



Lewis v. Clarke: Impact on Sovereign Immunity – Latest Developments

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Lewis v. Clarke

(2017) 581 U.S. ___, 137 S.Ct. 1285, 197 L.Ed.2d 631

- ❖ **HELD:** In a suit brought against a tribal employee in his individual capacity for a tort committed in the scope of employment, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.
- ❖ **HELD:** An indemnification provision codified under tribal law cannot, as a matter of law, extend the tribe's sovereign immunity to individual employees who would otherwise not fall under its protective cloak.



What the Lv.C Majority Said



- ❖ Tribal employee was sued in his personal or individual capacity, as opposed to official, capacity.
- ❖ Suits against government officers for actions taken under the color of state law are not barred by the state’s sovereign immunity. (*citing Hafer and Bivens*)
- ❖ “This is not a suit against [the]Tribal employee in his official capacity. It is simply a suit against employee to recover for his personal actions, which will not *require* action by the sovereign or disturb the sovereign’s property.”

What the Lv.C Majority Said



- ❖ “The critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.”
- ❖ The “tribal employee was operating the vehicle within the scope of his employment, but on state lands, and the judgment will not operate against the tribe” (because the State courts have no jurisdiction over the Tribe per *Kiowa* and *Bay Mills*).
- ❖ “[I]ndemnification is not a certainty here. The [Tribal employee] will not be indemnified by the [Tribe] should it determine that he engaged in ‘wanton, reckless, or malicious’ activity.” Indemnification provisions are a voluntary choice on the part of the state.

Lewis v. Clarke: Impact on Sovereign Immunity



- In 2020, there were 22 federal district court cases and 6 federal appellate court cases that discussed (not just cited) *Lewis v. Clarke*. About 1/3 involved officers or employees of Indian tribes.
- Some of these cases are grappling with the scope and meaning of *Lewis v. Clarke*. One of these cases seeks to narrow the *LvC* holding, to avoid “the exception swallowing the rule.”
- Other cases underscore our previous “use the force wisely” advice, particularly in payday lending and use of excessive force cases (e.g., law enforcement).



The 2020 federal cases

Avoid having “the exception swallowing the rule.”

- ❖ ***Cunningham v. Lester*** (Fed. Dist. Ct Maryland, slip op.). Rejects overly broad reading of *Lewis v. Clarke*, i.e., that if Plaintiff names D’s in individual capacity and seeks money damages from them in such capacity, no SI applies. Court points instead to a 4th Circuit case, *Martin v. Wood*, 772 F.3d 192 (4th Cir 2014), with multi-factor test, and says this test was not overruled by *LvC*.



The 2020 federal cases

Our advice is always “use the force wisely”

- ❖ ***Easely v. Hummingbird Funds*** (S.D. Alabama) (payday lending). Court rejects SI defense for individual capacity defendants who worked for the company. Doesn’t go into much discussion on capacity question. But court does note 609% interest rate and payment of over \$1900 on a \$650 loan (over 4 month period).
- ❖ ***Hengle v. Asner*** (E.D. Virginia) (payday lending) Allowing suit to proceed against Tribal Council and other officials where acting ultra vires (only for injunctive relief).



The 2020 federal cases

Excessive force cases

- ❖ ***Grenskow v. Provost*** (7th Cir). Tribal elder at Tribal Council meeting was forcibly removed by Tribal P.D. at direction of Tribal Council. Because claims was brought by tribal member against tribal officers to remove her from a tribal meeting on tribal land, the tribe was the real party in interest, even for the excessive force claim. Dismissed.
- ❖ ***Vangjeli v. Banks*** (E.D. PA). Excessive force claim against an individual security officer employed by a contractor for Department of Homeland Security **can** proceed. Contractor employee allegedly exceeded limits on use of force built into contract.



The 2020 federal cases

New twist: was tribal officer “exercising inherent sovereign powers of the Tribe?”

❖ ***Eyck v. U.S.*** (D. South Dakota). Tribal P.D. officer assisted state police in high speed chase on non-tribal lands. Chase resulted in accident and those injured sued U.S. and tribal officer in their individual capacity. Court asked whether the officer was “exercising the inherent sovereign powers of the Tribe” and found that he was not, because the chase was on non-tribal lands. Allowed suit to proceed, even though officer was acting within his job duties/official capacity.

❖ ***Roeman v. U.S.*** (D. South Dakota). Same case as *Eyck*.



The 2020 federal cases

Sovereign immunity, governance, and social media.

❖ ***Attwood v. Clemens*** (11th Cir). Florida legislator blocked citizen from his twitter and FB accounts. Citizen sued for injunction. Arguing that legislator was preventing him from participating in a public forum in violation of his civil rights. Result: suit allowed to proceed. Concurrence gives a broad reading of *LvC* in this context.



The 2020 federal cases

- ❖ ***McGirt v. Oklahoma***, No. 18-9526, --- U.S. ---, 140 S.Ct. 2452, --- L.Ed.2d --- (2020).
- ❖ In a 5–4 decision, the U.S. Supreme Court held that the boundaries of the Muscogee (Creek) Nation reservation, as defined in its 1866 treaty with the United States, remain intact. Overnight, the Creek Reservation was recognized to be 3.25 million acres; the entire area is “Indian Country,” as defined by federal law.
- ❖ Includes approximately 400,000 people in Tulsa, OK.

Hypothetical cases



- Can a tribal employee resist a subpoena in third-party action not involving the tribe? If the material is all human resources records/material?
- What if the information the employee has is a blend of official information and personal information gleaned from being at work but not necessarily part of official function?

Hypothetical cases



- Is a volunteer assisting a TDHE in carrying out government-authorized actions protected by sovereign immunity, or is he or she by definition acting in personal capacity? E.g., removal and disposal of tenant's junk vehicles kept on adjacent, TDHE-owned land.



Hypothetical cases

- A TDHE takes official action by resolution limiting the role of a former employee of the TDHE's wholly-owned commercial subsidiary – not allowed to be an expert witness in meth contamination cases involving the TDHE.
- Former employee alleges interference with contract because a potential TDHE contractor will not contract with the former employee.
- What if an individual capacity allegation is raised that TDHE executive director misstated intent of resolution, but acting on behalf of Tribe?



Hypothetical cases

- Do tribal officials face future legal claims for how they addressed the COVID-19 pandemic in their jurisdiction?
- Failure to spend federal funds or incorrect/ineffective/untimely expenditure of federal or tribal funds?
- Failure to institute minimum levels of protection/safest practices for citizens/members?
- Failure to close public spaces during the height of the infections? Or to properly execute other recommended protocols?
- Personal injury or wrongful death claims?



Thank you. Questions?

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