*, at 1978.

Second, defendants argue that there is a lack of “judicially discoverable and manageable standards” for resolving the matter. This court again disagrees. The interpretation of the Constitution is the issue here and that always follows “judicially manageable standards”. As in this case, the requirement for notice is judicially established and this court has no problem applying the standard enunciated in the *Mullane* case. Finally, defendants argue that if this court were to do anything other than dismiss this case, this court would be exerting control over the House of Delegates as well as expressing lack of respect to that body. This court does not agree. Determining whether plaintiff Salii’s rights under due process were violated when House Resolution No. 02-00800-20S was adopted without giving him adequate notice and an opportunity to be heard involves nothing more than an interpretation of the Constitution.

It is the duty of this court to interpret the Constitution. And where as here, there appears to be a conflict between provisions of the Constitution, it is the role of the court to say ¶359 what the law is. *Remeliik, et al. v. The Senate*, 1 ROP Intrm. 1 (High Court, August 1981), *The Senate v. Remeliik, President of the Republic of Palau*, 1 ROP Intrm. 90 (Tr. Div. Nov. 1983), *United States v. Nixon*, 418 U.S. 700, 703 94 S.Ct. 3090 and *Marbury v. Madison*, 1 CRANCH, 137, 177, 2 L.Ed. 60 (1903). For this court to do less is to avoid its constitutional responsibility.

JUSTICIABILITY

Defendants’ second motion to dismiss this case is based on lack of justiciability. To decide whether a claim is justiciable, meaning “appropriate” for judicial review, the court must determine whether “the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Baker v. Carr, supra*, at 198 and *Powell v. McCormack*, 395 U.S. 486, 89, S.Ct. 1944, 1961.

Having determined that the House of Delegates has a duty to comply with the requirement of the due process before expelling plaintiff Salii and the House having failed to

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give adequate notice and an opportunity to be heard to Salii before expelling him, the only issue is whether there is appropriate judicial remedy. The defendants argue that plaintiffs are asking for coercive remedies, which are not appropriate for this case. The plaintiffs argue that declaratory judgment under Rule 57 of our Rules of Civil Procedures is appropriate.

The court agrees with the plaintiffs' position. Rule 57 **1360** provides that the court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought.

Accordingly, defendants' motion to dismiss for lack of justiciability is denied.

Privileged and Immunity Clause

Defendants' motion to dismiss them as defendants is based on Section 9, Article IX of the Constitution of the Republic of Palau which provides for the privileges and immunities of member of the Olbiil Era Kelulau. That section reads:

No members of either House of the Olbiil Era Kelulau shall be held to answer in any other place for any speech or debate in the Olbiil Era Kelulau.

ROP Constitution, Article IX, Section 9. This section, referred to as the Speech and Debate clause, is patterned after Article 1, Section 6(1) of the United States Constitution which reads:

. . . for any Speech or Debate in either House, they shall not be questioned in any other place.

U.S. Constitution, Article 1, Section 6[1]. The construction placed on this Speech and Debate clause by the United States Supreme Court is relevant and to the point. That court has defined the scope of the immunity as:

Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, *supra*, at 204, 26 L.Ed. at 392. Furthermore, the clause **1361** not only provides a defense on the merits but also protects a legislator from the burden of defending himself.

Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation.

Powell v. McCormack, 395 U.S. 486, 502, 23 L.Ed. 2d 491, 506, 89 S.Ct. 1944. Nothing could be clearer. The court agrees with the defendants' position. Plaintiffs argument that the clause is

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confined to criminal offense is not correct.

Accordingly, all members of the House of Delegates made defendants in this case for voting to adopt House Resolution No. 02-0080-20S to expell plaintiff Salii are indeed immune by the Speech and Debate Clause of the ROP Constitution. They are hereby dismissed as defendants herein.

The court, however, denies the same motion with respect to Hersey Kyota, the Chief Clerk of the House. While the Speech and Debate Clause protects defendant delegates, it does not protect employees of the House of Delegates who act pursuant to House Order. *Powell, supra*, at 1955.

With the foregoing, the following orders and declaration of rights are hereby entered.

IT IS ORDERED that defendants' motion to dismiss this matter for lack of justiciability and separation of powers doctrine is denied;

1362 IT IS FURTHER ORDERED that defendants' motion to dismiss all the defendants is granted only with respect to all defendants who are members of the House of Delegates;

IT IS FURTHER ORDERED that defendants' motion to dismiss Hersey Kyota, Chief Clerk of the House, is denied;

IT IS FURTHER ORDERED AND ADJUDGED that the rights of the parties are as follows: House Resolution No. 02-0080-20S expelling Carlos Salii was adopted in derogation of Salii's constitutional right to a notice and an opportunity to be heard. Accordingly, House Resolution No. 02-0080-20S is hereby declared null and void.