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Michigan v. Bay Mills Indian Community: A Positive Outcome for Tribes with Important Lessons for the Future

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On May 27, 2014, the United States Supreme Court issued a stunning opinion upholding the important concept of tribal sovereign immunity from civil suit by States in the case of *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, No. 12-515, (2014). The decision in this closely watched case has numerous legal and practical implications for tribal governments, tribally-owned and operated businesses, and businesses partnering with tribes. When the Court last considered a key question of tribal sovereign immunity from suit in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998), it characterized the doctrine as "accidental" and questioned its utility at length before ultimately upholding the doctrine in a 6-3 ruling. There was enormous concern among tribes and their partners that the Court's existing skepticism of tribal sovereign immunity could result in a modification (partial or complete) of the doctrine in the unfavorable environment of the Roberts Court. Before *Bay Mills*, Native American tribes and businesses had one win and nine losses in the Roberts Court era. Justice Elena Kagan's opinion for the 5-4 majority of a fractured Court laid these concerns to rest and left tribal business and economic development leaders breathing a collective sigh of relief.

Viewing *Bay Mills* Through the Lens of *Kiowa*

In order to fully appreciate just how significant and unexpected the Court's decision in *Bay Mills* is, one must understand how it compares to past precedent. The Court last visited the particular issue of tribal sovereign immunity for off-reservation commercial activity in the 1998 *Kiowa* decision. Although *Kiowa* dealt with a dispute between a tribe and an individual, rather than a tribe and a state, the case is still cited for its ultimate pronouncement that tribal sovereign immunity from suit extends to both governmental and commercial activities, both on- and off-reservation.

The *Kiowa* Court – both majority and dissent – openly questioned both the jurisprudential foundation for the doctrine of tribal sovereign immunity and the wisdom of continuing to extend the doctrine in the off-reservation or commercial activity context. The *Kiowa* majority characterized tribal sovereign immunity as an almost "accidental" doctrine that developed out of a "passing reference" or dicta rather than a "reasoned statement of doctrine." 523 U.S. at 756-757. It is nothing short of remarkable that the Roberts Court – which has ruled against tribal interests repeatedly, and by wide margins – has departed so fundamentally from the tenor of *Kiowa* in reaffirming sovereignty and immunity in *Bay Mills*.

Even Justice Kagan's majority opinion acknowledges the differences in tone between *Kiowa* and *Bay Mills*, noting that the majority in *Kiowa* had "expressed a fair bit of sympathy toward" dissenting arguments. 572 U.S. ___, No. 12-515, slip op. at 17. In contrast to *Kiowa*, the *Bay Mills* decision constitutes a full throttled endorsement of the principles of tribal sovereignty and attendant immunity.

Opinion of the Court

Factual and Procedural History

Since 1993, the Bay Mills Indian Casino has had a gaming compact with Michigan authorizing the operation of a casino on the tribe's reservation in the Upper Peninsula of Michigan. In 2010, Bay Mills used funds from land claims settlement legislation to purchase land in Vanderbilt, Michigan – 125 miles away from the Reservation on Michigan's Lower Peninsula – and began operating a casino on the parcel. Michigan challenged Bay Mills' operation of the facility, alleging that operation of the facility violated the

Indian Gaming Regulatory Act (IGRA), 102 Stat. 2467, 25 U.S.C. §2701 *et seq.*, and the existing compact because the Vanderbilt facility was not located on "Indian lands." The district court agreed with the State and enjoined Bay Mills from operating the facility, but the United States Court of Appeals for the Sixth Circuit reversed and found that the Tribe was immune from suit on the basis of its sovereignty and the lack of any clear waiver of immunity. IGRA contains a limited waiver of sovereign immunity for tribes operating casinos on tribal trust lands, but is silent on operations not on "Indian lands." Michigan sought Supreme Court review and the Court granted certiorari.

The Majority Opinion

The Court affirmed the Sixth Circuit's opinion and found that Michigan's suit against Bay Mills was barred by tribal sovereign immunity. The Court's opinion, authored by Justice Kagan and joined by Chief Justice Roberts, and Justices Kennedy, Breyer and Sotomayor, found no "unequivocal" Congressional authorization for Michigan's suit. Moreover, the Court found that the plain language of IGRA did not authorize Michigan's claim. Finally, the Court found that Michigan offered no new arguments to overrule the Court's holding in *Kiowa* that tribal immunity applies to commercial activity outside of Indian territory.

The Court based its opinion on the concepts of *stare decisis* and deference to Congress. In discussing *stare decisis*, the Court noted that "it does not overturn its precedents lightly," *id.* slip op. at 15, and cited two hundred years of precedent demonstrating that Tribes are afforded "the common law immunity from suit traditionally enjoyed by sovereign powers." *Id.* slip op. at 5. The Court, citing *Santa Clara Pueblo v. Martinez*, noted that:

> Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' That immunity, we have explained is 'a necessary corollary to Indian sovereignty and self-governance.

Id.

The Court, "reaffirmed a long line of precedents concluding that 'the doctrine of tribal immunity'—without any exceptions for commercial or off-reservation conduct—'is settled law and controls this case.'" *Id.* slip op. at 15. Moreover, because Michigan enjoyed alternative enforcement options, including *Ex Parte Young* type suits against tribal officials, criminal enforcement against individual patrons of the Vanderbilt casino, and renegotiation of the terms of the Tribal-State compact, the Court found adherence to *stare decisis* appropriate. The Court acknowledged that while these alternative enforcement remedies may be less efficient, it did not mean that the Court should abrogate its long-standing precedent.

With respect to deference to Congress, the Court found it significant that in the sixteen years following the Court's *Kiowa* decision, Congress had not acted to abrogate tribal sovereign immunity for off-reservation commercial activities. Ultimately, said the Court, "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Id.* slip op. at 17. The Court further noted that any limits imposed by Congress on tribal sovereign immunity must be clear.

The Sotomayor Concurrence

Justice Sotomayor's concurring opinion may, over time, prove to be a critically important piece of legal reasoning supporting tribal sovereignty. Sotomayor's concurrence provided a detailed analysis of why history and comity also require the wholesale affirmation of sovereign immunity. Her opinion cited to several key pieces of recent legal scholarship on the history of sovereign immunity and recognized the special nature of tribal sovereignty arising from the origins of the federal trust relationship. Justice Sotomayor pointed to the seminal Indian law case *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), in explaining why tribes are not like states or foreign countries: "[t]he condition of the Indians in relation the to the United States is perhaps unlike that of any other two people in existence." 572 U.S. ___, No. 12-515, slip op. at 3 (Sotomayor, J., concurring).

Justice Sotomayor also found that "[p]rinciples of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including off-reservation commercial conduct." *Id.* In support, Justice Sotomayor cited two reasons. First, because Tribes are barred from suing a state in federal court, "including for commercial conduct that chiefly impacts Indian reservations," it would be "anomalous" to permit a state to sue a Tribe in federal court for commercial conduct that chiefly impacted state lands. *Id.*, slip op. at 4 (Sotomayor, J., concurring). Second, Tribes must be permitted to engage in commercial enterprises because such operations may be the only means for a Tribe to achieve federal policy objectives, including greater self-sufficiency, the ability to fund sovereign functions, and reduced reliance on federal funding.

The Dissent

Justice Thomas, joined by Justices Scalia, Ginsburg, and Alito, offered an aggressive dissent. The Thomas dissent found that the expansion of tribal sovereign immunity to off-reservation commercial activities "is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty." 572 U.S. ___, No. 12-515, slip op. at 1 (Thomas, J., dissenting). Justice Thomas, adamant that *Kiowa* was wrongly decided, lamented that "inequities engendered by unwarranted tribal immunity have multiplied." *Id.* Unlike State sovereign immunity, which is constitutionally based, tribal sovereign immunity, according to Justice Thomas, existed "because federal or state law provides it, not merely because the tribe is sovereign." *Id.* slip op. at 3 (Thomas, J., dissenting).

Justice Thomas – like Justice Sotomayor in her concurrence – cited to the principle of comity as support for his argument, albeit in a different way and with a different result. According to Justice Thomas, "permitting immunity for a tribe's off-reservation acts represents a substantial affront to a different set of sovereigns—the States, whose sovereignty is guaranteed by the Constitution." *Id.* slip op. at 4 (Thomas, J., dissenting). The principle of comity, therefore, mandated abrogation of tribal sovereign immunity.

Justice Thomas' dissent also challenged the Court's notion of deference to Congress, noting that it was "this Court, not Congress that adopted the doctrine of tribal sovereign immunity in the first instance." *Id.* slip op. at 8 (Thomas, J., dissenting). Rather than be persuaded by Congress's lack of action in the years following *Kiowa*, Justice Thomas found that "legislative action is usually indeterminate" and therefore "require[s] very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines."

Implications

The State of Michigan chose a bold strategy in asking the Supreme Court to modify the doctrine of tribal sovereign immunity, asking the Court to abrogate existing precedent in giving States a right to sue tribal governments directly. When Michigan's counsel was questioned at oral argument about the range of remedies already available to Michigan, he characterized *Ex Parte Young* injunctive relief and state powers of criminal prosecution as "imperfect remedies," and encouraged the Court to allow "the State to have its whole panoply of remedies" lest it deprive the State of a sovereign attribute. Transcript of Oral Argument at 13-14, 18, *Michigan v. Bay Mills Indian Community*, 572 U.S. ___ (2014) (No. 12-515). Michigan was supported by the extensive arguments submitted by sixteen states as *amici curiae*, most of which have substantial tribal populations, asking the Court not to "extend" the reach of tribal sovereign immunity. These states argued that tribal activity in nonbank lending, campaign finance, and additional gambling issues have caused disputes to proliferate in a manner that required increased powers for States against Tribes. The opinion in *Bay Mills* shows a five justice majority un-persuaded by the arguments of Michigan and the *amici* States.

However, notwithstanding the failure of States to achieve a sweeping abrogation of tribal sovereign immunity, important practical lessons can be drawn from the *Bay Mills* decision:

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- The Court reminds States that, absent federal law to the contrary, tribes operating businesses beyond reservation are subject to generally applicable states laws, even though enforcement of this applicable law may be through narrow and specific avenues.
- Tribes and their business partners should prepare for hard fought negotiations with States over compacts of all types, as the Court has highlighted this arms-length negotiation process as a preferred way to achieve mutually agreed upon methods for dispute resolution.
- Processes for fair and effective bilateral negotiations between tribal interests and State interests must be established. This depends in part on relationship building over time. Each State should have designated staff or offices for tribal relations and tribes should have designated officers for interfacing with state authorities. This needs to extend beyond traditional areas of interaction between Tribes and States and include business regulators who may have interests in evolving areas of tribal economic development, such as e-commerce.
- Tribes and their business partners must redouble efforts to protect sovereignty and expansive economic development opportunities with political and regulatory relationship building. The majority opinion makes clear that definitive evidence of Congressional consideration of essential principles of federal Indian law was a critical factor in the Court reaching the decision it did. Tribes and their partners must develop and execute effective federal relations strategies.
- Tribes and their essential partners should avoid litigation that might expose core attributes of sovereignty to adverse decisions by federal appellate courts. A close read of the dissenting opinion counsels that Indian Country as a whole was likely one vote away from suffering an adverse ruling that would have changed the very legal nature of Tribes and inherent sovereignty.
- Businesses dealing with Tribes, either as partners or counterparties, must have sophisticated legal counsel that can craft transactional documents and dispute resolution procedures that respectfully account for the unique legal status of Tribes and their businesses.

For More Information

For assistance or additional information, please contact Ed Gehres, Dan Press, or Scott Nuzum, or anyone in the firm's Native American and Tribal Business Practice Group.

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