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SCOTUS Issues Two Significant Decisions Impacting Tribal Sovereignty

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On Thursday, June 15, the Supreme Court of the United States issued two decisions concerning tribal sovereignty: one of which upheld the Indian Child Welfare Act (ICWA), and one of which concluded that Congress abrogated tribal sovereign immunity in the Bankruptcy Code.

Constitutionality of Indian Child Welfare Act

In *Haaland v. Brackeen*, No. 21-736, 599 U.S. ____ (2023), a 7-2 decision written by Justice Amy Coney Barrett, the Court affirmed the constitutionality of ICWA. The 1978 law was enacted in response to a long history of Native children being forcibly removed from their families and placed in non-Indian homes and boarding schools that had no ties to tribal culture or traditions. ICWA requires a state court to place an Indian child needing to be adopted or placed in foster care with an Indian caretaker if one is available. Placement with the child's extended family is preferred, followed by placement within the child's Tribe. If no tribal members are available, the child is to be placed with members of another tribe. The Court noted that ICWA "requires a state court to place an Indian child with an Indian caretaker, if one is available . . . even if the child is already living with a non-Indian family" and "even if the state court thinks it is in the child's best interest to stay" with that family.

In a decision that is a victory for Native rights, the Court rejected arguments that Congress exceeded the scope of its authority when it enacted ICWA. In doing so, the Court affirmed that Congress has the power to displace state court jurisdiction in matters of family law. The Court also rejected arguments that ICWA falls outside the scope of Congress' authority under the Indian Commerce Clause and violates the Tenth Amendment. Although petitioners also argued that ICWA violates the Equal Protection Clause by providing preferences based on race and unlawfully allows tribes to alter placement preferences, the Court did not decide those questions after finding that petitioners lacked standing to raise them.

Justice Neil Gorsuch wrote a concurrence emphasizing ICWA's historical context and significance. Justice Brett Kavanaugh wrote separately to emphasize that the Court did not address or decide the Equal Protection Clause issue. Justices Clarence Thomas and Samuel Alito dissented.

Bankruptcy Code's Abrogation of Tribal Sovereign Immunity

In *Lac Du Flambeau Band of Lake Superior Chippewa Indians et al. v. Coughlin*, No. 22-227, 599 U.S. ____ (2023), the Court concluded in an 8-1 decision that the Bankruptcy Code unambiguously abrogates tribal sovereign immunity. The decision means that tribes do not have immunity from lawsuits alleging violations of the bankruptcy code's automatic stay rules.

The case involved a dispute between the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band) and Brian W. Coughlin, an individual who had borrowed $1,100 dollars from one of the Band's businesses and filed bankruptcy before repaying the loan. Under the Bankruptcy Code, filing for bankruptcy automatically prevents creditors from engaging in collection efforts while bankruptcy proceedings are pending. Although governments typically enjoy immunity from lawsuits due to their sovereign status, the Bankruptcy Code abrogates the sovereign immunity of any "governmental unit" for purposes of the Code. The Code defines that term as including specific types of governments, and "other foreign or domestic government[s]." The question before the Court, and on which circuit courts had split, was whether a tribe qualifies as an "other foreign or domestic government," or whether Congress needed to have specifically referenced Indian tribes to have expressly abrogated tribal sovereign immunity.

In the majority decision written by Justice Ketanji Brown Jackson, the Court concluded that the Bankruptcy Code unequivocally abrogates the sovereign immunity of "any and every government that possesses the power to assert such immunity," which included federally recognized tribes. That interpretation, the Court reasoned, was also consistent with other provisions of the Bankruptcy Code.

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Considering whether federally recognized tribes are "governments," the Court concluded they are, and have long been recognized as such.

The Court rejected the Band's argument that Congress was required to mention Indian tribes explicitly and distinguished other cases finding no abrogation of tribal sovereign immunity on the grounds that those cases did not involve similarly structured and worded statutes. Justice Thomas concurred in the judgment but argued that tribal sovereign immunity is a "flawed premise" that the Court should abandon. Justice Gorsuch dissented, noting the unique status of Indian tribes under federal law and finding the Bankruptcy Code's language insufficient to constitute an express abrogation of tribal sovereign immunity.

For More Information

Van Ness Feldman's nationally recognized Native Affairs team monitors and provides analysis of court decisions, regulations, legislation and other matters affecting Indian country. For further information, please contact Charlene Koski at ckoski@vnf.com or any other member of our Native Affairs practice.

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