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No. _____ OFFICE OF THE CLERK
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IN THE
Supreme Court of the United States

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

_____*_____
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

_____*_____
PETITION FOR A WRIT OF CERTIORARI

_____*_____
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July 6, 2009

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QUESTIONS PRESENTED

1. Whether an Indian tribe can use Indians Claims Commission Act funds, appropriated by Congress and distributed to the tribe with a specific exemption from federal income tax, to pay federal income tax exempted salaries to elected officials the tribe is required to have under its tribal constitution.

2. Whether the imposition of a penalty by the Internal Revenue Service against the tribal chairman for sovereign legislative actions of the tribe improperly infringes on the tribe's sovereign powers.

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**PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS**

Petitioners, John A. Barrett, Jr., and Sheryl S. Barrett, respectfully pray that a writ of certiorari be issued to reverse the judgment of the Tenth Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 561 F.3d 1140 (10th Cir. 2009) and is reproduced in the Appendix at p. 1-21. The District Court did not publish its opinion. The memorandum opinion of the District Court is reprinted in the Appendix at p. 22-38, and can be found at 2007 WL 4303050 (W.D. Okla. 2007).

JURISDICTION

On April 6, 2009, the Tenth Circuit Court of Appeals filed its decision. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Tenth Circuit Court of Appeals' decision on a writ of certiorari.

**STATUTORY AND TRIBAL CONSTITUTIONAL
PROVISIONS AND AGREEMENT BETWEEN
CONGRESS AND CITIZEN POTAWATOMI
NATION INVOLVED**

Relevant portions of the Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, 25 U.S.C. §§ 1401, et seq., the Constitution of the Citizen Potawatomi Nation and the agreement between the Citizen Potawatomi Nation and Congress, 48 FR 40567-01, are set forth in an appendix to this petition. Appendix, p. 39-47.

STATEMENT OF THE CASE

Introductory Statement

The decision of the United States Court of Appeals for the Tenth Circuit upholds a breach of an agreement by Congress with the Citizen Potawatomi Nation which exempts tribal judgment funds appropriated by Congress from federal income tax, and usurps the legislative and electoral processes of the Citizen Potawatomi Nation in the budgeting and implementation of the agreement as mandated by Congress.

The agreement by Congress with the Citizen Potawatomi Nation, and the appropriation of funds by Congress, were pursuant to remedial legislation, *i.e.* the Indians Claims Commission Act and the Indian Tribal Judgment Funds Use or Distribution Act. The agreement mandates that the Citizen Potawatomi Nation legislatively determine, and

have approved by the general electorate, the specific expenditures to be made, and expressly provides that “none of the funds . . . made available under this plan for programing [sic] shall be subject to Federal or State income taxes.”

In the exercise of its sovereign power, the Citizen Potawatomi Nation appropriated and paid a portion of the judgment funds for the salary of the Chairman, a constitutionally required tribal office. These governmental actions were made in accordance with the agreement, taking into account the broad categories of uses allowed by the agreement. The lower court decisions erroneously subject these payments to federal income tax and penalties.

The District Court failed to recognize that Indian tribes have always been exempt from federal income tax, and erroneously determined that this express exemption from Federal income tax was for the benefit of the Citizen Potawatomi Nation.

The Tenth Circuit usurps the exercise of tribal governmental power as mandated by Congress and impermissibly substitutes its judgment for the legislative branch of the Citizen Potawatomi Nation, in holding that the payments were not within the broad categories of uses authorized by Congress, and legislatively appropriated and budgeted by the Citizen Potawatomi Nation in accordance with the agreement. The Tenth Circuit also erroneously held that, assuming the payments were within the categories of uses under the agreement, absent a specification of the recipient of the funds from the Citizen Potawatomi Nation in the express language

of the exemption from Federal income taxation, though the exemption specifies no recipients at all, such payments were taxable.

STATEMENT OF FACTS

The Citizen Potawatomi Nation is the ninth largest federally recognized Indian tribe with approximately 27,000 members (73 FR 18553).

In the 1970s and 1980s, the Citizen Potawatomi Nation was awarded judgments by the Indian Claims Commission¹ with respect to lands taken from the Citizen Potawatomi Nation.

The Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, 25 U.S.C. §§ 1401, et seq., prohibited the Citizen Potawatomi Nation or its citizens from directly receiving the funds for these judgments. Instead, Congress delegated to the Secretary of the Interior, after consultation with the Citizen Potawatomi Nation, the preparation of programming plans for the use and distribution of the funds appropriated by Congress. At least twenty percent (20%) of the funds were required to be set

¹ In 1946, the Indian Claims Commission was established via the Indian Claims Commission Act, 60 Stat. 1069, 25 U.S.C. §§ 70-70v-3. A primary purpose of the Indian Claims Commission was to settle "claims arising from the taking by the United States, whether as a result of treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." *Id.* § 70a.

aside and programmed for economic development, common tribal needs, educational requests, and such other purposes as the affected tribe may justify. 25 U.S.C. § 1403(b)(5).

On September 8, 1983, Congress approved a plan with the Citizen Potawatomi Nation (the “1983 Agreement”). 48 FR 40567-01. Appendix, p. 39-42. The 1983 Agreement set aside for programming thirty percent (30%) of the funds, to be held in perpetual trust by the Secretary of the Interior. The remaining funds were distributed *pro rata* to the citizens of the Citizen Potawatomi Nation.

The 1983 Agreement provides that the programming funds are to be used pursuant to a Ten-Year Tribal Acquisition, Development, and Maintenance Plan (the “Ten-Year Plan”), to include “those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally.” Appendix, p. 43.

Section 6(b) of the 1983 Agreement expressly provides: “None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes...” Appendix, p. 41.

The 1983 Agreement tasks the development of annual budgets for the expenditure of the judgment funds to the Citizen Potawatomi Nation Business

Committee, a constitutionally created tribal body serving as the legislative branch of the Citizen Potawatomi Nation. Appendix, p. 45. Each year, as required under the 1983 Agreement, the citizens of the Citizen Potawatomi Nation vote on approval of the budget. Appendix, p. 40.

In 1996, pursuant to the American Indian Trust Fund Reform Act of 1994, 87 Stat. 466, 25 USC §§ 4001 *et seq.*, the Secretary of the Interior approved the Citizen Potawatomi Nation's withdrawal of trust funds held by the Secretary of the Interior. After withdrawal, the funds maintained their status as trust funds, and are invested and managed by the Citizen Potawatomi Nation pursuant to a detailed Investment Management Policy. Under the Investment Management Policy, any use or expenditure of the judgment funds remains subject to the 1983 Agreement and the Ten-Year Plan. *See*, 25 U.S.C. § 4023(c).²

Thus, any expenditure of tribal judgment funds continues to be set forth in a budget developed by the Business Committee pursuant to the 1983 Agreement and the Ten-Year Plan, and submitted to

² The Citizen Potawatomi Nation maintains the trust fund in a separate trust account held with the First National Bank & Trust in Shawnee, Oklahoma. The Citizen Potawatomi Nation's earnings from the trust fund that are to be expended for the year are placed in the Citizen Potawatomi Nation's General Fund account as a sub-account, and accounted for separately from the remainder of the Citizen Potawatomi Nation's General Fund monies. The trust funds must be audited on an annual basis by an independent certified public accountant and submitted to the Secretary of the Interior.

the general electorate of the Citizen Potawatomi Nation for vote and approval.

For the 2001 tax year, the Chairman of the Citizen Potawatomi Nation, a constitutionally elected tribal position, serving as the executive branch of the Citizen Potawatomi Nation, was petitioner John A. Barrett, Jr. Appendix, p. 43. The duties of the Chairman include general supervision of the daily affairs of the Citizen Potawatomi Nation. The daily affairs of the Citizen Potawatomi Nation include oversight, coordination and development of the various programs set forth in the 1983 Agreement and the Ten-Year Plan.

In 2001, the budget developed by the Business Committee and approved by the general electorate of the Citizen Potawatomi Nation included the payment of the salary of the Chairman from the trust funds. The Business Committee determined that the salary payments to the Chairman were not subject to federal or state income taxes as set forth in the 1983 Agreement and the Ten-Year Plan.

The Internal Revenue Service, after audit, found that the salary of the Chairman was subject to federal income tax and accordingly made an assessment based on the \$48,057.66 paid to the Chairman by the Citizen Potawatomi Nation. The Chairman paid the tax, interest and penalties

assessed by the Internal Revenue Service and filed for refund with the District Court.³

The District Court held the salary to the Chairman was subject to federal income tax, finding that the express exemption set forth in the 1983 Agreement was for the benefit of the Citizen Potawatomi Nation. The District Court's opinion ignores that Indian tribes, as sovereigns, have never been subject to Federal income taxes.

The Tenth Circuit affirmed the District Court denial of the refund claim, finding that payment of a salary to the Chairman of the Citizen Potawatomi Nation is not an expenditure for "those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally" as required by the 1983 Agreement and the Ten-Year Plan. The Tenth Circuit made this finding notwithstanding that the trust funds have increased from less than \$4 Million to approximately \$12 Million under the guidance and day-to-day oversight of the Chairman. The finding usurps the Congressionally mandated legislative and electoral processes of the Citizen Potawatomi Nation in

³ The issues in this case relate to Petitioner John A. Barrett, Jr. Petitioner Sheryl A. Barrett is a necessary party to these proceedings because she filed a joint income tax return for calendar year 2001 with Petitioner John A. Barrett, Jr.

budgeting and appropriating funds under the 1983 Agreement and the Ten-Year Plan.

In addition, the Tenth Circuit found that, assuming the functions and duties of the Chairman were within the tribal programming uses set forth in the 1983 Agreement and the Ten-Year Plan, because the recipient of such payment, *i.e.*, the Chairman, was not specified in the phrase “None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes...,” the payments to the Chairman were taxable.

This finding ignores the fact that no recipients are specified in the 1983 Agreement and the Ten-Year Plan. Moreover, the exemption from federal income tax is clearly expressed. The recital by the Tenth Circuit of general rules of interpretation that an exemption must be clearly expressed and cannot be granted by dubious inferences, and requiring that the recipient of the payments be specified in the exempting language, ignores the history and purposes of the mandate by Congress that specific expenditures for the broad categories of uses under the 1983 Agreement and the Ten-Year Plan be determined by the legislative and electorate processes of the Citizen Potawatomi Nation.

REASONS FOR GRANTING THE PETITION

I.

THE TENTH CIRCUIT DECISION UPHOLDS A BREACH OF AN AGREEMENT BETWEEN THE TRIBE AND CONGRESS, AND USURPS THE LEGISLATIVE AND ELECTORAL PROCESSES OF THE TRIBE AS MANDATED BY CONGRESS IN DIRECT CONTRAVENTION OF THE DECISIONS OF THIS COURT.

Congress and the Citizen Potawatomi Nation entered into an agreement for the use of judgment funds awarded by the Indian Claims Commission and appropriated by Congress. That agreement expressly provides that “None of the funds . . . made available under this plan for programing [sic] shall be subject to Federal or State income taxes . . .” Appendix, p. 41.

The decision of the Tenth Circuit upholds a breach of the agreement between the Citizen Potawatomi Nation and Congress by subjecting to taxation payments made by the Citizen Potawatomi Nation under the agreement, and usurps the legislative and electoral processes of the Citizen Potawatomi Nation by ignoring those processes which were mandated by Congress as a prerequisite to the use of the tribal judgment funds.

The United States recognizes the Citizen Potawatomi Nation as a domestic dependent sovereign and maintains a government-to-govern-

ment relationship with the Citizen Potawatomi Nation. 25 C.F.R. § 83.2. Under the Constitution, Indian relations are the “exclusive province of federal law.” *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Congress, through exercise of its power under the Commerce Clause, is the sole source of this nation’s policy for Indian affairs. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). This power is “plenary and exclusive.” *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2004).

Congress has unilaterally developed and promoted a policy of tribal self-determination. *See, e.g.*, 25 U.S.C. § 1451; 25 U.S.C. § 450(a); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991); and *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 824 fn 9 (10th Cir. 2007) (various Acts of Congress, Executive Branch policies and judicial opinions have consistently reaffirmed the strong federal interests in promoting strong tribal economic development, self-sufficiency and self-governance).

Congress, acting pursuant to federal statutes and under the terms of the agreement it made with the Citizen Potawatomi Nation, appropriated funds settling the Citizen Potawatomi Nation’s judgments awarded by the Indians Claims Commission for the taking of its land. As part of that agreement, the Citizen Potawatomi Nation set aside a portion of the funds to be programmed for tribal economic development, common tribal needs, educational requests,

and such other purposes as the affected tribe may justify. 25 U.S.C. § 1403(b)(5); Use and Distribution Plan of September 8, 1983, 48 FR 40567-01 (the "1983 Agreement"); and Ten-Year Tribal Acquisition, Development, and Maintenance Plan (the "Ten-Year Plan"). Appendix, p. 39-43.

The agreement the Citizen Potawatomi Nation made with Congress expressly exempted the judgment funds appropriated by Congress and used pursuant to the 1983 Agreement and the Ten-Year Plan from federal or state income taxes.

The scope of Congress' intended exemption of these funds from federal income taxes has to be measured against a back-drop made up of two basic, long-established principles: (1) The Citizen Potawatomi Nation, as a tribe, does not need the federal income tax exemption which Congress included in the agreement it made with the Citizen Potawatomi Nation; historically, Congress has never imposed income taxes on federally recognized Indian Tribes. *See*, F. Cohen, Handbook of Federal Indian Law, 231 (3d Ed. 1982); 26 U.S.C. § 7871; and Rev. Rul. 67-284, 1967-2 C.B. 55 (Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.), but (2) individual Indians, who are subject to income taxes, can be exempted by statutes, treaties, Congress' agreements with the Indian tribes, or Congress' enactments dealing with tribal affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent Five Civilized Tribes etc. v. Commissioner of Internal Revenue*, 295 U.S. 418, 55 S.Ct. 820 (1935); Rev. Rul. 59-354, 1959-2 C.B. 24; and Rev. Rul. 54-456, C.B. 1954-2.

In line with its policy of promoting tribal self-determination, Congress left to the Citizen Potawatomi Nation, as an exercise of the Citizen Potawatomi Nation's own sovereign powers, the selection and definition of specific expenditures of its income tax exempted funds. The 1983 Agreement required that the Citizen Potawatomi Nation legislatively adopt a budget for the use of the funds, and that such budget be approved by its general electorate. Appendix, p. 40.

As Congress intended, the Citizen Potawatomi Nation exercised its sovereign powers. By tribal legislation, the Citizen Potawatomi Nation appropriated part of its income tax exempted funds to pay a salary to Petitioner John A. Barrett, Jr. ("Barrett") for his service in the constitutionally required tribal office of chairman of the tribe. Appendix, p. 45. The duties of the Chairman include the day-to-day oversight of the development and execution of the various programs set forth in the 1983 Agreement and the Ten-Year Plan. Those programs expressly include "those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally."

In developing the budget for the trust funds held under the 1983 Agreement and the Ten-Year Plan, the Citizen Potawatomi Nation determined that the Chairman's duties were an integral part

thereof. Accordingly, the budget for the expenditure of the trust funds included salary for the Chairman for such duties. This budget was submitted to and approved by a vote of the citizens of the Citizen Potawatomi Nation. An intended result of these actions was the federal income tax exemption of the salary of the Chairman.

Relying on that, and the income tax exemption which Congress had mandated to be included in the agreement it made with the Citizen Potawatomi Nation, Barrett did not report his tribal salary as income.

The Internal Revenue Service determined that Barrett's salary was taxable income, claiming it did not fall within the exemption. The Internal Revenue Service imposed additional taxes and an accuracy penalty.

The Tenth Circuit upheld the Internal Revenue Service's position. By doing that it approved the breach of Congress' agreement with the Citizen Potawatomi Nation and permitted infringement on its sovereign legislative powers, in the following particulars:

A. Determining that the salary paid to Barrett, for his services as Chairman of the tribe, was not an expenditure for programmed tribal related acquisition, development and maintenance—and by making that determination the Tenth Circuit infringed on the Citizen Potawatomi Nation's sovereign legislative power to determine and define expenditures it would make for tribal economic

development, common tribal needs and other justifiable expenditures, as contemplated by 25 U.S.C. § 1403(b)(5) and the 1983 Agreement; and

B. Determining that the tax exemption that Congress and the Citizen Potawatomi Nation had agreed upon was not sufficiently specific to exempt the salary the Citizen Potawatomi Nation paid to Barrett — and by making that determination the Tenth Circuit upheld the breach of Congress' agreement with the Citizen Potawatomi Nation and eroded Congress' intent to use tribal expenditure of judgment funds as an integral part of its policy to promote tribal self-determination and the development of strong tribal governments.

There can be no doubt that the 1983 Agreement provides an exemption from federal income taxes. It expressly says so. And because Indian tribes, including the Citizen Potawatomi Nation, are exempt from Federal income taxes, the exemption is only applicable to the recipient of the funds as determined by the governmental processes of the Citizen Potawatomi Nation pursuant to the 1983 Agreement. In this case, the recipient of the funds was Barrett, the Chairman of the Citizen Potawatomi Nation.

II.

THE TENTH CIRCUIT DECISION
IMPROPERLY CHILLS THE SOVEREIGN
ACTION OF THE CITIZEN POTAWATOMI
NATION BY ALLOWING A PENALTY TO BE
IMPOSED FOR THE LEGITIMATE AND
PROPER EXERCISE OF SOVEREIGN
LEGISLATIVE POWER.

The penalties assessed in this case chill the Citizen Potawatomi Nation's ability to rely upon the agreement with Congress, and to use its sovereign power to appropriate income tax exempted funds, by permitting penalties for claiming an exemption that was authorized by federal statutes and by Citizen Potawatomi Nation legislation pursuant to those statutes.

A tribe has inherent sovereign powers and may exercise those powers within the confines of the tribe's constitution. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978). Those powers include the power to direct its constitutionally required officials to take or not take certain actions. Additionally, a tribe has the power to pay or not pay its constitutionally required officials, and, if payment is made, the form of payment and conditions pursuant to which payment is made.

The Citizen Potawatomi Nation, through its legislative process, as approved by its general electorate, budgeted and appropriated funds to pay Barrett for his duties as Chairman of the Citizen Potawatomi Nation. The payments were from trust

funds awarded to the Citizen Potawatomi Nation by the Indian Claims Commission, which the Citizen Potawatomi Nation determined were impressed with a specific exemption from federal income tax.

Based thereon, Barrett did not report or pay federal income taxes on the funds received from the Citizen Potawatomi Nation. The Internal Revenue Service assessed penalties with respect to the payments made by the Citizen Potawatomi Nation to Barrett.

Imposition of penalties against Barrett can only be construed as a penalty against the Citizen Potawatomi Nation and an unlawful challenge to or restriction of the exercise of sovereign powers by the Citizen Potawatomi Nation.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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