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[Nov. 1974?]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel.
H. JOHN ROGERS,

Plaintiff

v.

CIVIL ACTION NO. 74-1455

WILLIAM B. SAXBE, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants, by their undersigned attorneys, hereby move to dismiss the above-entitled action pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds that the Court lacks jurisdiction over the subject matter of the action and the complaint fails to state a claim upon which relief can be granted.

In support of this Opposition, the Court is respectfully referred to the Memorandum in Support of Motion to Dismiss, filed herewith.

Respectfully submitted,

CAPLA A. HILLS
Assistant Attorney General

EARL J. SILBERT
United States Attorney

IRVING JAFFE
Deputy Assistant Attorney General



IRWIN GOLDBLOOM
Acting Deputy Assistant
Attorney General

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(202) 739-3300

Attorneys for Defendants.



UNITED STATES DISTRICT COURT
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Plaintiff

v.

CIVIL ACTION NO. 74-1455

WILLIAM B. SAXBE, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

STATEMENT OF THE CASE

Plaintiff in this suit asserts that he is entitled to obtain relief enjoining the Attorney General and the Special Prosecutor "from any and all actions and investigations concerning the unconditional pardon granted to former President Richard M. Nixon" (Complaint, prayer for relief (1)). Plaintiff further seeks the removal of Special Prosecutor Jaworski, an Order directing the Attorney General and/or the Court to appoint three attorneys to investigate the pardon and take further action and damages. (Complaint, prayer for relief 2-4, 6). The complaint further alleges that plaintiff is a member of the West Virginia and Supreme Court Bars and that plaintiff brings the action on behalf of a class "defined as all those citizens of the United States of America who oppose the granting of an unconditional pardon to former President Richard M. Nixon" (Complaint, para. 1, 5, prayer for relief 5).

Defendants' Motion to Dismiss should be granted because plaintiff lacks standing to maintain this action and he has failed to demonstrate the existence of a justiciable case or controversy.



ARGUMENT

A. Standing

The Supreme Court recently reaffirmed what has been a long-standing and fundamental premise of the law of federal jurisdiction--that a person cannot present any question he deems of interest to a federal court for resolution. The case or controversy requirement of Article III does not permit litigation of a "generalized grievance" where the impact is "undifferentiated and 'common to all members of the public.'" United States v. Richardson, --- U.S. ---, 42 U.S.L.W. 5088 (June 25, 1974). As the Chief Justice observed in his opinions for the Court in these cases:

The party who invokes the [judicial] power must be able to show . . . that he has sustained or is in immediate danger of sustaining some direct injury . . . , and not merely that he suffers in some indefinite way in common with people generally. [Richardson, supra, at 5078 (quoting from Frothingham v. Mellon, 262 U.S. 447, 488).]

* * * * *

[s]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. [Schlesinger v. Reservists Committee to Stop the War, supra, 42 L.W., at 5092.]

Plaintiff does not assert any concrete injury which differentiates his interest from that common to all members of the public.

With respect to his challenge to the pardon, plaintiff advances nothing but a generalized grievance about the conduct of government, which the Supreme Court has clearly determined is not cognizable by a federal court. This Court, in Koffler



v. Ford, Civil No. 74-1406 (Judge Gesell, September 25, 1974), rejected a similar challenge to the pardon for lack of standing and held:

. . . when the pardon is granted this act cannot be reviewed by a court on the mere complaint of a citizen. The fact that plaintiff is a taxpayer, an attorney and legal educator gives him no special standing different from any other citizen. See Schlesinger v. Reservists Committee to Stop the War, 94 S.Ct. 2925 (1974); United States v. Richardson, 94 S.Ct. 2940 (1974). [Koffler v. Ford, D.D.C. Civil No. 74-1406 (September 25, 1974).]

Plaintiff, therefore, lacks standing to maintain this action and it should be dismissed.

An additional jurisdictional defect in this complaint is its failure to demonstrate the existence of a justiciable case or controversy. This jurisdictional defect exists wholly apart from the plaintiff's lack of standing to maintain this action.

A "threshold requirement imposed by Art. III of the Constitution" is "that those who seek to invoke the power of federal courts must allege an actual case or controversy." O'Shea v. Littleton, 414 U.S. 488, 493 (1974). In order to establish a case or controversy "[a]bstract injury is not enough. . . ." The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical". Even a "constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." Golden v. Zwickler, 394 U.S. 103, 110 (1969). See also, Laird v. Tatum, 408 U.S. 1 (1972). The "threshold" test, again, is that plaintiff go beyond a "hypothetical" or "conjectural" grievance and allege an immediate and real case or controversy. Plaintiff clearly fails this test.



B. A Decision Not To Prosecute A Particular Individual Is Discretionary And Not Subject To Judicial Control.

Plaintiff directs his claims against the prosecuting authorities (the Attorney General and the Special Prosecutor) and seeks to focus prosecutorial efforts on a particular individual. Plaintiff may not maintain an action seeking such relief:

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. * * * Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. [Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) (citations omitted)].

For this reason the District of Columbia Circuit Court of Appeals has consistently rejected attempts to interfere with the prosecutor's discretion. Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967), cert. denied, 381 U.S. 735; Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 ("It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General."); Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965), affirming 219 F. Supp. 762. This fundamental principle should result in dismissal of the action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

Respectfully submitted,

CARLA A. HILLS
Assistant Attorney General

EARL J. SILBERT
United States Attorney

IRVING JAFFE
Deputy Assistant Attorney General

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel.
H. JOHN ROGERS,

Plaintiff

v.

WILLIAM B. SAXBE, et al.,

Defendants.

CIVIL ACTION NO. 74-145

O R D E R

This matter having come before the Court on the Defendants Motion to Dismiss filed by defendants and the Court being fully advised in the premises, it is this ____ day of December, 1974

ORDERED that the Defendants' Motion to Dismiss be, and hereby is, granted; and it is

FURTHER ORDERED that the action be, and hereby is, dismissed.

UNITED STATES DISTRICT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Defendants' Motion to Dismiss, supporting memorandum, and proposed Order upon counsel for plaintiff by placing copies of the foregoing papers in the mail addressed to plaintiff at 2114 Indianola Avenue, Columbus, Ohio 43201, this 6th day of December, 1974.

JEFFREY AXELRAD



For file
P.

THE WHITE HOUSE
WASHINGTON

12/10/74

Spoke with Axelrad - neither President nor anyone connected with him is a party or is otherwise involved. Suit is against Attorney General and Special Prosecutor and these documents only sent for our information due to the subject matter, i.e., the pardon.

BR.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES, ex rel.
H. JOHN ROGERS,

Plaintiff

v.

CIVIL ACTION NO. 74-1455

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Defendants.

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UNITED STATES DISTRICT COURT
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O R D E R

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ORDERED that the Defendants' Motion to Dismiss be, and hereby is, granted; and it is

FURTHER ORDERED that the action be, and hereby is, dismissed.

UNITED STATES DISTRICT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Defendants' Motion to Dismiss, supporting memorandum, and proposed Order upon counsel for plaintiff by placing copies of the foregoing papers in the mail addressed to plaintiff at 2114 Indianola Avenue, Columbus, Ohio 43201, this 6th day of December, 1974.

JEFFREY AXELRAD