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*Minn. Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973) (L. Graeme Bell, III, Native American Rights Fund, Washington, D. C., Thomas W. Fredericks and David H. Getches, Native American Rights Fund, Boulder, Colo., Daniel M. Rosenfelt, Eric E. Van Loon, Center for Law and Education, Cambridge, Mass., for plaintiffs).

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argument presented by counsel for both parties, the Court awards the plaintiff's attorney \$1,750 in attorney's fees for which the defendant is hereby liable.

[3] In view of the above ruling, the Court need not reach the other issues presented by the parties in this case and also denies defendant's motion for a new trial based on newly discovered evidence.<sup>6</sup>



The MINNESOTA CHIPPEWA TRIBE  
et al., Plaintiffs,

v.

Frank C. CARLUCCI, etc., et al.,  
Defendants.

Civ. A. No. 175-73.

United States District Court,  
District of Columbia.

April 25, 1973.

Action, inter alia, to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act, wherein case came before court on Government's suggestion for dismissal of action as to the President. The District Court, June L. Green, J., held that the action was maintainable over objection of lack of standing, inasmuch as plaintiffs were intended beneficiaries of the Indian Education Act. The Court further held that, although, under the Act, the President had discretion to choose whom to appoint, inasmuch as he apparently had no discretion to decide whether the Council should or should not be constituted, the action was

6. Subsequent to the in-court announcement of summary judgment for the plaintiff, the defendant submitted a motion for a new trial supported by an informal opinion letter from the Federal Trade Commission which stated that a disclosure statement similar to the one in the instant

not subject to dismissal on basis that it related to executive, discretionary or political acts.

Suggestion for dismissal of action as to President denied.

Appointments to the National Advisory Council on Indian Education were made by the President of the United States May 5, 1973.

In a separate order of May 8, 1973, the Court dismissed the case as moot as to the President.

#### 1. Federal Civil Procedure $\S$ 656

Complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant.

#### 2. Courts $\S$ 284(3)

Federal district court had subject matter jurisdiction of complaint seeking to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. 5 U.S.C.A. §§ 701-706; 28 U.S.C.A. §§ 1331, 1337, 1361, 1362.

#### 3. United States $\S$ 26

President of United States is not completely immune from judicial process for sole reason that he is President.

#### 4. United States $\S$ 26

Judiciary has jurisdiction over President of United States to compel him to perform a nondiscretionary act required by law.

#### 5. Mandamus $\S$ 23(1)

Intended beneficiaries of Indian Education Act had standing to maintain action to require President of United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. Fed.

case appeared to be in substantial compliance with the Act and Regulation Z. As the letter states, it is only an "informal staff opinion which is advisory in nature and is in no way binding upon the Commission" and accordingly not binding on this Court.

Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat. 334.

#### 6. Mandamus ⇐76

Although, under Indian Education Act, President of United States had discretion to choose whom to appoint to National Advisory Council on Indian Education, inasmuch as he apparently had no discretion to decide if the Council should or should not be constituted, action brought to require him to appoint members of Council was not subject to dismissal on basis that the action related to executive, discretionary or political acts. Indian Education Act, § 442(a-c), 86 Stat. 334.

#### 7. Mandamus ⇐151(2)

Where it appeared that only President of United States had been given power to appoint members of National Advisory Council on Indian Education, but he had neither made such appointments nor delegated his power to another and no implied delegation appeared, action to require President to appoint members of Council could be maintained over objection that joinder of President as party was unnecessary in that plaintiffs could be afforded complete relief by suing member of President's Cabinet. Fed.Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat. 334.

L. Graeme Bell, III, Native American Rights Fund, Washington, D. C., Thomas W. Fredericks and David H. Getches, Native American Rights Fund, Boulder, Colo., Daniel M. Rosenfelt, Eric E. Van Loon, Center for Law and Education, Cambridge, Mass., for plaintiffs.

Harold H. Titus, Jr., U. S. Atty., Arnold T. Aikens and Michael A. Katz, Asst. U. S. Attys., Washington, D. C., for defendants.

1. Part D, § 442(a) of the Act provides, "There is hereby established the National Advisory Council on Indian Education . . . which shall consist of fifteen members who are Indians and Alaska Natives appointed by the President of the United States. Such appointments

#### ORDER

JUNE L. GREEN, District Judge.

In this action plaintiffs seek *inter alia* to require the President of the United States to appoint members of the National Advisory Council on Indian Education pursuant to The Indian Education Act, Title IV of Pub.L.No.92-318, 86 Stat. 334, approved by the President June 23, 1972.<sup>1</sup> In answering the complaint, the government admitted that the President is charged with duties and responsibilities under the statute in question. The answer further admitted that the President has heretofore neither made any appointments to the Council, nor delegated his power to another.

The case is before the Court on the government's "Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States". Fed.R.Civ. P. 12(h)(3) provides,

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[1] In determining whether the Court has jurisdiction over the subject matter, the Court is reminded that

" . . . where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted [and not here relevant] must entertain the suit. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. . . ." Bell v. Hood, 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

shall be made by the President from lists of nominees furnished, from time to time, by Indian tribes and organizations, and shall represent diverse geographic areas of the country." The complaint does not refer to any lists.

Moreover, the complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant. *Caserta v. Home Lines Agency, Inc.*, 154 F.Supp. 356 (S.D.N.Y.1957), *aff'd.*, 273 F.2d 943 (2d Cir. 1959).

[2] A review of the complaint and plaintiffs' jurisdictional statement indicates that the Court has subject matter jurisdiction and that this case may eventually be decided on the merits. Plaintiffs have cited several statutes, e. g., 28 U.S.C. §§ 1331, 1337, 1361, 1362 and 5 U.S.C. §§ 701-706, and the Court is satisfied on the question.

Since the government contends that any claim against the person of the President is barred by the separation of powers doctrine, the Court now addresses itself to this issue.

[3, 4] The President of the United States is not completely immune from judicial process for the sole reason that he is President. *Atlee v. Nixon*, 336 F. Supp. 790 (E.D.Pa.1972), (dictum); *cited with approval in Meyers v. Nixon*, 339 F.Supp. 1388 (S.D.N.Y.1972) (dictum). Chief Justice Marshall held long ago that the judiciary has jurisdiction over the President to compel him to perform a nondiscretionary act required by law. *United States v. Burr*, 25 Fed.Cas. p. 30, No. 14,692d (C.C.A.Va.1807) (subpoena *duces tecum* against the President held proper).

Suits against the President have generally been unsuccessful for several reasons, none of which appears present in the case *sub judice*.

[5] The first reason is lack of standing. *E. g.*, *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972). In the case at bar, it appears plaintiffs have a personal stake and interest in the outcome of the controversy and might suffer actual injury in fact. Plaintiffs are intended beneficiaries of the Indian Education Act. The National Advisory Council clearly was intended to play a key role in administration of the Act. It appears

that the implementation of the Act may be impossible or impracticable unless the Council is constituted by the President.<sup>2</sup>

The second reason suits against the President have foundered is that they relate to "executive" or "discretionary" acts. *Mississippi v. Johnson*, 4 Wall (71 U.S.) 475, 18 L.Ed. 437 (1866). More recently, the Supreme Court has defined a question as "political" if it involves one of the following:

" . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

[6] Based on the present record it appears that this case does not fall within the *Baker* definition, and that *Mississippi* is distinguishable. Plaintiffs do not pray that the Court determine whether Indians are recognized as tribes. They do not ask that the Court alter the special relationship between Indians and the United States. Their claim does not involve the President's role as Commander in Chief of our armed forces or as an architect of our foreign policy. They do not seek to enjoin the President from executing the law.

Plaintiffs' suit does not relate to ongoing supervisory acts which require the exercise of judgment, but to single specific "one-shot" acts, appointments to the Council. Although the President clearly has discretion to choose whom to appoint to the Council, he apparently has no dis-

2. The responsibilities of the Council are described in § 442(a)-(c) of the Act.

cretion to decide if the Council should or should not be constituted. The Indian Education Act, § 442(a) provides that ". . . appointments [to the Council] shall be made by the President. . . ." (emphasis added). See *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971) (mandamus will issue to require the exercise of permissible discretion.)

[7] In the third place, joinder of the President as a party defendant is generally unnecessary: a plaintiff may be afforded complete relief by suing a member of the President's Cabinet. *E. g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). In the instant case, however, it appears that plaintiffs' only remedy is to sue the President directly. Only the President is given the power to make appointments to the Council. As earlier noted, the President has neither made such appointments nor delegated his power to another. The record does not suggest any implied delegation.

For the foregoing reasons, it is by the Court, this 25th day of April 1973,

Ordered that the Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States, should be and the same hereby is denied.



**Lester M. ANDERSON, Plaintiff,**

v.

**FAIRCHILD HILLER CORPORATION,  
Defendant.**

**Civ. No. A-10-73.**

United States District Court,  
D. Alaska.

May 23, 1973.

Personal injury action against helicopter manufacturer. Defendant moved for summary judgment. The District Court, Plummer, J., held that plaintiff

could not maintain claim for breach of warranty for lack of privity and that claim in strict liability was barred by two-year statute of limitations.

Motion granted.

**1. Sales ⇨409**

Four-year statute of limitations for breaches of contract covered by UCC applies even though claim is for personal injuries. AS 45.05.242.

**2. Products Liability ⇨15**

Sellers of defective products are strictly liable, without regard to warranties or disclaimers, for personal injuries proximately caused by defect even though defect is not unreasonably dangerous.

**3. Products Liability ⇨71**

**Sales ⇨425**

Remedy in strict liability is available in every personal injury case involving breach of implied warranty of merchantability.

**4. Sales ⇨279**

Warranties of merchantability under UCC cover not only personal injuries but also losses of property and commercial profits. AS 45.05.222.

**5. Sales ⇨255**

Plaintiff could not maintain personal injury claim for breach of warranty against helicopter manufacturer in absence of privity of contract, under Alaska law.

**6. Limitation of Actions ⇨31**

Under Alaska law, action to enforce strict liability was governed by two-year limitation statute governing personal injury claims not otherwise provided for. AS 09.10.070.

**7. Products Liability ⇨5**

Strict liability is more nearly akin to tortious negligence than to contractual warranty, because no contract is required and strict liability may not be disclaimed.