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FEDERAL COURTS SECTION NEWSLETTER

May 2, 2017

2018 Annual Meeting Program

The topic for next year's meeting is Federal-Court Remedies Against the Executive, which we are co-sponsoring with the Remedies Section. Confirmed panelists include Jim Pfander (Northwestern), Amanda Frost (American), Sam Bray (UCLA), and Nick Parillo (Yale). The section will meet Friday, January 5, 2018, at 1:30 p.m.

In the Supreme Court

Here are brief summaries of cases the Court has decided in the October 2016 Term, followed by descriptions of cases awaiting review and cases in which the Court has heard argument that appear to present Federal Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2016 Term

***Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017)**

The Bankruptcy Court may not authorize a distribution settlement that violates the statutory priority scheme. The supporting creditors had argued that since the objecting creditors would get nothing under a Chapter 7 bankruptcy, they suffered no injury-in-fact by the settlement and therefore lacked standing. The Court rejected that argument, noting that had the Bankruptcy Court not approved the settlement, a different settlement, consonant with the statutory priority scheme, might offer mid-priority creditors some recovery.

***Lewis v. Clarke*, 2017 WL 1447161 (U.S. Apr. 25, 2017)**

A tribe's sovereign immunity does not bar individual-capacity damages against tribal employees for torts within the scope of their employment. The fact that the tribal gaming authority might indemnify the employee (for ordinary negligence liability) does not extend tribal sovereign immunity to the employee.

***Lightfoot v. Cendant Mortgage* Corp., 137 S.Ct. 553 (2017)**

The phrase "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal" in Fannie Mae's charter does not confer subject-matter jurisdiction on the district court over every case by or against Fannie Mae. The Court distinguished *American National Red Cross v. S.G.*, 505 U.S. 247 (1992).

***McLane Co. v. EEOC*, 137 S.Ct. 1159 (2017)**

A district-court order to quash or enforce a subpoena is reviewable only for abuse of discretion, not *de novo*.

Cases Argued

***Chester, N.Y. v. Laroe Estates, Inc.*, No. 16-605 (Decision below: 828 F.3d 60 (2d. Cir. 2016)) (Argument transcript)**

Do Rule 24(a) intervenors need Article-III standing (three circuits) or is it sufficient that the case in which they intervene presents a case or controversy?

***Hernandez v. Mesa*, No. 15-118 (Decision below: 785 F.3d 117 (5th Cir. 2015)) (*Argument transcript*)**

(1) Does a formalist or functionalist analysis govern extraterritorial application of the Fourth-Amendment prohibition of unjustified deadly force as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area the United States controls? (2) May the court grant or deny qualified immunity based on facts —such as the victim's legal status—unknown to the officer at the time?

***Los Angeles County v. Mendez*, No. 16-369 (Decision below: 815 F.3d 1178 (9th Cir. 2016)) (*Argument transcript*)**

(1) Does the Ninth Circuit's provocation rule conflict with *Graham v. Connor*, 490 U.S. 386 (1989), on the manner of determining an excessive-force, § 1983 case against a police officer? (2) If the rule is permissible, must the court tailor its qualified-immunity analysis to determine whether every reasonable officer would have known his conduct would provoke a violent confrontation on the facts of the case even after a district-court finding of no unreasonable force within the meaning of the Fourth Amendment? (There is a third issue involving chain of causation—not a federal-courts issue.)

***Microsoft Corp. v. Baker*, No. 15-457 (Decision below: 797 F.3d 607 (9th Cir. 2015)) (*Argument transcript*)**

Does a circuit court have jurisdiction under Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice?

***Perry v. MSPB*, No. 16-399 (Decision below: 829 F.3d 760 (D.C. Cir. 2016)) (Argument transcript)**

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case.

Is an MSPB decision disposing of a "mixed" case on jurisdictional grounds subject to judicial review in district court or in the Federal Circuit?

***Ziglar v. Abbasi*, Nos. 15-1358, 15-1359, 15-1363 ((Decision below: 789 F.3d 218 (2d Cir. 2015) (*Argument transcript*)**

(1) Did the Second Circuit define "new context" at too high a level of generality when it implied Fifth-Amendment *Bivens* claims against respondents? (2) Did the Second Circuit err by failing to focus on the context of the individual cases to determine the issue of qualified immunity—

whether it was clearly established that *petitioner Ziglar's* conduct was unconstitutional? (3) Did the Second Circuit err by upholding a § 1985(3) claim against petitioner Ziglar even though it found that the statute's applicability to federal officials' actions was not clearly established, on the theory that petitioner's conduct violated some other clearly established law?

Granted Certiorari

***Patchak v. Zinke*, No. 16-498 (Decision below: 828 F3d 995 (D.C. Cir. 2016))**

A landowner in a rural area of Michigan sued to prevent the Gun Lake Tribe from establishing a casino on land allocated to it under the Indian Reorganization Act. The case has already been to the Supreme Court once, over the question of whether the plaintiff had "prudential" standing. After the Court found that he did, and remanded for further proceedings, Congress enacted the Gun Lake Trust Land Reaffirmation Act, ratifying the allocation of land and included in it a provision withdrawing subject-matter jurisdiction in cases relating to the allocated land, specifically mentioning "an action pending in a Federal court as of the date of enactment of this Act."

Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including the Supreme Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation-of-powers principles?

Comments, Questions, Submissions

Don Doernberg (McGeorge) prepared this newsletter. If you would like to contribute to (or do entirely) a newsletter, contact Curtis Bradley, Chair of the Section for 2018, at Duke Law School, (919) 613-7179, cbradley@law.duke.edu, Amy Barrett, Chair-Elect of the Section for 2018, at Notre Dame Law School, (574) 631-6444, abarrett@nd.edu or Don Doernberg, 11333 Long Valley Road, Penn Valley, CA 95946-9360, at (530) 274-1228, DLD@law.pace.edu so that your name can be placed in nomination at the 2018 meeting in San Diego. Please make the contact as quickly as reasonably possible.

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