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Protecting Tribal Nations' Sovereign Immunity from Tort Claims

On March 7, 2019, the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) adopted Resolution No. 2019 SPF: 016, entitled "Protecting Tribal Sovereign Immunity by Committing to Risk Management Solutions for Tort Victims." USET SPF's resolution is part of an ongoing effort in Indian country to address the current risks to Tribal Nations' tort sovereign immunity.

This briefing paper summarizes the current threat to Tribal Nations' sovereign immunity from tort claims, especially arising from off-reservation commercial activities, and discusses broad strokes methods for addressing the threat.

I. Threat to Tribal Nations' Tort Sovereign Immunity

Tribal Nations now engage in significant economic activities, including outside Indian country. These activities have been essential for Tribal Nations to develop the funds we need to operate strong governments and take care of our people. However, these activities are also drawing Tribal Nations' sovereign immunity under fire. While Supreme Court precedent currently establishes that Tribal Nations' sovereign immunity does extend to cases arising from off-reservation commercial activities, there is the threat of a possible chipping away with regard to torts.

A. General Rule of Tribal Nations' Sovereign Immunity

The Supreme Court has recognized that Tribal Nations, like other sovereign powers, possess immunity from lawsuits as a core aspect of our sovereignty. The Supreme Court has established that, when a Tribal Nation has sovereign immunity, the only way for a case against it to proceed is: (1) if the Tribal Nation has waived its sovereign immunity; or (2) if Congress has unequivocally abrogated the Tribal Nation's sovereign immunity. However, the Supreme Court has said it draws the "bounds" of Tribal Nations' sovereign immunity, determining whether it applies to a particular case in the first place.

B. Areas of Vulnerability

There are particular areas where Tribal Nations' sovereign immunity is under attack. Below, we have discussed three major areas tied closely to the tort threat.[1]

i. Off-Reservation Commercial Activity

While the Supreme Court has affirmed that Tribal Nations have sovereign immunity from suits arising from commercial activities taking place off-reservation, those same decisions contain language claiming such

[1] However, there are other areas of attack, including but not limited to cases styled as *in rem* against Tribal Nations' property (including patent and real property cases) and cases arguing a Tribal Nation is not in actual control of a business venture (including payday lending cases).

application may be "unfair" to plaintiffs and suggesting Congress act to abrogate it.[2] The Court's majority opinions in those cases have said "[t]here are reasons to doubt the wisdom of perpetuating the doctrine"[3] and that "it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity."[4] In this way, while the Court has affirmed sovereign immunity's application to such cases, it has invited Congress to do away with it. Further, the dissenting opinions in these cases show that a growing number of justices believe cases upholding Tribal Nations' sovereign immunity for suits arising from off-reservation commercial activities were wrongly decided and should be overturned entirely.[5]

ii. Tort Claims

Additionally, the Supreme Court has indicated a willingness to take matters into its own hands in certain circumstances that it views as especially compelling—and it has provided tort cases as an example.

The Supreme Court has stated that it "has taken the lead in drawing the bounds of tribal immunity"—meaning it determines whether Tribal Nations' sovereign immunity covers a particular case in the first place (not even giving Congress or Tribal Nations the option to choose whether to abrogate or waive it).[6] And while it has said that its precedent establishes broad application of Tribal Nations' sovereign immunity, it has also said departure from that precedent is possible with a "special justification."[7]

The Supreme Court has gone on to signal that such "special justification" may exist for tort plaintiffs. Black's Law Dictionary defines "tort" as a civil wrong for which a remedy may be obtained.[8] This usually means a person has suffered an injury and seeks damages against the person or entity responsible. Tort plaintiffs are often viewed sympathetically by courts as accidental plaintiffs requiring recourse for their injuries.

The Supreme Court has spoken of tort "victims" as presenting the requisite "special justification" to find the bounds of Tribal Nations' sovereign immunity inapplicable. The Court in the 2014 *Bay Mills* case said:

We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us.[9]

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[2] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991).

[3] *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

[4] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014).

[5] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (dissenting opinions by Justice Scalia and Justice Thomas joined by Justices Scalia, Ginsburg, and Alito); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) (dissenting opinion by Justice Stevens joined by Justices Thomas and Ginsburg). In 2017, in a case where the Court found sovereign immunity lacking for other reasons, two justices still filed separate opinions reiterating their positions that Tribal Nations' sovereign immunity does not apply to off-reservation commercial activities. *Lewis v. Clarke*, 137 S. Ct. 1285 (2017) (concurring opinions by Justices Thomas and Ginsburg).

[6] *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998).

[7] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)).

[8] *Tort*, Black's Law Dictionary (11th ed. 2019).

[9] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 n.8 (2014) (quoting *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)). And a dissenting justice construed the majority opinion's suggestion as follows: "The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an

Before that, in the 1998 *Kiowa* case, the Court's majority opinion also said tort plaintiffs may be different, stating "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[10] Again, the dissenting justices in these decisions cited tort cases as an especially compelling situation in which Tribal Nations' sovereign immunity should not apply to off-reservation commercial activities.[11]

Plaintiffs challenging Tribal Nations' tort sovereign immunity, and even some courts, have seized onto this language. For example, in the 2017 case of *Wilkes v. PCI Gaming*, the Alabama Supreme Court built off this momentum and held broadly that "tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members."[12] It claimed "the Supreme Court of the United States has expressly acknowledged that it has not ruled on the issue whether the doctrine of tribal sovereign immunity has a field of operation with regard to tort claims."[13] In the *Wilkes* case, an employee of the Poarch Band of Creek Indians' hotel and casino allegedly injured the plaintiffs while on the job but off-reservation, but the court did not limit its holding to these circumstances. A petition for *certiorari* was rejected by the United States Supreme Court, and the case is now proceeding in the lower court, but some anticipate that it could come again before the United States Supreme Court.

The federal government and state governments have sovereign immunity in the tort context, but many have issued limited waivers. The United States has waived its own sovereign immunity for some tort liability pursuant to the Federal Tort Claims Act ("FTCA").[14] Additionally, many, if not all, states have enacted their own versions of the FTCA to waive sovereign immunity for tort cases in their courts.[15]

iii. Claims Against Individual Officials or Employees

The Supreme Court has also indicated that Tribal Nations' officials and employees may not fall under Tribal Nations' sovereign immunity, even when on duty or operating in their official capacity, and it has already held immunity inapplicable in a tort case against an employee.

'off-reservation' tort exception to *Kiowa*'s blanket rule." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 827 n.5 (2014) (Scalia, J., dissenting).

[10] *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

[11] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 825 (2014) (Scalia, J., dissenting) ("As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike."); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 766 (1998) (Stevens, J., dissenting) ("Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.").

[12] *Wilkes v. PCI Gaming Auth.*, No. 1151312, 2017 WL 4385738, at *4 (Ala. Sept. 29, 2017).

[13] *Wilkes v. PCI Gaming Auth.*, No. 1151312, 2017 WL 4385738, at *4 (Ala. Sept. 29, 2017).

[14] 28 U.S.C. § 1346(b)(1); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 765 (1998). Tribal Nations' employees are considered covered employees for purposes of the FTCA if they are acting within the scope of their employment in carrying out Indian Self-Determination and Education Assistance Act contracts. Pub. L. No. 101–512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C. § 5321 notes); *see also* 25 U.S.C. § 5396.

[15] The Supreme Court recently recognized states' sovereign immunity by overturning *Nevada v. Hall,* 440 U.S. 410 (1979), and instead holding that the Constitution prohibits states from denying in their own courts the sovereign immunity of other states and thus does not permit a state to be sued by a private party without its consent in the courts of a different state. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

In the recent 2017 *Lewis v. Clarke* case, the Court examined whether Tribal Nations' sovereign immunity bars "individual-capacity damages actions against tribal employees for torts committed within the scope of their employment and for which the employees are indemnified by the tribe."[16] It held "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."[17] It said the fact that the employee was acting within the scope of employment was not sufficient to extend the Tribal Nation's sovereign immunity to the employee, nor was the Tribal Nation's indemnification.[18]

Even outside the tort context, in other recent cases upholding Tribal Nations' sovereign immunity, the Court noted the plaintiffs' ability to bring suit against individuals rather than the Tribal Nation. In *Bay Mills*, it said the state could bring suit seeking injunctive relief against individual Tribal Nations' officers "responsible for unlawful conduct" as well as criminal prosecutions against "anyone who maintains—or even frequents—an unlawful gambling establishment."[19] In *Oklahoma Tax Commission*, it said "[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."[20]

The federal government's and state governments' sovereign immunity extends to officials and employees operating in their official capacities or on duty, but it does not extend to suits against them in their individual capacities—a doctrine the Supreme Court in *Lewis v. Clarke* claimed to be following.[21] Similarly, there is a narrow doctrine under federal law, referred to as the *Ex parte Young* doctrine,[22] whereby the sovereign's immunity is not imparted onto its official for suit against the official even in his official capacity when specific circumstances are met—a doctrine to which the Supreme Court in *Bay Mills* and *Oklahoma Tax Commission* claimed to be analogizing.[23]

II. Broad strokes Methods for Reducing Risk to Tort Sovereign Immunity

When Indian Country pursues actions to protect Tribal Nations' sovereign immunity from tort claims—whether they are requests to the federal government to act or actions undertaken by Tribal Nations—we should examine how the action will further the below goals.

A. Obtain Congressional Reaffirmation

The Supreme Court has said that it will defer to Congress's choice of whether to abrogate Tribal Nations' sovereign immunity more broadly for the overarching category of off-reservation commercial activities.

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[16] *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017).

[17] *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017) (emphasis added).

[18] *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017).

[19] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014).

[20] *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991).

[21] The Court in *Lewis v. Clarke* arguably simply held that the same rules apply to Tribal Nations' sovereign immunity as to other sovereigns' immunity. If this were true, even after this case, Tribal Nations' sovereign immunity, just like other sovereigns' immunity, should still extend to actions that restrain or compel action by a Tribal Nation or impact its treasury (except where that is only as a result of a voluntary indemnification), as those are deemed official capacity actions. However, lower courts have not always used those terms in the same ways in the Tribal Nation context, so now there is ambiguity about what they mean, which lower courts will likely exploit to chip away at Tribal Nations' sovereign immunity.

[22] *See Ex parte Young*, 209 U.S. 123 (1908).

[23] The *Ex parte Young* doctrine only applies when suit is brought in federal court seeking prospective injunctive or declaratory relief (rather than damages) when there is an ongoing violation of federal law. However, Supreme Court references to bringing suit against Tribal Nations' officials has not been limited to these narrow circumstances.

Thus, if Congress affirmed the continued existence and importance of the doctrine for off-reservation commercial activities, the Supreme Court would likely defer.

With regard to the more narrow category of tort claims, for which the Supreme Court has signaled it could create a carve out, the Court in the recent *Bay Mills* case acknowledged that Congress has not specifically addressed whether immunity should apply in the ordinary way. Thus, if Congress confirmed its view that Tribal Nations have sovereign immunity that has not been abrogated in tort cases, including arising from off-reservation commercial activities, the Supreme Court may defer. However, as noted below, this may not be enough to stop the Supreme Court from creating a carve out.

B. Eliminate Argument for Special Justification

Despite historically deferring to Congress on the matter, the Supreme Court in the recent *Bay Mills* case—and drawing from ideas from earlier cases—indicated it may take matters into its own hands with regard to tort cases, especially arising from off-reservation commercial activities and especially if Congress does not affirmatively act. The Court has warned it could depart from its precedent establishing broad application of Tribal Nations' sovereign immunity if a "special justification" exists, thereby finding Tribal Nations' sovereign immunity does not extend to cover the case in the first place (regardless of what Congress says, though it would likely defer if Congress acted to affirm). It has hinted that it could find such "special justification" exists for a "victim" who has not chosen to deal with a Tribal Nation and has no alternative way to obtain relief—specifically referring to tort cases.

Thus, if Tribal Nations take steps to demonstrate to the Court that no special justification exists for creation of a carve out by addressing what the Court has said it views as a fundamental fairness question, the Court is more likely to leave Tribal Nations' tort sovereign immunity intact. Such steps could include Tribal Nations taking "risk management measures"—which can include protecting potential tort plaintiffs from injury by making business operations safer and providing redress to those who are injured. Redress can come in the form of payments from insurance or funds pooled from various sources (such as multiple Tribal Nations). Redress can also come in the form of Tribal Nations exercising their sovereignty by enacting limited waivers of sovereign immunity that allow potential tort plaintiffs to pursue tort claims in the Tribal Nation's own courtroom and within the Tribal Nation's own parameters.

For more information or to join this effort, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.