No. 17-5140

IN THE
United States Court of Appeals
for the District of Columbia Circuit

HO-CHUNK, INC. et al.,
Appellant,

v.

JEFF SESSIONS et al.
Appellee,

On Appeal from the
United States District Court of the District of Columbia
Case No. 1:16-cv-01652 (Hon. Christopher R. Cooper)

APPELLANTS' REPLY BRIEF

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> Rather than going through the long, slow regulatory process provided in statute, agencies make new rules through guidance documents by simply sending out a letter . . . . This cuts off the public from the regulatory process by skipping the required public hearings and comment periods and it is simply not what these documents are for . . . . I'm announcing today: this process is over. We have prohibited all Department of Justice components from issuing any guidance that purports to impose new obligations on any party outside the executive branch. We will review and repeal existing guidance documents that violate this commonsense principle.
>
> - Attorney General Jeff Sessions[1]

SUMMARY OF ARGUMENT

In its Brief for Appellees (Brief), ATF fails to support its arguments that the Tribal Entities did not preserve the issue of whether ATF violated the Administrative Procedure Act (APA) and that the Contraband Cigarette Trafficking Act's (CCTA) recordkeeping requirements apply to the Tribal Entities despite being government instrumentalities.

As a preliminary matter, ATF is incorrect that the Tribal Entities raised the issue of whether ATF violated the APA for the first time on appeal. The issue was raised in the Complaint and briefed before the District Court. ATF also fails to refute that it acted in an arbitrary and capricious manner when, by sending demands for records to the Tribal Entities, and without notice and comment

[1] Keynote remarks at the 2017 National Lawyers Convention (November 17, 2017). Available at https://www.c-span.org/video/?437462-4/2017-national-lawyers-convention-jeff-sessions (beginning at 20:12, last visited Jan. 4, 2018).

rulemaking, it purported to change the rule that government instrumentalities are exempt from recordkeeping. Such shifting rules imposing new obligations on the Tribal Entities without notice and comment are precisely what the APA seeks to prevent.

Neither does ATF's Brief demonstrate that the Tribal Entities, despite being government instrumentalities, are "persons" under the regulations and, as such, are subject to the recordkeeping requirements. Until now, ATF has never disputed the fact that the Tribal Entities are "wholly tribally-owned entities established by the federally-recognized Winnebago Tribe of Nebraska under its tribal law." ECF 7:6. ATF attempts to backtrack in its Brief, however, stating it is now "unclear whether they are in fact tribal instrumentalities." Br. at 18. Throughout its Brief, ATF attempts to characterize the Tribal Entities as corporations owned by private tribal members in an attempt to avoid its own exemption of government instrumentalities from the recordkeeping requirements. E.g., id. at 27 (citing cases).

Finally, the 2010 amendments to the CCTA do not authorize ATF's record demands. To the contrary, those amendments explicitly adopt the Indian canon of construction and carry forward the federal common law exemption of tribal government instrumentalities from "person" under the CCTA. For these reasons, ATF's record demands should be vacated.

ARGUMENT

I. ATF Violated the APA When It Amended its Rule Without Notice and Comment Rulemaking.

A. The Tribal Entities preserved the issue on appeal of whether ATF violated the APA.

ATF erroneously claims that the Tribal Entities raised "procedural APA arguments" for the first time on appeal and therefore forfeited such arguments. Br. at 25. To the contrary, in every stage of this action, the Tribal Entities raised the issue of whether ATF complied with the APA when it subjected the Tribal Entities to the recordkeeping regulations. Not only did the Complaint allege that ATF violated the APA, ECF 1:10, but throughout these proceedings the Tribal Entities argued that ATF failed to comply with procedural requirements when it changed its rules.[2] Finally, the District Court ruled on whether ATF's actions were consistent with the APA as a matter of law. ECF 21:6-7.

[2] See ECF 12-1:10 (arguing deference not owed to agency position taken for the first time in litigation); ECF 16:3-4, 10-13 (arguing that ATF acted in an arbitrary and capricious manner and abused its discretion because it failed to acknowledge its change in position and citing, *inter alia*, United Student Aid Funds, Inc. v. King, No. 15-CV-01137 (APM), 2016 WL 4179849, at *4 (D.D.C. Aug. 5, 2016)); ECF 17:2-4 (noting the unaltered definitional exemption of government instrumentalities from the recordkeeping requirements); ECF 20:4 (arguing that ATF did not change its definition of "person" on the record and citing Missouri Pub. Serv. Comm'n v. F.E.R.C., 783 F.3d 310, 316 (D.C. Cir. 2015)(overruled on other grounds)); ECF 24:6 (same); ECF 30:6-8.

Notwithstanding, even if the Court finds that the Tribal Entities did not preserve the issue of whether ATF violated the APA, it has discretion to hear and resolve such issue for the first time on appeal. Singleton v. Wulff, 428 U.S. 106, 121 (1976).

Hearing an issue for the first time on appeal is well within the Court's discretion when the issue is a fully briefed, purely legal question. Association of American Railroads v. U.S. Dept. of Transp., 821 F.3d 19 (D.C. Cir. 2016). In Association of American Railroads, the court considered a claim on appeal even though the party "never so much as hinted at this argument until their first brief filed in [the appellate] court." Id. at 25. Several considerations convinced the court that exercising appellate jurisdiction was appropriate. Id. First, "the government thoroughly briefed the claim" and thus it was not a case in which "the opposing party lost its opportunity to contest the merits" nor was there risk of "an improvident or ill-advised opinion on the legal issues tendered." Id. at 26 (internal quotations omitted). Additionally, the court found that the unpreserved claim was an "abstract legal question, one that [did] not turn on facts that would have been developed in district court." Id. Accordingly, the court held that "[d]eciding fully briefed, purely legal questions is a quotidian undertaking for an appellate court." Id.

Here, as in Association of American Railroads, ATF has thoroughly briefed the issue and thus has not "lost the opportunity to contest the merits" of the Tribal Entities' argument. Id. Furthermore, the issue of whether ATF acted lawfully under the APA is a purely legal question that would not have turned on the development of facts in the district court.

Finally, considering the issue for the first time on appeal is especially appropriate here where the Tribal Entities received no notice or opportunity to comment on the application of the CCTA recordkeeping requirements to them as tribal government instrumentalities in contravention of nearly four decades of policy and practice. See Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419 n.5 (D.C. Cir. 1992)(finding that courts of appeal "have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal . . . [when there is] uncertainty in the state of the law . . . [or when] review is necessary to prevent a miscarriage of justice . . . .")(internal citations omitted).

B. ATF is incorrect that it did not have to engage in notice and comment rulemaking before amending its regulations.

ATF incorrectly argues that the new rule that government instrumentalities are no longer exempt from recordkeeping is merely an interpretation that does not require notice and comment rulemaking. Br. at 30-31.

The fact that ATF's new rule is a legislative rule requiring notice and comment rulemaking is clear. As this Circuit has found:

> When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of both agency personnel and members of the public, whose meaning the agency announces as clear and definitive to the public . . . , it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule. To sanction any other course would render the requirements of [the APA] basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of "reinterpreting" their own rule.

Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 231–32 (D.C. Cir. 1992).

In distinguishing between legislative and interpretative rules, courts are not bound by the "label" attached by the administrative agency. Columbia Broad. Sys. v. United States, 316 U.S. 407, 416 (1942). Rather, it is "the substance of what the [Agency] has purported to do and has done which is decisive." Id. In distinguishing between legislative and interpretative rules, this Circuit looks at whether the rule in dispute "has the force of law." Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993)(internal quotations omitted). A rule "has such force only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule." Id.

The "clearest case" of an agency intending to exercise legislative power is "where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate." Id. Second, an agency likely intends its

rule to be legislative when it is published in the Code of Federal Regulations. Id. Third, "[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." Id. (alterations in original)(internal quotations omitted).

Clearly, the rules published in 27 C.F.R. part 646 are legislative. This is evident from Congress's delegation of legislative power to the Attorney General in the CCTA. Specifically, 18 U.S.C. § 2343(a) requires recordkeeping "as the Attorney General may prescribe by rule or regulation." Additionally, 18 U.S.C. § 2346 states that "[t]he Attorney General, subject to the provisions of section 2343(a) of this title, shall enforce the provisions of this chapter and may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter." See also 45 Fed. Reg. at 48612 (July 21, 1980) (citing 18 U.S.C. § 2346 as the authority for the rules). In other words, in the absence of these rules, "the legislative basis for agency enforcement would be inadequate." Am. Min. Cong., 995 F.2d at 1109.

When promulgated, the rules stated that government instrumentalities are exempt from the recordkeeping requirement. 45 Fed. Reg. at 48612. The disputed rule, contained in letters purporting to impose recordkeeping obligations on the Tribal Entities, "repudiates or is irreconcilable" with that prior legislative rule and

is thus an amendment of that rule. Id. This "amendment to a legislative rule must itself be legislative." Id. A legislative rule promulgated without proper notice and comment rulemaking is procedurally invalid. See Nat'l Family Planning & Reprod. Health Ass'n, Inc., 979 F.2d at 229 (holding that new directives effectively amending regulations "as previously interpreted and enforced" by the agency "are not exempt from notice and comment rulemaking as an interpretative rule.")

II. Government Instrumentalities Such as the Tribal Entities Are Not "Persons" Under the Regulations.

In 1980, ATF stated that "government agencies and instrumentalities are not included in the definition of 'person' in these regulations" and thus are not subject to the "recordkeeping requirements of this subpart." 45 Fed. Reg. at 48612. ATF explicitly did not limit that policy to the federal government as it now contends. Br. at 22. This is evident in ATF's explicit refusal on the record to add an exemption specific to the federal government and by its incorporation into the regulations of the definition of "person" in 1 U.S.C. § 1 exempting government agencies and instrumentalities,[3] which, under federal common law, includes tribal government instrumentalities. See Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701 (2003). ATF conceded on the record that the Tribal Entities are government

[3] E.g., 45 Fed. Reg. at 48612.

instrumentalities,[4] and ATF did not purport to change its rule exempting government instrumentalities from the recordkeeping requirements until it sent letters to the Tribal Entities. Neither has ATF sought records from the Tribal Entities in the nearly four decades since the rule was enacted. Br. at 29. Thus, if ATF has ***not*** changed the "clear" regulatory definition of "person" as used in the regulations, 45 Fed. Reg. at 48612, the Tribal Entities are exempt from the recordkeeping requirements and ATF's record demands should be vacated.

III. The 2010 Amendments to the CCTA Do Not Give ATF the Authority to Enforce the Recordkeeping Requirements Against the Tribal Entities.

ATF argues that the reason it never sought the Tribal Entities' records in the last thirty-seven years is not because of a change in policy but because of a change in statutory authority. Br. at 29. This argument weighs in favor of the Tribal Entities: if ATF believes that the CCTA was amended to provide additional authority it lacked when the statute was first enacted, it must amend its regulations to implement those changes. Yet, ATF has never amended the regulations and they remain as initially promulgated in 1980. Id. at 5 n.1.

Regardless, ATF misstates the legal implications of the 2010 amendments. Before the Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375 *et seq.* (PACT Act) amended the CCTA, ATF had the authority to seek records from any person

[4] See, e.g., ECF 7:6.

on consent or pursuant to a warrant. Br. at 29 (citing 92 Stat. at 2464). Nothing in the 2010 amendments altered that authority.

Finally, the amendments to the CCTA made by the PACT Act do direct ATF's authority, although not in the way ATF claims.

First, section 5 of the PACT Act, Exclusions Regarding Indian Tribes and Tribal Matters, contains tribal protections recognized under federal common law and states that nothing in the PACT Act "or the amendments made by [the PACT] Act shall be construed to amend, modify, or otherwise affect" those protections. Pub. Law 111-154 § 5. See also 15 U.S.C. § 375 Note. Further, section 5(e) explicitly adopts the Indian canon of construction, stating that "any ambiguity" between the application of the language of section 5 and the remainder of the PACT Act "shall be resolved in favor of this section." Id. at § 5(e). See also CCTA, 18 U.S.C. § 2346(b)(2) ("Nothing in this chapter shall . . . restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe."). Therefore, under the law of this Circuit,[5] and as expressed in the CCTA and PACT Act, if there is any ambiguity as to whether ATF may lawfully request records from tribal government instrumentalities, it must be resolved in the tribes' favor.

[5] E.g., Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988) (upholding the Indian canon of construction).

Second, section 5(a) of the PACT Act states that "amendments made by this Act shall [not] be construed to amend, modify, or otherwise affect . . . any Federal law, including Federal common law . . ., regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . ." Pub. Law 111-154 § 5(a)(3). See also 15 U.S.C. § 375 Note. As discussed above, under federal common law, Tribal government instrumentalities are not "persons" under 1 U.S.C. § 1. See Inyo County, 538 U.S. at 704 n.1. ATF's attempt to read tribal government instrumentalities into "person" under 1 U.S.C. § 1 as incorporated into the regulations affects federal common law regarding the lack of State jurisdiction over tribes by accomplishing ATF's unstated goal here: to equate, in the eyes of the law, government instrumentalities owned by tribes with corporations owned by private tribal members. The very amendment ATF claims gave it the authority to inspect the Tribal Entities' records incorporates the federal common law protections under 1 U.S.C. § 1, protections Congress placed into the CCTA and ATF incorporated into the regulations. See H.R. CONF. REP. 95-1778, 1978 U.S.C.C.A.N. 5535, 5538. See also 45 Fed. Reg. 48609, 48612.

The 2010 amendments did not give ATF the authority to enforce the recordkeeping requirement against the Tribal Entities and the record demands should be vacated.

CONCLUSION

The Tribal Entities properly preserved the issue of whether ATF complied with the APA. Even if this issue was not preserved, this Court should resolve it because it has been thoroughly briefed and is a purely legal question. In resolving the issue, the Court should find that ATF violated the APA when it did not promulgate the disputed rule through notice and comment rulemaking and the record demands should be vacated.

Further, ATF's record demands should be vacated because the Tribal Entities, as government instrumentalities, are not "persons" and are therefore exempt from the recordkeeping requirements.

Dated: January 4, 2018

Respectfully submitted,

HO-CHUNK, INC.; WOODLANDS DISTRIBUTION COMPANY; HCI DISTRIBUTION COMPANY; and ROCK RIVER MANUFACTURING COMPANY, Appellants

By: /s/ B Benjamin Fenner
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th of January 2018, the foregoing **Appellants' Reply Brief** has been served by Electronic Case Filing.

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