Ngirmekur v. Office of Palau Election Comm'n, 9 ROP 295 (Tr. Div. 2002)

ALBERT NGIRMEKUR,
Plaintiff,

v.

OFFICE OF PALAU ELECTION COMMISSION, KELULUL NGARDMAU, VICTOR R. MASAHIRO, ANANIAS NGIRAIWET, WILLARD KUMANGAI, MASUBED TKEL, DIANA SMAU and TORIBIONG SAKAZIRO,
Defendants.

CIVIL ACTION NO. 02-207

Supreme Court, Trial Division
Republic of Palau

Decided: July 15, 2002

[1] **Constitutional Law:** Impeachment; Judicial Review; **Courts:** Judicial Review

Because the Ngardmau Constitution places the power of impeachment in the legislative branch, the Court has no role to play concerning whether there were good and sufficient reasons to remove a governor from office.

[2] **Constitutional Law:** Impeachment; Justiciability

Whether a state legislature's vote to impeach an official violated the official's due process rights is a justiciable question.

[3] **Constitutional Law:** Due Process

The hallmarks of due process are notice and an opportunity to be heard.

[4] **Constitutional Law:** Due Process; Impeachment
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Plaintiff cannot argue that he was denied due process rights because he was not allowed to challenge the evidence against him where plaintiff did not attend the impeachment hearing.

[5] **Constitutional Law:** Due Process; Impeachment

There is no basis for finding a due process violation for failure to prepare Articles of Impeachment where the adopted resolution gave a detailed summary of the charges and, given the lack of any explicit requirements in Ngardmau's Constitution, the procedures followed were not fundamentally unfair.

[6] **Constitutional Law:** Impeachment; **Words and Phrases**

The word "impeached" in the Ngardmau Constitution follows popular parlance and means both accused and ultimately removed.

LARRY W. MILLER, Associate Justice:

This matter is before the Court on the motion of plaintiff Albert Ngirmekur for an order preliminarily enjoining defendant, the Palau Election Commission, from proceeding on July 24 with a special election for the Governor of Ngardmau State.[1] Ngirmekur was elected Governor for a 4-year term in December 2000, an office which he continued to hold until May 25, 2002, when the Kelulul Ngardmau voted to impeach him from office. Ngirmekur now contends that the proceedings by which he was purportedly removed from office violated his due process rights. Since the Election Commission had no role in those proceedings and stands ready to carry out the election or not as the Court may order, the principal defendants are the members of the Fifth Kelulul Ngardmau who voted to impeach Governor Ngirmekur and who argue that the motion should be denied and that the election should proceed as scheduled.

[1] The Court begins with some observations about the proper scope of its role in this matter. The framers of the Ngardmau Constitution, following the Palau Constitution and the U.S. Constitution, placed the power of impeachment in its Legislative Branch. Article VI, Section 3, of the Ngardmau Constitution states that "[t]he Governor may be impeached from office by a vote of not less than two-thirds (2/3) of the members of the Kelulul Ngardmau for treason, bribery or personal enrichment." To that extent, the Court took the position that it has no role to play – and would consider no evidence – concerning whether there were good and sufficient reasons to remove the Governor from office. That was for the Legislature to determine, and the Court's silence on that issue does not constitute either agreement or disagreement with that decision.

The Court has proceeded with this case on the assumption that although it has nothing to say about the merits of impeachment – i.e., whether or not there were good reasons to remove the Governor from office – it may have some authority to police the impeachment process – to determine whether the way in which the Governor was ⊥297 removed comported with constitutional requirements. This assumption is itself debatable. A majority of the U.S. Supreme Court has held that whether the evidence supporting the impeachment of a U.S. federal judge could be heard first by a committee of the U.S. Senate who would then issue a report to the full Senate, rather than having the full Senate hear the evidence in the first place, was a nonjusticiable political question. *Nixon v. United States*, 113 S. Ct. 732 (1993). The Arizona Supreme Court, for its part, has held that while it had authority to see that its legislature complied with the explicit requirements of its constitution – for example, "that the senators take

[1]Ngirmekur began the case by filing his complaint and a motion for a temporary restraining order. At the Court's suggestion, and with the agreement of the parties, that motion was converted into a motion for a preliminary injunction. Since it appears that all of the pertinent facts probably have been elicited at the preliminary injunction hearing, the Court would now make the further suggestion that that hearing be considered the trial on the merits, *see* ROP R. Civ. Pro. 65(a)(2), so that a final judgment may be entered and an appeal taken.

a prescribed oath" or "that conviction be had by a two-thirds vote of the elected senators" – it had "no power . . . to dictate to the Senate, either before or after the impeachment trial, the rules – and methods to be followed by the Senate in reaching its conclusions." *Mecham v. House of Representatives*, 782 P.2d 1160, 1161 (Ariz. 1989).[2]

Other courts have left the door to judicial review open, although rejecting the claims made in the cases before them. The Connecticut Supreme Court, for example, held that "[t]he exclusive power of impeachment . . . does not carry with it the authority to ignore individual rights with impunity," *Kinsella v. Jaekle*, 475 A.2d 243, 255 (Conn. 1984). And the New Hampshire Supreme Court, following the lead of one of its former members, held open the possibility that "unusual circumstances . . . might justify a more searching review of impeachment proceedings." *In re Petition of Judicial Conduct Comm.*, 751 A.2d 514, 516-17 (N.H. 2000) (quoting *Nixon*, 113 S. Ct. at 748 (Souter, J., concurring in the judgment)).[3] In *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.2d 240, 245-48 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit – in circumstances arguably analogous to those presented here – held that the separation-of-powers concerns underlying the political question doctrine did not apply where a *federal* court was reviewing the actions of the *state* legislature and, therefore, that due process and free speech claims arising out of a state impeachment proceeding were justiciable.[4]

[2, 3] Following this second line of cases, the Court finds that it *may* consider plaintiff's due process arguments. It concludes, however, that no violation has been shown. The hallmarks of due process are notice and an opportunity to be heard. *See, e.g.*, *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999); *Governor of Kayangel v. Wilter*, 1 ROP Intrm. 206, 209 (Tr. Div. 1985). Here, the evidence presented at the hearing demonstrates that plaintiff was given notice of the charges against him and an opportunity to refute those charges before his removal from office.

Although evidence was presented ⊥298 concerning prior efforts to initiate impeachment proceedings as well as prior attempts by the Governor to rebut those charges, the Court believes it need look no further back than May 3 of this year, when the impeachment resolution now challenged was first introduced. That resolution, in its "whereas" clauses, its proposed conclusions, and in attached exhibits, lays out in some detail the allegations assertedly justifying the removal of the Governor from office: that he had "spent public fund[s] of Ngardmau state to pay to himself without authority by law or specifically authorized by appropriation law" and had "for[g]ed signatures on Ngardmau State checks to authorize payments of public fund[s] to pay to himself without authority or specifically authorized by appropriation law." On the same day that

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[2]In an earlier case arising out of the same proceedings, that court held that because there was no property right to be Governor of Arizona the due process clause was not even implicated. *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988).

[3]Justice Souter noted, for example, that the court should intervene were the Senate "to act in a manner threatening the integrity of its results," for example, by deciding whether to impeach or not "upon a coin toss." *Id.*

[4]The Court then found, however, that all of the state senators who had been named as defendants were entitled to dismissal on the basis of legislative immunity. *See id.* at 248-54.

the resolution was introduced and preliminarily approved, the Speaker of the Fifth Kelulau Ngardmau, defendant Victor Masahiro, delivered a letter to the Governor attaching the resolution, summarizing the charges contained in it, asking him to appear and testify about those charges, and offering the opportunity to present documentary evidence in support of his testimony, at a hearing scheduled for May 25, 2002. The letter informed the Governor that he could appear by himself or "be represented by an attorney of [his] choice." Although the Governor could not recall whether the copy of this letter shown to him in court was precisely the letter he had received, he acknowledged receiving some letter from speaker Masahiro informing him about the May 25 hearing, and he neither then nor now has complained that he was unaware of the charges made against him.[5] The Governor did not attend the hearing on May 25, which went forward in his absence and which resulted in the adoption of Resolution No. 5-11-02 removing him from office.

[4] Notwithstanding these facts, which seem to the Court to show that he did have notice and an opportunity to be heard, plaintiff puts forward a number of grounds as to why he believes due process was violated. Principally, he argues that it was necessary for the Kelulul Ngardmau to adopt special rules or procedures to govern his impeachment, in particular, to explain how he would be able to "present his defense, conduct cross ⊥299 examination, and/or challenge[] [the] evidence against him." Brief in Support of Motion for Injunction, July 12, 2002, at 7. This argument would have more force if plaintiff actually attended the hearing and had been denied the right to defend himself. Having failed to do so, the mere fact that no rules were set down to define his rights is not enough for the Court to conclude that they would have been denied to him.

[5] Likewise, the Court sees no basis for concluding that due process was violated because no "Articles of Impeachment" as such were prepared. As noted above, the resolution that proposed the impeachment and that was ultimately adopted gave a detailed summary of the charges against him. More fundamentally, although plaintiff complains that defendants did things "the Palauan way", the Court sees no basis – given the lack of any explicit requirements in the Ngardmau Constitution – for it to require the Kelulul Ngardmau to observe any particular formalities, especially where, as here, there has been no showing that the procedures that were

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[5]On May 24, 2002, his counsel wrote a letter to Speaker Masahiro, stating:

> I represent Governor Ngirmekur in the matter pertaining to the allegation of the misappropriation of the public funds. Because the legislature of Ngardmau State has passed the resolution to request the Office of Special Prosecutor to investigate and to take appropriate legal action accordingly and that the investigation is underway, it would not be appropriate and proper for Governor to appear in the hearing on the above-referenced resolution and to give any statements about on the allegation of the misappropriation of public funds. For this reason, I have instructed the Governor not to appear before you on May 25th, 2002 to answer any questions.

Notwithstanding his counsel's letter, plaintiff testified that the (or a) reason he did not attend the May 25 hearing was because the resolution had already been voted upon. *See* p. 298 *infra*. The Court makes no finding as to *why* the Governor did not attend and quotes his counsel's letter simply to confirm that he was aware of the hearing and its subject and opted, for whatever reason, not to attend.

Ngirmekur v. Office of Palau Election Comm'n, 9 ROP 295 (Tr. Div. 2002) followed were fundamentally unfair.

Plaintiff also complains that he was not given notice of or an opportunity to be heard at the hearing on May 3, 2002, when the impeachment resolution was first proposed. That is true, but the Court cannot see how he was prejudiced when clearly he was given the opportunity to be heard on May 25.[6] Although it was suggested at trial that it was unusual, if not unheard of, for the Kelulul Ngardmau to adopt measures only after a second reading – as it did with the impeachment resolution at hand[7] – the Court does not see how or why it should condemn the legislature for giving *greater* consideration to this matter (and more importantly, offering plaintiff an opportunity to present his case) than it would to more routine bills and resolutions.

[6] A final point should be made about the use of the word "impeached". When speaking of the United States Constitution, it is a misnomer – albeit a common one – to use "impeached" to mean removed from office. President Bill Clinton (like President Andrew Johnson before him) was impeached, but because he was not convicted by a two-thirds vote of the Senate, he remained in office until the end of his term. By contrast, the Court believes it clear that the word "impeached" as used in the Ngardmau Constitution follows popular parlance and means both accused and ultimately removed. Any other reading would make no sense, and would conflict both with the following section of the Ngardmau Constitution which, as originally adopted and later amended, refers to the Office of the Governor becoming vacant "due to . . . impeachment," *see* art. VI, § 4; and with the Palauan version of § 3 which uses the word ⊥300 "mois" or "remove".[8]

For all of these reasons, plaintiff's motion for a preliminary injunction is denied.

So Ordered.

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[6]This fact distinguishes this case from *Salii v. House of Delegates*, 3 ROP Intrm. 351 (Tr. Div. 1988), *vacated as moot*, 1 ROP Intrm. 708 (1989), in which it was clear that the expulsion resolution was introduced and adopted in the course of a single session without prior notice or a subsequent opportunity to be heard.

[7]Although the resolution was passed on first reading on May 3, 2002, a second vote was taken on May 25, 2002. It should be noted that there are two versions of the resolution in evidence: one, dated May 3, 2002, and listing at the end of the names of the legislators who introduced it, and a second, which recites that it was "PASSED: May 25, 2002" and which is signed by Speaker Masahiro and certified by the clerk of the legislature.

[8]That the Ngardmau Constitution does not specify which version should prevail makes it all the more important to read both versions harmoniously. As shown above, conforming the English version of Section 3 to the Palauan version makes it consistent with *both* versions of the following section, which refer to the office becoming vacant (or "teleu") due to impeachment, and which would make no sense if impeachment only meant "accused".