The Senate v. Nakamura, et al., 7 ROP Intrm. 212 (1999)

THE SENATE,
Appellant,

v.

KUNIWO NAKAMURA, TOMMY REMENGESAU, JR., ELBUCHEL SADANG, and ANTONIO MIKEL,
Appellees.

CIVIL APPEAL NO. 98-54
Civil Action No. 510-96

Supreme Court, Appellate Division
Republic of Palau

Aargued: March 19, 1999
Decided: June 4, 1999

Counsel for Appellant: Dorji Roberts, David Schluckebier, Senate Legal Counsel

Counsel for Appellees: Scott Campbell, Jesse M. Caplan, Office of the Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

NGIRAKLSONG, Chief Justice:

For the second time, this Court must determine whether the Trial Division properly dismissed this case. This Court previously ruled that the Senate had standing to maintain this action because it asserted an injury to its law making powers. Now, this Court must decide whether the Senate has stated any claim upon which relief can be granted. Specifically, the Court must determine whether the Constitutional provisions at issue are self-executing, whether the Senate has stated a claim under either 40 PNC §401 or the common law, and whether injunctive relief is an appropriate remedy.

On November 27, 1996, the Senate of the OEK filed this action against Kuniwo Nakamura, President of the Republic; Tommy Remengesau, Jr., the Minister of Administration; Elbuchel Sadang, the Director of the National Treasury; and Antonio Mikel, the Director of Program Management and Budget, alleging that in fiscal year 1995, the executive branch expended $644,154 more than was appropriated by the OEK. The Senate seeks judicial relief in the form of a declaratory judgment that Appellees violated articles VIII, IX, and XII of the Constitution and 40 PNC § 401 by expending funds without legislative approval. The Senate further seeks statutory and common law restitution of the unauthorized expenditures to the National Treasury and injunctive relief prohibiting Appellees from again expending funds in excess of the amount appropriated by the OEK and requiring Appellees to institute as accounting

system.

The Trial Court originally dismissed the case in 1997 finding that the Senate lacked standing to bring this action. This Court reversed. *The Senate v. Nakamura* , 7 ROP Intrm. 8 (1998). After remand from the Appellate Division, Appellees moved to dismiss all of the claims in the Senate's First Amended Complaint pursuant to ROP R. Civ. Pro. 12(b)(6), alleging that the complaint fails to state any claim upon which relief can be granted. The Trial Division dismissed the Complaint in its entirety, finding that the Constitutional provisions at issue were not self-executing, that the Senate had failed to state a claim under 40 PNC §401, and that the Senate was not the proper party to seek restitution to the National Treasury. This Court reviews the Trial Division's order granting the motion to dismiss *de novo*. ⊥213 *Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir. 1993).

I.

The Senate has alleged that Appellees have violated several provisions of the Constitution: (1) Article XII, § 1, which prohibits funds from being withdrawn from the Treasury except by law; (2) Article VIII, § 7(6), which provides that the President is authorized to spend funds pursuant to appropriations; and (3) Articles IX, § 1 and XII, § 3 which invest the OEK with the exclusive legislative authority to enact laws and amend the annual budget. Appellees moved to dismiss the claims arising under the Constitution alleging that the constitutional provisions at issue are not self- executing, but rather, require implementing legislation to have any effect. We focus our discussion, as did the parties, on Article XII, § 1.

Article XII, § 1 of the Constitution reads:

> There shall be a National Treasury and a state treasury for each of the states. All revenues derived from taxes or other sources shall be deposited in the appropriate treasury. No funds shall be withdrawn from any treasury except by law.

The Trial Division held that the final sentence of this provision ("the withdrawal clause") is not self-executing because the phrase "except by law" reflects an intent of the framers that subsequent enabling legislation be passed to give effect to it. The Trial Division further held that the withdrawal clause is not self-executing because it lacks "language implementing [its] directive[] or providing for [its] enforcement."

Appellants argue that the phrase "except by law" does not indicate that the framers anticipated subsequent enabling legislation to give effect to this provision. Rather, the Senate argues that "except by law" refers to the annual budgets and supplemental appropriations enacted by the OEK. Therefore, the Senate argues, it is the President's spending power that is not "self-executing," not the prohibition against spending unappropriated funds.

i. The Gibbons test to determine whether constitutional provisions are self-executing

This Court starts from the principle that constitutional provisions are presumed to be self-executing -- "that every provision in the Constitution has content and meaning which may be given immediate effect." *Gibbons v. Etpison*, 4 ROP Intrm. 1, 4 (1993). This presumption arises out of a reluctance to reach the opposite conclusion and hold that the fundamental principles that the framers thought worthy of enshrining in the Palau Constitution are nevertheless without meaning and ineffective. Thus, we have previously held that this presumption can be overcome only where "(1) [the Court] cannot determine the scope or nature of the right from the language of the provision even with recourse to the full panoply of interpretive devices which courts normally use to divine the meaning of constitutional language; or (2) [w]here the provision reflects an intention of the framers that it not be implemented until legislative or other action is taken." *Id.*

The first question, then, is whether the "nature and scope" of the withdrawal clause is sufficiently defined. *Id.* We believe that it is. The Trial Division held that the withdrawal clause was not adequately defined because it does not contain language providing for its enforcement. However, a provision does not have to provide for a remedy in order to be ⊥214 self-executing. 16 Am. Jur. 2d *Constitutional Law* § 104 (1998). The question whether a constitutional provision is self-executing is distinct from the question whether it creates a private right of action for damages or other relief. [1] Here, the Senate does not claim the existence of such a right of action or claim any remedy, [2] but seeks only a declaration of the meaning of the withdrawal clause and its applicability to the facts it has alleged in its complaint. Moreover, the availability of declaratory relief does not depend on the existence of any other remedy. Rather, the declaratory judgment statute makes clear that a court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 14 PNC § 1001 (emphasis added). Despite not specifying a remedy for violations, the withdrawal clause otherwise adequately defines the nature and scope of the right it creates. Specifically, the withdrawal clause prohibits the withdrawal of funds from the National Treasury, unless and until legislation is enacted which authorizes the withdrawal. Since both the nature and scope of the withdrawal clause are clearly defined, it passes the first prong of the *Gibbons* test.

The second question posed by *Gibbons* is whether the framers intended that the provision have effect immediately or whether they contemplated subsequent legislation to give it effect. In determining the framers' intent, we look first to the language chosen, that is, the language of the withdrawal clause itself. *ROP v. Etpison* , 5 ROP Intrm. 313, 317 (Tr. Div. 1995) (where the

---

[1] Thus, for example, while there has never been any doubt that the Fourth Amendment to the U.S. Constitution, which protects against unreasonable searches and seizures, was self-executing and became effective with its ratification, the question whether it gave rise to a private right of action for damages was not resolved until nearly 200 years later, and then only by a divided vote. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 91 S.Ct. 1999 (1971).

[2] To be sure, as we discuss below, the Senate's complaint does seek additional remedies. But those remedies are sought on the basis of statutory and common law, not the Constitution.

language is unambiguous, courts find intent in the ordinary meaning of the language alone); *see also Yano v. Kadoi*, 3 ROP Intrm. 174, 182 (1992) ("where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."). While we have previously held that language similar to that in the withdrawal clause -- terms such as "pursuant to appropriation laws" or "as provided by law" -- indicated an intent that enabling legislation be passed to animate a constitutional provision, *Kiuluul v. Obichang*, 2 ROP Intrm. 201 (1991), we also observed that such an interpretation "depends on the constitutional context." *Id.* at 203.

The context of the withdrawal clause strongly favors a finding that the framers intended its prohibition to be self-executing. Here the words "except by law" do not reflect any intention that the principle of the withdrawal clause must await further legislation to be implemented, but rather are an integral part of that principle -- that no money may be taken from the National Treasury except pursuant to a duly-enacted law. Unlike the provision at issue in *Kiuluul*, which directed an election to be held once certain circumstances occurred, the general nature of the withdrawal clause is prohibitory, and as such, it is logical to believe that the framers intended it to have an immediate and ongoing protective effect.[3] Such an interpretation ⊥215 comports with the general principle that prohibitory constitutional provisions are interpreted to be self-executing. 16 Am. Jur. 2d *Constitutional Law* § 105 (1998).

Thus, the presumption of self-execution articulated in *Gibbons* has not been rebutted here. Unlike the Trial Division, we are not persuaded that *Harrington v. Bush*[4] compels a different conclusion. In the first place, this Court is not bound by interpretations of the U.S. Constitution. While authority construing the U. S. Constitution is helpful where it is similar to Palau's, the framers of Palau's constitution did not merely want to create a "carbon copy" of an existing government, *Remeliik v. The Senate*, 1 ROP Intrm. 1, 6 (1981), and we are free to interpret the Palau Constitution differently than U.S. courts might. *See Yano v. Kadoi*, 3 ROP Intrm. 174, 189 (1992). Furthermore, we do not believe that *Harrington* is contrary to our holding. *Harrington* was an effort by a U.S. Congressman to invalidate various statutes that had been enacted by Congress to implement the U. S. Constitution's equivalent of the withdrawal clause. In concluding that that clause was "not self-defining," 553 F.2d at 194, the court was holding only that Congress had the "power to give meaning to the provision." *Id.* The court did not say that the clause was not self-executing in the absence of congressional action, nor does such a conclusion necessarily follow. To the contrary, it is not inconsistent to say both that a particular clause is self-executing and that the legislature has the power to enact legislation to carry out its purposes. 16 Am. Jur. 2d *Constitutional Law* § 105 (1998) ("The fact that a right granted by the constitution might be better or further protected by supplementary legislation does not prevent the provision from being self-executing.").[5]

---

[3] Further, although we need not look to the records from the Consitutional Convention since we believe that the language of the withdrawal clause is clear, the reports from the Constitutional Convention support this interpretation. Standing Committee Report No. 42 clearly anticipates that the withdrawal clause have an immediate effect: "This Section requires that all withdrawals made from the general fund must be made pursuant to appropriation laws enacted by the [OEK] or State Legislatures."

[4] 553 F.2d 190 (D.C. Cir. 1977).

[5] *Gibbons* itself reflected this understanding in holding both that the initiative clause was

Therefore, we hold that the withdrawal clause is self-executing, and reverse the Trial Division's finding to the contrary. The Senate has stated a claim based on the alleged violation of this provision, and the matter is remanded to the Trial Division for determination of whether the Senate is entitled to the declaratory relief it has requested.[6]

⊥216 **II.**

The Senate seeks a declaration that Appellees Nakamura and Mikel violated 40 PNC § 401 and requests damages in the form of restitution from Appellees Mikel and Nakamura for the violations of this statute. 40 PNC Section 401 provides that

> (a) Unless otherwise specified by law, all projects and operations financed by means of appropriation laws of the Olbiil Era Kelulau shall be contingent upon the availability of funds. No person shall obligate or expend funds made available or appropriated by the Olbiil Era Kelulau until he receives written certification from the National Director of Program, Budget and Management for expenditures and obligations of the executive branch . . . that funds are available and that obligations may be incurred
>
> . . .
>
> (c) Any person obligating or expending funds of the National Treasury without written authorization as specified in this section, shall be personally liable for the payment of such obligations or expenditures unless the Olbiil Era Kelulau by joint resolution subsequently approves or ratifies said obligation, and provides for the satisfaction thereof.

40 PNC § 401.

The Senate argues that Appellees Mikel and Nakamura violated Section 401 in three ways. First, the Senate's first amended complaint alleges that Appellee Mikel certified that funds were available for which there had been no appropriation. Second, the complaint alleges that Appellee Nakamura either knew or failed to discover that Appellee Mikel had certified that funds

---

self-executing and that it was permissible, and even desirable, for the OEK to enact implementing legislation: "[A]lthough the framers intended to permit the OEK to iron out details of the initiative process, and perhaps even expected them to do so, they did not intend that the OEK's failure to act on this subject should stand in the way of a citizen's right to 'directly introduce constitutional changes.'" 4 ROP Intrm. at 6.

[6] The Senate also alleges that Appellees' conduct violates other provisions in the Constitution. However, since the Senate only seeks declaratory relief and because the alleged conduct cannot violate these other clauses without also violating the withdrawal clause, the Senate can gain no additional relief from any further ruling. Therefore, because we hold that the withdrawal clause of the Constitution is self-executing, we need not reach the question of whether the other provisions in the Constitution are self-executing.

were available for which there had been no appropriation and therefore, that Nakamura could not rely on such certifications. Finally, the complaint alleges that Nakamura expended funds for which there had been no lawful authorization issued by Mikel. The Trial Division ruled that because the plain language imposes liability only where there is an expenditure without a certification of funds and imposes no liability on a person who makes the certification, the Senate failed to state a claim upon which relief could be based.

Perhaps recognizing that the Appellees' conduct is not prohibited by the actual language of the statute, the Senate suggests that this Court should look beyond the plain language of the statute and instead look at the intent of the legislature in enacting the legislation. One of the purposes of this law, it claims, is to ensure that the OEK has appropriated funds for the project before any money is withdrawn from the treasury. Therefore, since the purpose of the law is to prevent expenditures that have not been appropriated, the law must punish anyone who facilitates any unlawful expenditure.

The Senate's reasoning is contrary to the basic principle of statutory construction if the language of a statute is clear, the Court does not look behind the plain language of the statute to divine the legislature's intent in enacting the legislation. As the United States Supreme Court has observed:

⊥217 We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain , 112 S.Ct. 1146, 1149 (1992)(citations omitted). The Senate's argument that this court should ignore the plain language of the statute and instead base its decision on the alleged intent of the legislature must fail. *See also, Baules v. Nakamura. et al.*, 6 ROP Intrm. 317, 320 (Tr. Div. 1996) (finding that the complaint did not allege a violation of § 401 because it did not allege that the expenditures were made without a certification by the budget director). By its terms, all Section 401 requires is that an authorization is obtained. The statute says nothing about issuing improper authorizations, or a party's duty to investigate whether an authorization is accurate before relying upon it. Therefore, the Senate has failed to state a claim under Section 401 by alleging either that Appellee Mikel issued improper certifications or that Appellee Nakamura improperly expended funds by relying on an improper certification.

The Senate further argues that, even under a literal reading of Section 401, it has stated a claim because the complaint alleges that "Defendant Nakamura . . . obligated and expended funds for Executive Branch projects and operations in Fiscal Year 1995 for which there had been no lawful written authorization issued [by] Defendant Mikel." The Senate argues that this paragraph pleads in the alternative that Nakamura expended funds for which he did not obtain any authorization.

Besides the fact that the Senate's position requires that the Court ignore the word "lawful" when reading this paragraph, the Senate's interpretation of this paragraph does not

comport with the other allegations in the cause of action. The meaning of this paragraph becomes clear when read in context with the four paragraphs immediately preceding this allegation. The Senate's complaint contains five paragraphs constituting the Section 401 claim against Nakamura: Paragraphs 46 and 47 of the Amended Complaint allege that Nakamura knew that Mikel wrongly certified that funds were available; paragraphs 48 and 49 allege that Nakamura knew that he could not rely upon written authorizations wrongly issued by Mikel; and paragraph 50 alleges that Nakamura expended funds with no lawful certification. If as alleged by the Senate, paragraph 50 is read to allege that Nakamura expended funds without receiving a written certification at all, paragraphs 46-49 must then embody their claim that Nakamura also spent funds pursuant to a written but unlawful certification. Since paragraphs 46-49 do not allege that Nakamura actually spent any money, the claim that Nakamura expended funds with an unlawful certification must include paragraph 50. Therefore, rather than a "pleading in the alternative," the Senate is requesting that this Court read one allegation as having two mutually exclusive meanings. Although this Court must liberally construe the complaint in the light most favorable to the Senate, *Yano v. Kadoi*, 3 ROP Intrm. 174, 180 (1992), the Court does not have to torture the language of the complaint to find a cause of action. Accordingly, we affirm the trial court's dismissal of the fourth and fifth claims of the Amended Complaint.

III.

The Senate alleges that, under the common law of the United States, applicable ⊥218 in Palau pursuant to 1 PNC § 303, each Appellee is jointly and severally liable to the National Treasury for the unappropriated funds that were expended by the Executive Branch. The Trial Division found that the Senate did not have standing to bring this claim. Having reached this conclusion, the Trial Division saw no need to address the other grounds raised by Appellees in their motion to dismiss -- in particular, that any common law claim for restitution has been superseded by the legislature's passage of laws that address when government officials are liable for unauthorized expenditures. A fundamental rule of judicial restraint, however, dictates that we avoid constitutional questions when it is possible to decide the case on other grounds. *Jean v. Nelson*, 105 S.Ct. 2992, 2997 (1985). Here, we believe that the Trial Division's decision dismissing the common law restitution claims can and should be affirmed without addressing the difficult separation-of-powers issues to which those claims give rise.

The common law of the United States is the law of decision in the Republic of Palau only "in the absence of statutes" enacted by the Olbiil Era Kelulau. 1 PNC § 303. The question of when a statute displaces common law is an issue of first impression. Appellant, citing United States case law, argues that a statute does not displace common law unless the statute expressly states that it intends to replace the common law. This is the principle of statutory construction that applies in the United States when the courts are determining whether a federal statute displaces state common law. *See e.g. Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 104 S.Ct. 304, 307 (1983) ("The common law . . . ought not be deemed to be repealed, unless the language of the statute be clear and explicit for this purpose"). This strict rule of construction is a result of federalism concerns. *City of Milwaukee v. Illinois and Michigan*, 101 S.Ct. 1784, 1792 (1981). Obviously, such concerns are not implicated by 1 PNC § 303.

The U.S. courts, however, apply a different test when determining whether federal statutes displace federal common law. Federal Common law applies "in the absence of an applicable Act of Congress," *Clearfield Trust Co. V. United States*, 63 S.Ct. 573 (1943), which is similar to the situation in Palau, where we apply United States common law only in the absence of an applicable Act of the OEK. 1 PNC § 303. In determining whether federal statutory law has displaced a previously available federal common-law action, the U.S. courts look to whether the legislation has spoken directly to the question addressed by the common law. This "involves as assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common-law." *City of Milwaukee v. Illinois and Michigan*, 101 S.Ct. 1784, 1792 n. 8 (1981). We hold that this is the proper analysis to apply to determine when United States common law applies in Palau. *E.g., In re Ngirausui*, 5 ROP Intrm. 339, 343 (Tr. Div. 1996) ("Because the OEK has spoken directly to the issue of what property may be devised by will, that command must be given effect.")

Appellees argue that the OEK's passage of 40 PNC § 401 has displaced any common law claim for restitution to the National Treasury. We must therefore determine whether 40 PNC § 401 speaks directly to the question addressed by the common law. The common-law cause of action for restitution to the public treasury is a vehicle to remedy illegal expenditures of public funds. 56 Am.Jur.2d § 288 ("it is well settled that when municipal officers . . . fraudulently misapply, appropriate, or lose funds of the municipality left in their charge, they are ⊥219 personally liable for the loss thus caused."); 74 Am. Jur. 2d *Taxpayers' actions* § 1 (1974) ("the right of a taxpayer to attack illegal or fraudulent transactions involving official acts has been regarded as existing at common law").

The question therefore is whether the statute at issue, 40 PNC § 401, directly addresses the problem of illegal expenditures of public funds. The statute requires that a person obtain a written certification from the Budget Director before any funds are expended. 40 PNC § 401(a). The statute further provides that any person who fails to obtain a written certification before expending public funds is personally liable for the payment of the funds expended. 40 PNC at 401(c). The language of the statute itself provides that the purpose of requiring a written certification is two-fold: to insure that funds are available and to ensure that the OEK has appropriated funds for the project before any money is withdrawn from the treasury. 40 PNC § 401(a). This is clearly an attempt to deal with the problem of illegal expenditures.

The Senate argues that a statute cannot displace the common law where the statute does not prohibit conduct that is prohibited by the common law. In other words, the Senate believes the common law is a supplement, filling in gaps by creating additional liability. For example, in this case, the Senate argues that since we found that 40 PNC §401 does not apply to the facts of this case, it cannot displace a common law rule that would apply to Appellees' actions. However, as explained above, the question is not whether the OEK has proscribed the exact conduct prohibited by the common law, but whether the OEK has spoken directly to the problem

of illegal expenditures of public funds. [7] We believe that it has, [8] and therefore affirm the dismissal of the Senate's common law claims.

IV.

Finally, the Senate seeks injunctive relief prohibiting Appellees from again expending funds in excess of the amount appropriated by the OEK and requiring Appellees to institute an accounting system to ensure that the executive branch does not spend in excess of the amount appropriated by law. The Trial Division found that an injunction was not warranted because there is no substantial threat that the Senate will suffer irreparable harm, that the balance of hardships did not weigh in favor of the Senate, and the public interest would not be advanced by granting an injunction. Further, the Trial Division noted that since the OEK has enacted legislation that now subjects a person to liability for expending funds in excess of appropriations, any similar behavior in the future will not evade judicial review. This Court affirms the Trial Division's denial of injunctive relief.

⊥220 First, as to the injunction requiring Appellees to institute an accounting system, the Senate can obtain the same remedy through legislation. The Constitution vests the OEK with the exclusive legislative right to enact laws, ROP Constitution, Article IX, Section 1, including the power to establish such a system by legislation. Since the Senate can obtain this remedy through alternative means, the Senate will not suffer irreparable harm if it is not granted an injunction. Therefore, the Senate may not obtain an injunction for this purpose.

Second, as to the request that the court enjoin Appellees from again expending funds in excess of the amount appropriated by the OEK, the Senate has an adequate remedy at law. The Senate has passed legislation proscribing precisely the conduct the Senate seeks to enjoin. 40 PNC §§ 401-410. This legislation provides for both civil and criminal penalties for the expenditure of funds in excess of the amount appropriated by the OEK. *Id.* at § 406(c). Therefore, since there is an adequate remedy at law, the Senate may not obtain an injunction.

Conclusion

For all of the reasons stated above, the trial court's order dismissing the Senate's complaint is affirmed in part and reversed in part, and the case is remanded to the Trial Division for further proceedings consistent with this opinion.

---

[7] In at least one way, 40 PNC § 401 provides for additional liability for public officials since it provides for strict liability for expenditures made without a written authorization. The common law, on the other hand, merely provides for a standard of due care. *Sixth Kelulul A Kiuluul v. Ngiramekatii*, 5 ROP Intrm. 321 (Tr. Div. 1995).

[8] The statute at issue here does not express any intention to preserve preexisting common law remedies. *Compare FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992), where Congress made clear that preexisting remedies should remain intact: "Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law." *Id.* at 536.