Andres v. Palau Election Comm'n, 9 ROP 289 (Tr. Div. 2002)

SEIT ANDRES, Senator, and JOSHUA KOSHIBA, Senator,
Plaintiffs,

v.

THE PALAU ELECTION COMMISSION,
Defendant.

MIRIAM TIMARONG,
Intervenor.

CIVIL ACTION NO. 02-220

Supreme Court, Trial Division
Republic of Palau

Decided: July 11, 2002

[1] **Civil Procedure:** Injunctions

The standards for granting injunctive relief are as follows: (1) whether plaintiffs have a substantial likelihood of success on the merits; (2) whether plaintiffs will suffer irreparable injury if the injunction is not granted; (3) whether the threatened injury to the plaintiffs outweighs the threatened harm the injunction will cause the defendants; and (4) where the public interest lies.

[2] **Civil Procedure:** Injunctions; **Elections:** Recall

In addressing whether a recall election should be enjoined, the most important factor to consider is whether the plaintiffs have shown that they are likely to succeed in demonstrating that the constitutional requirements for holding a recall election have not been met.

[3] **Civil Procedure:** Injunctions

In an injunction case, the plaintiffs do not need to prove that they are certain to win, but only that it is a likely, and not merely a possible, result.

[4] **Elections:** Certification of Petitions; Recall

For a recall petition to be valid and sufficient, the petition must be signed by not less than twenty-five percent of the number of persons who voted in the most recent election for that member of the Olbiil Era Kelulau.

[5] **Elections:** Certification of Petitions; Recall

The number of signatures required on a recall petition is calculated by taking the number of votes

the member whose recall is sought received in the most recent election and multiplying it by 25%.

[6] **Elections:** Certification of Petitions; Recall

Neither Palau statute nor regulation requires the submission of affidavits of the persons who circulated recall petitions.

[7] **Elections:** Certification of Petitions; Recall

Signatures on recall petitions are presumptively valid.

[8] **Elections:** Certification of Petitions; Recall

The burden is on the plaintiffs challenging the recall election to prove that less than 25% of the registered voters validly signed the petition.

[9] **Civil Procedure:** Injunctions; ⊥290 **Elections:** Certification of Petitions; Recall

Plaintiffs may be able to show a substantial likelihood of succeeding on their claim where they can show that hundreds of people who signed the recall petitions were not told or were affirmatively misled as to the true purpose of the petitions.

[10] **Elections:** Certification of Petitions

A voter has a right to withdraw his or her signature from a petition, but this right must be exercised at the latest before the appropriate agency has determined the sufficiency of the petition.

LARRY W. MILLER, Associate Justice:

This matter is before the Court on the motion of plaintiffs, Senators Seit Andres and Joshua Koshiba, for an order preliminarily enjoining defendant, the Palau Election Commission, from proceeding with the recall elections scheduled for today. By the Court's Order of July 5, 2002, Miriam Timarong, who organized the petition drive seeking to hold the recall elections, was permitted to intervene as a defendant in order to oppose the motion. Following a hearing at which the Court stated its reasons for denying the motion in open court, the Court now issues this written decision.

[1, 2] The standards for granting injunctive relief, and their applicability to the question whether an election should be enjoined, are well established. A court must consider:

1) whether plaintiffs have a substantial likelihood of success on the merits;

2) whether plaintiffs will suffer irreparable injury if the injunction is not granted;

> 3) whether the threatened injury to the plaintiffs outweighs the threatened harm the injunction will cause the defendants; and
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> 4) where the public interest lies.

Gibbons v. Etpison, 5 ROP Intrm. 273, 276 (Tr. Div. 1992). In addressing whether an election should be enjoined, the Court believes that the impact of the latter factors turns in large part on the first – whether plaintiffs have shown that they are likely to succeed in demonstrating that the constitutional requirements for holding a recall election have not been met. If they were to make that showing, then it would surely be in the public interest to avoid the expense and effort associated with carrying out a nationwide election where, by hypothesis, its results would likely be declared null and void; and the injury to plaintiffs of having to go through an unnecessary election would surely outweigh any harm that either the government or the proponents of the recall would suffer by the delay of determining whether the election should be permanently enjoined or allowed to go forward.

[3] If, on the other hand, the Court were to find that plaintiffs are unlikely to succeed or even that success was merely possible, but not probable,[1] then the other factors would weigh ⊥291 against the granting of injunctive relief. If there is a real possibility that, as the Election Commission found, the requisite number of Palauan voters have validly exercised their constitutional prerogative to propose the recall of their elected representatives, it would surely be in the public interest, and the balance of equities would certainly favor allowing the election to proceed.[2] As the Election Commission readily concedes, if it should later turn out that plaintiffs are right and that the election should not have gone forward, the Court retains its authority to declare it void. The Court therefore turns to the merits of plaintiffs' claim.

[4, 5] It is plaintiffs' primary contention that "the purported recall petitions are invalid and insufficient under the Constitution, Article IX, Section 17, and cannot be a proper basis for holding a recall election." Complaint, at 22. The Court begins, therefore, with that provision of the Constitution:

> The people may recall a member of the Olbiil Era Kelulau from office. A recall is initiated by a petition which shall name the member sought to be recalled, state the grounds for recall, and be signed by not less than twenty-five percent (25%) of the number of persons who voted in the most recent election for that member of the Olbiil Era Kelulau. A special recall election shall be held not later than sixty (60) calendar days after the filing of the recall petition. A member of the Olbiil Era Kelulau shall be removed from office only with the approval of a majority of

[1]The Court does not mean to say that plaintiffs must prove that they are certain to win, but only that that is a likely – and not merely a possible – result. The Court still has bad memories of the Florida judge who seemed to suggest that Al Gore would be entitled to a recount only if he made the seemingly impossible showing that the recount would show him to be the winner. The Court does not demand the impossible; it says only that where – as it finds below – the ultimate result is uncertain, the election should go forward.

[2]The recall provision of the Constitution, quoted in full below, directs that "[a] special recall election shall be held not later than sixty (60) calendar days after the filing of the recall petition." Const., art. IX, §17.

> the persons voting in the election, and such vacancy shall be filled by a special election to be held in accordance with law. A recall may be sought against an individual member of the Olbiil Era Kelulau no more than once per term. No recall shall be permitted against a member who is serving the first year of his first term in the Olbiil Era Kelulau.

The principal issue that the Court must ultimately address is whether the recall petitions contain a sufficient number of valid (or validly obtained) signatures. Thus, the first question to be answered is what are those numbers. The Election Commission calculated that the number of signatures needed to ask for a recall was 1527 with respect to Senator Andres and 1571 for Senator Koshiba. The Commission arrived at those figures by taking the number of votes each had received in the 2000 General Election (6108 and 6283 respectively) and multiplying it by 25%. Although plaintiffs suggest that the Commission should have utilized 25% of the total number of votes counted in the last election, the Court can find no reason to fault either the Commission's reading of the Constitution or its arithmetic. The most sensible and, in the Court's view, the only plausible reading of "the number of persons who voted in the most recent election ⊥292 for that member of the Olbiil Era Kelulau" is the number of votes cast for the member whose recall is sought. That the framers of the Constitution chose the words "for that member" belies any suggestion that they meant to refer to all the votes cast in the most recent election[3] or even "for that office" – words they could have chosen, but did not. So the question becomes: are the plaintiffs likely to show that the petitions do not contain the sufficient number of valid signatures?

[6] Plaintiffs' first argument is a sweeping one – that the Court should disregard the petitions in their entirety because they were not accompanied by affidavits of the persons who circulated the petitions, averring that they had personally witnessed the signatures and properly identified that the signatories were who they purported themselves to be. This contention is supported by cases from various U.S. jurisdictions, but it is, in the Court's view, inapt for Palau for the principal reason that Palau – unlike those U.S. jurisdictions – has neither law nor regulation requiring the submission of such affidavits or prescribing their format. Thus, while the Court could not quibble with the proposition that "petitions which fail to meet the substantial requirements of statute or rule are invalid, since these requirements are for the purpose of insuring the integrity of the . . . process," *Corbly v. City of Colton*, 278 N.W.2d 459, 461 (S.D. 1979) – that proposition has no applicability here.[4]

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[3]As the Court observed at the hearing, such an interpretation of the constitutional language, which applies to both houses of the OEK, would have the effect of immunizing from recall all of the members of the House of Delegates except the delegate from Koror, because 25% of the total votes cast exceeds the number of registered voters of every other state.

[4]Plaintiffs cite *Corbly* in support of their argument that a circulator's affidavit is a *sine qua non* of a valid petition "even in the absence of such a statute or regulation." Plaintiffs' Memorandum of Points and Authorities in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction, June 28, 2002, at 10. But although the petition in *Corbly* was filed during a three-month gap between the repeal of one form and the adoption of a new one, the court rejected the argument that "there were no . . . verification requirements at the time the petition was filed," noting that "[t]here were . . . two statutes in effect by which the legislature required the petition to be verified, even though the [State Board of Elections] had not administratively specified an exact verification form." 278 N.W.2d at 461-62.

[7, 8] Rejecting plaintiffs' argument that the absence of circulator affidavits requires the wholesale invalidation of the petitions is consistent with, if not compelled by, the Appellate Division's decision in *Gibbons v. Etpison*, 4 ROP Intrm. 1 (1993). *Gibbons* said that "the weight of authority [is] that the signatures on petitions are presumptively valid," rejecting the appellants' contention that "this presumption only applies to petitions where the circulators have sworn that the signatures are genuine and where public officials have verified that the signers were qualified voters." 4 ROP Intrm. at 9.[5] The ⊥293 court held that the challengers bore "the burden of proof on their claim that less than 25% of the registered voters signed the petition," and said that "[t]o reverse this burden, and require petitioners to demonstrate the validity of each signature would place a potentially insuperable, and unwarranted, obstacle in the way of petitioners' constitutional right of initiative." *Id.* This case, of course, involves the constitutional right of recall, but the Court can see no reason not to say equally that recall is "one of the most precious rights of our democratic process and that it is the duty of the court to jealously guard it." *See id.* at 4.

[9] *Gibbons* does not stand in the way of plaintiffs' second argument, however. Where in *Gibbons* the court noted that "plaintiffs failed to present a single person to testify that his name had been forged or procured by fraud or coercion of any kind," *id.* at 8, here plaintiffs have attempted to show that hundreds of people who signed the petitions were not told or were affirmatively misled as to the true purpose of the petitions.[6]

As the Court said at the hearing, the answer to the question whether, considering all of the evidence presented, plaintiffs have shown a substantial likelihood of succeeding on their claim that the number of valid signatures on the petitions falls below the constitutional minimum, is "maybe". Although plaintiffs have made factual and legal contentions that – if accepted uncritically – would strike enough signatures to fall below the constitutional minimum for each petition, the Court is not prepared to accept all of them at this time. For example, plaintiffs' calculations depend, in part, on the Court striking all names signed in Japanese characters as well as all signatures where the name on the petition did not precisely match the name on the Election Commission's voter registration records. As to the first, while it may be

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[5]Although it is not clear from the decision (and the Court does not recall independently), the clear implication from the appellants' having made this argument is that there were no circulators' affidavits submitted in that case. Indeed, since it appears from the subsequent discussion that public officials *had* "verified that the signers were qualified voters," *see id.* at 8, appellants' argument must have been founded on the absence of such affidavits.

[6]*Gibbons* is also distinguishable because while in that case "no attempt was made to match and compare each signature on the petition with the signatures on file of each registered voter," *id.* at 8, here the Election Commission did make an effort to do just that. This distinction cuts both ways: although it obviously assists plaintiffs' cause that the Election Commission found that between one-fourth and one-third of the signatures appearing on both petitions did not belong to registered voters, were unverifiable or were duplicative and should not be counted, this fact undercuts plaintiffs' suggestion that the Election Commission showed some predilection to approve the petitions, or bias against plaintiffs. If there were such a bias, then it seems unlikely that the Election Commission would have undertaken the detailed analysis of the signatures, but would simply have checked whether the names were of registered voters or not.

true that names in Japanese characters are easier to forge and harder to verify than names in English, the Court believes that it remains plaintiffs' burden to show that any or all of those signatures are not genuine and that there is no justification for striking them in the absence of such proof. As to the second, the Court sees no irregularity in the Election Commission making the effort to match signatures even though, as frequently done in Palau, a person may have used his father's first name instead of his last name, or a woman used her husband's name instead of her father's (or a former husband's) or may have otherwise used a name different from the name with which he or she registered to vote. The Court knows of no rule that says there must be a precise match as long as the Commission can verify that the person who signed the petitions is the same person who is registered to vote.

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Plaintiffs' proof also depends on the Court accepting at face value the more than 1,200 declarations by voters, many saying that they were affirmatively misled, who assert that they did not understand the purpose of the petitions when they signed one or both of them. The problems with accepting those declarations, however, are both factual and legal. First, the Election Commission has raised the issue that these declarations, although some were witnessed, are not affidavits sworn under penalty of perjury. The Court might overlook this deficiency on a motion for preliminary relief – after all, they are at least as authoritative as the signatures on the petitions themselves. The Court is troubled, however, by the fact that at least a few of the people on whose behalf those declarations were filed – denying their intention to support the recall effort – have already signed affidavits submitted by the intervenor, reaffirming their desire to have their names counted. As much of the testimony at the hearing made clear, there are a great many people with conflicting loyalties who may be susceptible to requests for assistance from both sides in this dispute and whose true intentions may be difficult to discern from the papers they sign.[7]

[10] Second, those declarations raise the question of how long a voter may wait before asking that his or her name be withdrawn. This is another matter that is the subject of statute or regulation elsewhere, but where Palau law is silent. The Court is inclined to recognize a person's right to withdraw his or her signature from a petition, but also to recognize that a limitation on this right is necessary both as a matter of administrative necessity – there has to be some deadline so that the Election Commission's review process may be completed[8] – but also a matter of fairness, since belated withdrawals prejudice the organizers of a petition drive who stop collecting signatures in the belief that they have gathered a sufficient amount.[9] Here, a substantial number of the declarations offered by plaintiffs were executed and submitted well

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[7]In addition, some caution is appropriate in assessing the reliability of declarations in which the declarants aver that they previously signed documents without fully understanding them.

[8]While some jurisdictions allow withdrawal only until the petition has been filed, others permit withdrawal until the appropriate agency has determined its sufficiency. *See generally* Annotation, *Right of Signer of Petition or Remonstrance to Withdraw Therefrom or Revoke Withdrawal, and Time Therefor* , 27 A.L.R.2d 604 (1953). Although the Election Commission accepts the later deadline, it argues somewhat incongruously that the cutoff date should be considered June 6, 2002, when it proclaimed the petitions to be sufficient on the basis of a statistical analysis, rather than June 21, 2002, when it informed plaintiffs' counsel that it had finally finished its name-by-name review of the petitions.

[9]If the right to withdraw were to be extended indefinitely, then arguably the Court should also give intervenor and other supporters of the petition drive the opportunity to submit additional signatures.

after any deadline that other jurisdictions have set. *See* n.8 *supra*.

Finally, it should be noted that the evidence before the Court is not one sided. Although less voluminous, intervenor has already put forward a small stack of affidavits of registered voters who swear that they signed the petitions, but whose names were not counted by the Election Commission. The Court believes that such evidence is permissible, and that it is altogether likely, given the large number of signatures ⊥295 invalidated by the Election Commission, that more of such evidence could be produced at trial,[10] adding to the numbers of qualified signatures and offsetting the reductions urged by plaintiff.

The bottom line then, is that while the Court believes that it is altogether possible that after a full presentation of the evidence, the plaintiffs might prove their case, the Court is unable to conclude that they have shown a "substantial likelihood of success on the merits," and finds that it would not be justified in granting an injunction to stop the recall election from taking place. It was and is for that reason that plaintiffs' motion is denied.

[10]Ironically, as the Court pointed out at trial, the best indication that the Election Commission was at least in some instances *too* strict in its verification procedures is the fact that many of the people who signed declarations on plaintiffs' behalf and who acknowledged signing the petitions (albeit for assertedly wrong reasons) turned up on the Election Commission's list of "not verified" – and therefore excluded – signatures.