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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

GAMING: Indian Gaming Regulatory Act

Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996)

The Seminole Tribe of Florida (the Tribe) brought suit against the State of Florida (the State) pursuant to the Indian Gaming Regulatory Act (IGRA).[1] The IGRA permits a tribe to sue a state in federal court in order to compel good faith negotiations toward the formation of a gaming compact.[2] The State moved to dismiss the Tribe's complaint on the ground of sovereign immunity from suit in federal court. The district court denied the motion,[3] but the Court of Appeals for the Eleventh Circuit reversed, finding that the Indian Commerce Clause did not grant Congress the authority to abrogate state's Eleventh Amendment immunity.[4] The Court also found that the doctrine expounded in *Ex parte Young*[5] does not permit a tribe to compel good faith negotiations by suing a state's governor.[6]

In a strongly divided opinion, the Supreme Court affirmed the court of appeals' dismissal of the Tribe's suit. In doing so, the majority held that (1) the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause,[7] and (2) the doctrine of *Ex parte Young* may not be used to enforce the IGRA against a state official.[8]

On the issue of immunity, the Court recognized that the Eleventh Amendment presupposes that each state is a sovereign entity, and that the doctrine of sovereign immunity precludes individual lawsuits without a state's consent.[9] The Court also recognized that Congress may abrogate a state's immunity if it has "unequivocally expressed its intent" to do so, "pursuant to a valid exercise of power."[10] In the present case, Congress' *intent* to abrogate the states' immunity from suit is "unmistakably clear."[11] On the other hand,

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1. Seminole Tribe v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992).
2. 25 U.S.C. § 2710(d)(7) (1994).
3. Seminole Tribe v. Florida, 801 F. Supp. at 656.
4. Seminole Tribe v. Florida, 11 F.3d 1016, 1026 (11th Cir. 1994).
5. 209 U.S. 123 (1908).
6. Seminole Tribe v. Florida, 11 F.3d at 1028.
7. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119 (1996).
8. *Id.*
9. *Id.* at 1122.
10. *Id.* at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
11. *Id.* (quoting Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989)); *see* 25 U.S.C. §

the issue of Congress' *authority* to abrogate was explored more fully by the Court.

The Court focused its analysis on the question of whether the IGRA was passed pursuant to a constitutional provision granting Congress the power to abrogate a state's immunity.[12] The Court has recognized only two constitutional provisions which grant Congress the authority to abrogate: the Fourteenth Amendment,[13] and, in a plurality opinion, the Interstate Commerce Clause.[14] The Court found that the Indian Commerce Clause, under which the applicable provisions of the IGRA were passed, is indistinguishable from the Interstate Commerce Clause in the present case.[15] By doing so, the Court implicated the plurality opinion of *Pennsylvania v. Union Gas Co.*,[16] which recognizes Congress' authority, under the Interstate Commerce Clause, to abrogate a state's sovereign immunity. Rather than attempt to distinguish the present case from *Union Gas*, the Court overturned the earlier opinion, declaring it "wrongly decided."[17] *Union Gas*, the Court found, had been proven to be a "solitary departure from established law."[18] Moreover, the rationale of *Union Gas* deviated from the Supreme Court's established federalism jurisprudence, and the divided opinion caused confusion in the lower courts.[19] The Court concluded that the Eleventh Amendment restricts federal judicial power under Article III of the Constitution, and that Article I cannot be used to circumvent the limitations placed on federal jurisdiction.[20]

In its second major holding, the Court determined that the doctrine of *Ex parte Young*[21] may not be used to enforce the applicable provision of the IGRA against a state official.[22] The *Ex parte Young* doctrine allows a suit against a state official to proceed, notwithstanding the Eleventh Amendment, where the remedy sought is injunctive relief from a continuing violation of federal law.[23] The Court found that the intricate remedial scheme created by the IGRA both defines and limits the duty that the Act imposes.[24] The IGRA requires relatively modest sanctions against a state, culminating in the Secretary of the Interior unilaterally imposing gaming regulations where an

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2710(d)(7)(B) (1994).

12. Seminole Tribe v. Florida, 116 S. Ct. at 1124.
13. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
14. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
15. Seminole Tribe v. Florida, 116 S. Ct. at 1127.
16. 491 U.S. 1 (1989).
17. Seminole Tribe v. Florida, 116 S. Ct. at 1128.
18. *Id.*
19. *Id.*
20. *Id.* at 1131.
21. 209 U.S. 123 (1908).
22. Seminole Tribe v. Florida, 116 S. Ct. at 1132.
23. *Id.*
24. *Id.*

agreement cannot be reached through negotiation or mediation.[25] The *Ex parte Young* doctrine, on the other hand, would expose a state official to the full extent of a federal court's remedial powers, including contempt sanctions. The availability of the *Ex parte Young* doctrine would enable a tribe to circumvent the less strict remedial measures of the IGRA in favor of a court imposed sanction against a state official. The Court, therefore, will not rewrite the statutory enforcement scheme to "approximate what it thinks Congress might have wanted had it known that [abrogation] was beyond its authority."[26]

Justice Stevens, dissenting.

In his dissent, Justice Stevens emphasized the effect of the majority opinion in preventing Congress from providing a federal forum for a broad range of actions.[27] He found the issue to be whether there was an implicit bar to federal jurisdiction beyond that imposed by the Eleventh Amendment.[28] Stevens explored the origins of the modern doctrine of state sovereign immunity to determine that the majority is supported by little more than speculation in its conclusion that "the Eleventh Amendment's express but partial limitation on the scope of Article III reveals that an implicit but more general limitation was already in place."[29]

Stevens cited the opinion in *Hans v. Louisiana*[30] in support of the conclusion that the doctrine of state sovereign immunity was a common-law rule that Congress had directed the federal courts to respect, *not* a constitutional privilege that Congress could not displace by statute.[31] The ruling in *Hans*, Stevens argued, was based on the fact that Congress had not attempted to overcome the common-law presumption of sovereign immunity.[32] In the present case, he argued, Congress *has* expressed its intent to overcome that presumption, and it has the clear authority to do so.[33] The doctrine of sovereign immunity, Stevens argued, "has nothing to do with the limit on judicial power contained in the Eleventh Amendment." Rather, it is based on concerns of federalism and comity that "merit respect, but are . . . subordinate to the plenary power of Congress."[34] Justice Stevens ended with an unusually direct admonition of the majority opinion. "It may well follow that the misguided opinion of today's majority has nothing more than an advisory character. Whether or not that be so, the better reasoning in Justice

25. 25 U.S.C. § 2710(d)(7) (1994).
26. Seminole Tribe v. Florida, 116 S. Ct. at 1133.
27. *Id.* at 1134.
28. *Id.* at 1137.
29. *Id.*
30. 134 U.S. 1 (1890).
31. Seminole Tribe v. Florida, 116 S. Ct. at 1137.
32. *Id.*
33. *Id.* at 1138.
34. *Id.* at 1142.

Souter's far wiser and far more scholarly opinion will surely be the law one day."[35]

Justice Souter, with whom Justice Ginsburg and Justice Breyer join, dissenting.

Justice Souter's dissent took Justice Steven's contention, that the majority had elevated the common-law principle of sovereign immunity to constitutional stature, and explored its implications in extraordinary detail. He traced the historic development of the majority's repudiation of *Union Gas* from the earliest days of our nation's founding. In doing so, he reached the conclusion that the Eleventh Amendment only limits federal jurisdiction in cases of citizen-state diversity, not in cases where federal questions are implicated.[36] On this point, he found no apparent disagreement in the majority opinion. The implication of this point is that, since the plaintiffs in the case at bar are citizens of the State that they are suing, the Eleventh Amendment does not apply to them.[37] Therefore, Souter argued, the Court must look elsewhere for the source of the immunity that the State cited.[38]

Souter argued that the source the majority found was the *common-law* doctrine of state sovereign immunity, as it was wrongly promoted to the status of constitutional law.[39] Souter, like Stevens, contended that the Court in *Hans v. Louisiana* had no occasion to consider whether Congress could abrogate the common-law sovereign immunity by statute. Indeed, he argued, that issue was not addressed until the Court decided in *Union Gas* that such immunity had no constitutional status and was subject to abrogation.[40] The *Hans* Court wrongly decided, it was argued, that the principle of sovereign immunity derived from common law insulated a state from federal question jurisdiction as to a suit from one of its own citizens.[41] The majority's step of constitutionalizing the *Hans* Court's holding merely compounded the mistake and "takes its place with other historic examples of textually untethered elevations of judicially derived rules to the status of inviolable constitutional law."[42]

As to the issue of the doctrine of *Ex parte Young*, Souter found a separate and dispositive basis for overturning the court of appeals dismissal. Souter argued that the fact that a suit against a state official under the *Ex parte Young* doctrine may have had a significant impact on state government did not invalidate the doctrine's application.[43] Souter explored the history of the

35. *Id.* at 1145.
36. *Id.*
37. *Id.* at 1152.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1178.

doctrine, and defended it as more than mere judicial fiction.[44] While he recognized that, in theory, Congress may bar enforcement by suit even against a state official, he did not find any clear statement of intent to displace the *Ex parte Young* doctrine in the IGRA. Furthermore, he did not find that the IGRA's "intricate remedial mechanisms" displaced the doctrine in the case at bar. Therefore, he would reverse the judgment of the court of appeals.[45]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LAND ACQUISITION: Delegation Under the Indian Reorganization Act

South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th Cir. 1995)

In March 1990, the Lower Brule Tribe of Sioux Indians submitted an application under the Indian Reorganization Act of 1934,[46] asking the Secretary of the Interior to acquire ninety-one acres of land in trust for the purpose of industrial development.[47] The land was partially within the City of Oacoma, South Dakota.[48] The City and State protested the acquisition to the Area Director of the Bureau of Indian Affairs (BIA), who notified them in March 1991 that the Tribe's application would be approved.[49] On subsequent appeal to the Interior Board of Indian Affairs, the BIA disclosed that the Assistant Secretary for Indian Affairs had approved the application in December 1990, without notifying the City or State.[50] The Board then dismissed the appeal, citing lack of jurisdiction to review the decisions of the Assistant Secretary.[51] In July 1992, the City and State filed an action,[52] seeking judicial review under the Administrative Procedure Act.[53]

The City and State argued that the acquisition was invalid because 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority.[54] Alternatively, they argued (1) that the agency violated its own rules of procedure, (2) that the Assistant Secretary acted beyond the scope of his authority, and (3) that the approval was arbitrary and capricious.[55] The

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44. *Id.* at 1180.

45. *Id.* at 1181.

46. 25 U.S.C. § 465 (1994) ("The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians. Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.").

47. South Dakota v. U.S. Dep't of the Interior, 69 F.3d 878, 880 (8th Cir. 1995).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. 5 U.S.C. §§ 701-706 (1994).

54. South Dakota v. U.S. Dep't of the Interior, 69 F.3d at 880.

55. *Id.*

Secretary moved to dismiss on the ground that an acquisition under 25 U.S.C. § 465 is "committed to agency discretion by law" and therefore is not subject to judicial review.[56] The district court granted the Secretary's motion to dismiss, concluding that 25 U.S.C. § 465 is not an unconstitutional delegation of legislative authority because the statute identifies the agency to which power is delegated and "clearly delineates the general policy to be applied and the bounds of that delegated authority."[57]

On appeal to the Eighth Circuit, the City and State argued that 25 U.S.C. § 465 provides no legislative boundaries to control the Secretary's acquisition of trust lands.[58] The Secretary responded that the statutory purpose and boundaries of the delegated power are sufficiently defined in the act.[59] The court of appeals held that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority, and reversed the decision of the district court.[60]

In reaching its conclusion, the court found that Congress, in enacting the statute, did not "articulate and configure the underlying public use" that justifies a trust acquisition.[61] Although the legislative history of section 465 suggests that Congress did not intend to delegate unrestricted power to acquire trust lands, the court determined that Congress failed to incorporate that limited purpose into the act itself.[62] The court found that the agency received this unconstitutional delegation, then used the lack of statutory control to claim that its actions were beyond judicial review.[63] The court describes the result as "an agency fiefdom whose boundaries were never established by Congress, and whose unrestrained power is free of judicial review."[64]

The court cited a concurring opinion by Justice Rehnquist, which summarized the functions of the nondelegation doctrine.[65] First, the nondelegation doctrine ensures that important choices of social policy are made by Congress, to the extent consistent with orderly governmental administration.[66] Second, the doctrine insures that Congress provides the recipient of the delegated authority with an "intelligible principle" to guide the exercise of discretion.[67] Third, the doctrine insures that reviewing courts will be able to test the exercise of discretion against ascertainable standards.[68]

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56. *Id.*
57. *Id.*
58. South Dakota v. U.S. Dep't of the Interior, 69 F.3d at 881.
59. *Id.*
60. *Id.* at 885.
61. *Id.* at 883.
62. *Id.* at 884.
63. *Id.*
64. *Id.* at 885.
65. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980).
66. South Dakota v. U.S. Dep't of the Interior, 69 F.3d at 885.
67. *Id.*
68. *Id.*

The court concluded that 25 U.S.C. § 465 failed all three of these criteria, and was therefore invalid as an unconstitutional delegation of Congressional authority.[69]

Murphy, Circuit Judge, dissenting.

On dissent, Judge Murphy argued that the court unnecessarily reached the constitutional issue of delegation. Instead, the court should have focused on the issue of the district court's dismissal for lack of jurisdiction under the Administrative Procedures Act.[70] Even if the court had reason to address the delegation issue, the dissent argued, the majority decision is inconsistent with established nondelegation doctrine.[71] Looking to the language of the statute, its purpose and factual background, and the statutory context in which the standards appear, the dissent concluded that 25 U.S.C. § 465 sufficiently defined the scope of delegated authority to acquire trust lands for Indians.[72] The majority, it was argued, departed from precedent by invalidating a statute based on the broadest possible reading of its terms, and focusing on unlikely hypothetical situations.[73] By doing so, the court ignored the limiting effect of the context in which the statute was passed.[74]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CIVIL RIGHTS: Banishment

Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir. 1996)

In November and December 1991, a dispute arose on the Tonawanda reservation. Petitioners, then members of the Tonawanda Band, accused members of the Council of Chiefs, the principal lawmaking body of the Tribe, of various misconduct. The allegations included misusing tribal funds, suspension of tribal elections, excluding members of the Council from tribal business, and burning of tribal records.[75] Subsequently, Petitioners formed an interim Council of the Tonawanda Band.[76] In January 1992, Petitioners were served with a notice of permanent banishment from Tribal land. The notice stated that Petitioner's actions to "overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of the Seneca Nation, and further by becoming a member of the Interim General Council [*sic*], are considered treason. Therefore banishment is required."[77] Furthermore, Petitioners were advised that they were "stripped of [their]

69. *Id.*
70. *Id.*
71. *Id.* at 886.
72. *Id.* at 889.
73. *Id.* at 887.
74. *Id.*
75. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 877-78 (2nd Cir. 1996).
76. *Id.*
77. *Id.* at 878.

Indian citizenship," and that they had lost all rights and privileges afforded Tribal members.[78]

Petitioners brought suit in federal district court, claiming that the banishment order amounted to a criminal conviction in violation of the rights guaranteed under Title I of the Indian Civil Rights Act (ICRA).[79] They sought writs of habeas corpus under the applicable ICRA provision.[80] The United States District Court for the Western District of New York concluded that permanent banishment is not a sufficient restraint on liberty to trigger the ICRA's habeas corpus provision. The Court dismissed for lack of subject matter jurisdiction.[81]

The Court of Appeals for the Second Circuit reviewed the issue of whether the habeas corpus provision of the ICRA "allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve 'banishment' rather than imprisonment."[82] The Court concluded that the district court erred in dismissing the petitions, and that the ICRA does offer access to federal review in cases of banishment from the reservation.[83]

Petitioners argued that the banishment orders were criminal sanctions and reviewable under the ICRA. Respondents claimed that the orders were civil in nature, and were merely "membership determinations," at the complete discretion of the Tribe.[84] The Court accepted neither argument in full, determining that, while the banishment orders constitute punitive sanctions for allegedly criminal behavior, such a sanction is not itself sufficient to permit a district court to hear an application for a writ of habeas corpus under the ICRA.[85] The Court cited *Jones v. Cunningham*, 371 U.S. 236 (1963), in concluding that a party seeking to invoke federal court jurisdiction under § 1303 of the ICRA must demonstrate "a severe actual or potential restraint on liberty."[86] The court found that Petitioners sufficiently demonstrated such restraint on liberty in the case at bar, and therefore, the district court improperly dismissed the applications for writs of habeas corpus.[87]

In reaching its conclusion, the court examined permanent banishment as a restraint on liberty. The Court noted that physical custody is no longer the only criterion by which federal habeas corpus jurisdiction is determined.[88] Furthermore, the Court noted, "restraint" does not require ongoing supervision

78. *Id.*
79. 25 U.S.C. §§ 1301-1303 (1994).
80. *Poodry*, 85 F.3d at 879.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 880.
87. *Id.*
88. *See* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

or prior approval.[89] In light of these facts, the "coerced and peremptory deprivation of the petitioner's membership in the tribe and their social and cultural affiliation" satisfied the Court's understanding of a sufficient restraint on liberty.[90]

Having concluded that the petitions should be considered on the merits, the Court then found that the Tribe itself was not a proper defendant in the case at bar.[91] The Court concluded that nothing in the ICRA subjects tribes to federal court jurisdiction in civil actions for injunctive or declaratory relief.[92] Furthermore, since the respondent in a habeas corpus action is an individual custodian, the court cannot imply a general waiver of the Tribe's sovereign immunity.[93]

Jacobs, Circuit Judge, dissenting.

The dissenting judge did not find the issue to be whether Petitioners would suffer impairments of liberties enjoyed by *other tribal members*, but rather, whether they would suffer impairments of liberties enjoyed by *the American public at large*.[94] He concluded that Petitioner's constitutional rights, *as American citizens*, would not be impaired by their banishment from Tribal lands. Therefore, Petitioners did not demonstrate a severe restraint on any liberty that the writ of habeas corpus could protect.[95] The dissent agreed with the majority view that the Tribe was not a proper party to the action.[96]

89. *Poodry*, 85 F.3d at 895.
90. *Id.*
91. *Id.* at 899.
92. *Id.*
93. *Id.*
94. *Id.* at 902.
95. *Id.* at 901.
96. *Id.*