Governor of Kayangel v. Wilter, 1 ROP Intrm. 206 (Tr. Div. 1985)

GOVERNOR OF KAYANGEL, GOVERNOR OF NGEREMLANGUI, CHAIRMAN OF NGARDMAU COUNCIL, GOVERNOR OF NGETPANG, GOVENOR OF NGCHESAR, GOVERNOR OF AIRAI, GOVERNOR OF PELELIU and GOVERNOR OF TOBI,
Plaintiffs,

v.

NATIONAL GOVERNMENT OF THE REPUBLIC OF PALAU, HARUO N. WILTER, in his capacity as Minister of Administration, and ANDRES UCHERBELAU, in his capacity as Director of National Treasury, Republic of Palau,
Defendants.

CIVIL ACTION NO. 172-84

Supreme Court, Trial Division
Republic of Palau

Order granting motion to dismiss
Decided: April 24, 1985

BEFORE: MAMORU NAKAMURA, Chief Justice.

The chief executives of eight states maintain this action challenging the legality of President Remeliik's impoundment of state block grant funds appropriated by the Olbiil Era Kelulau (OEK) for Fiscal Year 1984. The Republic now moves to dismiss the Complaint under Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the Court grants the motion to dismiss.

I

For the purpose of this motion, plaintiffs' allegations are taken as true. On December 30, 1983, the OEK passed RPPL 1-61, the unified national budget for Fiscal Year 1984. Under Item IV, the OEK appropriated $3,160,000 to the state governments as block grants, each state to receive a ⊥207 specified portion of the total. Under Section 4(e) of Item IV, the bill directed that the block grant funds "shall be allotted quarterly to . . . the Chief Executives of the State Government." Section 6 specifically exempted these funds from the unobligated funds reversion clause of the same section. Before signing the bill into law on January 4, 1984, the President exercised line item veto authority and reduced the block grant total by nearly half to $1,604.000. According to the plaintiffs' allegations, the President now refuses to make any RPPL 1-61 allotments to the states.

On November 26, 1984, the plaintiffs filed their complaint in this matter challenging the President's asserted impoundment authority over the block grant funds. On December 24, 1984,

the defendants filed the instant motion to dismiss. The arguments of counsel were heard on February 8, 1985, at which time the Court requested supplemental memoranda on the scope of the President's impoundment authority. The Court has read the supplemental briefs, has considered the arguments of counsel and now renders its decision dismissing the Complaint.

II

The Constitution of the Republic of Palau gives the President ". . . all the inherent powers and duties of a national chief executive, . . ." Art. VIII, § 7. The parties to this action differ as to whether the authority to impound funds is included as an "inherent" power of the Presidency. While Article VIII, defining the powers of the President, does not explicitly grant the impoundment authority, the power is implicitly found in Article IX, Section 16, which provides:

> The Olbiil Era Kelulau, with the approval of not less than two-thirds (2/3) of the members of each house, may release funds appropriated by the Olbiil Era Kelulau but impounded by the President.

In its report to the Constitutional Convention, the Committee on the Legislature confirms the defendants position in its conclusion that Section 16 "implicitly requires the power of the President to refuse to spend funds appropriated by the [OEK]." Comm. on the Leg., Stand. Comm. Rep. No. 22 (March 22, 1979).

While the plaintiffs concede, as they must, that Section 16 of Article IX implicitly recognizes impoundment authority, they argue that the power is not self-executing but ⊥208 rather depends on enabling legislation from the OEK. At this point, the plaintiffs look to RPPL 1-16, Section 12(2), which provides:

> (2) The President of the Republic of Palau or his duly authorized representative(s) may take action or inaction that defers, withholds, delays or precludes the obligation, effectuation or expenditure of budget authority as established by the Olbiil Era Kelulau; PROVIDED, that the President immediately notifies the Olbiil Era Kelulau of the same, and within thirty (30) days the Olbiil Era Kelulau passes a joint resolution approving said action. Failure of the Olbiil Era Kelulau to pass a joint resolution within thirty (30) days shall prohibit the President of the Republic or his duly authorized representative(s) from deferring, withholding, delaying or precluding any prescribed budget activity as established by the Olbiil Era Kelulau.

The plaintiffs argue that this language is very similar to that used in the Impoundment Control Act of 1974, 31 U.S.C. §§ 1401-1407, a statute of the United States the constitutionality of which is not questioned.

The plaintiffs' confusion in this matter lies in their failure to distinguish the impoundment authority of the President of the Republic from that of the President of the United States. Plaintiffs are correct in their assertion that the United States President has only that

impoundment authority given the executive by the Congress. Thus, when addressing claims of unlawful refusal to disburse appropriated funds, federal courts will look to the language of the appropriation bill to determine whether Congress intended to give the President discretionary authority over the expenditure of appropriated funds. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35, 95 S.Ct. 839 (1975). *See generally Annot., Executive Impoundment of Funds Appropriated by Congress*, 27 A.L.R. Fed. 214 (1976). And when faced with the overzealous impoundment practices of former President Nixon, the Congress was able to pass the Impoundment Control Act of 1974, which strictly limited the President's impoundment authority, while staying within constitutional bounds.

The weakness in the plaintiffs' argument, then, is that they fail to address the fact that the impoundment authority found within the Republic of Palau, is of a ⊥209 constitutional dimension. It is a fundamental principle of our constitutional system of tripartite government that the powers granted the executive in the Constitution cannot be qualified or otherwise diminished by the legislative branch. Moreover, the Constitution itself provides the OEK a remedy for the President's refusal to obligate funds: the funds can be released by a two-thirds (2/3) vote of each house. The Constitution being the"Supreme law of the land", Art. II, § 1, RPPL 1-16 can place no lawful restrictions on the presidential impoundment authority. What the U.S. Congress can do in this area, the OEK cannot, because of the source of the impoundment power. In the United States, the authority is legislative; in Palau, it is constitutional. For this reason, too, the language used by the OEK in an appropriations bill can have no mandatory effect on the subsequent action taken by the President. Thus, the inclusion of language in RPPL 1-61 to the effect that the monies therein appropriated "shall be allotted quarterly" does not stay the President's hand in the exercise of his impoundment authority.

III

The power to impound appropriated funds is, however, limited by the express provisions of the Constitution itself. The Presidential powers granted under Article VIII and IX must be exercised so as not to violate other constitutional provisions. Section 5 of Article IV provides:

> Every person shall be equal under the law and shall be entitled to equal protection. The government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status, or clan affiliation . . . .

Under this Section, then, the impoundment authority may not be exercised in a manner so as to invidiously discriminate against a person or class of persons.

The due process clause provides:

> The government shall take no action to deprive any person of life, liberty or property without due process of law . . . .

Art. IV, § 6. The doctrine of due process has two components: procedural and substantive.

Under the procedural component, a person cannot be deprived of property without notice and an opportunity to be heard. In *Board of Regents v. Roth*, ⊥210 408 U.S. 564, 92 S.Ct. 2701 (1972), the U.S. Supreme Court defined the limits of constitutionally protected property interests:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it.

92 S.Ct. at 2709.

The facts of the case at bar would not support an allegation of a deprivation of procedural due process. An OEK appropriation alone does not "entitle" the proposed recipient to the funds; the expenditure of the funds is left to the President who possesses constitutional impoundment authority. Thus, having no protectable interest in the appropriation, the states are not entitled to the requirements of procedural due process (notice and a hearing) before a decision to impound the funds is made.

Another procedural due process question arises in this case from the President's exercise of a line item veto as to RPPL 1-61. Does this action, which implicitly approves the reduced appropriations, created an entitlement in the states, triggering procedural due process requirements before the impoundment authority is exercised? The President's line item veto authority is found in Section 15 of Article IX, which provides:

> . . . The President may reduce or veto an item in an appropriation bill and sign the remainder of the bill, returning the item reduced or vetoed to each house . . . together with the reason for his action; . . . [.]

This line-item veto authority is separate from an independent of the impoundment authority recognized in Section 16. Thus, although appearing somewhat incongruent, the President's impoundment power is not diminished or otherwise restricted by his exercise of a line-item veto. It must heretofore be concluded that no entitlement was created in the states by the reduction of the initial appropriation even though such would seem to imply approval of the resulting budget figures.

Due process also has a substantive dimension. Under the principle of substantive due process, governmental action ⊥211 "shall not be unreasonable, arbitrary, or capricious, and . . . the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 511 (1934).

Considering the limits imposed by the principles of substantive due process and equal protection on the exercise of the President's impoundment authority, in order to state a claim upon which relief can be granted, plaintiffs must allege that the impoundment authority was exercised in an arbitrary or capricious manner, was founded on other than a regional basis or was invidiously discriminatory. For instance, allegations of action taken to discriminate against one state, if proven, would be unconstitutional "place of origin" discrimination permitting the Court

to enjoin the impoundment. Or, for another example, were the impoundment alleged to have been taken to punish individuals for political activity or to vent a personal animosity, the complaint would state a substantive due process claim which could survive a 12(b)(6) motion to dismiss.

In the case at bar, the plaintiffs have made no such allegations. Rather than alleging that the monies were impounded for improper reasons, the plaintiffs have only alleged that the monies were impounded. The foundation of their argument is the illegality of the impoundment. Plaintiffs have misread the President's powers. Not having alleged any improper motive, the plaintiffs have not stated a claim upon which relief can be granted and must have their claim dismissed.

IV

The Court adds here one note regarding the procedure which will be followed in cases such as this. In actions of this nature, that is, those challenging the constitutionality of government action, two competing interests are at play. On one hand, suits of this nature can have a devastating effect on the operation of the government if allowed to proliferate and especially if allowed to go to trial unnecessarily; on the other hand, of course, the claims such as the one before the Court represent the sole avenue of relief for individuals seeking to vindicate their constitutional rights or otherwise attempting to keep their government officials within constitutional bounds. A balance must be struck wherein serious and substantial allegations of constitutional violations are fairly adjudicated, yet wherein baseless claims are disposed of at the pleading stage so as to avoid the time and expense of extensive discovery and lengthy trials. The U.S. Supreme Court has recognized the need for such a balance in *Harlow v. Fitzgerald*, U.S.,102 S.Ct. 2727 (1982). ⊥212 There, the Court struggled with the procedural aspects of the good-faith immunity of governmental officials with respect to allegations of constitutional violations. The accepted test of good-faith had two components, one subjective and one objective. Under the objective component, the action is reviewed for its objective reasonableness; that is, whether the defendant should have known that his or her actions would violate the constitution. The subjective component probes for evidence as to whether the defendant in fact knew of the unconstitutionality of the action. The problem the Court had with the subjective element of the defense, was that it turned on a question of fact, "inherently requiring resolution by a jury." 102 S.Ct. at 2738. The Court concluded that significant burdens to the government accompanied the litigation employing the subjective test:

> It now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial-distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. These variables explain

> in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

102 S.Ct. 2738 [footnotes omitted].

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To avoid these disruptive effects, the Court modified the test, in effect dropping the subjective component. The new test was hoped "to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." 102 S.Ct. 2739.

This Court concurs with the U.S. Supreme Court in that procedures should be outlined in cases of this nature so that insubstantial claims may be disposed of at the pleading stage. Accordingly, in future claims of unlawful impoundment the Court will follow a two-step approach. First, the complaint must allege that the impoundment is based on an improper motive of constitutional significance. Where no such equal protection, due process or other allegations of constitutional magnitude are made, the suit cannot survive a 12(b)(6) motion to dismiss. Second, where such allegations are made, they must be supported by affidavits or other recorded evidence to survive a motion for summary judgment. Bare allegations of improper motive will not get the plaintiffs to trial. However, just as importantly, the Court believes that this procedure will also allow plaintiffs the opportunity to uncover, through discovery, evidentiary support for their allegations as well as allow them the thorough judicial review to which they are entitled.

V

In conclusion, the motion to dismiss in this case is granted for failure on the part of the plaintiffs to allege that the impoundment was arbitrary, capricious or otherwise exercised for an improper purpose.

Each party shall bear its own costs.