TRIBAL SUPREME COURT PROJECT MEMORANDUM

MAY 3, 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).

INDIAN LAW CASES DECIDED BY THE SUPREME COURT

LEWIS V. CLARKE (NO. 15-1500) – On April 25, 2017, the Court issued its opinion, reversing the Connecticut Supreme Court and holding that, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." Further, the Court held that "an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach." This case involved Mr. Clarke, a limousine driver employed by the Mohegan Tribal Gaming Authority, who rear-ended and injured the Lewises on an interstate highway outside the Tribe's reservation in Connecticut. The Connecticut Supreme Court had held that the doctrine of tribal sovereign immunity extends to Mr. Clarke as an employee of a Tribe who was acting within the scope of his employment when the accident occurred.

Writing for a unanimous Court, Justice Sotomayor observed that a government employee who is acting within the scope of his employment at the time a tort is committed is not – by itself – sufficient to bar suit against that employee on the basis of sovereign immunity. The opinion makes clear that this common law principle applies regardless of whether the employee works for the federal government, a state government, or a tribal government. The Court also points to the distinction drawn from its legal precedent between individual- and official-capacity suits. In an official-capacity suit, the relief sought is only nominally against the government official and is – in fact – against the official's office and thus the sovereign itself. On the other hand, an individual-capacity suit seeks to impose personal liability upon the government official for their tortious actions. Accordingly, it is the identity of the "real party in interest" which dictates what immunities may be available. In applying these principles to this case, the result was apparent to the Court:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official

> capacity. It is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'"

The Court rejected Mr. Clarke's argument that the Mohegan Tribal Gaming Authority is the real party in interest here because it is required by tribal law to indemnify tribal employees for any adverse judgment under these circumstances. The Court observed that it has never before had occasion to decide the question of whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity. Based on the same general principles outlined above, the Court held that "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." Once again, the Court made it clear that this principle will apply equally regardless of whether it is the immunity of the federal government, a state government, or a tribal government, at issue.

The implications of this decision are unclear at this point, but should begin to be clarified through pending and future litigation. The Court has laid down a bright-line rule that tribal sovereign immunity does not extend to suits brought against tribal employees or officials in their individual capacity – unless there is a determination that the Tribe is the "real party in interest." In addition, the Court left open the question of whether tribal employees and officials are entitled to "official immunity" – immunity for actions taken within the scope of their employment – on a similar basis as state and federal employees and officials. A copy of the opinion, the oral argument transcript and the briefs filed in this case are available at http://sct.narf.org/ caseindexes/ lewis_v_clark.html.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case:

PATCHAK V. ZINKE (NO. 16-498) – On May 1, 2017, the Court granted review of a petition filed by David Patchak, a non-Indian landowner 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 standalone 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. Mr. Patchak had successfully argued before the Supreme Court in 2012 that he had prudential standing to bring an APA action and *Carcieri* challenge to the acquisition of trust land for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians/Gun Lake Tribe. The Court has granted review of Question Presented 1:

> Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ("the Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) ("*Patchak I*"). While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the Bradley Property "shall be promptly dismissed," but did not amend any underlying

substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

1. Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

Unless extensions are requested, the petitioner's opening brief is due on June 15, 2017. The United States' and the Tribe's briefs in response are due on July 17, 2017. The case will not be argued until after the Court returns from its summer recess on October 2, 2017.

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:

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION V. JEWELL (NO. 16-1135) – On March 9, 2017, a group of civic associations, state assemblyman, and county government representatives filed a petition seeking review of a summary order issued by the U.S. Court of Appeals which upheld the dismissal of their claims challenging a decision by the Department of the Interior to accept into trust approximately 13,000 acres for the benefit of the Oneida Indian Nation of New York. On April 19, 2017, the United States filed a waiver of its right to respond, and the petition has been scheduled for conference on May 11, 2017.

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. On February 9, 2017, the State of Utah filed an amicus brief in support of the City of Myton. The Tribe's brief in opposition is due on May 12, 2017.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

TUNICA-BILOXI GAMING AUTHORITY V. ZAUNBRECHER (NO. 15-1486) – On May 1, 2017, the Court denied review of a petition filed by the Tunica-Biloxi Tribe 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 at the tribal-owned casino located on tribal trust land.

SUN V. MASHANTUCKET PEQUOT GAMING ENTERPRISE (NO. 16-1008) – On April 17, 2017, the Court denied review of a petition filed by a group of gamblers seeking review of a summary order issued by the U.S. Court of Appeals for the Second Circuit which affirmed the dismissal of their § 1983 claims against tribal officials who refused to payout their winnings at the casino based on the court's lack of personal jurisdiction based on the failure of petitioners to perfect service. Although petitioners raised the issue of

tribal sovereign immunity, the Second Circuit determined that it did not need to address it or the relevance of the Ninth Circuit's recent decision in *Pistor v. Garcia*.

CITIZENS AGAINST RESERVATION SHOPPING V. JEWELL (NO. 16-572) – On April 3, 2017, the Court denied a petition filed by a non-Indian group seeking review of a decision by the U.S. Court of Appeals for the District of Colombia Circuit which 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."

MEYERS V. ONEIDA TRIBE OF WISCONSIN (NO. 16-745) – On March 20, 2017, the Court denied a petition 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.

ALTO V. JEWELL (NO. 16-799) – On February 27, 2017, the Court denied a petition filed by former enrolled tribal members of the San Pasqual Band of Mission Indians 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.

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).