TRIBAL SUPREME COURT PROJECT MEMORANDUM

FEBRUARY 7, 2017
UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (http://sct.narf.org).

On Tuesday, January 30, 2017, President Trump announced his nomination of Judge Neil Gorsuch to fill the vacancy on the Supreme Court of the United States created by the death of Justice Antonin Scalia. Judge Gorsuch has served on the United States Court of Appeals for the Tenth Circuit since 2006, nominated by President George W. Bush and confirmed by the U.S. Senate by unanimous consent (voice vote). Senator Grassley, Chairman of the U.S. Senate Judiciary Committee, has announced a six-week timeline for the Committee to schedule confirmation hearings for Judge Gorsuch as the next Associate Justice of the Supreme Court. In preparation for these hearings, the Tribal Supreme Court Project, through the National Congress of American Indians and the Native American Rights Fund, will closely review Judge Gorsuch's background and record as it relates to federal Indian law and the sovereign interests of Indian tribes. We will provide a full report to tribal leaders and advocates prior to the confirmation hearings.

Judge Gorsuch hails from the West, with the Tenth Circuit encompassing six states: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming; and the territory of 76 federally recognized Indian tribes. NCAI, NARF and other advocates throughout Indian country have long sought the nomination of Justices with knowledge of federal Indian law, and more generally with experience on western issues directly impacting Indian tribes such as water law and public lands. Western experience is lacking in the current makeup of the Court, and is a vitally important perspective. As an example, Justice Sandra Day O'Connor came to the Court in 1981 as a former attorney, legislator and judge for the State of Arizona, and participated in the 2001 historic visit to Indian reservations to learn more about tribal judicial systems and federal Indian law. Judge Gorsuch appears to share a similar interest, joining a group of Tenth Circuit Judges in 2007 to attend the NCAI Annual meeting in Denver and to participate in a dialogue with the Litigation and Governance Committee, chaired by John Echohawk. Judge Gorsuch appears to have significantly more experience with Indian law cases than other recent Supreme Court nominees. His opinions have commonly recognized Tribes as sovereign governments, although these cases only addressed a relatively narrow set of issues.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case:

LEWIS V. CLARKE (NO. 15-1500) – On January 9, 2017, the Court heard oral argument in *Lewis v. Clarke* which involves the question of whether the doctrine of tribal sovereign immunity extends to an employee of the tribe who is acting within the scope of his employment. The petitioners—the Lewises—are a non-Indian couple who were rear-ended by a limousine driver employed by the Mohegan Tribal Gaming Authority on I-95 outside the Tribe's reservation in Connecticut.

During oral argument, petitioners contend that the sovereign immunity of an Indian tribe does not bar suit against Mr. Clarke since they are suing him in his individual-capacity for a tort committed outside the reservation and did not name the Tribe as a party to the suit. In amending their state court complaint, the petitioners had dropped their suit against the Tribal Gaming Authority, and proceeded against Mr. Clarke in his individual capacity. The trial court, relying on *Maxwell v. San Diego* (9th Cir. 2013), held that the doctrine of tribal immunity does not apply when the Tribe is neither a party, nor the real party in interest because the remedy, and the damages sought will be paid by the defendant himself, and not the Tribe. The Connecticut Supreme Court distinguished *Maxwell* (a case involving claims of gross negligence), reversed the trial court, and held that the doctrine of tribal sovereign immunity extends to the driver as an employee of a Tribe who was acting within the scope of his employment when the accident occurred. The petitioners specifically requested that the Court resolve this conflict among the lower courts. The question presented in the cert petition is: "Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." Further, petitioners argued that an Indian tribe cannot expand its sovereign immunity from suit to torts committed off the reservation and has no authority to deprive nonmember tort victims of their state-law right to recover for their injuries.

On behalf of the United States, the Solicitor General argued that tribal sovereign immunity is not implicated in this case since it involves a suit against a tribal employee in his individual-capacity – not in his official capacity. Accordingly, although tribal sovereign immunity does not bar such suits against tribal employees, tribal employees may raise the related but distinct defense of official immunity. In its amicus brief in support of reversing the lower court, the United States has argued:

> The Connecticut Supreme Court . . . h[eld] that a claim directly related to a tribal employee's performance of his official duties is a claim against the sovereign and could not be considered a personal-capacity claim. Those holdings are directly contrary to the settled rule that distinguishing between a personal-capacity suit and an official-capacity suit turns not on the conduct that gave rise to the suit, but on the party against whom relief is sought.
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> Although sovereign immunity does not bar personal-capacity suits against employees of a sovereign, employees who are sued in their personal capacities may raise the related but distinct defense of official immunity. For negligence actions, this Court held that federal common law immunized federal employees from liability arising out of actions that involve the employee's exercise of "discretionary" judgment. *Westfall v. Erwin*, 484 U.S. 292, 295-297 (1988). That common-law rule reflects a balance between the benefits and costs of insulating government employees from suit.

Questions from the Court then focused on whether the defense of official immunity was properly before it in this case, or whether the question of official immunity needed to be decided on remand to the Connecticut state courts. In response, Mr. Clarke and the Tribe focused on why tribal sovereign immunity applies in this case:

> [T]he Mohegan tribe is asking for the same protections from suit that every other sovereign enjoys. If Clarke were a Federal employee, a foreign employee, or a Connecticut State one, this suit would be barred. There's no reason the rule should be different for tribes. And, indeed, for the last 50 years, it hasn't been ever since the Davis decision in 1968. Lower courts have given tribal employees a broad immunity from tort liability until the Ninth Circuit recently reversed course.

As the argument unfolded, a majority of the Justices focused their questions on whether the Tribe should be considered as the real party in interest based on its indemnification statute, but expressed skepticism regarding whether the Lewises should be barred from seeking relief in state court against Mr. Clarke. A copy of the oral argument transcript and the briefs filed in this case are available at http://sct.narf.org/caseindexes/lewis_v_clark.html.

The Project worked directly with the attorneys representing Mr. Clarke and the interests of the Mohegan Tribe to develop an effective amicus brief strategy. A total of four amicus briefs were filed in support: (1) Brief amici curiae of the National Congress of American Indians, the Navajo Nation, et al. (joined by the States of Texas, New Mexico, Colorado, Arizona and Oregon); (2) Brief amici curiae of Ninth and Tenth Circuit Tribes (a total of 21 Tribes); (3) Brief amici curiae of Seminole Tribe of Florida, et al.; and (4) Brief amici curiae of The Otoe-Missouria Tribe of Indians, et al.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

The following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

CITY OF MYTON V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (NO. 16-868) – On January 6, 2017, the City of Myton filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the town lies entirely with the boundaries of the reservation and is "Indian country" for purposes of determining criminal jurisdiction. The Tribe's brief in opposition is due on March 13, 2017.

ALTO V. JEWELL (NO. 16-799) – On December 19, 2016, petitioners, former enrolled tribal members of the San Pasqual Band of Mission Indians, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the 2011 decision of the Assistant Secretary of Indian Affairs, which reversed an earlier 1995 decision upholding the enrollment of petitioners, was not barred by the doctrines of issue or claim preclusion, and was not arbitrary, capricious or an abuse of discretion. On January 23, 2017, the United States filed a waiver of its right to respond.

MEYERS V. ONEIDA TRIBE OF WISCONSIN (NO. 16-745) – On December 7, 2016, a petition was filed seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which affirmed the district court and held the Tribe has sovereign immunity from a putative class action lawsuit brought pursuant to the Federal Fair Credit Reporting Act. The Tribe's brief in opposition is due on February 8, 2017.

CITIZENS AGAINST RESERVATION SHOPPING V. JEWELL (NO. 16-572) – On October 27, 2016, a non-Indian group filed a petition seeking review of a decision by the U.S. Court of Appeals for the District of Colombia Circuit which affirmed the district court and upheld the decision of the Secretary to take land in trust for the Cowlitz Tribe based on *Chevron* deference applicable to the two-part inquiry in concluding that the Cowlitz Tribe is a "recognized Indian tribe now under Federal jurisdiction." On November 28, 2016, an amicus brief in support of Citizens Against Reservation Shopping was filed by the California Tribal Business Alliance, the Mooretown Rancheria of Maidu Indians and the United Auburn Indian Community. The United States brief in opposition is due on February 17, 2017.

PATCHAK V. JEWELL (NO. 16-498) – On October 11, 2016, David Patchak, a non-Indian landowner (who successfully argued before the Supreme Court in 2012 that he had prudential standing to bring an APA action challenging the acquisition of trust land for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians/Gun Lake Tribe) filed a petition seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held that the Gun Lake Trust Land Reaffirmation of 2014, a stand-alone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, was constitutionally sound and removed jurisdiction from the federal courts over any actions relating to that property. On November 14, 2016, a group of Federal Court Scholars filed an amicus brief in support of the petitioner. On November 11, 2016, the Tribe filed its brief in opposition. On November 14, 2016, the United States filed a waiver of its right to respond, and the petition was scheduled for conference on January 6, 2017. However, on December 15, 2016, the Court requested a response brief from the United States which is due on February 16, 2017.

TUNICA-BILOXI GAMING AUTHORITY V. ZAUNBRECHER (NO. 15-1486) – On May 26, 2016, a petition was filed seeking review of a decision by the Louisiana Court of Appeals which held that state courts have subject matter jurisdiction over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment with the Tribe at the tribal-owned casino located on tribal trust land. The brief in opposition was filed on July 11, 2016, and the petition was scheduled for conference on September 26, 2016, but the Court has not yet taken any action.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

AGUAYO V. JEWELL (NO. 16-660) – On January 23, 2017, the Court denied a petition filed by former enrolled tribal members of the Pala Band of Mission Indians seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court and held that the Bureau of Indian Affairs did not act arbitrarily and capriciously when it concluded that, according to tribal law, it had no authority to intervene in a tribal membership dispute.

R.P. V. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES (NO. 16-500) – On January 9, 2017, the Court denied a petition filed by the non-Indian foster parents of Alexandria P. ("Lexi") seeking review of a decision by the Court of Appeal of the State of California which affirmed the lower court and held that the foster parents failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA).

MACKINAC TRIBE V. JEWELL (NO. 16-539) – On January 9, 2017, the Court denied a petition filed by the Mackinac Tribe seeking review of a per curiam opinion of the United States Court of Appeals for the District of Colombia Circuit which held that the Tribe must exhaust its administrative remedies for federal

acknowledgement under Part 83 prior to making a claim of federal recognition for purposes of requiring the Secretary of the Interior to conduct an IRA election under Part 81.

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA V. JEWELL (NO. 16-616) – On January 9, 2017, the Court denied a petition filed by the Nisenan Tribe, a non-federally recognized Indian tribe that was a party to the *Tillie Hardwick* class action litigation, seeking review of a decision by the U.S Court of Appeals for the Ninth Circuit which affirmed the district court's dismissal of the Tribe from the *Tillie Hardwick* case effective, *nunc pro tunc*, as of 1983, and then dismissed its 2009 action as time-barred under the six-year statute of limitations.

WOLFCHILD V. REDWOOD COUNTY (NO. 16-286) – On November 7, 2016, the Court denied a petition filed by the lineal descendants of the loyal Mdewakanton which sought review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that they did not have cause of action under federal common law for violation of possessory rights to aboriginal land, and that the 1863 Act that authorized the Interior Secretary to set apart land for loyal Mdewakanton did not create private remedy.

PRO-FOOTBALL, INC. V. BLACKHORSE (NO. 15-1311) – On October 3, 2016, the Court denied the petition for writ of certiorari before judgment (by the Fourth Circuit) filed by Pro-Football. However, the Court did grant the petition filed by the United States in *Lee v. Tam*, No. 15-1293, in which it will review an en banc decision of the U.S. Court of Appeals for the Federal Circuit which held that the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the free speech clause of the First Amendment.

KELSEY V. BAILEY (NO. 16-5120) – On October 3, 2016, the Court denied review of a petition filed by a member of the Little River Band of Ottawa Indians seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which upheld his criminal conviction in tribal court for misdemeanor sexual assault against a tribal employee at the Band's Community Center which is located on land owned by the Tribe but outside its reservation boundaries.

JONES V. NORTON (NO. 16-72) – On October 3, 2016, the Court denied the petition filed by the parents of Todd Murray, an enrolled member of the Ute Indian Tribe, seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the district court's dismissal of their §1983 claims against state law enforcement officials for violation of his rights under the 1868 Ute Treaty which resulted in his death.

FLUTE V. U.S. (NO. 15-1534) – On October 3, 2016, the Court denied review of a petition filed by a group of Native Americans who are descendants of the victims of the 1864 Sand Creek Massacre seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that their action for an accounting of funds held by the federal government in trust for payment of reparations to their ancestors is barred by the doctrine of sovereign immunity.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Sam Owl, 1516 P Street, NW, Washington, DC 20005.
Please contact us if you have any questions or if we can be of assistance: John Dossett, NCAI General Counsel, 202-255-7042 (jdossett@ncai.org), or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).