

## Justices May Rein In Congress' Ability To Upend Lawsuits

By **Andrew Westney**

*Law360, New York (May 1, 2017, 10:06 PM EDT)* -- The U.S. Supreme Court agreed Monday to consider whether a federal law meant to end a suit challenging a Michigan tribal casino project is an abuse of congressional authority, a move that comes as the Trump administration's attacks on the judiciary have raised more general separation of powers concerns.

The high court granted certiorari Monday to a petition by David Patchak, who claims the D.C. Circuit's upholding of the Gun Lake Act — which led to the dismissal of his suit over the U.S. Department of the Interior's taking of a parcel of land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' casino — could give Congress the power to stop any lawsuit it wants to.

The court's decision to address the separation of powers issue could put teeth in a long-standing high court precedent meant to prevent Congress from making inroads on judicial authority, attorneys say.

And the justices will weigh the limits of congressional power "at an interesting time, when the question of judicial deference to other branches is very much on people's minds," Sheppard Mullin Richter & Hampton LLP partner Jonathan Meyer said.

The battle between Trump's executive authority and the courts' power has been at the center of debate over the president's travel ban, with Attorney General Jeff Sessions' recent disparaging comment on a Hawaii federal judge's block of the ban following earlier remarks by the president critical of the federal judiciary.

The Patchak case will now turn public attention to another axis of the federal balance of power, as the justices examine "how much deference can be granted to the legislative branch and how far they can go in approaching judicial function," Meyer said.

The current petition actually marks the second time Patchak's case has reached the high court, after the justices ruled in 2012 that Patchak had standing and the suit could go forward.

Following remand of the case to the district court, Congress passed the Gun Lake Act, which was signed into law by President Barack Obama in 2014. Among its provisions, the statute affirmed the DOI's decision to take the tribal land into trust under the Indian Reorganization Act and stripped Patchak and any other potential claimants of the ability to challenge that decision in federal court.

At the center of Patchak's petition is whether the Supreme Court's 1871 decision in *U.S. v. Klein*, which ruled a law unconstitutional because it directed a decision in a pending case without amending any law, means the Gun Lake Act is invalid.

That issue was tackled by the high court just last year in its *Bank Markazi v. Peterson* decision, in which the court upheld a 2012 federal law that retroactively made assets linked to Bank Markazi, the Iranian central bank, subject to a judgment in favor of families of the victims of the 1983 Marine Corps barracks bombing in Beirut.

But while the DOI relied on the Bank Markazi ruling in its opposition to Patchak's petition, the justices' decision to take his case may indicate that they're ready to draw a line against Congress treading on the courts' turf, attorneys say.

According to the petition, the law at issue in the Bank Markazi case didn't create a separation of powers violation because it created new substantive legal standards that it allowed a lower court to apply, rather than simply requiring the dismissal of litigation.

"If Congress allows the Gun Lake Act to stand, it's hard to imagine what principled limitation there is on Congress' power to undertake similar legislation, which effectively dictates the outcome of the case after it's already been considered," Scott E. Gant of Boies Schiller Flexner LLP, who represents Patchak in the case, told Law360.

While federal laws intended to stop ongoing litigation haven't been that common historically, a Supreme Court affirmation of the Gun Lake Act might mean they "get a lot less rare in a hurry," according to University of Texas School of Law professor Stephen I. Vladeck, who worked on an amicus brief in the case submitted by several federal courts scholars.

"We're in an age of rather unprecedented attacks on the federal courts, including by the sitting president, and so it seems like an especially dangerous time for the courts to be giving more power to the political branches," Vladeck said.

And a dissent in the Bank Markazi case by Chief Justice John Roberts, joined by Justice Sonia Sotomayor, hinted at dissatisfaction among at least some of the justices that the decision could be interpreted overly broadly to allow Congress to direct courts to make specific decisions, attorneys say.

Congress' passage of the Gun Lake Act to snuff out Patchak's suit after the high court's first ruling in the case may have increased the justices' willingness to hear the suit again, and may not bode well for the government and the Gun Lake Tribe, attorneys say.

But if the government does win the case, that could set a template for Congress to pass more legislation targeting suits, Mayer Brown LLP special counsel Charles A. Rothfeld said.

"You can imagine all kinds of situations where interest groups or individuals who have particular disputes going on will go to Congress, and Congress could tell the courts to say, 'Alright, suit dismissed, no jurisdiction,'" he said.

"If you have the resources to do that, I think people will increasingly take that tack," Rothfeld said.

Native American tribes will also be watching the case closely, partly out of concern that the Supreme

Court could raise questions around Congress' plenary power with respect to tribes, according to Native American Rights Fund senior staff attorney Richard Guest.

While the Patchak ruling should focus purely on the separation of powers question, "I don't think we want to get into the scope of the authority of Congress to act to the benefit of Indian tribes," Guest said. "I think we're in dangerous territory if we're opening up this case for the justices to opine on that."

And a ruling against the Gun Lake Tribe would allow Patchak to press his underlying claims that the DOI's acquisition of trust land for the tribe's casino is in conflict with the Supreme Court's 2009 *Carcieri v. Salazar* decision, Guest added.

"That's the issue that the tribes are extremely interested in seeing resolved favorably," he said.

Patchak is represented by Scott E. Gant of Boies Schiller Flexner LLP.

The government is represented by Jeffrey B. Wall, Jeffrey H. Wood, William B. Lazarus, E. Ann Peterson and Lane N. McFadden of the U.S. Department of Justice.

The Match-E-Be-Nash-She-Wish Band is represented by Conly J. Schulte and Nicole E. Ducheneaux of Fredericks Peebles & Morgan LLP.

The case is *Patchak v. Zinke et al.*, case number 16-498, in the Supreme Court of the United States.

--Editing by Philip Shea and Catherine Sum.