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FEDERAL COURTS SECTION NEWSLETTER

July 7, 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

***Chester, N.Y. v. Laroe Estates*, Inc., 137 S.Ct. 1645 (2017)**

Intervenor as of right under Rule 24(a) must meet Article-III standing requirements if relief sought is different from that sought by a plaintiff.

***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.

***Davila v. Davis*, 2017 WL 2722418 (U.S. June 26, 2017)**

Ineffective assistance of post-conviction counsel does not provide cause to excuse a procedural default of an ineffective-assistance-of-appellate-counsel claim. The Court split five to four, refusing to apply *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to allow federal habeas relief when counsel on direct appeal is ineffective and post-conviction counsel is ineffective in failing to raise the appellate-ineffectiveness claim.

***Hernandez v. Mesa*, 2017 WL 2722409 (U.S. June 26, 2017) (*per curiam*)**

Qualified-immunity analysis extends only to facts available to officials when they acted; facts they learned after the challenged conduct are irrelevant.

***Lewis v. Clarke*, 137 S.Ct. 1285 (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*.

***McWilliams v. Dunn*, 137 S.Ct. 1790 (2017)**

A five-to-four Court ruled that the state court's interpretation and application of *Ake v. Oklahoma was* "contrary to, or involved an unreasonable application of" *Ake's* clearly established rule "that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense[.]' " The Court remanded to the Eleventh Circuit for determination of whether the state courts' error had the "substantial and injurious effect of influence" that would require granting habeas relief.

***Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017)**

A circuit court lacks jurisdiction under 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice. Three justices concurred in the judgment, concluding that the circuit court lacked Article-III jurisdiction.

***Perry v. MSPB*, 2017 WL 2694702 (U.S. June 23, 2017)**

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.

An MSPB decision disposing of a "mixed" case on jurisdictional grounds is subject to judicial review in district court, not in the Federal Circuit.

***Ziglar v. Abbasi*, 2017 WL 2621317 (U.S. June 19, 2017)**

A four-to-two Court (Justices Sotomayor, Kagan, and Gorsuch not participating) held that the post-9/11 detention policy arose in a new context for *Bivens* purposes, thus triggering a required special-factors analysis that rendered the claim ineligible. A new context exists if a case is "different in a meaningful way" from *Bivens*, *Davis*, or *Carlson*. Without quite being explicit, the Court seems substantially to have limited those cases to their facts.

Granted Certiorari

***Gill v. Whitford*, No. 16-1161 (Decision below: 218 F.Supp.3d 837 (W.D. Wis. 2016)**

This is the challenge to Wisconsin's redistricting plan and involves proper application of the partisan-gerrymandering test of *Davis v. Bandemer*, 478 U.S. 109 (1986). There are multiple issues on the merits; the federal-courts issue is whether partisan-gerrymandering claims are justiciable.

***Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (Decision below: 639 Fed. Appx. 639 (Fed. Cir. 2016))**

Does the Patent and Trademark Office's *inter partes* review—an adversarial process—violate the Constitution by adjudicating private-property rights in a non-Article-III forum without a jury?

***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) and Celestine McConville (Chapman) 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.