

*The Senate v. Nakamura*, 8 ROP Intrm. 190 (2000)

**THE SENATE,  
Appellant,**

v.

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

CIVIL APPEAL NO. 99-35  
Civil Action No. 510-96

Supreme Court, Appellate Division  
Republic of Palau

Argued: April 12, 2000

Decided: May 22, 2000

Counsel for Appellant: David Schluckebier, Pat Harris, Senate Legal Counsel

Counsel for Appellees: David Perrin, Office of the President Legal Counsel

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

BEATTIE, Justice:

For the third time we review the dismissal of the Senate’s claim that executive-branch officials violated the Constitution by spending unappropriated government funds in fiscal year 1995. On remand from *The Senate v. Nakamura*, 7 ROP Intrm. 212 (1998), the Trial Division held that it lacked jurisdiction because the case did not present a justiciable controversy. We affirm in part, reverse in part, and remand with instructions for the ¶191 Trial Division to grant the declaratory relief requested by the Senate.

### **I. Facts and Procedural Background**

A detailed statement of the background of this case is set forth in *The Senate v. Nakamura*, 7 ROP Intrm. 8 (1998), and *The Senate v. Nakamura*, 7 ROP Intrm. 212 (1998). We will briefly review the facts here. In fiscal year 1995, the executive branch spent \$20,507,039, approximately \$644,000 more than the \$19,862,885 appropriated for governmental spending by the Olbiil Era Kelulau (“OEK”). The OEK proceeded to enact legislation prohibiting the expenditure of unappropriated government funds and subjecting violators to civil and criminal penalties. See 40 PNC § 406.

On November 27, 1996, the Senate brought this action against President Kuniwo

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Nakamura; Tommy Remengesau, Jr., the Minister of Administration; Elbuchel Sadang, the Director of the National Treasury; and Antonio U. Mikel, the Director of Program Management and Budget, alleging that the defendants spent the unappropriated funds in violation of the Constitution and 40 PNC § 401.<sup>1</sup> The Senate sought restitution of the funds under the common law and 40 PNC § 401, an injunction barring further expenditures of unappropriated funds, and a judicial declaration that the expenditures violated 40 PNC § 401 and articles VIII, IX, and XII of the Constitution.

The Trial Division determined that the Senate lacked standing and dismissed the case. We reversed, holding that the expenditure of unappropriated government funds constituted a sufficient injury to the Senate's law-making powers to confer standing. *See The Senate v. Nakamura*, 7 ROP Intrm. 8 (1998) ("*The Senate I*").

On remand the Trial Division again dismissed the case, holding that the Senate failed to state a claim upon which relief could be granted. *See* ROP R. Civ. P. 12(b)(6). The court held that the constitutional provisions allegedly violated were not self-executing, that the Senate 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.

We affirmed dismissal of the claims arising under 40 PNC § 401 as well as the claims for restitution and injunctive relief. *See The Senate v. Nakamura*, 7 ROP Intrm. 212 (1998). However, we held that the constitutional provisions at issue were self-executing and remanded for a determination of "whether the Senate is entitled to the declaratory relief it has requested." *Id.* at 215.

Consistent with the mandate on remand, the Trial Division held that the Senate was not entitled to declaratory relief and entered summary judgment for the defendants. The Trial Division also denied the Senate's motion to amend the complaint to include new and amended claims for restitution under the common law and 40 PNC § 401.

## II. Discussion

We affirm the denial of the Senate's motion to amend the complaint. On remand, the Trial Division was limited to the issue **¶ 192** remanded, which was to determine whether the Senate was entitled to declaratory relief. *See Alik v. Ueki*, 6 ROP Intrm. 148, 151 (1997). This mandate left no room for consideration of the Senate's new or amended claims for restitution.

However, we conclude that the Senate is entitled to declaratory relief. Not only do the Senate's constitutional claims present a justiciable controversy, there no longer remains any genuine issue of material fact that the defendants violated the Constitution by causing unappropriated government funds to be spent in fiscal year 1995. Accordingly, the Senate is entitled to a declaratory judgment as a matter of law.<sup>2</sup>

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<sup>1</sup> 40 PNC § 401 requires government officials to obtain a certificate of availability from the Budget Director before spending government funds.

<sup>2</sup> This disposition makes it unnecessary to address the denial of the Senate's motions to

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### ***A. The Defendants' Motion for Summary Judgment***

The Appellate Division's review of summary judgment is de novo and plenary. *See Akiwo v. ROP*, 6 ROP Intrm. 105, 106 (1997). This court must reach the same conclusion of law as the trial court to affirm summary judgment; no deference is appropriate. *See id.*

The availability of declaratory relief is governed by 14 PNC § 1001, which provides, "In a case of actual controversy within its jurisdiction, any appropriate Court of the Republic, upon the filing of an appropriate pleading, may declare the rights and legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." Rule 57 provides, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." ROP R. Civ. P. 57.

This court has not examined the requirements for a declaratory judgment under section 1001 or Rule 57. However, section 1001 is based on the Declaratory Judgment Act of the United States. *See* 28 U.S.C. § 2201. Accordingly, we turn to the law of the United States for guidance in construing section 1001. *See Kazuo v. ROP*, 1 ROP Intrm. 154, 172 n. 43 (1984) (holding that it is appropriate to consult the law of other jurisdictions on issues of first impression).

Like section 1001, the Declaratory Judgment Act limits declaratory relief to cases of "actual controversy within the court's jurisdiction." 28 U.S.C. § 2201. The exercise of judicial power by the courts of the United States depends on the existence of a case and controversy; federal courts lack power to render advisory opinions. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 113 S. Ct. 2173, 2178 (1993). Consequently, a party seeking relief under the Declaratory Judgment Act must show the existence of a case and controversy in order to state a claim for a declaratory judgment. *See, e.g., Aetna Life Ins. Co. v. 1193 Haworth*, 57 S. Ct. 461, 464 (1937).<sup>3</sup>

The difference between an abstract question and a controversy is one of degree and is not discernible by any precise test. *See Babbitt v. United Farm Workers Nat'l Union*, 99 S. Ct. 2301, 2308 (1979). The basic inquiry is whether the conflicting contentions of the parties present a real and substantial controversy between parties having adverse legal interests, in a dispute that is definite and concrete, not hypothetical or abstract. *See id.* As applied to declaratory judgments, a party seeking declaratory relief must demonstrate the existence of a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 61 S. Ct. 510, 512 (1941).

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lift the stay of discovery and to continue summary judgment.

<sup>3</sup> This Court has stated that its jurisdiction under the Palau Constitution may be broader than the jurisdiction of federal courts in the United States. *See Gibbons v. ROP*, 1 ROP Intrm. 634, 637 (1989). It is unclear whether section 1001 incorporates the "case and controversy" jurisdictional requirement of article III of the U.S. Constitution or the jurisdictional grant of article X of the Palau Constitution. We need not decide that issue here, however, because in our view the case meets the potentially more restrictive "case and controversy" standard.

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The Trial Division determined that the Senate's claims for declaratory relief did not present a "live controversy affecting valuable legal rights." We disagree. In *The Senate I*, we stated this case was "a justiciable controversy involving the executive branch's constitutional authority to spend unappropriated funds." *The Senate*, 7 ROP Intrm. at 12. Although the statement did not refer to the aspects of justiciability at issue here, we still believe this case presents a justiciable controversy. The defendants have refused to concede that the expenditures were illegal and thereby implicitly maintain that the executive branch has constitutional authority to spend unappropriated government funds. The Senate, for its part, continues vigorously to prosecute this lawsuit and has not ratified the expenditures. In our opinion this case presents a "substantial" controversy "of sufficient immediacy and reality" to warrant declaratory relief. *Maryland Cas. Co.*, 61 S. Ct. at 512.

The Trial Division determined that a declaratory judgment would be nothing more than an advisory opinion because the Senate can obtain no other relief and the enactment of 40 PNC § 406 established penalties for future expenditures of unappropriated funds. The court concluded, "No rights can be affected, no effective relief can be granted, and, because of the subsequent enactment of legislation, the situation which arose here can never again arise."

Again we disagree. Declaratory relief is appropriate where it will serve a useful purpose in clarifying the legal relations of the parties or terminate the uncertainty and controversy giving rise to the proceeding. *See, e.g., Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (10<sup>th</sup> Cir. 1996). Adjudication of the Senate's constitutional claims will resolve the controversy over whether the executive branch can spend unappropriated government funds. A judgment in the Senate's favor will foreclose constitutional challenge to section 406 on the grounds that it infringes the President's spending power. It will also ensure that the executive branch does not spend unappropriated funds in the event section 406 1194 is amended, repealed, or invalidated.<sup>4</sup> A judicial declaration will therefore have a sufficiently meaningful effect on the rights of the litigants to justify declaratory relief, even though no other relief can be obtained by the Senate.

The Trial Division also determined that the case did not present a justiciable controversy because the defendants did not contest that the over-expenditures occurred and the Senate had other remedies available to it at the time of the expenditures, including oversight hearings, legislation, and impeachment. However, the absence of a factual dispute does not render a case non-justiciable as long as controversy persists over the legal ramifications of those facts. Moreover, a declaratory judgment should not be refused merely because another remedy is available. *See* ROP R. Civ. P. 57; *ARW Exploration Corp. v. Aguirre*, 947 F.2d 450, 454 (10<sup>th</sup> Cir. 1991).

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<sup>4</sup> We note that the Senate produced evidence that President Nakamura asserted a right to spend government funds in excess of budgetary appropriations limits before the enactment of section 406. *See* Letter from President Kuniwo Nakamura to Hon. Surangel S. Whipps, Speaker of the House of Delegates, and Hon. Alan Seid, Chairman of the House Ways & Means Committee, Fourth OEK (Nov. 6, 1995). This evidence demonstrates that it is not unreasonable to expect the executive branch to assert a similar right in the event section 406 is amended, repealed, or invalidated.

In our view, the Senate's constitutional claims present a live, justiciable controversy and therefore meet the jurisdictional requirements for declaratory relief under section 1001. Accordingly, we reverse the Trial Division's grant of the defendant's motion for summary judgment.

### ***B. The Senate's Right to Declaratory Relief***

Having determined that the Trial Division erred in granting summary judgment for the defendants, we now address whether the Senate is entitled to declaratory relief at this stage in the proceedings.

In drafting the Palau Constitution, the framers sought to regulate the spending of government funds in order to ensure "that the money which the people have entrusted to their government will be controlled in ways prescribed by laws which establish the accountability of those handling the money." *Committee on General Provisions*, *Constitutional Convention*, *Standing Committee Report No. 42* at 6 (1979). The framers divided the power to appropriate government funds between the executive branch and the OEK. The President has the power to submit an annual budget and to veto appropriations bills. *See ROP Const.* arts. VIII, § 7(8) and IX, § 15. The OEK has the power to approve, modify, or amend the President's budget in the process of enacting appropriations legislation. *See id.* arts. IX, § 1 and XII, § 3.

The framers also explicitly restricted the spending of government funds to the amounts and purposes provided for by duly-enacted appropriations laws. Article VIII gives the President the spending power, but limits that power "to spend[ing] money pursuant to appropriations." *See ROP Const.* art. VIII, § 7(6). The Withdrawal Clause of article XII provides, "No funds shall be withdrawn from any treasury except by law." *See ROP Const.* art. XII, § 1. The framers left ¶195 no doubt that the phrase "by law" refers to appropriations laws.

The expenditure by the executive branch of government money in excess of appropriations transgresses the constitutional framework for regulating the spending of government funds. The expenditure of unappropriated funds exceeds the spending power of the executive branch under section 7(6) of article VIII. It violates the Withdrawal Clause of article XII by causing the withdrawal of unappropriated funds from the National Treasury. And it violates separation of powers by infringing the OEK's lawmaking authority. "The Constitution grants the power to appropriate funds to the OEK." *The Senate*, 7 ROP Intrm. at 11. The spending of unappropriated funds nullifies the OEK's appropriations power with respect to those funds.

The defendants contend that the executive branch may have had constitutional authority to spend the unappropriated funds because the OEK failed to appropriate sufficient money to meet legislated cost-of-living salary increases for government employees. However, the defendants have identified no constitutional provision giving the executive branch the authority to spend unappropriated government funds for even legitimate governmental purposes. The constitutional prohibition against spending unappropriated government funds indicates that

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deficiencies in appropriations must be remedied through the legislative process, not by the unilateral action of the executive branch.

The defendants also contend that the executive branch may have authority to spend unappropriated government funds in emergencies. We decline to enter into “speculative inquiries of matters that lack concrete factual situations.” *KSG v. ROP*, 3 ROP Intrm. 127, 128-29 (1992). We do not understand the defendants to contend that the expenditures were for emergency purposes.

Having determined that the expenditure of unappropriated funds by the executive branch violates the Constitution, it only remains to be determined whether the defendants spent unappropriated funds. A litigant is entitled to summary judgment if the evidence shows that there is no genuine issue of material fact and that the litigant is entitled to a judgment as a matter of law. *See* ROP R. Civ. P. 56(c). An appellate court has power to order summary judgment for the appellant even where no motion has been made. *See Becheserrak v. ROP*, 5 ROP Intrm. 63, 67 (1995) (quoting 6 *James W. Moore & Jeremy C. Wicker, Moore’s Federal Practice* § 56.27[2], [3] (2<sup>nd</sup> ed. 1988)).

The Senate is entitled to judgment as a matter of law on its constitutional claims because there no longer remains a genuine issue of material fact that the defendants violated the Constitution by spending unappropriated government funds. It is now undisputed that the defendants caused government funds to be spent in excess of appropriated amounts in fiscal year 1995.<sup>5</sup> *See* Memorandum of Points and Authorities in Support of Defendants’ Motion for Summary Judgment at 2 (“In fiscal year 1995, the national government of the Republic of Palau **¶196** spent money which was not appropriated or made available by the Olbiil Era Kelulau.”). It is also undisputed that the OEK has not ratified the expenditures.<sup>6</sup> Consequently, there is no genuine issue of material fact that the violation persists.

### III. Conclusion

We hold that the Senate is entitled to a declaratory judgment as a matter of law that the defendants violated the Constitution by spending unappropriated government funds in fiscal year 1995. Accordingly, we REVERSE the grant of the defendants’ motion for summary judgment and remand with instructions for the Trial Division to issue the declaratory relief requested by the Senate. We AFFIRM the denial of the Senate’s motion to amend the complaint.

MILLER, Justice, concurring in part and dissenting in part:

I hesitate to write separately, because I agree wholeheartedly with and join in nearly all of

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<sup>5</sup> Counsel for the defendants confirmed during briefing and at oral argument that the defendants do not dispute that they caused the expenditure of unappropriated government funds in fiscal year 1995.

<sup>6</sup> This point was conceded by counsel for the defendants during briefing and at oral argument.

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Justice Beattie's excellent opinion for the Court. In particular, I agree that the grant of summary judgment to defendants should be reversed and that declaratory relief should be granted in favor of plaintiff. I dissent only because I believe that plaintiff was entitled to a ruling on its motion to amend its complaint to seek additional relief. I do not believe that our prior mandate "left no room for consideration of the Senate's new or amended claims for restitution," *see p. 3 supra*, nor do I believe that it would have been appropriate for us to so limit the trial court's discretion.<sup>7</sup> I cannot say now that a denial of plaintiff's motion would necessarily constitute an abuse of that discretion. I say only that that discretion should have been exercised and would remand for that purpose as well.

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<sup>7</sup> While it is true that the matter was before us for the second time on appeal, that could not have been a justification for restricting plaintiff's ability to proceed. Neither appeal would have taken place had the trial court correctly anticipated our eventual rulings: defendants' motion to dismiss on standing grounds would have been denied and their motion to dismiss for failure to state a claim would have been denied in part and granted in part. At that point, it would have been perfectly appropriate for plaintiff to try to amend its complaint, as it did on remand, to cure pleading deficiencies and to assert alternative legal theories. That it took two successful appeals for plaintiff to reach the same point was surely no basis for limiting the procedural avenues that would otherwise have remained open to it.