No. _____

In the Supreme Court of the United States

DEAN SENECA,

Petitioner,

v.

UNITED SOUTH AND EASTERN TRIBES, et al.,
and
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DENNIS G. CHAPPABITTY
Counsel of Record
P.O. Box 292122
Sacramento, CA 95829
(916) 682-0575

Attorney for Petitioner

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QUESTION PRESENTED

Whether the Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials against a federal agency official?

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PETITION FOR A WRIT OF CERTIORARI

Dean Seneca respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. Appendix ("App.") at 1a -12a. The court's order denying rehearing and rehearing en banc is unreported. App. At 26a - 27a. The opinion of the district court is unreported. App. At 13a - 25a.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2008. App. at 1a. A timely petition for rehearing was denied on December 11, 2008. *Id.* at 26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS, EXECUTIVE ORDER AND PRESIDENTIAL MEMORANDUM INVOLVED

Relevant portions Section 450f(a)(1) and Section 450l(c) of the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, *et seq.*, are set forth in an appendix to this petition. App. at 28a - 29a.). These specific language of these relevant provisions of the ISDEAA provide:

25 U.S.C. § 450f(a)(1) titled "Self-determination

contracts" -

> *The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable.* The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions. (Emphasis added).

25 U.S.C. § 450l(c) titled "Contract or Grant Specification - Model Agreement" -

> (2) Purpose.—Each provision of the [ISDEAA] (25 U.S.C. 450 et seq.) and *each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions,*

> *from the Federal Government to the Contractor: (List functions, services, activities, and programs).* (Emphasis added).

Executive Order 13175 (App. at 30a - 38a) signed by President William J. Clinton on November 9, 2000 titled "Consultation and Coordination With Indian Tribal Governments" states, *inter alia*:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

This Executive Order imposes mandates upon federal agencies to honor "fundamental principles" in formulating, implementing and consulting with tribes on policies that have tribal implications. App. at 31a.

Presidential Memorandum for the Heads of Executive Departments, and Agencies: Government-to-Government Relationship with Tribal Governments, signed by President George W. Bush on September 4, 2004. App. at 39a - 40a. This Presidential Memoran-

dum recognizes continuing adherence to Executive Order 13175 states, *inter alia*,

> More recently, Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000. I reiterated my Administration's adherence to a government-to-government relationship and support for tribal sovereignty and self-determination earlier this year in Executive Order 13336, entitled American Indian and Alaska Native Education.

STATEMENT OF THE CASE

Free, open and frank dialogue and verbal discourse have long played a crucial role in strengthening the "government-to-government" relationship between the federal government, acting through its numerous agencies, to over 500 tribal governments.

Federal agencies and their directors are compelled by executive policies to interact with tribes "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." App. at 30a.

Often, blunt discussions between agency directors and tribal officials (or those lawfully authorized to speak on their behalf) encourages the allocation of limited federal funds to ensure ISDEAA program success. The vast majority of the thousands

of telephone calls and personal meeting where federal agency directors and tribal officials converse on federal policies are impromptu and "off-the-record."

Without the ability to engage in free verbal discourse on broad ranging issues dealing with ISDEAA matters, the essential openness and candor that is the essence of the federal government's relationship with tribes is lost.

This case raises a question of broad and general importance: What is the proper interpretation of key provisions and standards set forth in 25 U.S.C. § 450f and § 450l(c)? The answer to this question affects the actions of every federal official required to deal with federally-recognized Indian tribes executing ISDEAA contracts with federal agencies, primarily the U.S. Department of Interior, Bureau of Indian Affairs and the U.S. Department of Health and Human Services ("DHHS").

This Petition raises the fundamental and essential question of whether the federal courts can classify each and every verbal exchange between federal agencies and tribes as falling within the boundaries of "administrative functions" language in the ISDEAA.

A. Background

The United States of America has long recognized the existence of a "government-to-government" relationship with Indian tribes. Federal agencies like the DHHS are bound by the mandates of

Executive Orders in maintaining the unique "government-to-government" relationships with tribes, including those who have decided to steer a course of "self-determination" provided by the ISDEAA. It is within the complicated boundaries of "Federal Indian Law" that a federal agency official must deal with tribal governments.

For example, Dean Seneca was the Director of the Agency for Toxic Substances and Disease Toxic Substances and Disease Registry ("ATSDR") Office of Tribal Affairs on July 5, 2006. It was on this date, that James Martin, acting Executive Director of the United South and Eastern Tribes, Inc. ("USET") filed a complaint with ATSDR against Mr. Seneca. App. at 13a - 14a.

As Director of the ATSDR Office of Tribal Affairs, he was required by Executive Order to "encourage Indian tribes to develop their own policies to achieve program objectives." App. at 33a. Bound by his duties in this regard, Seneca sought "interactions" between himself and USET staff members during the spring of 2006. App. at 14a. The focus of these "interactions" was to encourage, assist and aid in the preparation of testimony by USET representatives before DHHS in March and May of 2006 on matters dealing with the Agency's budget for fiscal year 2008. *Id.*

In the course of encouraging these interactions with USET staff members, Seneca had to maintain an awareness of those statutory mandates imposed on him by the ISDEAA. It was within this complex area

of federal and tribal law and regulation and executive directives to federal agencies, that allegations were leveled against Seneca that he engaged in inappropriate behavior considered by USET to be slanderous, bullying, threatening and disparaging. *Id.*

Seneca disputed these allegations by Martin and others and filed an action on July 23, 2007 against USET, Martin, Lisa Berrios and Brenda Shore for libel, interference with employment, intentional infliction of emotional distress, invasion of privacy, and injury to peace, happiness and feeling based on the July 2006 communications on Agency budget considerations for fiscal year 2008. App. at 16a.

B. Prior Proceedings

1. United States District Court for the Northern District of Georgia - Atlanta Division.

Dean Seneca's tort case against the individually named USET officials was dismissed on the basis of the United States Attorney's certification that they were acting within the scope of their employment and performing under a self-determination contract at the time his claims arose. App. at 22a.

The district court reasoned that the *contract* entered into with DHHS bound the parties to "facilitate meaningful consultation between agencies of [HHS] and tribes." App. at 20a. Further, the district court found that the clause including the language quoted in the preceding sentence sufficiently encompassed USET's "preparation for and per-

formance of its testimony before HHS in spring 2006 . . .". *Id.*

Alternatively, the district court left the language of "just-quoted clause of the contract" aside and interpreted the ISDEAA as directing DHHS to delegate "administrative functions" required to execute the substantive program delegated to tribal organizations. App. at 21a.

Under the heading of "information-gathering and budget-formulation", the district court expanded the operational scope of the ISDEAA to include *all* of the thousands of verbal discussions, *even if allegedly false and defamatory.*

Finally, the district court examined the ISDEAA contract in place at the time Seneca's claims arose that follows the language of the model provision described at 25 U.S.C. § 450l(c):

> Consequently, in light of the contract's directive that its "provision[s] . . .shall be liberally construed for the benefit of USET, the Court is convinced that the USET employees were performing under the self-determination contract at the time Seneca's claims arose.

In applying a "liberal" standard, the district court instantly expanded the specific provisions of the ISDEAA contract examined here to sweep within its confines *the substance of all verbal discourse, i.e., formal or informal, on the record or off-the-record and*

other innocuous verbalisms exchanged back and forth between federal agencies and tribes on a daily basis.

2. Court of Appeals for the Eleventh Circuit.

The court of appeals affirmed the substitution of the United States as defendant. In affirming the district court's dismissal of Senecas tort claims against USET employees, the court of appeals framed the question (App. at 9a) as:

> The question before us is whether, at the time of the events giving rise to this cause of action, the employees named as defendants were acting pursuant to USET's self-determination contract with HHS/IHS or whether they were acting in furtherance of USET's other duties.

The court of appeals opined that the district court's conclusion that the USET employees were acting under an ISDEAA contract between the U.S. government and USET was not clearly erroneous. The court engaged in its own analysis of the alleged substance of the tort claims asserted by Seneca that the conduct in issue fell outside of the contract (App. at 10a):

> Furthermore, even if the testimony itself fell outside of the contract, the conduct that actually led to the tort claims - the writing of complaint letters to Seneca's supervisor - falls within the scope of the

self-determination contract.

Clearly, the court of appeals affirmation of the dismissal stood on the mere existence of a "relationship" established by contract and not the merits of whether Seneca himself was subjected to provisions of a ISDEAA contract authorizing libel by USET employees with some sort of "axe to grind". Why should these employees tortuous actions be protected as their behavior is clearly outside of the scope of the contract.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE QUESTIONS OF BROAD AND GENERAL IMPORTANCE THAT DEAL WITH THE INTERPRETATION OF THE ISDEAA.

Dean Seneca frames the question for this Honorable Court to grant his Petition as:

> Whether the Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials against a federal agency official?

In effect, the Court of Appeals impermissibly expanded the Indian Self-Determination Act to include as "administrative functions" *all* verbal exchanges

between federal and tribal officials performed under the ISDEAA contract. This erroneous expansion of provisions in the contract resulted in the validation of malicious and false characterizations of Dean Seneca's conversations with USET officials.

This case concerns a scheme by tribal officials to defame a deeply dedicated tribal advocate, Dean Seneca, and his efforts to vindicate this personal wrong in the federal courts. These tribal officials aimed false accusations at him which were forwarded to his supervisors.

It was error for the lower courts to apply a "liberal" standard to the ISDEAA that brought within the scope of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d) libelous statements that were not "contractable" under any stretch of the imagination.

The essence of those matters construed by the Court of Appeals and the District Court as properly within the ISDEAA were purely verbal in nature. Consequently, the communications from the tribal officials to Seneca's supervisor were incapable of falling within the meaning of "administrative functions" that are "contractable" within the meaning of the ISDEAA. False accusations like those leveled at Seneca cannot be contracted as a program "deliverable" nor should they be considered as a necessary part of "preserving the working relationship with ATSDR". App. at 10a.

In addition to adhering to their regulatory

duties, DHHS officials, like Dean Seneca, are compelled to follow Executive Orders describing the parameters of their interaction when they consult and coordinate with tribal officials. App. at 30a - 40a. They have an already difficult job of steering their actions through a maze of laws and regulations governing the maintenance of the federal trust relationship between tribes and federal agencies.

Because of the inherent friction between tribes and the U.S. government in a variety of areas subject to chance, it cannot be doubted that tribal officials want to "grind their axes" against the discretionary opinions or regulatory interpretations that they perceive as going against their interest.

When the lower courts applied a "liberal" standard to construe false accusations leveled against Seneca by tribal officials as "perform[ance] under the self-determination contract at the time [his] claims arose" (App. at 21a), thousands of dedicated federal officials must now be very concerned. They must watch what they say and how they say it for fear of misinterpretation and retaliation by tribal officials who will then hide behind the sovereign immunity of the United States..

Frank and, often blunt, verbal exchanges between DHHS officials and ISDEAA tribes on matters of mutual concerns, such as the budgeting of limited federal dollars, is a fundamental principle underscoring the success of federal programs that benefit tribal governments.

By imposing a "liberal" standard, there is the potential that the otherwise defamatory statements of tribal officials will be reported to someone's federal supervisor and mislabeled as an "administrative function" under ISDEAA. Likewise, there is now the high risk that the well-intentioned verbal advocacy of DHHS officials will subject them to personal vendettas and malicious schemes by tribal officials to ruin their careers and reputations *without* sufferance of legal liability.

As for the lower courts' reliance on an erroneous imposition of a "liberal" standard in this case, it conflicts with the "lubricant", free and unimpeded verbal discourse, necessary to encourage the efficient interaction of any federal agency dealing with tribes under the ISDEAA on a broad range of issues, some routine and some controversial.

Equally, it is a matter of deep concern to every one of the thousands of federal official who must express themselves freely and frankly on a multitude of matters related to ISDEAA grant implementation without fear of facing false accusations or retribution from tribal officials that they were engaging in "inappropriate behavior".

If allowed to stand, the court of appeals decision will encourage the "chilling" of frank dialogue between federal agencies and tribes because that dialogue could be wrongfully taken as slanderous, bullying, threatening and disparaging. At worst, the innocent dialogue could be intentionally and maliciously labeled by tribal officials as impeding any class of "working relation-

ship" between agencies and tribes and reported up the ranks to ruin a victim's career or position with the agency.

The Court of Appeals impermissibly expanded the intent of the Indian Self-Determination Act by applying a "liberal" standard to bring within its scope libelous conduct directed by tribal officials toward a federal agency official.

This liberal interpretation of ISDEAA provisions has extremely broad and serious implications to the ability of federal officials to encourage meaningful dialogue with tribes who may have known and unknown adverse interest toward the federal policies promoted by the agency and its officials.

CONCLUSION

This Court should grant the petition for writ of certiorari.

DATED: March 6, 2009 Respectfully submitted,

s/Dennis G. Chappabitty
DENNIS G. CHAPPABITTY
Counsel of Record
P.O. Box 292122
Sacramento, CA 95829
(916) 682-0575