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## Patchak V. Zinke Stresses Need For Separation Of Powers

By **James Marino**

Law360, New York (August 28, 2017, 5:51 PM EDT) -- The public is often baffled by the cases that the U.S. Supreme Court decides to hear out of the hundreds presented yearly. So are many lawyers and legal scholars. This term, for example, the question of who a baker must bake a cake for has arisen to the level of constitutional importance. On the other hand, the relatively unknown case of Patchak v. Zinke gets none of the notoriety in the media or the public eye, yet it is probably one of the more important cases that have been decided by the court since Marbury v. Madison defined the parameters of the three branches of our government over 210 years ago. That landmark decision established the law of the land, making clear the critical need for maintaining the system of checks and balances and separation of powers between the executive, legislative and judicial branches, as well as the rights and protections for the people of the United States for whom the Constitution was written.



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In the current case, David Patchak challenged the intrusion of an Indian gambling casino into his neighborhood in rural Michigan with all the negative impacts that would follow and alleged it violated an earlier Supreme Court decision defining what tribes had a right to do so. That 2009 case, *Carcieri v. Salazar* (555 U.S. 579), held that the only Indian tribes that could bring land into trust under the Indian Reorganization Act (25 USC 465-480) were those tribes in existence on or before June 18, 1934, and who were under the jurisdiction of the federal government at that time, interpreting the plain congressional meaning of that language in the act when it was written. Patchak alleged in his complaint this newfound Gun Lake Tribe (the Match-E--Be-Nash-She-Wish band of Pottawatomi Indian tribe) was not entitled to do so.

Seeking to dispose of Patchak's lawsuit early on, the agency and the tribe, as real party in interest, attacked Patchak's standing to challenge the Bureau of Indian Affairs and U.S. Department of Interior decisions even though they were obviously engaged in a not very subtle attempt to evade the application of the *Carcieri* holding, which would prevent taking the rural land next door to Patchak's property into trust in order for the tribe to build and operate a gambling casino.

By the provisions of the Indian Gaming and Regulatory Act [25 USC 2703 (4) and (5)] (hereafter the IGRA) to engage in class III casino gambling the Indian group must not only be a federally acknowledged tribe but it must have land on which to site the casino that is either a recognized and lawful established Indian reservation, is land owned by the tribe but subject to federal prohibition against any alienation or it must be land held by the federal government in trust for that tribe pursuant to 25 USC 465. Therefor the *Carcieri* decision became a hurdle for the numbers of small tribes who obtained federal acknowledgment after June 18, 1934, and in particular after Congress enacted the IGRA in October 1988. Therefor these newly acknowledged groups could not get land into trust for a casino even though they were entitled by law to federal tribal status and acknowledgment, entitled to get welfare, grant monies and federal benefits and services provided to Indian tribes.

The federal agencies were initially successful in alleging that Patchak had no standing to challenge the introduction of a gambling casino next door. He persisted in the litigation and in the interim the

Bureau of Indian Affairs authorized the creation of trust land and the casino construction began almost immediately. Then, in the court case, these defendant agencies further attacked Patchak's suit on the basis the federal Quiet Title Act barred any challenge to land the title of which was now held by the United States in trust.

Ultimately the Supreme Court found Patchak did have prudential standing to contest the intrusion of a gambling casino in his neighborhood and also to litigate the legitimacy of the newly acknowledged Michigan Gun Lake Tribe, for which the Secretary of Interior had transferred the land into federal trust to allow construction of the casino, given the apparent violation of the court's earlier Carcieri decision. The Supreme Court also found that the Quiet Title Act was not applicable because Patchak's suit did not assert any interest in the land held by the U.S. in trust for the tribe and remitted the case back to the lower courts to hear Patchak's suit on its merits.

Undaunted, the tribe and the agencies went to their friends in Congress and had Sen. Debbie Stabenow, D-Mich., introduce a bill (S 1603) which retroactively "affirmed" or ratified the illegal creation of federal trust land for the casino by the Secretary of Interior. Despite the obvious question of legalizing prior unlawful, arbitrary and capricious actions in violation of the Administrative Procedures Act (APA 5 USC 702-706) the bill did not stop there. It purported to order the district court in which Patchak's current case was pending to dismiss his case and forever bar him from any future judicial relief notwithstanding his right to that judicial relief as expressly set out in the APA. Rather remarkably, the circuit court sustained the dismissal of his case and he filed his present writ of certiorari.

The question of whether the legislative branch can intrude on the prerogatives of the judicial and executive branches in the manner the Michigan Reaffirmation Act (S 1603) has done may not be as glitzy as who has to bake a cake for whom, but it is fundamentally far more important when Congress has attempted to aggrandize its own power, and declare that which was an illegal administrative fiat can then somehow make it legal by affirmation in a congressional bill and then deny citizens the right to challenge such actions under the letter and spirit of the Administrative Procedures Act.

That act was expressly enacted to give those affected citizens, who are impacted by quasi-judicial decisions of federal agencies, the right to a judicial challenge and their day in a court of law. Nor does this usurping of power seem at all consistent with any view of the historic balance of powers which would, if permitted to stand, allow any federal administrative agency to maneuver around the clear meaning of any Supreme Court precedent, like that established in the Carcieri case, supra. Then when caught in the act and challenged in court, run to Congress to pass a specific bill to cover up or excuse their earlier illegal actions. Such an abuse of power also implicates the constitutional prohibition against ex post facto laws and bills of attainder.

The same kind of retroactive affirmation of illegal administrative actions approving a transfer of a massive parcel of fee owned land into federal Indian trust status was written into another bill just recently passed out of the House Natural Resources Committee (H.R. 1491 LaMalfa) and is also being challenged in district court under the express authority of the APA, guaranteeing citizens, local governments and communities the legal right to challenge arbitrary, capricious and illegal actions by administrative agencies of the executive branch of government and do so by filing a lawsuit in the federal district courts.

These important issues question what right does Congress have to retroactively declare that what was and remains illegal nevertheless be "made legal" by legislative dispensation, thus rendering the protections and provisions of the APA and the judicial relief provided in that law for redress essentially vapid and illusory.

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