

ROP v. Sisor and Tmol, 3 ROP Intrm. 376 (Tr. Div. 1991)
REPUBLIC OF PALAU,
Plaintiff,

v.

WAKAKORO SISIOR and DEMEI TMOL,
Defendants.

CRIMINAL CASE NO. 337-91

Supreme Court, Trial Division
Republic of Palau

Decision and order on defendants' motion to disqualify interim special prosecutor and dismiss information

Decided: December 23, 1991

NGIRAKLSONG, Associate Justice:

This matter came before the Court on defendant Sisor's motion to disqualify interim Special Prosecutor David Webster, Esq. and dismiss the information herein. Co-defendant Tmol joined the motion. Defendant Wanda Adolf also filed the same motion to disqualify the interim Special Prosecutor and dismiss the information in *ROP v. Adolf*, Criminal Case No. 333-91. Both motions were consolidated for a hearing on November 29, 1991. Oldiais Ngiraikelau, Esq. appeared for Sisor and Adolf, Johnson Toribiong, Esq. appeared for defendant Tmol and Thomas L. Roberts, Esq. of the Guam law firm of Moore, Ching & Boertzel appeared for the Interim Special Prosecutor. David Webster, Esq. was present.

BACKGROUND

The "Special Prosecutors Act" (hereafter the "Act" when convenient) became effective on August 2, 1985. 2 PNC 501 et **§377** seq., as amended. The Act sets forth the procedures for appointment and the duties of the Special Prosecutor in pertinent part:

There is hereby created an Office of the Special Prosecutor for the Republic of Palau. The Office shall be headed by a Special Prosecutor appointed for a term of five years by the President with the advice and consent of the Senate and shall be within the Office of the President for budget purposes only. . . . The Special Prosecutor will not be removed from his duties except for cause and without the President first consulting the President of the Senate and the Speaker of the House of Delegates and ascertaining that their consensus is in accord with his proposed action. The President must appoint a Special Prosecutor within 30 days of receipt of a Joint Resolution from the Olbiil Era Kelulau requesting such appointment. In the event the President fails to so appoint, the Olbiil Era Kelulau may appoint a Special Prosecutor by Joint Resolution of the Olbiil Era Kelulau pursuant to

ROP v. Sisor and Tmol, 3 ROP Intrm. 376 (Tr. Div. 1991)
Article IX, Section 5(20) of the Constitution of the Republic.

At least three candidates have been nominated or offered to fill the position of Special Prosecutor but none of them was successfully appointed. Consequently, the office has remained vacant since its creation over six years ago.

On October 16, 1990, Secretary Manuel J. Lujan of the United States Department of Interior issued Secretarial Order No. 3142 which provides in Section 4 that “[t]he Assistant Secretary may assist the government of Palau in locating a special prosecutor... as needed, and in the event of a vacancy may appoint a special prosecutor . . . on an interim basis” [Emphasis added].

¶378 By letter dated May 17, 1991, Ms. Stella Guerra, the United States Department of the Interior Assistant Secretary of Territorial and International Affairs, informed the President of Palau that she had selected Mr. David Webster as the interim Special Prosecutor for Palau. Mr. Webster assumed the duties of the interim Special Prosecutor in June, 1991.

It is undisputed that Mr. Webster has not been appointed to his office by the President of Palau with the advice and consent of the Senate, or by Joint Resolution of the Olbiil Era Kelulau (hereafter the “OEK”).

Defendants’ motion argues that the appointment of Mr. Webster as an interim Special Prosecutor is unconstitutional and therefore the information in this matter should be dismissed. According to defendants, the appointment is unconstitutional because:

1) ROP Const. Article VIII, Section 7(3) provides that the President has the power to appoint national officers with the advice and consent of the Senate. The interim Special Prosecutor is a national officer. Since he was appointed by Assistant Secretary Stella Guerra, the appointment usurps the power of the President and the OEK and is in conflict with ROP Const. Article VIII, Section 7(3) and

2) The enabling Act sets forth the procedures to be followed in appointing a Special Prosecutor. The appointment of an interim Special Prosecutor by Assistant Secretary Stella Guerra **¶379** did not comply with those procedures and is therefore in conflict with the Act.

The interim Special Prosecutor argued in his brief that although there was a conflict between ROP Const. Article VIII, Section 7(3), the enabling act thereto and Section 4, Secretarial Order No. 3142, the appointment of the interim Special Prosecutor was a valid exercise of the United States’ administering authority under the Trusteeship Agreement. This conflict, according to the interim Special Prosecutor, was to be resolved in favor of his appointment by the Assistant Secretary by virtue of ROP Const. Article XV, Section 10 which states in part that “[a]ny provision of this Constitution or a law enacted pursuant to it which is in conflict with the Trusteeship Agreement between the United States of America and the United States Security Council shall not become effective until the date of termination of such Trusteeship Agreement.” The interim Special Prosecutor’s brief failed, however, to cite a

ROP v. Sisor and Tmol, 3 ROP Intrm. 376 (Tr. Div. 1991)

specific conflict between the ROP Constitution and the Trusteeship Agreement. At oral argument, the interim Special Prosecutor changed his position and argued that no conflict exists between Section 4, Secretarial Order No. 3142, and ROP Const. Article VIII, Section 7(3), the enabling Act or the Trusteeship Agreement.

ISSUE

The central issue properly before the Court is whether Section 4 of Secretarial Order No. 3142, which authorizes the **L380** Interior Assistant Secretary to appoint an interim Special Prosecutor, conflicts with ROP Const. Article VIII, Section 7(3) or its enabling Act? Necessarily, the word “conflict” between a statute and the constitution must first be defined.

The word “conflict” is synonymous with “inconsistent”, “contradictory”, and “repugnant to”. See *E.B. Elliot Ad. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1150 (1970); *The Abby Dodge v. U.S.*, 32 S.Ct. 310, 311 (1912). Black’s Law Dictionary, 5th edition, 1979, defines the word “inconsistent” as:

mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other. . . (citation omitted).

This definition is widely adopted. See, 20A Words and Phrases, 5th Ed. pp. 341-44.

The word “inconsistent” has been defined to mean impossibility of concurrent operative effect. *In Re Brown*, 329 F. Supp. 422, 426 (1971) (emphasis added); *Fritz et al v. Sali et al*, 1 ROP Intrm. 521 (1988) or “incapable of a fair reconciliation.” 16 Am. Jur. 2d *supra* at sec. 255.

The Court rules that there is no conflict between Section 4 of Secretarial Order No. 3142 and ROP Const. Article VIII, Section 7(3) or the enabling Act. Defendants have failed to rebut the presumption favoring the constitutionality of Section 4 of the Secretarial Order. They have failed to show by a clear **L381** and convincing proof that a conflict exists between Section 4, Secretarial Order No. 3142 and ROP Const. Article VIII, Section 7(3).

PRESUMPTION OF CONSTITUTIONALITY

The Court starts with 1 PNC 301(a) and (b) which provides:

“The following are declared to be in full force and to have the effect of law in the Republic: (a) The Trusteeship Agreement: (b) Such laws of the United States as shall, by their own force, be in effect in the Trust Territory, including . . . orders of the Secretary of the Interior . . .” (emphasis added).

By enacting 1 PNC 301(a) and (b) pursuant to its constitutional authority, the OEK has given Section 4, Secretarial Order No. 3142 the status of a statute. Hence, Section 4, Secretarial Order No. 3142, like 1 PNC 301 (a) and (b), enjoys the presumption in favor of its

ROP v. Sisor and Tmol, 3 ROP Intrm. 376 (Tr. Div. 1991)

constitutionality. Every intendment is in favor of the validity of a statute, and “it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears.” *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 354 (1904). The presumption in favor of the constitutionality of a statute is based on the principle of separation of powers. 16 Am. Jur. 2d *Constitutional Law*, Section 213 (1979). One branch of the government must not encroach upon the domain of another and that the Legislature would not knowingly enact unconstitutional legislation. *Id.* It remains, however, the ultimate duty of the Court to determine the constitutionality of any law. *Remeliik, et al., v. The Senate*, 1 **L382** ROP Intrm 1 (High Court, August, 1981); *The Senate v. Remeliik*, 1 ROP Intrm 90 (Tr. Div. Nov. 1983); *United States v. Nixon*, 418 U.S. 700, 703 94 S.Ct. 3090 (1974); *Marbury v. Madison*, 1 Cranch, 137, 177, 2 L. Ed. 60 (1903).

Because of the presumption in favor of the constitutionality of Section 4, Secretarial Order No. 3142, the Court is guided by certain rules of statutory construction. One such rule is that “. . . every act is to be construed so as to maintain its constitutionality if possible.” *New York C.H.R.R. Co. v. U.S.*, 212 US 481, 29 S.Ct. 304, 308 (1908). Also consistent with the presumption of constitutionality “. . . is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of its constitutional authority.” (emphasis added). *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 363 (1914).

May Section 4, Secretarial Order No. 3142 be read consistent with ROP Const. Article VIII, Section 7(3) or the enabling Act?

The purpose and intent of Section 4, Secretarial Order No. 3142, is not to abrogate or repudiate ROP Const. Article VIII, Section 7(3) or its enabling Act. This is clear from the expressed language of Section 4. It is equally clear that the purpose and intent of the Section shows a clear awareness of ROP **L383** Const. Article VIII, Section 7(3) and the enabling Act. Section 4 of the Secretarial Order only provides “. . . assist[ance]” . . . “as needed . . .” and “. . . on an interim basis . . .” It is clear from the language of Section 4 that when a Special Prosecutor is finally appointed pursuant to the Constitution, the office of the interim Special Prosecutor will cease to exist.

The Court finds that Section 4, Secretarial Order No. 3142 complements and affirms ROP Const. Article VIII, Section 7(3), and its enabling Act. Vital functions envisioned under the Constitution are being discharged by the interim Special Prosecutor. We do not have a situation where there are two Special Prosecutors, one appointed pursuant to Section 4, Secretarial Order No. 3142 and another appointed pursuant to the Constitution, both concurrently exercising the same duties and responsibilities. Only the office of the interim Special Prosecutor is operative.

Proof for Showing
Unconstitutionality

ROP v. Sisor and Tmol, 3 ROP Intrm. 376 (Tr. Div. 1991)

The Court finds that defendant not only have failed to rebut the presumption in favor of the constitutionality of Section 4 of the Secretarial Order, but they have failed as well to carry their burden of proving the unconstitutionality of Section 4 of the Secretarial Order by a clear and convincing standard of proof.

The burden of proving the unconstitutionality of an act varies with jurisdictions. The burden of proof is described in **¶384** many ways, but basically it is either a clear and convincing or beyond a reasonable doubt standard. 16 Am. Jur. 2d *supra* at Sec. 254. The U.S. Supreme Court stated a quantum of proof in the case of *Fletcher v. Peck*, 6 Cranch. 87, 125 3 L. Ed 162 (1809).

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. (emphasis added).

To prove the alleged conflict between the Secretarial Order and ROP Constitution, defendants have to show by at least a clear and convincing proof that Section 4, Secretarial Order No. 3142 and ROP Const. Article VIII, 7(3) or the enabling Act are “incapable of concurrent operative effect”, *In Re Brown, supra*, or “incapable of a fair reconciliation.” 16 Am. Jur. 2d *Supra* at section 255. Since the Court concludes that Section 4 of Secretarial Order may be read to be reconciliable with ROP Const. Article VIII, Section 7(3), the Court holds that defendants have failed their duty of proving the unconstitutionality of the Secretarial Order.

¶385 CONCLUSION

The Court holds that defendants have failed to rebut the presumption of constitutionality in favor of Section 4, Secretarial Order No. 3142. The Court further holds that defendants have failed to carry their burden of proving the unconstitutionality of Section 4, Secretarial Order No. 3142 by a clear and convincing standard of proof.

Accordingly, defendants’ motion to disqualify the interim Special Prosecutor and dismiss the information in this case and in *ROP v. Adolf*, Criminal Case No. 333-91 is hereby DENIED.

With the Court’s decision today, it is not necessary to address the other issues raised under the Trusteeship Agreement, the United Nations Charter and United Nations’ Resolutions.