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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

TABLE OF CONTENTS

I. NATIVE AMERICANS/JURISDICTION

NATIVE AMERICAN TRIBAL COURT DOMESTIC RELATIONS DETERMINATION ENTITLED TO FULL FAITH AND CREDIT PURSUANT TO INDIAN CHILD WELFARE ACT OF 1978 DESPITE CHALLENGE BY STATE OF ALASKA BASED ON PUBLIC LAW 280. *Native Village of Venetie I.R.A. Council v. Alaska,* 918 F.2d 797 (9th Cir. 1990).

Plaintiffs Margaret Solomon and Nancy Joseph, Athabascan Indians from two native villages in Alaska, adopted babies through their respective tribal courts. The State of Alaska refused to recognize the adoptions and denied the plaintiffs Aid to Families with Dependent Children (AFDC) benefits. The adoptive mothers and their native village councils brought suit in the United States District Court for the District of Alaska, seeking to enjoin the state and its officials from refusing to recognize the adoptions. The district court dismissed the plaintiffs' claim. On appeal to the United States Court of Appeals for the Ninth Circuit, *Held: Reversed and remanded.*

The court of appeals first decided that the district court had jurisdiction to hear this case pursuant to 28 U.S.C. § 1362 (1988), which grants original federal question jurisdiction to federal district courts. The court

then found that the suit was not barred by the eleventh amendment because the states had consented to suits against them by Indian Tribes when the states joined the Union. This consent extended to suits by native villages in Alaska. The plaintiffs, however, were barred from receiving retroactive relief, though injunctive or declaratory relief was available to them.

The state contended that the plaintiffs lacked a federal cause of action. The court of appeals held that the native villages alleged a valid federal cause of action since claims "of sovereign power, as a 'matter of federal statute' and 'reserved powers' " presented a cognizable federal question. *Native Village*, 918 F.2d at 802 (citing *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474-75 (9th Cir. 1989)). The court further held that Congress did not intend the Indian Child Welfare Act to preclude federal claims by native villages based on their right of self governance or under the Act's full faith and credit clause. Due to the "unique legal status of Indians in American jurisprudence," *Native Village* at 802, the rule of *Thompson v. Thompson*, 484 U.S. 174 (1988), does not apply. The Supreme Court in *Thompson* held that the full faith and credit clause of the Parental Kidnapping Prevention Act of 1980 did not create a cause of action in favor of the litigants in a custody dispute.

The court of appeals stated that ambiguous provisions of statutes dealing with American Indians are to be liberally construed to benefit the Indians. The court could find no reason to deny a federal forum to the plaintiffs, especially in light of the historical role of state courts in ignoring the vital interests of American Indians.

Turning from jurisdictional issues to the merits of the case, the court determined that, under the Indian Child Welfare Act, tribal courts have exclusive jurisdiction over Indian children residing on reservations. With respect to children who do not reside on their tribe's reservation, state courts have concurrent jurisdiction with tribal courts, but must refer disputes to tribal courts unless good cause is shown. The state disputed the statute's application to the Indian villages, arguing that Alaska is governed by Public Law 280, a 1953 statute providing that tribes in Alaska (and certain other states) can only invoke jurisdiction over domestic matters after petitioning the Secretary of the Interior. The plaintiffs had not petitioned the Secretary, but they asserted that their inherent sovereignty gave them the necessary jurisdiction. The state asserted, in effect, that the statute divested the tribes of their inherent authority, and because these tribes had not petitioned the Secretary, they had no independent jurisdiction.

The court disagreed, noting that Public Law 280 had never been construed as a divestiture statute, but rather as allowing Indian tribes to

exercise such basic governmental functions as prescribing law and punishing tribal members for violations of tribal law. The court explained that Indian tribes are sovereign because of their original sovereignty. They do not need Congress to affirmatively grant them authority over their tribal members; that authority is presumed unless and until Congress affirmatively takes it away. Therefore, ruled the court, the plaintiff villages are sovereign if they "are the modern-day successors to an historical sovereign band of native Americans." *Native Villages* at 811. The court remanded this successor issue to the district court for determination.

Finally, the court noted that state authorities who had considered the issue found that Public Law 280 provided concurrent jurisdiction between state and tribal courts. Thus, the Ninth Circuit harmonized the Indian Child Welfare Act with Public Law 280 and concluded that the two statutes were ambiguous as to whether the "states have exclusive or concurrent jurisdiction over child custody determinations where the tribe has not petitioned for exclusive or referral jurisdiction." *Native Village* at 811. The court then resolved the ambiguities in favor of the Indians, granting concurrent jurisdiction to the tribal courts as long as the villages could prove to the satisfaction of the district court that they are the "modern-day successors to an historical sovereign band of native Americans." *Id. Significance*—The Ninth Circuit holds that Alaska must give full faith and credit to tribal court adoption decrees if the tribe can prove that it is a linear descendant of a sovereign native American Indian tribe.

II. International Trade

Tariff Act of 1930 Provision Requiring Case-By-Case Determination by International Trade Commission of What Constitutes Change in Circumstances Sufficient to Review Existing Antidumping Order Upheld Over Challenge to Legal Standard by Importer Subject to Antidumping Order. *Avesta AB v. United States,* 914 F.2d 233 (Fed. Cir. 1990).

In 1973, the United States Tariff Commission issued a finding that Swedish stainless steel plate was being placed in the United States market at less than fair value. The Commission issued an antidumping order. In 1985, Avesta AB, the sole Swedish producer and exporter of steel plate, sought to have the antidumping order revoked or modified on the ground of changed circumstances under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b). The Act requires the International Trade Commission (ITC) to investigate whether to revoke an antidumping order when the Commission "receives a request which it determines as a

threshhold matter 'shows changed circumstances sufficient to warrant a review.' " *Avesta*, 914 F.2d at 234-35 (quoting 19 U.S.C. § 1675(b)(1)).

The ITC determined that alleged changed circumstances did not warrant review of the antidumping order. Avesta AB appealed to the Court of International Trade which affirmed the ITC's decision. In 1987, Avesta amended its list of changed circumstances and again petitioned for review. The ITC again held that the alleged changed circumstances did not warrant review, and the Court of International Trade again affirmed. The United States Court of Appeals for the Federal Circuit *Held: Affirmed.*

Avesta argued on appeal that the ITC committed "a clear error of law by failing to apply the appropriate legal standard as to what qualifies as 'changes in circumstances *sufficient to warrant review*' under section 751(b)." *Avesta*, 914 F.2d at 235 (quoting 19 U.S.C. § 1675(b)(1)) (emphasis by the court). Avesta asserted that the statutory terms are not self-executing and that because they are "indeterminate" in meaning and application, they fail to meaningfully constrain the ITC's exercise of discretion. Further, Avesta alleged that the ITC failed to apply any guiding legal standard in reaching its decision. Avesta argued that a different standard, a mere "*reasonable appearance*" of changes in circumstances, should be applied on review. *Avesta*, 914 F.2d at 235 (emphasis original).

The court of appeals reviewed the long history of the practice of case-by-case determination by the ITC and noted that the practice was codified in the original statute in 1979 and preserved through amendments to the statute in 1984. The Court noted that Congress could have easily adopted a different standard of review had it so desired. Thus the court held that substantial deference must be applied to the commission's "determinations so long as they possess a rational basis in fact." *Avesta*, 914 F.2d at 237. The court then determined that since Avesta had not demonstrated sufficient changed circumstances, the commission's decision was to stand. *Significance*—The Federal Circuit rules that an ITC decision to review an antidumping order is discretionary, and the court will give substantial deference to the decision as long as it possess a rational basis in fact.

III. War

UNDER ARTICLE I, SECTION 8, CLAUSE 11 OF THE UNITED STATES CONSTITUTION, A FEDERAL DISTRICT COURT MAY ENJOIN MILITARY ACTION ONLY IF CONGRESS HAS DECLARED WAR OR THE PRESIDENT IS ABOUT TO COMMENCE HOSTILTIES—*Dellums v. Bush*, 752 F. Supp.

1141 (D.D.C. 1990).

On August 2, 1990, Iraq invaded Kuwait. Almost immediately President Bush sent United States armed forces to the Persian Gulf and undertook other steps, such as a naval blockade of Iraq, to deter Iraqi aggression and protect Saudi Arabia. Over the following months President Bush sent more United States troops to the gulf area and, on November 8, 1990, announced "that the objective was to provide 'an adequate *offensive* military option' " should it be required. *Dellums*, 752 F.Supp. at 1143 (emphasis original). At no time did Congress declare war on Iraq pursuant to Article 1, Section 8, Clause 11 of the United States Constitution.

Various members of Congress sought an injunction in the United States District Court for the District of Columbia to prevent the President from commencing offensive hostilities against Iraq absent a formal declaration of war or other congressional approval. The Department of Justice, on behalf of the President, argued that: (1) a political question was presented; (2) the plaintiffs lacked standing; (3) the doctrine of remedial discretion was applicable; and (4) the case was not ripe for judicial decision. The United States District Court for the District of Columbia *Held: Injunction Denied.*

The Constitution gives Congress the power to declare war, gives the President the executive power and makes him Commander in Chief of the Army and Navy. From these powers, the Department of Justice argued that the construction of the war and military powers is a non-justiciable political question. It argued that the question of whether the offensive actions taken by United States military forces constituted war was not one of "objective fact but involve[d] an exercise of judgment based upon all the vagaries of foreign affairs and national security." *Dellums*, 752 F. Supp. at 1145. The district court found this argument to be too broadly sweeping in that it would effectively deny Congress its constitutional power to declare war. In addition, according to the court, although the Constitution gives the Executive branch power to conduct foreign affairs, that grant does not automatically exclude judicial review. In fact, courts have historically determined whether the United States was at war for treaty, statutory, and contractual purposes.

The Department of Justice next argued that the plaintiffs lacked standing. The district court also rejected this argument. The court found that the congressmen had standing, as they alleged both (1) that they will personally suffer an actual or threatened injury, and (2) that the injury can be traced to the challenged act, which "is likely to be redressed by a favorable decision." *Dellums*, 752 F. Supp. at 1147 (quoting *Valley Forge Christian College v. Americans United for Separation*

of Church and State, Inc., 454 U.S. 464, 472 (1982)). Although the harm here alleged was a future harm to the plaintiffs' rights to vote on declaring war, they need not wait for the harm to occur, as the harm was "both 'real and immediate' not 'conjectural' or 'hypothetical.' " *Dellums*, 752 F. Supp. at 1147 (quoting *O'Shea v. Littleton*, 414 U.S. 448, 494 (1974)). The court concluded, therefore, that the plaintiffs had standing.

The court also rejected the Department of Justice's argument that the court should use its remedial discretion and allow the political departments to settle the matter. The court concluded that doctrine is applicable when a Congressman sues in court to redress a problem better solved in Congress. The court went on the explain that the doctrine has been applied generally when "the congressional plaintiffs were involved in intra-congressional battles . . . or were seeking a ruling on the constitutionality of a statute." *Id.* at 1148. These were not the issues in the present case, said the court, because the plaintiffs could not get relief within the Congress. The President still could begin offensive military actions if he believed that the executive branch is constitutionally empowered to do so. Therefore, the court concluded that it should hear this case.

Finally, the Department of Justice argued that the case is not yet ripe for judicial determination. The court agreed finding that the plaintiffs' case failed the ripeness requirement because neither the Legislative nor the Executive "branch had taken action asserting its constitutional authority," *id.* at 1150 (quoting *Goldwater v. Carter*, 444 U.S. 996, 997 (1979)), and therefore the case was not ripe. *Significance*—A federal district court rules that it will enjoin offensive military operations undertaken by the President only if Congress has affirmatively asserted its constitutional authority to not declare war, and the court determines that the President has committed to war.