

A Successful US Supreme Court Term For Native Americans

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In an unusually active term for Native American law issues, the U.S. Supreme Court heard three major cases in October Term 2015. In two of the three cases, the court unanimously voted in favor of tribal interests. But perhaps the most significant case is the one the court did not decide: *Dollar General v. Mississippi Band of Choctaw*, which involved the scope of tribal court civil jurisdiction over nonmembers. Justice Antonin Scalia's death led to a deadlocked vote (4-4 tie), thus preserving (without precedential effect) the Fifth Circuit's jurisdictional ruling in favor of the tribe.

Although the Roberts court is viewed by some as unsympathetic to Native American interests, this term can only be considered a success for tribal advocates. In *U.S. v. Bryant*, the court unanimously upheld, against constitutional challenge, the use of uncounseled tribal court convictions as qualifying predicate offenses for federal court sentencing. In *Nebraska v. Parker*, the court unanimously reaffirmed its prior holdings that Congress must act explicitly to diminish a Native American reservation. Even the court's one-sentence, per curiam decision in *Dollar General* ("The judgment is affirmed by an equally divided court.") represents a victory for tribal interests in that it left undisturbed a Fifth Circuit victory in favor of the Mississippi Band of Choctaw Indians. (Two other cases, *Menominee Indian Tribe of Wisconsin v. United States* and *Sturgeon v. Frost*, involved Native American tribes or lands but did not ultimately turn on core Native American law issues.)

As in a few other cases this term, Justice Scalia's death — and Congress' failure to confirm his replacement — left the important legal question in *Dollar General* unanswered. *Dollar General* had consented to tribal court jurisdiction regarding matters arising out of its lease with a tribally owned corporation on trust lands, but contested jurisdiction when it was sued in tort over allegations of sexual abuse of a minor by a *Dollar General* store manager. The Fifth Circuit ultimately held that the tribe could validly exercise jurisdiction and that judgment was affirmed by an equally divided Supreme Court. Many observers had predicted, however, that Justice Scalia (in light of his prior opinions) would have voted to reverse the court of appeals. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court cannot assert jurisdiction over certain civil claims against state officials). The absence of Justice Scalia's decisive fifth vote may well have avoided a reversal and the creation of binding precedent adverse to tribes. If a similar challenge to tribal jurisdiction returns to the Supreme Court — including, perhaps, after further tribal court proceedings involving *Dollar General* — Justice Scalia's successor will almost certainly hold the deciding vote.



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Other Notable Observations

Justice Clarence Thomas' unusual concurrence in *U.S. v. Bryant* bears mention. Although he joined the majority opinion, he announced that he would be open to reconsidering in a future case two aspects of tribal authority that have been settled by Supreme Court law for decades: (1) that tribal prosecutions need not comply with constitutional provisions framed specifically as limitations on federal or state authority; and (2) that the Constitution grants Congress plenary authority over Native American tribes (a constitutional question that was settled back in 1868). No one else joined Justice Thomas' concurrence, however, so the practical import of his views appear limited.

One of the strongest affirmations of inherent tribal sovereignty this term actually came in a case that did not directly implicate Native American issues. In *Puerto Rico v. Sanchez Valle* — involving the application of the double jeopardy clause to the Commonwealth of Puerto Rico — the court, in dicta, noted that the clause does *not* apply to successive prosecutions by the federal government and Native American tribes in light of “the ‘primeval’ or, at any rate, ‘preexisting’ sovereignty” of those tribes. The court explained that, “beginning with Chief Justice John Marshall and continuing for nearly two centuries, this court has held firm and fast to the view that Congress’ power over Native American affairs does nothing to gainsay the profound importance of the tribes’ preexisting sovereignty.” In so doing, the majority rejected the “deeply disturbing” reasoning of the dissent, which had postulated that Congress was the “source” of tribal criminal enforcement authority. The court explained that “the tribes are separate sovereigns precisely because of [their] inherent authority.” (As in *Bryant*, Justice Thomas wrote separately to state his “concerns” regarding the court’s Native American law jurisprudence.)

Looking Ahead

Taken together, the court's decisions this term (as well as its 5-4 decision in *Bay Mills* two terms ago) may signal a tenuous but growing solicitude for Native American tribes and issues in the Supreme Court. Of course, the critical unknown variable remains the identity of Justice Scalia's replacement — an issue that will almost certainly not be resolved until after the November presidential election, if not well into next term.

No Native American law cases have been granted for next term, but several petitions are pending. Among the most notable are *Pro-Football Inc. v. Blackhorse*, in which the Washington Redskins professional football team filed an unusual petition for certiorari before judgment, seeking Supreme Court review of its canceled “Redskins” trademark before the Fourth Circuit has rendered its decision; and *Lewis v. Clarke*, in which the court has been asked to resolve a circuit split regarding whether tribal sovereign immunity bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

More details on the term's major Native American law decisions and the two pending certiorari petitions can be found below.

U.S. v. Bryant, No. 15-420: Use of Tribal Court Convictions for Sentencing in Federal Court

Facts: Bryant pleaded guilty in Northern Cheyenne tribal court to domestic abuse on five occasions between 1997 and 2007. Bryant was punished in tribal court by terms of imprisonment, never exceeding one year. In each of these tribal court convictions, Bryant was not provided with an attorney. In 2011, Bryant was arrested, yet again, for assaulting women. As a result of the 2011 assaults, a federal grand

jury indicted Bryant on two counts of domestic assault by a habitual offender. The federal court used Bryant's previous offenses in tribal court to charge him as a "habitual offender."

Question Presented: Can uncounseled misdemeanor tribal court convictions, which result in a term of imprisonment of less than one year, be used as prior convictions for the purposes of a repeat-offender statute?

Holding: Yes, so long as there are no constitutional defects in the previous tribal court convictions. A tribal member's Sixth Amendment right to counsel and Fifth Amendment right to due process are not violated by using prior uncounseled tribal court convictions as predicate offenses for a repeat-offender statute in federal district court. That is because, unlike in federal or state court, there is no constitutional right to counsel for defendants who receive a conviction resulting in imprisonment of less than one year in tribal court.

Implications: Beyond its practical federal criminal-law significance, the decision reaffirms the doctrine of inherent tribal sovereignty by recognizing that Native American nations are preconstitutional sovereigns unconstrained by the Bill of Rights.

Nebraska v. Parker, No. 14-1406: Diminishment of a Reservation

Facts: The Omaha Tribe sought to enforce tribal liquor licenses and taxes on retailers in Pender, Nebraska. The retailers challenged the tribal taxes on the grounds that Pender is no longer located on the Omaha reservation. The retailers argued that, while Pender was originally located on the Omaha reservation, the reservation was diminished in 1882 when Congress opened up the reservation to allotment.

Question Presented: Did the 1882 Act that allowed the Omaha tribe to sell allotments of its tribal land reduce the original boundaries of the Omaha reservation such that Pender is no longer a part of the Omaha reservation?

Holding: No, the 1882 Act did not reduce the original boundaries of the reservation under the court's well-established precedent in this area. Only the clear intent of Congress can determine when tribal land is diminished, and that intent was not present here.

Implications: The holding of this case is not surprising based on the court's precedent. Notably, however, the court left open the question of whether equitable considerations may limit the tribe's power to tax the retailers in light of the tribe's century-long absence from the disputed lands.

Dollar General Corp. v. Mississippi Band of Choctaw Indians, No. 13-1496: Tribal Court Jurisdiction for Tort Claims Over Nonmembers

Facts: Dollar General opened a store in a retail shopping plaza located on trust lands within the Mississippi Choctaw reservation. Dollar General signed a multiyear lease with the tribally owned company that manages the shopping center, consenting to Mississippi Choctaw tribal court jurisdiction for matters arising out of its lease. A 13-year-old member of the Mississippi Choctaw Tribe was allegedly molested by the manager while interning at the Dollar General store. Dollar General unsuccessfully contested the jurisdiction of the tribal court.

Question Presented: Despite the general rule (articulated in *Montana v. U.S.*) that tribes do not have

civil jurisdiction over non-Native Americans, can tribal courts adjudicate civil tort claims against nonmembers that enter into agreements consenting to tribal court jurisdiction?

Holding: Lower court opinion affirmed by an equally divided court (4-4).

Implications: The deadlocked decision creates no nationwide binding precedent and leaves the jurisdictional ruling binding in the Fifth Circuit only. Expect to see this important issue in the Supreme Court again, perhaps after further tribal court proceedings involving Dollar General.

Pro-Football Inc. v. Blackhorse, No. 15-1874 (petition for certiorari pending): Constitutionality of Lanham Act's "Disparagement Clause"

Facts: Amanda Blackhorse filed a petition with the Trademark Trial and Appeal Board to cancel the registrations of six Washington Redskins trademarks for violation of the Lanham Act's disparagement clause, which bars the registration of trademarks that "may disparage ... persons, living or dead, institutions, beliefs or national symbols, or bring them into contempt or disrepute." The board held that the trademarks should be canceled. The team sued in federal court to challenge the board's decision and lost. During the team's appeal to the Fourth Circuit, the United States petitioned for certiorari in a separate case implicating the constitutionality of the disparagement clause. The team then filed an unusual petition for certiorari before judgment, asking the Supreme Court to skip the Fourth Circuit and to review its petition in tandem with the other.

Questions Presented: Does the Lanham Act's disparagement clause violate the First Amendment either by restricting content or by being too vague? Does the delay between registering a trademark and canceling the registration under the disparagement clause violate due process?

Timing: The court is expected to rule on the certiorari petition by October 2016.

Lewis v. Clarke, No. 15-1500 (petition for certiorari pending): Tribal Sovereign Immunity for Individual-Capacity Damages Actions

Facts: After a traffic accident involving a Mohegan Tribal Gaming Authority employee, petitioners (nontribal members) brought a damages suit against both the individual employee and the authority. After petitioners voluntarily dismissed their claims against the authority, the employee moved to dismiss on the ground of tribal sovereign immunity. The Connecticut Supreme Court, relying on the U.S. Supreme Court's Bay Mills decision, ultimately held that the doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their employment.

Question presented: Does the sovereign immunity of a Native American tribe bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment?

Timing: The court is expected to rule on the certiorari petition by October 2016.

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