

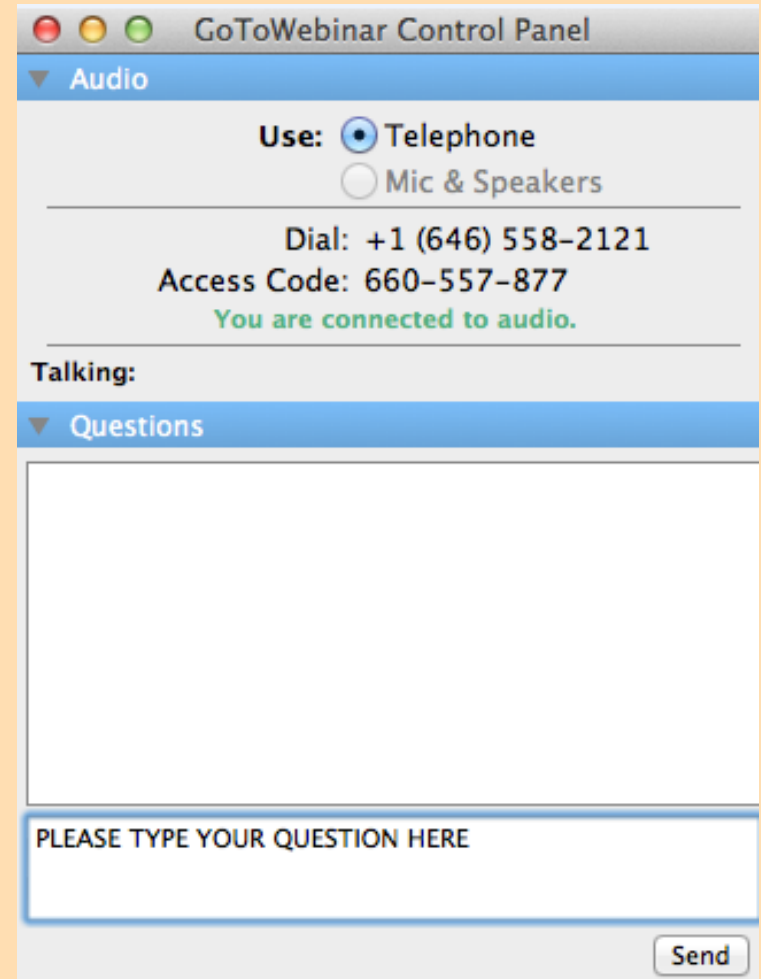


The Bay Mills Case: The Dispute over Tribal Sovereignty

Conflicting views over federal jurisdiction and tribal
sovereignty

Questions

- Use the chat feature on the right hand panel of your screen to submit questions.



The Panelists

Bill Lomax, President, NAFOA

Allison Binney, Partner, Akin Gump Strauss Hauer & Feld LLP

R. Lance Boldrey, Member, Dykema Gossett PLLC

Jeff Carey, Municipal Banking, Bank of America Merrill Lynch

Outline

- I. Background
- II. The Decision
- III. Implications

I. BACKGROUND

Background

- Question over whether lands purchased by the Bay Mills Indian Community for the purpose of a casino were “Indian lands” according to the Indian Gaming Regulatory Act (“IGRA”).
- The Michigan Indian Land Claims Settlement Act (“Settlement Act”), provided funds to Bay Mills and other Michigan tribes to use for the purchase of lands to “be held as Indian lands.”
- The Tribe purchased land in Vanderbilt, MI, and opened a casino on the parcel (125 miles away from its reservation).
- The Tribe believed that lands purchased with Settlement Act funds automatically qualified as “Indian lands” under IGRA. Michigan disagreed.

Background

- In 2010 Department of Interior determined that Vanderbilt land was not 'Indian Land'.
- State of Michigan successfully sued Bay Mills to close gaming facility.
- Bay Mills successfully appealed the ruling.
- In 2013 the Supreme Court agreed to review the case.
- May 27, 2014, Supreme Court issued ruling.

II. THE DECISION

Majority Opinion

- U.S. Supreme Court issued a 5-4 decision that upheld the doctrine of tribal sovereign immunity.
- The Court focused on the immunity issue, rather than an Indian land determination.
- The Court interpreted IGRA's partial waiver of tribal immunity narrowly.

Majority Opinion

- The majority offered ways in which states can preserve their ability to regulate off-reservation gaming, including:
 - Deny a gaming license to a tribe that applies to operate an off-reservation casino.
 - Sue tribal officials or employees seeking an injunction for gambling without a license if a tribe engages in gaming without a state license.
 - Prosecute anyone who “maintains or frequents an unlawful gambling establishment” if civil remedies are not enough.
 - Negotiate a tribal immunity waiver during the tribal-state compacting process.

Majority Opinion

- The Court refused to do away with tribal sovereign immunity, without “special justification”.
 - The case that the Court would have had to overturn in order to get rid of tribal sovereign immunity is *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

Dissent

- Justice Thomas wrote the principal dissent (Justices Scalia, Alito, and Ginsburg joined; Justices Scalia and Ginsburg also wrote separate dissents).
- The dissent argued that tribal sovereign immunity, by itself, cannot stand in the courts of other sovereigns. The application of tribal sovereign immunity in other sovereigns' courts is unique to tribal sovereign immunity.
- Thomas asserts that since the Court has created tribal sovereign immunity, it is more important that the Court fix it than Congress.
- Tribes are doing well and the Court created doctrine should be eliminated.
 - Thomas discusses how successful tribes have become in off-reservation, non-commercial activities. Mentions tribes' use of pay-day lending and non-Indian businesses, suggesting they are hiding behind tribal sovereign immunity.
- Upholding such immunity is an affront to the sovereignty of states.
- *All dissenters would have overturned Kiowa. This is something to keep in mind should the Court's composition change in the near future.*

III. IMPLICATIONS

Context for the Decision

- Sovereignty is central to self-determination.
- Since the rise of Indian gaming in the 1970s, there has been an ongoing struggle between the federal government, the states, and tribes.
- While some legal decisions such as *Sherrill* look back at tribal claims and past treaties, a recent breed of cases – *Carcieri*, *Patchak* and *Bay Mills* – reflect a judicial arc making it harder for tribal leadership, especially for economic development and sustained self-sufficiency.
- *Madison County v. Oneida Indian Nation of New York* back in 2010.

Examining the Decision

- Fact patterns that might justify serious reconsideration (“special justification”).
- First time that Chief Justice Roberts has voted in favor of tribal interests.
- Other mechanisms, including legal actions against the responsible individuals – suing tribal officials for injunctive relief and utilizing state criminal laws.
- “Panoply of tools” ...
- Justice Sotomayor pointed out the special challenges that tribes face with respect to raising revenue and the role that their commercial enterprise play in funding government.

Court's Principles Previously Affirmed

- First, as domestic dependent nations, tribes have inherent sovereign authority that is subject to control by Congress. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.* (1991).
- Second, unless and until Congress acts, tribes retain their sovereign authority. *United States v. Wheeler*, (1978).
- Third, among the core aspects of sovereignty that tribes possess – subject to congressional action – is the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, (1978).
- Fourth, tribes' immunity from suit applies to a suit brought by a state, *Puyallup Tribe, Inc. v. Department of Game of Wash.*, (1977), or arises from a tribe's commercial activities off Indian lands. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, (1998).
- Fifth, unless Congress has unequivocally authorized suit, in the absence of an express waiver by a tribe, the suit must be dismissed. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Okla.*, (2001).

A Win for Indian Country...For Now

- Other cases to consider

A Win for the State of Michigan?

- Michigan Attorney General Bill Schuette, ‘Michigan Can “Bring Suit Against Tribal Officials or Employees”’.

What Does it Mean That Tribal Officials can be Sued?

- *Ex parte Young* (in the tribal sovereign immunity context) would allow civil suits against tribal officials for injunctive (equitable) relief only. However, there's a whole body of case law around *Ex parte Young* that could have further implications further down the road.
- Distinction between official and individual capacity.
- Chilling effect on tribal governance – civil liability for chairman or council.

Considerations

- 1) Door open for certain potential plaintiffs.
- 2) State regulatory power can target individuals.
- 3) Winners: tribally-owned businesses engaged in off-reservation commercial conduct.
- 4) Winners: tribes in compact (re) negotiations.

Justice Analysis

- Justice Sotomayor
- Justice Thomas

Economic Impact

- Tribal governments and their enterprises remain somewhat exposed:
 - Expanded litigation from ‘ever-ready’ plaintiffs.
 - Increasing vulnerability as states seek to impose their jurisdiction.
 - Tribal leverage with surrounding states.
 - Additional challenges to land into trust and even existing tribal trust lands [as in *Big Lagoon*].
 - Possible exposure to state or local taxes.

Economic Impact: Sound Practices

- Belt & Suspender Approach
 - Utilizing sovereign immunity for contractual obligations.
 - The balance of state-tribal relations.
 - Remedies and legal appeals.
 - Diversification off-reservation.

Prudent Next Steps

- Structures
- Agreements
- Negotiations