08-4735cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,
v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OR KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

SCHAGHTICOKE TRIBAL NATION'S COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING *EN BANC*

DAVID K. JAFFE, ESQ.
BROWN, PAINDIRIS & SCOTT, P.C.
100 PEARL STREET
HARTFORD, CT 06103
(860) 522-3343

RICHARD EMANUEL, ESQ.
LAW OFFICES OF
RICHARD EMANUEL, ESQ.
601 PLYMOUTH COLONY
BRANFORD, CT 06405
(203) 483-6201

Attorneys for Petitioner-Appellant
Schaghticoke Tribal Nation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND COURT RULES:

MISCELLANEOUS:

PETITION FOR PANEL REHEARING

Pursuant to Rule 40, Fed. R. App. P., the Petitioner-Appellant, Schaghticoke Tribal Nation, petitions for rehearing of the appeal in *Schaghticoke Tribal Nation v. Kempthorne*, __ F.3d __ ("*Schaghticoke II*"). A copy of the panel's Nov. 4, 2009, amended opinion is attached to this combined petition.

"[T]he petitioner believes the court has overlooked or misapprehended" a "point of . . . fact"; Rule 40(a), Fed. R. App. Pro.; that is highly material to the resolution of Petitioner's "political influence" claim. The factual error appears in the following sentence of the amended opinion:

> Any political pressure, moreover, was exerted upon *senior* Interior Department officials; there is no evidence that any of the pressure was exerted upon [James E.] Cason who was the official ultimately responsible for issuing the Reconsidered Final Determination.

(Emphasis added.) *Schaghticoke II*, supra, slip op., at 4.

The point that has been "overlooked or misapprehended" is Cason's status within the Department. The opinion states that any political pressure "was exerted upon *senior* Interior Department officials"; (Emphasis added.) *Schaghticoke II*, slip op., at 4; thereby implying that Cason was *not* a senior official. That implication is refuted by the record. The Department's own lawyers described Cason's position of Associate Deputy Secretary as "[t]he *most senior* staff position" in the Department. (Emphasis added.) Br. for Resp.-App., at 71. In addition, former Secretary of the Interior Gale A. Norton, who appointed Cason to the Associate

Deputy Secretary position, described him as being part of her "leadership team."[1] Deposition of Gale A. Norton, at JA991-992, JA1018-19. *See also*, JA1837-39 (magazine article describing Cason as "essentially the department's *third in command*.") (Emphasis added.).

Since the panel's conclusion rested upon a misunderstanding of Cason's status in the Department's hierarchy, the Schaghticoke Tribal Nation requests rehearing of the appeal. The Tribe also requests that the opinion be amended. [2]

Respectfully Submitted,

SCHAGHTICOKE TRIBAL NATION
Petitioner-Appellant

BY: /s/ Richard Emanuel

DAVID K. JAFFEE, ESQ.
Brown, Paindiris & Scott, P.C.
100 Pearl Street
Hartford, CT 06103
(860) 522-3343

RICHARD EMANUEL, ESQ.
Law Offices of Richard Emanuel
601 Plymouth Colony
Branford, CT 06405
(203) 483-6201

Attorneys for Schaghticoke Tribal Nation

[1] As part of the leadership team, Cason knew that Norton—who had participated in policy decisions relating to the *positive* Final Determination (FD) for the Schaghticoke, *see* JA955, 958, 960, and who "knew that that [positive FD] was a decision reached on its merits," JA960—had *subsequently* been threatened by Rep. Frank R. Wolf at a meeting with three other members of the Connecticut Congressional delegation. *See* JA992, JA1017.

[2] The amended opinion properly deleted the phrase "a career employee of the Interior Department," between the words "Cason" and "who" in the quoted sentence. The record confirms that Cason was a political appointee; in fact, he was appointed *by Norton*. *See, e.g.*, JA1326 (Department press release announcing Norton's appointment of Cason); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 419 (D. Conn. 2008) (Dorsey, J.). In the interests of fairness, accuracy and completeness, Petitioner respectfully suggests that the panel amend the amended opinion to reflect that Cason was in fact a political appointee of Norton's.

PETITION FOR REHEARING *EN BANC*

The Petitioner-Appellant, Schaghticoke Tribal Nation, respectfully requests rehearing *en banc* of the appeal in *Schaghticoke Tribal Nation v. Kempthorne*, __ F.3d __ (Oct. 19, 2009, amended Nov. 4, 2009) (Cabranes and Miner, *Circuit Judges*, and Korman, *District Judge*) (per curiam) ("*Schaghticoke II*"), because the proceeding involves a question "of exceptional importance." Rule 35(b)(1)(B), Fed. R. App. P. The question is whether the "political influence" standard of *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2nd Cir. 1984)—which, prior to this case, had *only* been applied to *non*-adjudicative agency proceedings—provides adequate due process protection for litigants seeking to raise claims based on the "appearance of bias" or impropriety at federal *adjudicative* agency proceedings.

I. Introduction and Background

"The Schaghticoke are a state-recognized tribe of Indians who possess a state-recognized reservation in Kent." *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831, 826 A.2d 1102 (2003). The Connecticut Colony first reserved land for the Tribe's use in 1736, *see* JA846, and Connecticut recognizes the Tribe as one of five "indigenous tribes" that are "self-governing entities possessing powers and duties over tribal members and reservations." Conn. Gen. Stat. § 47-59a(b).

Despite the long pedigree of *state* recognition, the current appeal is the culmination of the Tribe's 28-year quest for *federal* "acknowledgment." As

District Court Judge Peter C. Dorsey noted in the opening line of his Ruling on Cross-Motions for Summary Judgment, the question of whether the Schaghticoke Tribal Nation (STN) constitutes an Indian tribe under federal law is a "politically loaded question." *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp.2d 389, 394 (D. Conn. 2008) ("*Schaghticoke I*"), also at SPA-1.

The Tribe initiated the acknowledgment process in 1981 by filing a Letter of Intent under the regulations. *See* 25 C.F.R. Part 83. The imperative for seeking acknowledgment was *land*: the Tribe was a defendant in a 1985 case brought by the federal government seeking to condemn a portion of its reservation for use as part of the Appalachian Trail, and the Tribe was a plaintiff in land claim actions (filed in 1975, 1998, and 2000) seeking restoration of original reservation lands, under the Non-Intercourse Act, 25 U.S.C. §177. "Acknowledgment" was deemed essential in order for the Tribe to prosecute or defend the land claims.

The Tribe filed its first Documented Petition with the Bureau of Indian Affairs (BIA) in 1994, and six years later it was awaiting consideration. The 1985, 1998, and 2000 land claim actions had been assigned to Judge Dorsey, and were later consolidated. JA1508. Because of inordinate delays at the BIA, in 2000 Judge Dorsey assumed control of the acknowledgment process for the STN. He directed the parties and *amici* to develop a "Scheduling Order" that he approved on May 8, 2001. JA2258. The Scheduling Order established a framework for the BIA's

determination of STN's petition, and prohibited *ex parte* communications between non-federal parties or *amici* and certain officials in the Department of the Interior.

The significance of the Scheduling Order is that *since May 8, 2001, the federal administrative process involving STN's petition for acknowledgment has been under the ultimate supervision and control of a federal judge—and all parties and amici have been participating in that process.*

There was no political outcry when, on Dec. 5, 2002, the Office of Federal Acknowledgment (OFA) issued a Proposed Finding ("PF") recommending *against* acknowledging the STN. After the submission of comments and additional evidence, the OFA issued a Final Determination ("FD") on Jan. 29, 2004, *acknowledging* STN as an Indian tribe. *See* JA651. Within hours, state and federal politicians launched a political assault against the Tribe's acknowledgment. The Tribe's opponents were driven by fear that federal acknowledgment would enable the tribe to open a casino, under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., that had been enacted in 1988.

After several months of intensive political opposition, including the first of three Congressional hearings at which the STN FD was attacked, Connecticut and other parties filed requests for reconsideration of the FD with the Interior Board of Indian Appeals ("IBIA"). In May 2005, the IBIA vacated the FD and remanded it to the Assistant Secretary – Indian Affairs "for further work and reconsideration."

JA901. That remand was based largely on the IBIA's limitation of the use of evidence of "state recognition" to satisfy the criteria for federal acknowledgment.

On Oct. 11, 2005, the OFA issued a Reconsidered Final Determination ("RFD"), declining to acknowledge the STN. *See* JA561. The STN then filed a Petition for Review in the District Court claiming, inter alia, that its due process rights had been violated by undue political influence. *See* JA159-64. Although review of federal agency decisions is normally limited to the Administrative Record; which in this case "contains over 6,774 distinct documents" comprising 47,012 pages, see JA25 and JA107; Judge Dorsey permitted "extra-record" discovery because STN made a "strong showing," *Citizens to Preserve Overton Park*, 401 U.S. 402, 420 (1971), in support of its claim that improper political influences had been exerted on decision makers at the Interior Department. After granting some of STN's requests for discovery and depositions, but denying others (e.g., discovery of White House documents), Judge Dorsey decided the case on cross-motions for summary judgment. He denied STN's request for oral argument.

II. The "Political Influence" Claim: An Overview

Judge Dorsey summed up the political activities that commenced on the day the Tribe received its positive FD:

> There is *no dispute* that the majority of Connecticut's Congressional delegation, the Governor, the Attorney General, and other anti-gaming advocates in Washington *fiercely opposed* the FD's acknowledgment of STN.

> * * *
> There is *no question* that throughout 2004 and 2005 the Connecticut Congressional delegation, Connecticut state and local officials, and other public and private stakeholders, including a community organization in the Town of Kent which hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf, *lobbied the Secretary of the Interior, the BIA, the IBIA, **the White House**, and **even this Court** about reversing the acknowledgment decision*.
> * * *
> … STN's FD *became the focus* of House and Senate subcommittee hearings attended by DOI staff, members of Congress, AG Blumenthal, and others.
> * * *
> There is *no question* that *political actors exerted pressure* on the Department over the course of 2004 and 2005 in opposition to the FD's acknowledgment of STN, both *publicly* through Congressional hearings and media publicity and *privately* through meetings and correspondence with the Secretary and other agency officials.
> * * *
> There is *no question* that, as discussed above, various members of Congress as well as the Connecticut Governor and AG expressed their disapproval with the STN acknowledgment at the Congressional hearings on the subject, and the hearings became heated on at least one occasion.

(Emphases added.) *Schaghticoke I*, at 402-03, 405, 410-11; SPA-16-17, 21, 29, 31.

A few of the political events deserve special mention:

1. An investigation and a clean bill of health: From the moment the Tribe received the positive FD, politicians sought to discredit the Tribe and the BIA. Many politicians called for investigations, claiming the Tribe or BIA had engaged in "unlawful" or "illegal" conduct. In response to Senator Christopher Dodd's request for an investigation, the Interior Department's Inspector General, Earl E. Davaney, conducted a comprehensive six-month investigation, and found that neither the Tribe nor the BIA had acted improperly. *See* JA1425-28.

2. The first *ex parte* violation: On March 17, 2004, Connecticut Attorney General Richard Blumenthal had a private discussion with Interior Secretary Gale A. Norton in Washington, D.C., and expressed his disagreement with the STN FD. Judge Dorsey found that the Attorney General's *ex parte* contact was "improper" and "inappropriate," and "threaten[ed] to subvert the integrity of the appeal process itself." JA1512; Br. of Pet.-App., at 23.

3. The Congressman's threat: On March 30, 2004, Secretary Norton was summoned to Capitol Hill to meet with Connecticut Representatives Christopher Shays, Nancy Johnson, and Rob Simmons. The meeting was held in the office of Rep. Frank R. Wolf from Virginia, a member of the House Appropriations Committee that has fiscal authority over the Department of the Interior. As Norton stated at her deposition, Rep. Wolf is "very opposed to gaming." JA989. The meeting in his office was "fairly emotional," and the Representatives were pressing her to overturn the STN FD. JA993. Norton testified that Wolf, who was angry, threatened her: "Congressman Wolf said *he would tell the President he thought I ought to be fired*." [3] (Emphasis added.) JA990-91, JA993, JA1014.

[3] "A Member [of Congress] should **not** directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official." (Bold in original.) *House Ethics Manual*, Committee On Standards of Official Conduct, U.S. House of Rep., 110th Cong. 2d Session (2008), at 306. "Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role." *Id.*, 307. The latter sentence was adopted in 1970. *Id.*, 356-57 (Advisory Opinion No. 1). *See also*, *Power Authority of New York v. FERC*, 743 F.2d 93, 110 (2nd Cir. 1984) ("*[E]x parte*

4. The "Repeal" bill: In March 2005, Rep. Nancy Johnson introduced the "Schaghticoke Acknowledgment Repeal Act of 2005." *See* JA1487-1507. The proposed legislation claimed that the STN FD was the result of "premeditated manipulation" of evidence and of the acknowledgment standards. It accused (by name), the Principal Deputy Assistant Secretary—Indian Affairs who had issued the STN FD, of participating in an "erroneous" and "unlawful" decision. JA1487-1507. Mr. R. Lee Fleming, Director of the OFA, and his staff were aware of this legislative attempt to repeal a decision made by OFA. JA1233. Fleming had not seen a "termination" bill during his tenure at OFA, *see*, JA1234. The bill did not become law, but it may have been viewed by OFA as a threat to its authority.[4]

5. Judge Dorsey's *ex parte* letter to Gov. Rell. On July 11, 2005, while the Tribe's petition was under reconsideration by the OFA, Connecticut Governor M. Jodi Rell wrote to Judge Dorsey, urging him not to allow the Tribe to submit additional evidence. JA1459-60. That letter was made part of the record. On Aug. 19, 2005, Judge Dorsey wrote a *private* letter to the Governor, that stated in full:

> Dear Governor Rell:
>
> Thank you for your letter of July 11, 2005. Your *frustration and impatience is fully warranted*. A court-ordered deadline for concluding the

---

communications by Congressmen or any one else with a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged.").

[4] In the 1950s and 1960s, "Congress terminated its trust relationship with 109 tribes." Steven L. Pevar, *The Rights of Indians and Tribes* 11-12, 67 (N.Y.U. Press 2004). Termination "is the ultimate weapon of Congress and the ultimate fear of tribes." *Id.*, 68. The termination policy was repudiated by President Nixon in 1970. *See*, 116 Cong. Rec. S23258-23262 (July 8, 1970).

> administrative proceeding was intended to accommodate three considerations: 1. the tribe's right to due process; 2. the BIA's caseload; and 3. the lawsuit's parties right to a reasonably prompt resolution of the dispute (including the State's interest). The prolonged protraction of this matter, to resolve the question of tribal recognition, *no. 1 has stretched*, no. 2 has given the BIA more time than it deserves, and no. 3 has deprived the parties of a reasonably prompt resolution.
>
> I have, in accordance with the view of the U.S. Attorney's Office, allowed a slight extension for a request for technical assistance and information. This was *to avoid any claim of infringement of the Tribe's due process*. I recognize this does not accommodate no. 3 above nor the view of your letter. It is intended to be a last extension of time upon the expiration of which the cases will be decided. It reflects a caution *intended to avoid a reversal by another Court which might buy a due process argument*.

(Emphasis added.) JA1461. Judge Dorsey's letter to the Governor was discovered by the Tribe *one year later* as a result of a FOIA request to the Governor's office. Once discovered, the Tribe sought "clarification" about the letter from Judge Dorsey, as well as supplemental discovery. JA70-74. Judge Dorsey maintained his letter had "no substantive significance" and did not reflect his views on the merits of STN's claims. JA88-89. At STN's request, the letter was made part of the record, but Judge Dorsey denied supplemental discovery about the letter. JA88-89.

The letter is improper: it is an *ex parte* communication with the Governor, an "interested party," *see* 25 C.F.R. § 83.1. As counsel acknowledged at oral argument before the panel, the letter does not furnish independent grounds for relief on appeal. However, it is emblematic of the political pressures and entanglements that have permeated this case—and which can lead even well-

intentioned adjudicators and judges "not to hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The letter displays a sympathetic attitude toward the Governor, and a grudging attitude toward the Tribe's rights. It suggests that three years before he ruled on the Petition for Review, Judge Dorsey was calibrating *how much* due process was needed to "avoid a reversal" *in this Court*. Logically, such calculation presupposes the Tribe would be unsuccessful in the BIA, and in the District Court, and therefore would *need* to appeal. It is not difficult to see why *any* litigant in a politically charged case, might feel that such a letter contributes to the *appearance* that the "fix was in."

III. How the Political Influence Claim Was Decided

A. By the District Court: Judge Dorsey defined the critical question as "whether the evidence presented shows that the [political] pressure exerted can be deemed to have *actually influenced the decision maker who issued the RFD*. (Emphasis added.) *Schaghticoke I*, at 410; SPA-29. Citing cases from other Circuits (but not citing *Town of Orangetown*, supra), he concluded *he* was not "persuade[d]" or "convince[d]"[5] that political activities "actually influenced" or "ultimately affected" the decision not to acknowledge the Tribe. *Schaghticoke I*, at 410-11; SPA-29, SPA-31-32. He observed that he had to "accept the evidence as

[5] On appeal, Petitioner contended that the District Court misapplied the summary judgment standards, by improperly acting as a factfinder, rather than properly determining whether there was a "genuine issue as to any material" fact. See Pet. Br., at 79-82; Pet. Reply Br., at 29-32.

presented at face value, in particular the testimony by the agency decisionmakers that they were not unduly pressured by particular politicians or the political climate at large." *Schaghticoke I*, at 411-12; SPA-33.

The Tribe also claimed that the "appearance of bias" or impropriety could itself invalidate an agency's decision. Although Judge Dorsey briefly referred to an "appearance of bias" standard,[6] he never applied such a standard.

B. By the Panel: The panel applied the political influence standard adopted by a panel of this Court in 1984:

> "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2nd Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2nd Cir. 1986).

Schaghticoke II, slip op., at 3. The panel found that although Connecticut political figures had shown "keen interest" in and "express[ed] adamant opposition to" the STN acknowledgment, and members of Congress had "strongly criticized" the STN FD, "the evidence submitted by the Schaghticoke cannot support a claim of improper political influence." *Id*., at 3-4. That conclusion was based primarily on the fact that "Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke." *Id*., at 4.

---

[6] Citing *D.C. Federation of Civic Associations et al. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C.Cir. 1971), Judge Dorsey stated, "'the *appearance* of bias or pressure may be no less objectionable than the reality.'" (Emphasis added by Judge Dorsey). *Schaghticoke I*, at 409; SPA-28.

The panel rejected Petitioner's "appearance of bias" claim in a footnote:

> Our standard for a claim of 'improper political influence' is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action.

Schaghticoke II., slip op., at 4, n. 1.

IV. Why Rehearing *En Banc* is Warranted

As STN argued on appeal, the *Orangetown* rule was designed and configured for political influence claims arising from *non*-adjudicative federal agency decisions. The agency involved in *Orangetown* "was not performing an adjudicatory function," but only "an administrative one dealing with the disbursement of grant funds." *Id.*, 188. And in *Chemung County*, supra—the only other decision of this Court applying *Orangetown*—the agency action under review was not adjudicative. Finally, neither of the two cases cited in *Orangetown*, at 188, as authority for the announced rule, involved adjudicative-type decisions.[7]

Judge Dorsey correctly noted that "[t]he BIA's federal acknowledgment process is an *adjudicative* process." (Emphasis added.) *Schaghticoke I*, at 409;

[7] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), involved informal rulemaking for emissions standards, and *Natural Resources Defense Council v. City of New York*, 534 F. Supp. 279 (S.D.N.Y.), aff'd, 672 F.2d 292 (2nd Cir.), cert. dismissed, 456 U.S. 920 (1982), involved building permits.

SPA-28. Prior to this case, *Orangetown* had *never* been applied by this Court, or any other, to a political influence claim arising from an adjudicative proceeding.[8]

A panel of this Circuit ordinarily is bound by the decision of a prior panel. *See Bank-Boston, N.A. v. Sokolowski*, 205 F.3d 532, 534-35 (2nd Cir. 2000). Thus, *en banc* review would be necessary for the Court to decide if *Orangetown*'s "one size fits all" rule should be modified to distinguish between adjudicative ("quasi-judicial") and rulemaking ("quasi-legislative") proceedings. Such a distinction has been expressly or implicitly recognized by the First,[9] Third,[10] Fifth,[11] Seventh,[12] Ninth,[13] Eleventh,[14] and District of Columbia Circuits.[15] It appears that no other Circuit applies an *Orangetown*-type rule "across the board."

---

[8] *Orangetown* was cited by the Sixth Circuit in an administrative *rulemaking* (non-adjudicative) case. *See, Radio Association on Defending Airwave Rights, Inc. v. United States Department of Transportation*, 47 F.3d 794, 807 (6th Cir), cert. denied, 516 U.S. 811 (1995).

[9] *Esso Standard Oil Co. (Puerto Rico) v. Lopez-Freytes*, 522 F.3d 136, 145-148 (1st Cir. 2008) (addressing claims of appearance of bias and actual bias).

[10] *Gulf Oil Corporation v. Federal Power Commission*, 563 F.2d 588, 610-12 (3rd Cir. 1977) ("administrative agencies must be allowed to exercise their adjudicative functions free of Congressional pressure"), cert. denied, 434 U.S. 1062 (1978).

[11] *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966) (when Congress intervenes in an agency's judicial function, courts become concerned not only with litigant's right to a fair trial, but "equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences"); *DCP Farms, et al. v. Yeutter*, 957 F.2d 1183, 1187-88 (5th Cir.) ("*Pillsbury* holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings.") (Emphasis in original.), cert. denied, 506 U.S. 953 (1992).

[12] *Monieson v. Commodity Futures Trading Commission*, 996 F.2d 852, 865 (7th Cir. 1993) (noting distinction between congressional intervention in legislative or judicial functions).

[13] *State ex rel. State Water Resources Control Board v. Federal Energy Regulatory Commission*, 966 F.2d 1541, 1551-52 (9th Cir. 1992) (Congressman's letters to FERC "do not rise to the level of undue congressional influence described in *Pillsbury*, nor do they adversely affect *the appearance of impartiality* in this case") (Emphasis added.); *Portland Audubon Society v. The*

CONCLUSION

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259 (2009). That principle "applies to administrative agencies which adjudicate as well as to courts," *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975), and "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2nd Cir. 1989) (same).

For the foregoing reasons, Petitioner respectfully urges this Court to rehear the appeal *en banc*.

Respectfully Submitted,
SCHAGHTICOKE TRIBAL NATION
Petitioner-Appellant

Endangered Species Committee, 984 F.2d 1534, 1539-47 (9th Cir. 1993) (amended opinion) (even "the President may not interfere with quasi-adjudicatory agency actions").

[14] *Fund for Animals, Inc., v. Rice*, 85 F.3d 535, 548 (11th Cir.1996) ("'congressional input neither created *an appearance of impropriety* nor actually affected the outcome'") (Emphasis added.).

[15] *D.C. Federation of Civic Associations et al. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C.Cir. 1971) (if Secretary of Transportation had been acting in judicial or quasi-judicial capacity, "plaintiffs might have prevailed *even without showing that the pressure had actually influenced* the Secretary's decision. With regard to judicial decision making, whether by court or agency, *the appearance of bias or pressure may be no less objectionable than the reality*.") (Emphasis added.), cert. denied, 405 U.S. 1030 (1972); *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers, et al.*, 714 F.2d 163, 169 (D.C.Cir. 1983) ("The [*Volpe*] court indicated that if the decision had been judicial or quasi-judicial, it could be invalidated by 'the appearance of bias or pressure.' Under this standard, pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision."); *ATX, Inc. v. United States Department off Transportation*, 41 F.3d 1522, 1527-29 (D.C. Cir. 1994) 1527-29 (where a proceeding is quasi-judicial, "we must determine whether congressional interference occurred, *or appeared to*, to such an extent as to compromise the administrative process") (Emphasis added.); *Koniag, Inc., The Village of Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (Congressional letter to Interior Secretary "compromised *the appearance of the Secretary's impartiality*") (Emphasis added.), cert. denied, 439 U.S. 1052 (1978). *See also, Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 672 F.2d 109, 113 (D.C.Cir. 1982) (*ex parte* contacts).

BY: /s/ Richard Emanuel
RICHARD EMANUEL, ESQ.
Law Offices of Richard Emanuel, Esq.
601 Plymouth Colony
Branford, CT 06405
(203) 483-6201

DAVID K. JAFFEE, ESQ.
Brown, Paindiris & Scott, P.C.
100 Pearl Street
Hartford, CT 06103
(860) 522-3343

Attorneys for Schaghticoke Tribal Nation

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this combined petition for rehearing and petition for rehearing *en banc* complies with the page limitation of fifteen (15) pages, as provided by Fed. R. App. P. 35(b)(2) and 35(b)(3), and Fed. R. App. P. 40(b).

Pursuant to Fed. R. App. P. 32(a)(5) and 32(a)(6), the undersigned counsel further certifies that this combined petition complies with typeface and type style requirements, because this petition has been prepared in proportionally-spaced typeface using Microsoft Word software with Times New Roman 14-point font.

/s/ Richard Emanuel
RICHARD EMANUEL
Counsel for Petiotioner-Appellant

ANTI-VIRUS CERTIFICATION

Pursuant to Second Circuit Local Rule 32(a)(1)(E), I, Richard Emanuel, hereby certify that I scanned the Portable Document Format (PDF) version of the Combined Petition for Panel Rehearing and Petition for Rehearing *En Banc*, for viruses, and no viruses have been detected. The name and version of the anti-virus detector that I used, is Symantec AntiVirus, Program 10.2.0.333, Version Nov. 13, 2009, rev. 3.

/s/ Richard Emanuel
Richard Emanuel
Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2009, copies of the attached combined petition for panel rehearing and petition for rehearing *en banc*, were sent by first class mail, postage prepaid, to all counsel of record, as follows:

David K. Jaffe
Brown, Paindiris & Scott, P.C.
100 Pearl Street
Hartford, CT 06103

John B. Hughes, Esq.
Assistant United States Attorney
157 Church Street
New Haven, CT 06510

Sara E. Costello
United States Department of Justice
Natural Resources Section
601 D Street, NW
Washington, D.C. 20004

David J. Elliott
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103-1212

Jeffrey B. Sienkiewicz
Sienkiewicz & McKenna, P.C.
9 South Main Street
P.O. Box 786
New Milford, CT 06776

Richard L. Street
Carmody & Torrance
50 Leavenworth Street
P.O. Box 1110
Waterbury, CT 06721-1110

Mark F. Kohler
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Susan Quinn Cobb
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Robert J. Deichert
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

/s/ Richard Emanuel
Richard Emanuel
Counsel for Petitioner-Appellant

08-4735-cv
Schaghticoke Tribal Nation v. Kempthorne

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: October 8, 2009 Decided: October 19, 2009
Amended: November 4, 2009)

Docket No. 08-4735-cv

SCHAGHTICOKE TRIBAL NATION,

Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,

Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,

Intervenors-Respondents-Appellees.[*]

Before: MINER and CABRANES, *Circuit Judges*, and KORMAN, *District Judge*.[**]

Appeal from a judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*). Petitioner-appellant Schaghticoke Tribal Nation brought a petition under the Administrative Procedure Act, 5 U.S.C. § 702, challenging the Department of the Interior's

[*] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

[**] The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

determination not to "acknowledg[e]" the "tribal existence" of the Schaghticoke Tribal Nation pursuant to 25 C.F.R. § 83.2. We affirm the District Court's grant of summary judgment to respondents-appellees and intervenor-appellees on the grounds that (1) the evidence presented by the Schaghticoke was insufficient to raise a claim of "improper political influence" under the standard set forth in *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984), and (2) the Department of the Interior's determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d.

Affirmed.

RICHARD EMANUEL, Branford, CT (David K. Jaffe, Brown Paindiris & Scott, P.C., Hartford, CT, *on the brief*), *for petitioner-appellant.*

JOHN B. HUGHES, Assistant United States Attorney, District of Connecticut (Nora R. Dannehy, Acting United States Attorney, District of Connecticut, and William J. Nardini, Assistant United States Attorney, *on the brief*), *for defendants-appellees.*

MARK F. KOHLER, Assistant Attorney General (Richard Blumenthal, Attorney General, and Susan Quinn Cobb and Robert J. Deichert, Assistant Attorneys General, *on the brief*), Office of the Attorney General, Hartford, CT, *for intervenors-respondents-appellees.*

PER CURIAM:

Petitioner-appellant Schaghticoke Tribal Nation (the "Schaghticoke") appeals from an August 27, 2008 judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*) entered after the District Court granted summary judgment to respondents and intervenor-respondents. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008).

In 2005, James E. Cason, Associate Deputy Secretary of the Department of the Interior, issued a Reconsidered Final Determination that declined to "acknowledg[e]" the "tribal existence"

of the Schaghticoke. *See* 25 C.F.R. § 83.2. The Schaghticoke brought this petition to challenge the Reconsidered Final Determination under the Administrative Procedure Act, 5 U.S.C. § 702. The parties cross-moved for summary judgment, and the District Court concluded that the Reconsidered Final Determination was not arbitrary or capricious under 5 U.S.C. § 706. *Schaghticoke*, 587 F. Supp. 2d at 412-18. The District Court also rejected the Schaghticoke's contentions that the Reconsidered Final Determination was "the product of undue influence exerted by state and congressional political forces" and had been issued in violation of the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. *Schaghticoke*, 587 F. Supp. 2d at 402, 409-12, 418-21. The District Court therefore granted summary judgment to respondents and intervenor-respondents.

On appeal, the Schaghticoke have abandoned their claim that the Reconsidered Final Determination was arbitrary or capricious. Instead, the Schaghticoke argue only that the Reconsidered Final Determination was the product of improper political influence and was issued in violation of the Vacancies Reform Act. Reviewing the District Court's grant of summary judgment *de novo*, *see, e.g.*, *Sassaman v. Gamache*, 566 F.3d 307, 312 (2d Cir. 2009), we affirm.

I. Improper Political Influence

Although Connecticut political figures showed keen interest in whether the Department of the Interior acknowledged the Schaghticoke, the evidence submitted by the Schaghticoke cannot support a claim of improper political influence. "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986).

Here, elected officials in Connecticut—including the state's Governor and Attorney General and members of the state's congressional delegation—met with and sent letters and emails to the

Secretary of the Interior and other Interior Department officials expressing an adamant opposition to the Interior Department's potential acknowledgment of the Schaghticoke. *Schaghticoke*, 587 F. Supp. 2d at 402-05. In addition, House and Senate subcommittees held hearings at which members of Congress strongly criticized an interim decision by the Interior Department that favored acknowledgment, and a bill was introduced in the House titled the "Schaghticoke Acknowledgment Repeal Act." *Id.* at 405-07.

Significantly, however, Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke. *Id.* at 404-05, 411. Any political pressure, moreover, was exerted upon senior Interior Department officials; there is no evidence that any of the pressure was exerted upon Cason, who was the official ultimately responsible for issuing the Reconsidered Final Determination. *See id.* at 407, 411. As a result, even if the Connecticut elected officials "intended to" influence the Reconsidered Final Determination, there is no evidence that they "*did* cause the agency's action to be influenced by factors not relevant under the controlling statute." *Orangetown*, 740 F.2d at 188 (emphasis added). We therefore affirm the District Court's conclusion that the Schaghticoke's evidence did not support a claim of improper political influence.[1]

II. Vacancies Reform Act

We also affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. Interior Department regulations provide that Indian acknowledgment decisions are to be made by "the Assistant Secretary–Indian Affairs, or that officer's authorized representative." *See* 25 C.F.R. § 83.1 (defining the term "Assistant Secretary" to include "the Assistant Secretary–Indian Affairs, or that officer's authorized

[1] Our standard for a claim of "improper political influence" is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader "appearance of bias" standard in this action.

representative"); *id.* § 83.10(*l*)(2) (providing that the "Assistant Secretary shall make a final determination regarding the petitioner's status"). In February 2005, the Assistant Secretary–Indian Affairs resigned. Ordinarily, when an "officer" such as the Assistant Secretary resigns, his or her duties are assumed by "the first assistant to the office," which in this case was the Principal Deputy Assistant Secretary–Indian Affairs. *See* 5 U.S.C. § 3345(a)(1). In February 2005, however, the Principal Deputy position was vacant, and thus the Secretary of the Interior delegated to Cason, the Associate Deputy Secretary, the Indian acknowledgment duties of the Assistant Secretary–Indian Affairs. It was in that capacity that Cason issued the Reconsidered Final Determination declining to acknowledge the Schaghticoke.

The Schaghticoke claim that the Final Reconsidered Determination was invalid because Cason was barred by statute from performing the duties of the Assistant Secretary–Indian Affairs. When an officer resigns and the "first assistant" position is vacant, the Vacancies Reform Act provides that "only the head of [the] Executive agency may perform any function or duty," *id.* § 3348(b)(2), "required by statute," *id.* § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [resigning] officer," *id.* § 3348(a)(2)(B)(i)(II); *see also id.* § 3348(d)(1) (providing that any action taken in violation of the Vacancies Reform Act "shall have no force or effect"). According to the Schaghticoke, therefore, only the Secretary of the Interior was authorized by the Vacancies Reform Act to make Indian acknowledgment determinations until a new Assistant Secretary–Indian Affairs took office.

The Schaghticoke's argument fails because Indian acknowledgment decisions may be made *either* by the "Assistant Secretary–Indian Affairs" *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(*l*)(2). Just as an Assistant Secretary, in the ordinary course, may name an "authorized representative" to make Indian acknowledgment decisions, the Secretary of the Interior

in February 2005, performing the Assistant Secretary's duties, simply named an "authorized representative"—Cason—to decide whether to acknowledge the Schaghticoke.

Put differently, the Vacancies Reform Act mandated that the Secretary of the Interior perform only those functions or duties of the Assistant Secretary that were "required by statute," 5 U.S.C. § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [Assistant Secretary]," *id.* § 3348(a)(2)(B)(i)(II). Indian acknowledgment decisions did not fall within that category because they could be made *either* by the Assistant Secretary *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(*l*)(2). Thus, the Vacancies Reform Act did not prohibit the Secretary of the Interior from designating Cason as the "authorized representative" in charge of Indian acknowledgment.

Accordingly, we affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act.

CONCLUSION

For the reasons stated above, the August 27, 2008 judgment of the District Court is AFFIRMED.