Foreign Investment Board v. OEK, 5 ROP Intrm. 344 (Tr. Div. 1996)

FOREIGN INVESTMENT BOARD
Plaintiff,

v.

OLBIIL ERA KELULAU
Defendant.

CIVIL ACTION NO. 226-95

Supreme Court, Trial Division
Republic of Palau

Decision
Decided: February 6, 1996

LARRY W. MILLER, Justice:

This case was commenced as a challenge to the exercise by the Olbiil Era Kelulau (OEK) of the "legislative veto" provided for in 6 PNC § 133 and to the constitutionality of that provision generally. Before the Court are cross-motions for summary judgment, plaintiff seeking judgment on the merits, and defendant arguing that this action is procedurally flawed and, in the alternative, that the legislative veto, as enacted and carried out, ⊥345 is valid. The merits of this challenge have been well briefed and well argued by counsel for the two named parties. Nevertheless, the Court agrees with defendant that this case is not the proper vehicle to decide the momentous constitutional issue that it presents. In short, the Court finds that the OEK is not a proper defendant, is doubtful whether the Foreign Investment Board (FIB) is a proper plaintiff, and concludes that this matter should be dismissed.

The salient facts are few and undisputed. In the spring of 1995, the FIB, acting pursuant to authority granted by the Foreign Investment Act, 28 PNC §§ 101-121, and in accordance with the rule making provisions of the Administrative Procedure Act, 6 PNC §§ 121-133, promulgated a set of rules and regulations. In June 1995, the OEK, acting pursuant to § 133 of the latter, determined to reject those regulations. After a single reading, each house of the OEK, the House of Delegates and the Senate, passed a resolution nullifying those regulations. The resolution was not forwarded to the President for his signature. The FIB, represented by the Attorney General, then commenced this action naming the OEK as the sole defendant thereto. The action seeks declarations that Section 133 is unconstitutional and that the resolution purporting to veto the FIB's regulations is void, and an injunction prohibiting the OEK from taking any steps to nullify the FIB's regulations other than through legislation enacted in accordance with Article IX, Section 14, and presented to the President pursuant to Article IX, Section 15.

The form of this lawsuit -- its plaintiff, its plaintiff's counsel, and its defendant -- is unprecedented. The Court is aware of no case in which an administrative agency brought suit to invalidate a law passed by the same body that created it. It has found one case in which the

attorney general of a state tried -- but was found to be without standing -- to challenge the constitutionality of a state statute. And it has found no case in which the United States Congress, a state legislature or the OEK was named as a defendant by *any* plaintiff in an action questioning the constitutionality of one of its statutes.

Taking the last first, it seems to the Court axiomatic that it is not the role of the legislature to defend the laws it has passed. Although plaintiff has cited Palau cases in which the OEK or one of its constituents was a party, they do not cast doubt on this proposition. In *Remeliik v. The Senate*, 1 ROP Intrm. 1 (Tr. Div 1981), the Court resolved a dispute over the meaning of the constitutional provisions relating to the Vice President. In *The Senate v. Remeliik*, 1 ROP Intrm. 90 (Tr. Div. 1983), the Court declared that the President had a duty to appoint a Public Auditor. ⊥346 Although both cases adjudicated disputes between the Executive and Legislative Branches, and although the latter explicitly concluded that the Senate had the capacity to sue and be sued in certain instances, neither addressed whether the OEK would be a proper defendant in the circumstances presented here.[1]

Typically, an action challenging the constitutionality of a law is brought against the person or body charged with carrying it out. Under the Palau Constitution as in the United States, the power to execute laws lies, not surprisingly, in the Executive Branch. Thus, it is the President who is granted the power "to enforce the law of the land", Article VIII, Section 7(1), and "to represent the national government in all legal actions", *id.*, Section 7(7). Thus, as plaintiff would concede, when someone wishes to bring an action challenging the validity of a statute, it is typically the Republic or one of its officers or agencies -- and not the OEK -- that is sued, and it is the President, acting through the Ministry of Justice, *see* 2 PNC § 105, and ultimately through the Office of the Attorney General, whose role it is, at least in the first instance, to act in its defense. It is thus a bit ironic that an action which, on the merits, charges the OEK with overstepping its legitimate powers, puts the OEK in a position typically reserved for the Executive Branch.[2]

⊥347 Is there any reason that this typical scenario should not be deemed universal, so that this

[1] Likewise, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated on other grounds*, 107 S. Ct. 734 (1987), although recognizing the propriety of some intra-governmental litigation, does not provide a precedent for this case. There, again, the issue was whether the U.S. Congress and its members had standing to sue as plaintiffs and not whether they could be named as defendants as was done here.

[2] The Order of the Chief Justice joining the OEK as a defendant in the recent official expense litigation does not suggest a different result here. Consistent with the discussion above, that action was not commenced against the OEK which passed the challenged statute, but against the executive officer -- the Director of the National Treasury -- charged with carrying it out. The Chief Justice's Order reflects his concern that the members of the OEK had an intimate financial stake in the litigation (although, arguably, as a collection of individuals rather than as a body) and the stated intention of counsel for both of its houses to seek to intervene at the appellate level. Especially given the latter, it was eminently reasonable for the Chief Justice to avoid repetitive proceedings by ensuring that all interested parties and all arguments they might offer were before him.

action may go forward? Plaintiff points out that this case arises out of the OEK's exercise of a purported legislative veto and not out of its general power to legislate. Arguably, therefore, recognition of this lawsuit would not set a precedent allowing parties to sue the OEK any time an otherwise duly enacted statute is challenged as invalid. But while the effect of this case could be so limited, the Court does not see any principled basis for such a distinction. Although the occasion for this lawsuit was the exercise of a legislative veto, what is ultimately at stake is the validity of the statute authorizing the OEK to exercise that veto -- a statute that itself was duly enacted by the first OEK over the President's objection. To allow this case to go forward would thus be to say that challenges to statutes authorizing legislative vetoes, alone among all other statutes, may be brought against the OEK. While that is a possible conclusion, the Court does not believe it is the right one.

Arguably, the Court's treatment of this issue is dispositive, and the Court need not address the other concerns noted above. Because the issues are, in the Court's view, interrelated, and in light of a possible appeal, the Court believes it prudent to discuss the question of the FIB's standing to sue, which has also been questioned.

Two factors lead the Court also to conclude that the FIB is not a proper plaintiff to this action. First, as stated earlier, the Court is aware of no case in which an administrative agency has even attempted to challenge as unconstitutional a legislative diminution of its powers. Moreover, in the closest analogy the Court could find, it has long been the general rule that "political subdivisions of the state . . . lack standing . . . to challenge the constitutionality of state laws directing or involving their performance." 16 Am. Jur. 2d *Constitutional Law* § 198 (2d ed. 1979). This rule has been enunciated both as to claims under the United States Constitution, *e.g. Housing Authority v. Ponca City* , 932 F.2d 1183, 1188 (10th Cir. 1991) ("It is well established that a political subdivision may not lodge constitutional complaints against its creating state"), and under state constitutions, *e.g. Denver Association for Retarded Children v. School District No. 1* , 535 P.2d 200, 204 (Colo. 1975) ("[A] political subdivision of the state, and the officers thereof, lack standing to challenge the constitutionality of a statute directing their performance.").

⊥348 Moreover, the role of the Attorney General in representing the FIB in this action is troublesome. It is entirely appropriate for the Attorney General's office to represent an agency of the national government. But it is extremely questionable, in the Court's view, for it to do so in an action challenging the constitutionality of a statute that it would typically be its role to defend. As the Court noted earlier, there is at least one case in which a state attorney general was found expressly to lack standing to bring an action attacking a state statute. *Baxley v. Rutland* , 409 F. Supp. 1249 (M.D. Ala. 1976)(three-judge court). While there, the attorney general was suing in his own name and on behalf of the state, the deficiency identified by the Court rejecting the claim would appear equally problematic here:

> We emphasize that this case is instituted solely upon the authority of the Attorney General. His mind alone is the directing force. In the unlikely event that he becomes convinced that the Alabama statues under attack are not violative of the Constitution, or if he should be succeeded by another who so concludes, then

Foreign Investment Board v. OEK, 5 ROP Intrm. 344 (Tr. Div. 1996)

> certainly at that time this case would lack 'that concrete adverseness which sharpened the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'

409 F. Supp. at 1257, *quoting Baker v. Carr*, 84 S.Ct. 691, 703 (1962). Here, too, whatever the view of the members of the FIB, this suit could not have come about absent a judgment by the Attorney General that the legislative veto was unconstitutional. While that judgment may be a reasonable one, and while, as the Court notes below, it may justify the Attorney General in choosing not to defend the constitutionality of the statute in an action brought by a third party, it seems an inadequate basis to proceed with an affirmative attack here.

One final comment is in order. There may be circumstances in which it is appropriate for the Attorney General to reach the independent judgment that a particular statute is not constitutional and to refuse to defend a constitutional challenge brought against it. In such circumstances, it would be entirely proper for the OEK to choose to intervene in support of its enactment. Indeed, that is precisely what happened in the United States case which decided the constitutionality of the legislative veto there. In *INS v. Chadha*, 103 S.Ct. 2764 (1983), the INS followed the dictates of a legislative veto at the administrative ⊥349 level.[3] However, when the agency's action was challenged in court, the Attorney General and later the Solicitor General agreed with Chadha that the legislative veto was unconstitutional. The only parties to defend its constitutionality were the two houses of the United States Congress which intervened in the Court of Appeals and remained in the case in the Supreme Court. Nevertheless, the Supreme Court's approval of this procedure is perhaps instructive here:

> We have long held that Congress is the proper party to defend the validity of a statute *when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable of unconstitutional*.

103 S.Ct. at 2778 (emphasis added).[4] Thus, notwithstanding that the battle lines in a future case may eventually be drawn quite similarly to this litigation, the Court believes that resolution of the important question raised herein should await a dispute raised in the first instance by and against more appropriate parties.

---

[3] In *Chadha*, the effect of the legislative veto was to revoke a suspension of deportation that had previously been granted and to require that Mr. Chadha be deported.

[4] It is also worth noting that the Supreme Court explicitly rejected

> the contention that Chadha lack[ed] standing because a consequence of his prevailing [would] advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests.

Id. at 2776. The premise of this contention, which the Court seems to accept, is that the Court would not have considered a lawsuit solely between the Executive Branch and Congress and that *Chadha's* participation was necessary.