

ROP v. Akiwo, 6 ROP Intrm. 283 (1996)
REPUBLIC OF PALAU and ELBUHEL SADANG,
in his capacity as the Director of the Bureau of
National Treasury under the Ministry of Administration,
Plaintiffs,

v.

RAYMOND AKIWO, SYLVESTER ALONZ, IGNACIO ANASTACIO,
DABINO ANASTACIO, SEIT ANDRES, EVENCE BECHES, FLAVIAN CARLOS,
HARUO ESANG, HARRY FRITZ, MARIO GULIBERT, JOSHU KOSHIBA,
HERSEY KYOTA, KERAI MRIUR, SAM MASANG, AUGUSTINE MESEBELUU,
DAIZIRO NAKAMURA, WILLIAM NGIRAIKELAU, SANTOS OLIKONG,
1284 THOMAS PATRIS, JOHNNY REKLAI, ISIDORO RUDIMCH, ALAN SEID,
ALBERT SHIRO, PETER SUGIYAMA, HIDEO TELL, SCHWARTZ TUDONG,
ELIA TULOP, MINAMI UEKI, and SURANGEL WHIPPS,
Defendants.

CIVIL ACTION NO. 350-95

Supreme Court, Trial Division
Republic of Palau

Decision and order

Decided: January 3, 1996

Counsel for Plaintiffs: Office of the Attorney General

Counsel for Defendants: Office of Senate Legal Counsel; Office of House Legal Counsel

ARTHUR NGIRAKLSONG, Chief Justice:

Before the Court are cross motions for summary judgment filed by plaintiff, the Republic of Palau (“government”), and defendants, who are legislators with the Olbiil Era Kelulau (collectively “defendants”). Also before the Court is defendants’ motion to dsimiss. The dispute arises over whether defendant legislators, who collected compensation in the form of official expense payments made by the government in violation of the Constitution, must reimburse the government in the amount of the unconstitutional payments and, if so, whether the government can offset the amount owed by withholding future official expense payments. For the reasons set forth below, the Court concludes that restitution is a proper remedy and that defendants must return the unconstitutional payments to the government. The Court also concludes that the government may offset the amount owed by withholding official expense payments.

I. FACTS

The facts surrounding this matter are largely undisputed. On September 22, 1993, the OEK passed, and the President signed into law, RPPL 4-10(4)(7).¹ The effect of the law was to increase the L285 compensation to members of the OEK by increasing monthly payments for “official expenses” from \$1,000 per month to \$2,000 per month. In April of 1995, this Court struck down the increase as unconstitutional. Decision, *Palau Chamber of Commerce v. Ucherbelau*, Civil Action No. 42-94 (April 3, 1995). The constitutional defect stemmed from the fact that the increase in compensation took effect during the OEK term in which the bill was passed. It was thus in violation of Article IX, Section 8 of the Constitution. See Palau Const. art. IX, § 8 (“[t]he compensation of the members of the Olbiil Era Kelulau shall be determined by law. No increase in compensation shall apply to members of the Olbiil Era Kelulau during the term of enactment . . .”). The parties acknowledge that the increase in compensation was unconstitutional.

The parties also agree that for sixteen months, beginning in January, 1994 and continuing until this Court struck down the increase in compensation, the twenty-nine individual defendants each received \$1,000 per month more in compensation than was constitutionally permitted. Thus, a total of \$464,000, \$16,000 per defendant, in unconstitutional compensation was paid by the government to the individual defendants.

II. DISCUSSION

Although the parties are in general agreement as to the underlying facts, the positions of the parties diverge sharply on the legal issues of liability and remedy. The government contends that restitution from the individual defendants in the amount of the unconstitutional payments is proper. The government also argues that it may properly withhold future official expense payments to defendants in order to set off the amount owed.²

Defendants argue that, because they accepted the increased compensation in good faith reliance on the validity of the public L286 law, restitution is not available to the government. Defendants also contend that there is no right to a set off, and further assert the defenses of

¹ RPPL 4-10(4)(7), part of the general appropriations bill for fiscal year 1994, amended 3 PNC § 202 to read:

There shall be made available, commencing as of January 1, 1994, to each member of the Olbiil Era Kelulau an official expense allowance of \$2,000 per month each to assist in defraying the expenses related to or resulting from the discharge of the member’s official duties. Members shall report expenditures to the Presiding Officers of the Olbiil Era Kelulau.

² The government previously requested a temporary restraining order to halt the official expense payments altogether, pending resolution of the dispute. Because an award of money damages after trial on the merits would provide an adequate remedy at law, the government was unable to establish irreparable injury. Accordingly, this Court denied the request for a temporary restraining order. Order, *ROP v. Akiwo*, Civil Action No. 350-95 (Dec. 8, 1995).

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sovereign, absolute and qualified immunity, and estoppel.

A. Summary Judgment Standards

Rule of Civil Procedure 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *ROP R. Civ. Pro. 56(c)*. Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a factual question as to the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 109 (1995).

A party may defeat a motion for summary judgment by offering evidence that shows there is a genuine issue of material fact to be resolved at trial. *Wolff*, 5 ROP Intrm. at 110. A fact is "material," as that term is used in Rule 56(c), if it must be resolved by the fact finder before the fact finder can determine if the essential element challenged by the movant exists. *Wolff*, 5 ROP Intrm. at 110.

B. Rule of Decision

The first step in resolving this dispute is identifying the rule of decision. The parties acknowledge, and the Court holds, that there is no constitutional or statutory provision or custom directly governing whether the government can recover payments made in violation of the Constitution. Accordingly, pursuant to Title I, Section 303 of the Palau National Code, the Court must turn first to the Restatements of the Law approved by the American Law Institute for the appropriate rule and, only if no such rule is found there, then to the law generally understood and applied in the United States. 1 PNC § 303 ("[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the Courts of the Republic of Palau . . .").

The Restatement of the Law of Restitution, section 46(a), addresses the conditions in which a recipient of funds paid by the **1287** government under a mistake of law³ is liable to the government for the amount paid.

³ The parties agree that the unconstitutional payments were the result of a mistake of law. That is, the payments were made under an erroneous belief that the public law permitting the increased compensation was constitutional.

§ 6. SATISFACTION OF NON-EXISTENT OBLIGATION. WHEN RESTITUTION GRANTED.

A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty so to do, is entitled to restitution as though the mistake were of fact if:

- (a) the benefit was conferred by a State or subdivision thereof

Particularly germane here is illustration 1 to section 46(a), which provides this example: “County X pays to its treasurer a salary fixed by statute which is greater than the constitutional limit. The county is entitled to restitution of the surplus.” Notably, there is no exception in the Restatement, or the case law interpreting it, for recipients of government funds who collected the public monies with a good faith belief that the payments were legal.

Defendants urge this Court not to follow the Restatement rule. The Court, however, has no such option. Although defendants cite decisions from a few state jurisdictions in the United States applying a rule different than that articulated in the Restatement, the OEK has expressly mandated that, in the absence of written or customary law, an applicable Restatement rule is the rule to be applied whether or not there is a contrary United States common law rule. 1 PNC § 303.

Defendants assert, without supporting authority, that the common law of the United States may govern even where the Restatement articulates a rule of common law on the issue. Defendant’s position ignores the plain and unambiguous language of 1 PNC § 303 that the common law of the United States is to provide the rule of decision “only to the extent” that the Restatement does not express a common law rule. Furthermore, and not surprisingly, defendants’ interpretation is contrary to the reading given the statute in every decision this Court could locate that addressed [§288](#) the issue. *See, e.g., Aguon v. Aguon*, 5 ROP Intrm. 122, 126-29 (1995) (judgments, torts, foreign relations and conflict of laws); *Salii v. Sugiyama*, 4 ROP Intrm. 89, 91-92 (1993) (trusts); *Kamiishi v. Han Pa Constr. Co.*, 4 ROP Intrm. 37, 40 (1993) (contracts); *A.J.J. Enter. v. Renguul*, 3 ROP Intrm. 29, 31 (1991) (contracts); *Etpison v. Rdialul*, 2 ROP Intrm. 211, 214 n.2 (1991) (contracts; under 1 PNC § 303, “the rules of the common law as expressed in the restatements of law as expressed by the American Law Institute shall be the rules of decision for the court unless there is other specific statutory authority.”); *see also* Decision *Becheserrak Tmilchol Co. v. Bultedaop*, Civ. Action No. 329-89 at 2 (Tr. Div. Mar. 7, 1995) (Miller, J.) (agency); Findings of Fact and Conclusions of Law and Analysis, *Carlos v. Whipps*, Civ. Action No. 583-93 at 6 (Tr. Div. Jan. 31, 1995) (Hoffman, J.) (restitution); Decision, *Eberdong v. Shiro*, Civ. Action No. 569-90 at 5 n.1 & 6 (Tr. Div. Jan. 10, 1995) (Hoffman, J.) (torts; “1 PNC § 303 incorporates the American Law Institute restatements as the law of Palau in the absence of any applicable written or customary law.”); *F/V Chin Mien Yu v. F/V Zhong Yuan*, 601, 4 ROP Intrm. 312, 316 n.1, 320 & 329 (Tr. Div. 1994) (Miller, J.) (contracts, torts); Findings of Fact and Conclusions of Law, *Ridep v. Ngiraingas*, Civ. Action No. 112-89 (Tr. Div. Nov. 18, 1993) (Beattie, J.) (torts).

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“It is For the OEK, not the courts, to judge the wisdom, fairness, and logic of Restatement rules incorporated into Palauan law by virtue of title 1, section 303 of the Palau National Code. *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994). Accordingly, the Court is bound by the legislative directive to apply the Restatement regardless of whether defendants have, as they urge, identified a better rule.⁴ *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 1289 110 (“[p]ursuant to Title 1, section 303 of the PNC, this Court follows the American Law Institute’s restatements of the law.”).

In any event, although it is the Restatement rule the Court follows, the common law rule in the United States as generally understood and applied is consistent with the restatement, the isolated cases cited by defendants notwithstanding. *See, e.g., Washington v. Continental Baking Co.*, 431 P.2d 993, 996 (Wash. 1967) (“[t]he great weight of authority seems to favor the position that a payment made by a state or political subdivision under a mistake of law is recoverable, distinguishing that situation from the normal rule where payment is made by mistake of law in situations between private parties.”) (quoting *Maryland v. Rucker*, 126 A.2d 846 (Md. 1956)); *New Mexico v. Axtell*, 393 P.2d 451, 454 (N.M. 1964) (“[p]ayments of public money by officials made under a mistake of law may be recovered.’ Such a rule, although differently worded, is followed in practically every jurisdiction throughout the country.”) (quoting Williston on Contracts); *Maricopa v. Avondale*, 467 P.2d 949, 952 (Ariz. Ct. App. 1970) (citing Restatement for propositions that “as a general rule, a public body can recover funds paid out by mistake” and “[b]y the better rule, where public monies are involved, recovery is not defeated by the circumstances that the mistake is one of law rather than one of fact.”); *see Wisconsin Cent. R. Co. v. United States*, 17 S.Ct. 45, 51 (1896); *In re Hooper*, 359 P.2d 569, 578 (3d Cir. 1966); *United States v. Russell Mfg. Co.*, 349 F.2d 13, 16 (2d Cir. 1965); *J.W. Bateson Co. v. United States*, 308 F.2d 510, 514-15 (5th Cir. 1962); *California v. Union Oil Co.*, 310 P.2d 409, 413 (Cal. 1957); *Aebli v. Board of Educ.*, 145 P.2d 601, 611 (Cal. App. 1944); *see also A. CORBIN, CORBIN ON CONTRACTS* § 617 & text accompanying n. 65 (1 vol. ed. 1952) (“[m]oney paid or other benefit conferred in the belief that it is legally due, this belief being caused by mistake of law, is recoverable just as if the mistake were one of fact if . . . the payment of benefit is given by a municipal or other governmental corporation”); 13 S. WILLISTON,

⁴ Courts that have adopted the Restatement rule, or a rule identical to the Restatement in all material respects, find its reasoning sound. *See, e.g., Comet Theater Enter., Inc. v. Cartwright*, 195 F.2d 80 (9th Cir. 1952) (section 46(a) “undoubtedly has some basis in a policy to protect public bodies from the collusive agreements made by their agents with outsiders”). In *Ada County v. Gess*, 43 P. 71, 72 (Idaho 1895), where a public official had collected compensation above the legal limit, the Idaho Supreme Court reasoned: “Some of the authorities cited, however, seem to . . . go so far as to hold that payments of the money of the public by its authorized agent to an officer on account of a mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. * * * Here is a plain and positive prohibition by the constitution, which cannot be avoided nor violated. To hold otherwise would open the door to unlimited payments of sums forbidden by the constitution as salaries or fees of public officers by the county commissioners with or without collusion, and these payments retained under the specious pretext that they were voluntary payments under a mistake of law.”). This Court, too, finds sound the reasoning behind the Restatement rule.

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A TREATISE ON THE LAW OF **1290** CONTRACTS § 1590 (3d ed. 1970) (“Payment of public money by officials under a mistake of law may be recovered.”). The cases cited by defendants “merely constitute a deviation from the rule a generally applied.” *Axtell*, 393 P.2d at 456. Further, the cases relied on by defendants do not purport to follow Restatement.

C. Liability

Having identified the rule of decision provided by the legislature, the next step is to apply the rule to the matter at hand. The language of section 46(a) of the Restatement and accompanying illustration 1, lead to the inescapable conclusion that, in the absence of some affirmative defense, defendants must reimburse to the government the compensation paid to them in violation of the Constitution. *See Ada County v. Gess*, 43 P. 71, 72 (Idaho 1895) (restitution proper where official compensated in an amount exceeding constitutional limit); *see also Austin v. Barret*, 16 P. 12, 16 (Ariz. 1932) (restitution proper from public officer who was paid for travel expenses where payment not permitted by law even though such payments were a matter of long standing custom and authorized for many years by A.G. opinion). Defendants do not offer an interpretation of the Restatement rule that would excuse them from the obligation to refund the compensation paid to them by the government in violation of the Constitution,⁵ nor could the Court find such an interpretation in the case law interpreting the Restatement rule or in the words of the Restatement rule themselves. Accordingly, based on the Restatement rule, incorporated in Palauan law by title 1, section 303 of the Palau National Code, the government is entitled to reimbursement.

D. Immunity

Defendants assert that they enjoy sovereign, absolute and qualified immunity from liability for the unconstitutional payments, and that the government is estopped from seeking the return of the money. The court rejects these arguments.

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1. Sovereign Immunity

Defendants first claim that they enjoy sovereign immunity from this action. Of course, only a sovereign can enjoy the defense of sovereign immunity. *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994) (“[t]he government is immune from lawsuits except to the extent it consents to be sued . . .”). Defendants argue that the lawsuit should be viewed as one against the legislature and not against individuals. Defendants are incorrect.

Through the lawsuit, the government seeks to return public funds that should not have been paid. In this particular case, the public funds were paid to individuals who also are

⁵ Defendants argue that they collected the excess compensation in “good faith” and that this excuses them from reimbursing the public treasury. Although this may be true under the rule expressed in a minority of United States jurisdictions, it is not the rule in the majority nor, more importantly, is it the rule in Palau which adopts the Restatement rule. Accordingly, to the extent defendants raise a genuine issue of fact concerning their good faith, such is not a “material” fact for summary judgment purposes. *See Wolff*, 5 ROP Intrm. at 112-13 & n.3.

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legislators. As was held in *Palau Chamber of Commerce v. Ucherbelau*, Civil Action No. 42-94 (April 3, 1995), the payments were compensation paid in violation of the Constitution to the individual defendants. The money was not paid to the OEK and thus it is not a lawsuit against the OEK. Nor is this a lawsuit against legislators for passing, in their official capacities and acting within the scope of their office, an unconstitutional act which resulted in improper payments. Rather, it is a lawsuit to recover from individuals payments made to them in violation of the Constitution.⁶ 17 Am. Jur. 2d United States § 114 (1975) (“Where, in an action against federal officers, the right asserted and the relief asked are against the defendants as individuals, they cannot protect themselves from liability by their official character as representatives of the sovereign.”).

That this is the true nature of the parties is confirmed by the fact that a judgment for the government will not prohibit or require governmental action, nor will it tap the public treasury. *See Stafford v. Briggs*, 100 S.Ct. 774, 783-84 (1980); 17 Am. Jur. 2d United States § 114 (1975). The defendants are not the sovereign and cannot avail themselves of the doctrine of sovereign immunity.

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2. Absolute Immunity

Defendants also contend that the speech and debate clause in Article IX, section 9 of the Constitution wraps them with absolute immunity.⁷ Specifically, defendants characterize the lawsuit as one against legislators who assisted in passing the unconstitutional increase in compensation. On this premise, defendants contend that the speech and debate clause protects them from liability. The premise, however, is flawed.

It is true that the defendants, acting in their capacities as legislators, enacted the legislation that ultimately led to this lawsuit. But to focus on that preliminary event is to introduce a red herring into the analysis. As discussed above, the gravamen of this action is not the passing of unconstitutional legislation, but rather the receipt by individuals of funds paid in violation of the Constitution. Defendants are not defendants by virtue of their having passed an unconstitutional act. They are defendants because they collected public funds that do not rightly belong to them. Certainly, if a defendant could show that he did not collect the unconstitutional compensation, he would properly be dismissed from this action, regardless of whether he voted for, voted against, or abstained from voting on the unconstitutional act. The defendant’s participation in the passing of the legislation is thus irrelevant with regard to the absolute immunity defense. Defendants are not cloaked in absolute immunity.

3. Qualified Immunity

⁶ In other words, this is not a case in which the government sues public official X for personal liability arising from the official acts of X taken within the scope of office that resulted in improper payments to individual A. Rather, this is a lawsuit against individual A to recover the improper payment made to individual A. Here, it happens that public official X is also individual A.

⁷ That provision states: “[n]o member of either house of the Olbiil Era Kelulau shall be held to answer in any other place for any speech, or debate in the Olbiil Era Kelulau.”

Defendants also contend that qualified immunity protects them from liability for returning the public funds. Specifically, defendants contend that, as public officials, they are immune from civil suits unless a reasonable person would have known that the increase in compensation violated clearly established laws. Defendants contend that immunity attaches here because it was not clearly established that the increase in compensation violated the Constitution. The Court rejects this defense.

Assuming that Palau recognizes the doctrine of qualified immunity as proposed by defendants, it does not apply in this case. Defendants are not sued in their capacities as public officials for passing unconstitutional legislation. Rather, they are sued as **¶293** private individuals who received public funds that were paid under a mistake of law. The doctrine of qualified immunity does not apply here.

4. Estoppel

The defendants also contend that restitution is governed by equitable principles and that under equity, the government is estopped from attempting to recover the improperly paid public funds from defendants. *See* RESTATEMENT OF RESTITUTION § 69 (1937). The Court notes initially that it is an open question whether the doctrine of equitable estoppel applies against the government in Palau at all, much less whether it can apply to give effect to a statute that violates the Constitution. To the extent that estoppel can in some circumstance be applied against the government to prevent it from recovering public funds paid in violation of the Constitution, the Court rejects the contention that it applies here.

The government may not be estopped on the same terms as any other litigant. *See Heckler v. Community Health Serv., Inc.*, 104 S.Ct. 2218 (1984). To establish equitable estoppel against the government, a party asserting the affirmative defense must, at a minimum, establish the traditional elements of estoppel and also show (1) affirmative misconduct by the government and (2) that the public's interest will not suffer undue damage as a result of the application of the doctrine. *See* *Agubata*, 60 F.3d at 1083; *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995); *New York v. Shalala*, 34 F.3d 1161, 1168 (1994). "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact." *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1516 (10th Cir. 1995); *Board of County Comm'rs v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). A showing of negligence by the government will not suffice to meet the "affirmative misconduct" element of the defense. *See Cadwalader v. United States*, 45 F.3d 297, 299-300 (9th Cir. 1995); *see also* Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies*, 27 A.L.R. FED. 702 (1976).

Courts that have applied equitable principles in determining whether to require reimbursement to the public coffers have agreed that the burden rests with the payee of the funds to show that equity is in his or her favor. *See Champ Spring Co. v. United States*, 47 F.2d 1, 3 (8th Cir. 1931) (to defeat on equitable **¶294** grounds an action for restitution by the government of funds that were improperly paid, a defendant bears the burden to show that the defendant has "a better right" to the funds than the public). "The test is whether [the payee] has a right to retain

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the money, not whether he acquired possession honestly or in good faith. If the money belongs [to the public] and [payee] can show no legal or equitable right to retain it, he ought in equity and good conscience to pay it over.” *Smith v. Rubel*, 13 P.2d 1078, 1080 (Or. 1932) (internal quote omitted)).

Defendants concede that they have no legal right to the money, but argue that equity provides them with title to the funds. The Court rejects this argument for three reasons.

First, defendants fail to show that they relied to their detriment on governmental action sufficient to warrant application of the doctrine of equitable estoppel. The government’s swift action to recover the illegally paid compensation renders the doctrine of estoppel inapplicable. The defendants collected the excess compensation for a mere sixteen months before it was declared unconstitutional and the payments halted. If there was any reliance by defendants on a government representation that the payments were legal, it was not sufficiently to their detriment to satisfy the requirements of equitable estoppel. *See Maricopa v. Avondale*, 467 F.2d 949, 953-54 (Ariz. App. 1970) (estoppel applies where funds distributed over 16 year period). Of course, that the legislators who passed the unconstitutional legislation are also the recipients of the unconstitutional payments also defeats any claim of detrimental reliance on the acts of the legislature.

Second, defendants make no showing that the government engaged in any act of misconduct. Indeed, defendants argue strenuously that the passage of the statute that authorized the payments was done in good faith. Although there is evidence that the Attorney General defended the constitutionality of the statute, there is a complete lack of evidence showing that the Attorney General or any other governmental agency or officer misrepresented to or concealed any material fact from defendants. At most, the uncontradicted evidence shows that the executive department held a mistaken belief that the payments were constitutional. *See Austin v. Barrett*, 16 P. 12, 16 (Ariz. 1932) (government not estopped from recovering excess travel expenses paid to public officer even though payments were long standing custom and authorized for years by A.G. opinion). This failure of proof is fatal to defendants’ estoppel argument. *See Rapp*, 52 F.3d at 1516-17.

1295 Third, applying the common law doctrine of equitable estoppel here would inflict undue damage to the public interest by preventing the government from pursuing the return of public funds. This is not a case involving two private parties; The distinction is of great moment. *In Heidt v. United States*, 56 F.2d 559 (5th Cir.), *cert. denied*, 53 S.Ct. 8 (1932), the Fifth Circuit held:

[A] voluntary payment made by an individual under no mistake of fact is ordinarily not recoverable, because he may do what he wills with his own money. But the rule is quite otherwise in payments of public money made by public officers. [Citations omitted]. They have no right of disposal of the money, but must act according to law, the law operating as a limitation on their authority to pay. The party receiving an illegal payment is bound to know the law, and ex equo bono is liable to refund it. [Citations omitted]. The long continuance of

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overpayments illegally made does not prevent their recovery, even when contractual relations are involved. [Citations omitted]. Much less where, as here . . . [the payments] are regulated wholly by law.

Fourth, and perhaps most importantly, to apply equitable estoppel so that a wrongfully held belief as to the legality of a statute could override a constitutional provision would unduly injure the public interest by compromising the integrity of the Constitution.⁸ The provisions of Palau by Article IX, section 8 of the Constitution, which provide protection of the public treasury, would be left eviscerated. *See Holder v. Office of Personnel Management*, 47 F.3d 412, 414 (Fed. Cir. 1995) (estoppel will not negate statutory prerequisite for disbursement). If statutes **1296** violative of constitutional provisions may be enacted by the legislature, signed by the executive and subsequently enforced through the common law doctrine of estoppel, the supreme authority of the Constitution and “the process of government itself would be undermined.” *Heyl & Patterson Int’l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 432 (3d Cir. 1981). Equity can not deprive the public of constitutional protection of its funds.

Accordingly, the government is not estopped from recovering the funds belonging to the public’s treasury. *See Office of Personnel Management v. Richmond*, 110 S.Ct. 2465, 2468-71 (1990) (Supreme Court of the United States “has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.”); *United States v. Agubata*, 60 F.3d 1081, 1083 (4th Cir. 1995) (“doctrine of equitable estoppel is rarely invoked against the government.”).

E. Recoverable Compensation

The proper measure of recovery is set forth in section 150 of the Restatement of Restitution: “[i]n an action of restitution in which the benefit received was money, the measure of recovery for this benefit is the amount of money received.” RESTATEMENT OF RESTITUTION § 150 (1937). It is undisputed that each defendant received \$16,000 more in compensation than was constitutionally permitted. Accordingly, each defendant must reimburse the government \$16,000.

F. Set Off

The final issue is whether the government may collect the amount owed by the

⁸ Defendants argue that the compensation was made to them to cover “official expenses” and that, through the doctrine of equitable estoppel, this relieves them from liability lest the public receive a windfall at the expense of defendants. Apparently recognizing that overpayments in salary to public officials are recoverable by the government, defendants attempt to distinguish payments for salary from payments for “official expenses.” The distinction is without legal significance; the public receives no less of a windfall by recovering improper payments made in the form of salary for a public official’s time than it does by recovering improper payments for other official expenses. Courts have rejected the estoppel argument where public money is at stake in order that the limitations on the expenditures of such money is honored. *See, e.g., Heyl & Patterson Int’l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 432-33 (3d Cir. 1981). This Court rejects the argument as well.

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defendants by withholding future official expense payments. The Court concludes that it may.

The other jurisdictions that have addressed the question of whether a governmental entity may set off overpayments by withholding future payments have held that such set offs are permissible. *See, e.g., Martinez v. Marshall*, 573 F.2d 555, 560 (9th Cir. 1977); *Lodge 2424, Int'l Ass'n of Machinists v. United States*, 564 F.2d 66, 71 (Ct. Cl. 1977) (“[f]ew principles are so well established as the right of the Government to recover by offset or otherwise sums illegally or erroneously paid. Moreover, it cannot be estopped from doing so by the mistakes of its officers or agents.”).

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The Reporters' Notes to section 46 of the Restatement of Restitution also suggests that the set off is a proper mechanism to recoup overpayments made under a mistake of law. RESTATEMENT OF RESTITUTION § 46 reporters' note 1937) (“[a] person who has paid by mistake of law has been permitted to set up the payment by way of set-off”) (and cases cited therein). The Court finds that especially where, as here, public money is at stake and there is no statutory or constitutional prohibition, the government may attempt to recoup illegally paid compensation through a set off of funds otherwise payable to the defendants.

ACCORDINGLY, IT IS ORDERED that the government's Motion for Summary Judgment is Granted. Each defendant is liable to the government in the amount of \$16,0000; the government may set off the amount each defendant owes by withholding official expense payments to each defendant. IT IS FURTHER ORDERED that the defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is DENIED.