NDNY FEDERAL COURT BAR ASSOCIATION, INC.
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NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

"FEDERAL INDIAN AND IMMIGRATION LAW"

Wednesday, December 9, 2020

3:00 p.m. to 5:00 p.m.

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. To register for this CLE webinar, click the link provided to receive a link to log in.

The program will begin with an overview of the areas of immigration law which are pertinent to attorneys practicing within the Northern District of New York, including addressing expedited removal, admission at the border, immigrants' due process rights at the border, and the travel bans implemented by the current administration. This discussion will also touch upon items that practitioners may encounter during their practice, including collateral consequences. The immigration portion will be followed by a historical overview of the basic tenets of Federal Indian Law, including issues of land tenure, sovereignty, and jurisdiction. The discussion will also cover the Supreme Court's recent application of these principals in the historic McGirt v. Oklahoma case, and the multiple ways in which the media has misinterpreted and misreported this important precedent.

Presenters:

Mary E. Armistead, Esq.,
Staff Attorney for The Legal Project's Immigration Unit

Robert Batson, Esq.,
Professor of Indian Law at Albany Law School

Patrick E. Brown, Esq.,
Founding member of Brown & Weinraub, PLLC

TIMED AGENDA:

3:00 p.m.- Federal Immigration Overview

4:00 p.m. Federal Indian Law Overview

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

"FEDERAL INDIAN AND IMMIGRATION LAW" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **2 credits** towards the **skills requirement** *

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

***PLEASE REMEMBER TO COMPLETE YOUR EVALATION AT SURVEY MONKEY. A LINK WILL BE PROVIDED.**

Immigration Law: Admission at the Border and Collateral Consequences

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Capital District Women's Bar Association

Office for Victims of Crime
OVC

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Who do immigration laws apply to?

- Any non-citizen (immigrants and nonimmigrants)
- Who is a citizen?
  - By birth (jus soli: birthright citizenship)
  - Through parents (jus sanguinis: derivative citizenship)
  - Through naturalization: legal application to acquire citizenship
  - By treaty: e.g. with Puerto Rico

Immigration Status Overview

- Any person who is not a U.S. citizen is subject to immigration law
- This includes many different types of status:
  - Lawful Permanent Residents (green card holder)
  - Conditional Residents (conditional green card holders/ two year green card holders)
  - Nonimmigrants (visitor, student, or work visas)
  - Refugees, Asylees
  - DACA, U visas, T visas, Temporary Protected Status (TPS)
  - Undocumented persons

Why Does Immigrant's Status Matter?

Immigration Status affects whether a person:

- Has a right to work legally
- Has a right to get a social security number
- May be eligible for public benefits
- Is vulnerable to removal from the U.S.
- Has permission to leave and return to the U.S.
- Has access to higher education
- Has ability to petition for relatives

Immigration Laws and Policies

- Statute: The Immigration And Nationality Act ("INA")
  - Codified at 8 U.S.C. § 1101
- Code of Federal Regulations (CFR): Codified at Title 8
- Caselaw: Administrative (USCIS and EOIR) and Judicial Opinions (US federal courts)
- Other: Agency Manuals, Policy Memos and Executive Orders, etc.

The Immigration System

- Pre 9/11: Immigration and Nationality Service (INS) and Executive Office for Immigration Review (EOIR)
  - INS and EOIR were both housed within the Department of Justice

- Post 9/11: United States Citizenship and Immigration Services (USCIS), Immigration and Custom Enforcement (ICE), Customs and Border Patrol (CBP), and EOIR
  - USCIS, ICE, and CBP are housed in the newly-created Department of Homeland Security (DHS)
    - Conflates immigration with issues of security
  - EOIR is still housed in the DOJ

Immigration Agencies and Their Roles

- Executive Office for Immigration Review (EOIR): institutional home of Immigration Courts (ICs), wherein immigration judges (IJs) preside over removal hearings, and the Board of Immigration Appeals (BIA), which reviews IJ decisions & administrative decisions by DHS officers
- Immigration and Customs Enforcement (ICE): responsible for locating, arresting, and charging individuals who are within the US without documentation
- Customs and Border Patrol (CBP): responsible for patrolling the border to ensure it is secure, including counterterrorism, customs, immigration, trade, and agriculture
- United States Citizenship and Immigration Services (USCIS): oversees lawful immigration to the US and is charged with processing immigrant visa petitions, naturalization petitions, & asylum & refugee applications

Pathways to Immigration Status

- Family
  - Immediate relatives
    - Spouse, child (under 21 and unmarried), or parent of a US Citizen
  - Preference Relatives
    - Older or married children and siblings of US Citizens
    - Spouse, children, or parent of LPR
- Employment
  - Primarily for skilled/educated workers (only 10,000 per year for unskilled workers)
- Diversity Visa
- Humanitarian Status
  - Asylum, VAWA (abused children/spouses of LPRs/citizens); U-Visa (victims of certain crimes), T-Visa (victims of human trafficking); Special Immigrant Juvenile Status (SIJS); and more

Inadmissibility and Deportability

- Immigration divides non-citizens into 2 categories: those seeking "admission" and those already admitted
- Inadmissibility: ground that prevents one from being "admitted" to the US
- Deportability: ground for taking away lawful status already obtained
- Burden of proof: inadmissibility falls on immigrant; deportability falls on government

Admission to the US

- Any non-citizen or non-LPR is "seeking admission" at each border entry and each immigration application
  - LPRs can be deemed "seeking admission" under certain circumstances (next slide)
- Admission usually occurs at the border: CBP determines whether a non-citizen/LPR who presents themselves at a port of entry (POE) is admissible
- However, it is also be a legal fiction for:
  - Any first encounter with immigration officials (ICE/CBP)
  - those who entered without inspection ("EWI"ed) and are applying for status from within the US
  - people seeking AOS
    * In these cases, USCIS determines admissibility

Are LPRs seeking admission?

- INA §101(a)(13)(C): LPRs are seeking admission if they have:
  - abandoned or relinquished LPR status
  - been absent for continuous period of more than 180 days
  - engaged in illegal entry abroad
  - departed the US while in removal proceedings
  - committed an offense identified in INA §212(a)(2) (criminal grounds)
  - entered at an undesignated time and place

If Determined Inadmissible

- Withdraw Application For Admission: Ask to withdraw application for admission without referral for removal.
- Deferred Inspection: Permitted to enter US but will be later inspected by US CBP or to US CIS (discretionary when documentation of status not available)
- Parole Status: Permit physical entry into the US without granting any lawful immigration status to applicant (discretionary: may be granted for humanitarian reasons)
- Charged With Removal: Charged with inadmissibility (INA §212)
- Expedited Removal: for certain inadmissible aliens (INA §235) (see next slide)
- Summary Removal: for Visa Waiver Program (VWP) entrants or those determined inadmissible based on national security grounds

Expedited Removal INA § 235(b)(1)(a)(i)

- Statutorily allowed for any alien who an immigration officer (ICE or CBP) determines is:
  - inadmissible pursuant to INA 212(a)(7 (failure to have documentation) OR INA 212(a)(6)(C) (has committed fraud or misrepresentation for an immigration benefit) AND
  - has been physically present in the US for less than 2 years (in A.G.'s discretion) UNLESS
  - The individual states that they intend to seek asylum or has a fear of returning to their home country OR they claim they are a U.S. citizen or have LPR, refugee, or asylee status
- Immigration officer makes decision re: removability
- Review by an Immigration Judge limited to:
  - Claim of asylum/fear of persecution OR claim of LPR, refugee, asylee status or U.S. citizen
  - Whether the order has been issued and the individual is the subject of the order

Due Process at the Border (Exclusion/Inadmissibility)

- *Nishimura Ekiu v. United States*, 142 U.S. 651(1893)
  - Procedural Due Process does NOT require judicial review of exclusion decision
  - The Immigration Officer is the "sole and exclusive judge" of the facts regarding exclusion
- *Yamataya v. Fisher*, 189 U.S. 86 (1903)
  - 5th Amendment does require notice and opportunity to be heard before an alien can be deported
  - BUT notice and opportunity to be heard can be satisfied by executive—need not be judicial
- *Knauff v. Shaughnessy*, 338 U.S. 537(1950)
  - Alien who seeks admission "may not do so under any claim of right"; admission is a "privilege"
  - "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry"
- *Landon v. Plasencia*, 459 U.S. 21(1982)
  - "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"
  - A continuously present alien is entitled to a fair hearing and a right to due process
  - But if "meaningful departure," alien is given the same rights as anyone else seeking admission

Due Process: Expedited v. Regular Removal

- Expedited Removal
  - Notice is from executive officer
  - Executive officer issues removal order after informal process
  - No access to counsel
  - Not recorded
  - No review by Board of Immigration Appeals (BIA)
  - Judicial review is precluded except for habeas petition
- Regular Removal
  - Served with written Notice to Appear (NTA)
  - Immigration judge conducts an administrative hearing
  - Right to an attorney (but not at government's expense)
  - Recorded
  - Review by Board of Immigration Appeals (BIA)
  - Judicial review available (except for discretionary issues)

INA § 212 Removal Proceeding Basics

- Administrative proceeding to determine an individual's removability under United States immigration law—for either inadmissibility OR deportability (expedited or summary removal is only available if someone is inadmissible)
- Conducted in Immigration Court by an Immigration Judge.
- The immigrant charged with removability is called the respondent.
- Commenced by a Notice to Appear (next slide).
  - Usually issued by ICE: at entrance, after arrest or conviction, in workplace raids
  - Note USCIS 6/28/18 Policy Memo on issuing NTAs
  - Can be issued in person or by mail
- Must Admit or Deny allegations in NTA

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [redacted] FINS #: 1168563354 File No: A206 [redacted]

DOB: [redacted] Event No: MCS1406000204

In the Matter of:

Respondent: [redacted] currently residing at:

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR ;
3. You entered in the United States at or near Hidalgo, TEXAS, on or about June 3, 2014;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who entered in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

AT A PLACE TO BE SET

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set *(Date)* at a time to be set *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

[redacted] SUPERVISORY BORDER PATROL AGENT

(Signature and Title of Issuing Officer)

Date: June 04, 2014 Weslaco, Texas

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07) N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: [redacted]

(Signature and Title of Immigration Officer)

X [redacted]

(Signature of Respondent)

Date: 6/4/14

Certificate of Service

This Notice To Appear was served on the respondent by me on June 04, 2014, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☒ in person ☐ by certified mail, returned receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

X [redacted]

(Signature of Respondent if Personally Served)

[redacted] BORDER PATROL AGENT

(Signature and Title of officer)

Form I-862 Page 2 (Rev. 08/01/07) N

Right to Counsel

- Respondents have the right to be represented by counsel at no expense to the Government by counsel of the alien's choosing who is authorized to practice in such proceedings (see INA §240(b)(4)(A)).
- If respondent cannot afford legal counsel - must be informed of free legal services in the area (see 8 C.F.R. §240.10(a)(2)).

Bond Eligibility

- Some individuals are subject to "Mandatory Detention"
  - Individuals who are inadmissible (for "arriving aliens") or are deportable (for "admitted aliens') based on certain criminal grounds
  - Individuals subject to Mandatory Detention are not bond eligible
- ICE makes the initial determination whether to detain an individual
  - ICE can:
    - grant "conditional parole" (i.e. bond with no monetary requirements)
    - grant bond at no lower than $1,500
    - Deny bond
  - Once ICE makes their determination, the individual can either accept or make a request for judicial review
- If a judicial determination has been made, an individual can only make an additional bond request if "circumstances have materially changed"

Bond Eligibility

- Must show:
  - The individual is not a danger to people or property
  - The individual is not a flight risk
- Prove through oral and documentary evidence, such as:
  - Evidence that the individual has US citizen or LPR family
    - Present marriage/birth certificates to prove relationships if possible
  - Proof of job and tax filings
  - Certificates showing completion of counseling or other rehab classes (if the individual has committed a crime)
  - Evidence of strong ties to the U.S. and community
    - Letters of support from family members/friends in the US, even if they don't have status

Inadmissibility Grounds

- Health-related (i.e., communicable diseases, vaccinations, physical or mental disorder, drug abuse or addict)
- Criminal-related (i.e., admit to or convicted of crimes involving moral turpitude (CIMT), controlled substances, prostitution, gambling, reason to believe drug trafficker, etc.)
- National Security-related (i.e., espionage, sabotage, terrorist activities, etc.)
- Public Charge-related (i.e., likely at any time to become a public charge…")
- Illegal Immigrants and Immigration Violators-related (i.e., present without authorization, failure to attend hearing, fraud or willful misrepresentation, false claim to US citizenship, etc.)
- Documentation Requirement-related (i.e., not in possession of valid immigration-related documents)
- Unlawful Presence-related (i.e., 3- and 10-year bar)
- Others: draft evaders; polygamists; international child abduction; unlawful voters; renounced US citizen for tax evasion

Deportation Grounds

- Inadmissible at Time of Entry or Adjustment of Status or Violates Status (i.e., unlawful entry, marriage fraud, smuggling, etc.)
- Criminal-related (i.e., aggravated felony, crime involving moral turpitude (CIMT), controlled substances, firearm-related convictions, domestic violence, stalking, crimes against a child and violations of orders of protection, high speed flight, failure to register as a sex offender, etc.)
- Failure to Register and Classification of documentation (i.e., false documents, false claim of US citizenship, etc.)
- Security-related (i.e., terrorist and national-security grounds)
- Public Charge-related (i.e., deportable within 5 years of admission)
- Unlawful Voters

Criminal Inadmissibility Grounds INA § 212(a)(2)

- Drugs: DHS has reason to believe individual is a drug trafficker OR conviction or admitted commission of a controlled substance offense
  - Exception: single offense of simple possession of 30g or less of marijuana intended for personal use only
- CIMT: Conviction or admitted commission of a crime involving moral turpitude
  - Crimes with an intent to steal or defraud as an element (e.g. theft, forgery) OR
  - Crimes in which bodily harm is caused or threatened by an intentional act, or serious bodily harm is caused or threatened by a reckless act (e.g. murder, rape, some manslaughter/assault crimes) OR
  - Most sex offenses
- CIMT exceptions:
  - Petty Offense Exception: (1) If only 1 CIMT, (2) the offense is not punishable > 1 year; AND (3) the sentence imposed was less than 6 months
  - Juvenile Exception : (1) Under 18 when crime committed and (2) more than 5 years before application
- Waiver available for inadmissibility if there will be extreme hardship to the alien's US citizen or LPR spouse, parent, or child

Criminal Deportability Grounds INA § 237(a)(2)

- INA §237(a)(2)(A) General Crimes:
  - CIMT within 5 years after admission for which a sentence of 1 year or more may be imposed
  - 2 or more crimes not arising out of a single scheme of criminal misconduct at any time after admission
  - Convicted of an aggravated felony at any time after admission
  - High speed Flight (i.e., from immigration checkpoint)
  - Failure to Register as a Sex Offender
- WAIVER: CIMTs, Aggravated Felony, High Speed Flight if granted full and unconditional pardon by President or Governor

Criminal Deportability Grounds INA § 237(a)(2)

- INA §237(a)(2)(B) Controlled Substances:
  - Convicted of any controlled substance violation at any time after admission
    - (exception: possession of 30 grams or less of marijuana for personal use)
  - Drug abuser or addict at any time after admission
- INA §237(a)(2)(C) Certain Firearm Offenses: Convicted of any crime relating to a firearm (accessory or part) or destructive device
- INA §237(a)(2)(D) Miscellaneous Crimes: espionage, sabotage, treason, sedition, threats against President, etc.
- INA §237(a)(2)(E) Crimes of Domestic Violence, Stalking, Crimes Against Children or (Civil or Criminal) Violation of Protection Order
- INA §237(a)(2)(F) Human Trafficking

What Is A "Conviction" for Immigration Purposes? INA § 101(a)(48)(a)

- A formal judgement of guilt has been entered by a court OR
- Adjudication has been withheld where:
  - A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and
  - The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Which New York Dispositions Are Convictions for Immigration Purposes?

CONVICTION	NOT A CONVICTION
Formal judgment of guilt in adult criminal court (including NY Juvenile Offender conviction)	**Youthful offender disposition (even though entered in adult court) and juvenile delinquency* dispositions (*possibly not "conduct" grounds)**
Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT made by the defendant	**Diversion, drug treatment, or family counseling IF PLEA OR ADMISSION OF GUILT WAIVED** (i.e. NY CPL §216.05[4])**
Conditional Discharging Sentence or *Alford Plea*	**Adjournment in contemplation of dismissal**
Post Conviction Relief/Motion pending on collateral challenge	**Conviction on direct appeal or NYS late notice of appeal (460.30)**
Disposition vacated/expunged in the "interest of justice" – based on rehabilitation ONLY! (*See Sutherland v. Holder,* Dckt. 12-4510, __F.3d__, 2014 W L 4999963 [2d Cir. Oct. 8, 2014])	**Disposition vacated based on legal defect in the criminal case (i.e. NY CPL §440.10 motion)**

Finality of Conviction

- Direct appeal compared with late filing of notice of appeal
  - A conviction based on a formal judgment of guilt must be final before it constitutes a "conviction" for immigration purposes, but that a rebuttable presumption of finality attaches once the time period for direct appeal passes. J.M. Acosta, 27 I&N Dec 420 (BIA 2018).
- Dismissal of a criminal appeal involving an involuntarily deported individual before the Appellate Division review of the appeal is completed = an abuse of discretion
  - People v. Ventura; People v. Gardner, 2011 NY Slip Op 07475 (10/25/2011)

DWI Offenses

- DWI (i.e. NY VTL §1192) currently does not automatically lead to inadmissibility or deportability unless there are aggravating factors:
  - Driving with a suspended or revoked license (i.e. NY VTL §§ 511(2) or 511(3)(a)(i)AUO)
  - Children endangered (i.e. Leandra's Law)
  - Under the influence of a controlled substance (i.e. NY VTL § 1192(4))

Public Charge Inadmissibility INA § 212(a)(4) and Deportability INA §237(a)(5)

- Deportable if, within 5 years from date of entry, becomes a public charge (i.e. primarily dependent on US Gov't)
- Inadmissible if "likely at any time to become a public charge…"
  - Old test: likely to become primarily dependent on US government
    - Focused on Affidavit of Support
    - Totality of the Circumstances Test considering statutory factors: (1) age; (2)health; (3) family status; (4) assets, resources, and financial status; (5) education and skills.
    - looked at reliance on cash-aid for income support (SSI or TANF) or long-term care paid for by the government (long-term care Medicaid)

Public Charge Inadmissibility INA § 212(a)(4) and Deportability INA §237(a)(5)

- New test
  - Shifts focus from affidavit of support to 5 statutory factors
  - Some factors defined as "heavily" negative or positive (see next slide)
  - Looks to receipt of designated benefits for any 12 months within a 36 month period
  - List of designated benefits expanded to include: non-emergency Medicaid; Supplemental Nutrition and Assistance Program (SNAP, formerly food stamps); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and Public Housing
  - Allows $1,000 bond to be posted for an individual determined likely to become a public charge

Heavily Weighted Factors

- Heavily negative:
  - Not a full-time student and is authorized to work, but currently unemployed.
  - Currently receiving, or certified or approved to receive one or more of the designated public benefits above the threshold.
  - Has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or will interfere with the ability to work, attend school or care for himself or herself, and the applicant is uninsured and has no prospect of obtaining private health insurance or financial resources to pay for reasonably foreseeable medical costs.
  - Has previously been found inadmissible or deportable based on public charge.

Heavily Weighted Factors

- Heavily positive:
  - The applicant's household has income of at least 250 percent of the FPG for the household size.
  - The applicant is authorized to work, is gainfully employed, and has an income of at least 250 percent of the FPG.
  - The applicant has private health insurance, not including insurance for which the applicant received subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act.

Travel (Muslim) Ban Basics

- Ban on Entry of Nationals from Certain Muslim-Majority Countries
  - Iraq, Iran, Libya, Somalia, Sudan, Syria, Yemen (Travel Ban 1.0)
  - Iran, Libya, Somalia, Sudan, Syria, Yemen ~~(Iraq)~~ (Travel Ban 2.0) (90 day ban)
  - Chad, North Korea, Iran, Syria, Yemen, Somalia, Libya, ~~Sudan~~ (Travel Ban 3.0) (no expiration date)
    - Eliminated language that gave preference to religious minorities (Christians)
- SC granted cert. on 1/19/18
  - Enjoined by several federal courts on grounds that it "drips with religious intolerance, animus and discrimination") (4th Cir)
  - SC disagreed, and allowed Travel Ban 3.0 to be fully enforced pending review

Trump v. Hawaii (S. Ct 2018)

- "The President has lawfully exercised the broad discretion granted to him under 1182(f) to suspend the entry of aliens into the United States."
- 1182(f) "vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA" so long as the President "finds that the entry of the covered aliens 'would be detrimental to the interests of the United States'"
- The President completed a "comprehensive evaluation."
- "[Judicial R]eview is limited to whether the Executive gives a 'facially legitimate and bona fide' reason for its action."
  - Rational basis review

FEDERAL INDIAN LAW

Federal Indian and Immigration Law CLE

December 9, 2020

Federal Indian Law

- Body of federal law that addresses the relationship between tribal, federal, and state governments.
- Consists of statutes, court decisions, treaties, and regulations of the Department of the Interior and other agencies.
- Over the last 30 years, the Supreme Court has decided an average of 2-3 Indian law cases per year (out of 75-85 cases).

Indian Tribe or Nation

- Government with authority over people within its territorial jurisdiction
  - Shared with U.S. and state in which located
- Tribe is not a foreign nation or a state
  - Tribe is a “domestic dependent nation under the protection of the United States government.” Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Federal trust responsibility.
  - State cannot impose its laws on a tribe. *Worcester v. Georgia*, 31 U.S. 515 (1832).

Tribal Land

- Doctrine of Discovery
  - Discovering European power gains legal title to the land it discovers, subject to the indigenous right of occupancy. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).
  - Exclusive right of discovering power to extinguish this right.
  - Right of a state to extinguish or preempt indigenous title is subject to the approval of the U.S. (Indian Trade and Intercourse Act, 25 U.S.C. § 177). See, *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974).
  - Tribal conveyances of land to individuals are void.

Indian Country

- All land within the limits of any Indian reservation under the jurisdiction of the U.S. 18 U.S.C. § 1151.
  - Includes lands patented and not under control of a tribe.
  - Includes rights of way.

What Laws Apply in Indian Country

- General Rule
  - Tribal and Federal laws apply to tribal members in Indian Country.
  - State and local laws do not apply.
- Criminal Jurisdiction
  - General Crimes Act of 1817. Criminal laws of U.S. apply to crimes between Indians and non-Indians. 18 U.S.C. § 1152.
  - Major Crimes Act of 1885. Specifies crimes punishable by the U.S. in Indian Country when both perpetrator and victim are Indians. 18 U.S.C. § 1153.
  - Congress granted NY jurisdiction over crimes committed by or against Indians on reservations. 25 U.S.C. § 232 (1948).
    - Cf. Public Law 280 (Pub. L. 83–280, Aug. 15, 1953, 18 U.S.C. §§ 1321–1326).

What Laws Apply in Indian Country

- Criminal Jurisdiction
  - Indian Civil Rights Act of 1968. Tribal law enforcement must adhere to most, but not all, provisions of the Bill of Rights. 25 U.S.C. §§ 1301-1304.
  - Indian tribal courts lack criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
  - Fifth Amendment double jeopardy clause does not prevent prosecution by both a tribe and the federal government. U.S. v. Wheeler, 435 U.S. 313 (1978).

What Laws Apply in Indian Country

- Civil Jurisdiction
  - State court civil jurisdiction in Indian Country. In 1950 Congress granted N.Y.S. courts jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings. 25 U.S.C. 233.
  - Tribal court civil jurisdiction. As a general rule tribal courts may not exercise civil jurisdiction over non-members unless authorized by Congress. There are two exceptions to this rule. *Montana v. United States*, 450 U.S. 544 (1981)
    - Tribes may exercise jurisdiction over nonmembers who enter consensual relationships with the tribe or its members.
    - Tribes may exercise jurisdiction over nonmembers within a reservation when the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

What Laws Apply in Indian Country

- Civil Regulatory Jurisdiction
  - Grant to state of jurisdiction over private civil litigation involving reservation Indians did not grant general civil regulatory authority. Bryan v. Itasca County, 426 U.S. 373 (1976).
  - Supreme Court found that state laws that provide for licensing of and limitations on the scope of gambling are civil regulatory and would not apply to gambling conducted or licensed by a tribe in its territory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Tribal Sovereign Immunity

- Indian tribes have sovereign immunity from suit that can only be revoked by an act of Congress. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014).
- Tribal sovereign immunity includes contract lawsuits, whether made on or off reservation, or involving governmental or commercial activities. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751.

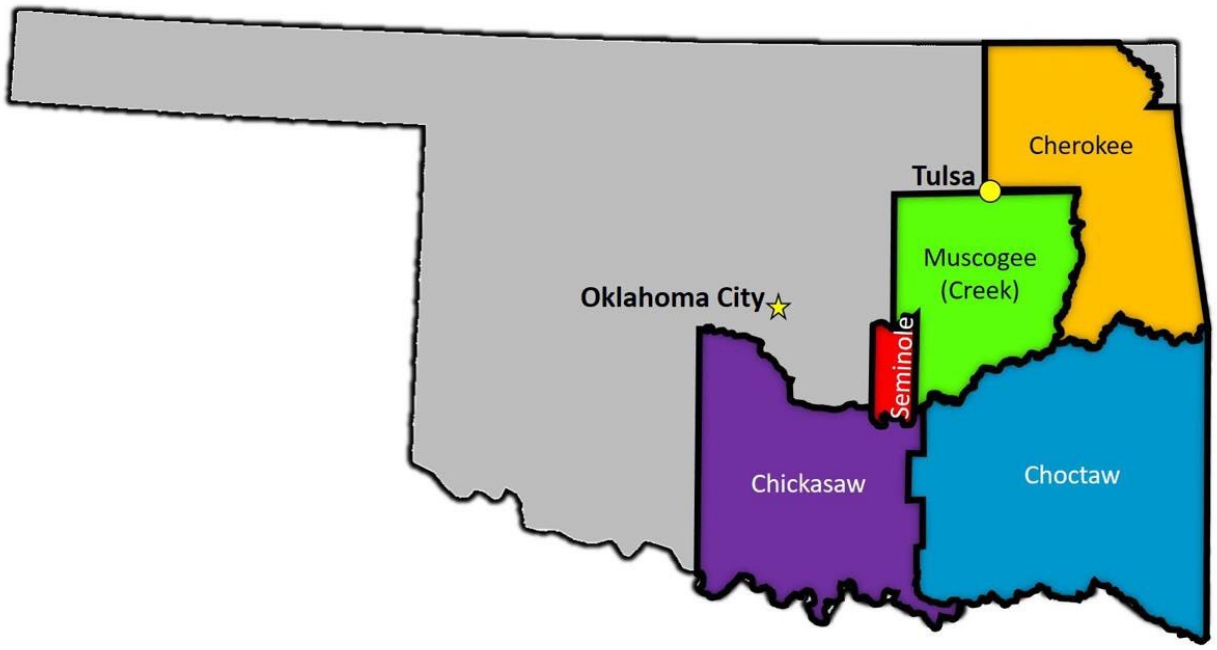
Jurisdiction over Reacquired Lands

- Repurchase of tribal lands 200 years later did not restore tribal sovereignty to the land, making the tribe liable to local governments for real property taxes. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).
- Sovereign immunity bars Seneca County from pursuing tax enforcement actions under Article 11 of the New York Real Property Tax Law against the Cayuga Indian Nation, and that *City of Sherrill* does not abrogate a tribe's sovereign immunity from suit. *Cayuga Indian Nation of NY v. Seneca County*, Docket No. 19-0032, 2d Cir. (2020). See, *Cayuga Nation v. Tanner*, 448 F.Supp.3d 217 (N.D. N.Y.2020)

Reservation Diminishment

- Land reserved for an Indian tribe remains Indian Country unless Congress diminishes or disestablishes it through a "clear expression of Congressional intent." *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020).

MCGIRT V. OKLAHOMA



"On the far end of the Trail of Tears was a promise"

G. WASHINGTON SAVAGE AS WOLF LETTER TO CONGRESS SEPTEMBER 7, 1783

- "Indians… retreat as our Settlements advance upon them and they will be as ready to sell as we are to buy. That is the cheapest as well as the least distressing way of dealing with them…."
- "which as we have already experienced is like driving the Wild Beasts of the Forest… when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had bypurchase at less expense…."

REMOVAL PERIOD

- During the early 1800s, U.S. Indian policy focused on the removal of tribes in the Southeastern part of the United States, including the Creek, to areas west of the Mississippi River.
- The Indian Removal Act of 1830 gave the president power to negotiate removal treaties with tribes to exchange unsettled western land for their ancestral lands in the Southeastern part of the United States.
- After the removal treaty of 1832, Creeks, along with many other tribes, were forcibly removed from their homeland to new land in Indian Territory (which would later become the state of Oklahoma in 1907), in what is called the Trail of Tears.

ALLOTMENT

- In 1887, Congress passed the General Allotment Act (also known as the Dawes Act), which authorized the federal government to review Indian tribal lands and divide parts of that land into equally valued allotments (or plots of land) for individual Indians and families.
- After the tribal lands were allotted to individual Indians, the federal government could negotiate to purchase extra land from the tribes and sell it to non-Indian settlers. As a result, 60 million acres were either ceded outright or sold to the government for non-Indian settlers and corporations as “surplus lands.”
- The Creek Nation, along with several other tribes known collectively as the “Five Tribes,” strongly resisted allotment agreements with the U.S. government for many years and refused to negotiate any agreements with Congress that included more ceding of their land. Eventually, Congress ratified the Creek Allotment Act in 1901. It provided 160-acre plots of land for individual Creek families.

STATUS OF TREATIES UNDER US LAW

- U.S. Constitution, Article VI: "This Constitution, and the Laws of the United States… and all Treaties made, or which shall be made… shall be the Supreme Law of the Land."
- Congress can unilaterally abrogate Indian treaties. *Lone Wolf v. Hitchcock, 187 US 353 (1903)*
- Treaties are contracts between nations. *Washington v. Fishing Vessel Assoc., 443 US 658 (1979).*
- Treaties do not grant rights to Indian Nations; treaties reserve existing tribal rights. *U.S. v. Winans, 198* US 371 (1905).
- 375 treaties with Indian Nations 1778-1871.

RESERVATION DIMINISHMENT AND DISESTABLISHMENT

- *Solem v. Bartlett,* US (1984) three part test to determine if reservation has been diminished or disestablished.
- Clear Congressional intent to diminish or disestablish found in specific statutory text.
- Contemporaneous events reveal widespread understanding that reservation has been diminished or disestablished.
- Subsequent history of land use by Indians and non-Indians.

THE PROMISE: 1832 CREEK NATION TREATY

- Creek Nation sold all of its homeland east of the Mississippi to U.S. for gifts, cash and annuities.
- Nation agrees to remove west of the Mississippi; U.S. to pay costs of removal.
- U.S. agrees to provide replacement homeland in the west.
- Nation to receive land patent, "fee simple" title.
- A "permanent home" to Creek Nation is "solemny guaranteed" where tribe can govern themselves and not be subject to territorial or State law.

FACTS OF CASE

- In 1997, petitioner Jimcy McGirt, was convicted in state court of raping a 4 year old girl and committing other sex crimes and was sentenced to a life term plus two 500-year terms in prison.
- Mr. McGirt is a member of the Seminole Nation of Oklahoma and his crimes were committed on what is arguably the Creek reservation in Oklahoma.
- In 2018, Mr. McGirt filed a petition for post-conviction relief on the basis that the state did not have jurisdiction over his alleged crimes. The lower state courts denied Mr. McGirt's petitions. Mr. McGirt then appealed to the U.S. Supreme Court, which agreed to hear the case.
- The question before the Court was whether McGirt's crimes were committed on a Creek reservation in the eastern part of Oklahoma or whether the state has jurisdiction over what it refers to as former Creek Nation Territory.

PETITIONER, MCGIRT

- The Creek reservation was clearly established in earlier treaties with Congress. The text of federal treaties makes it clear that a reservation of land was established for the Creek. Federal treaties in 1832, 1833, and 1856 guaranteed the Creek Nation's rights within its borders.
- Once a federal Indian reservation is established, only Congress can disestablish it through direct and specific language stated in a law. Congress never disestablished the Creek reservation.
- Congress did not give Oklahoma criminal jurisdiction over Indian country.
- Under the Major Crimes Act, the United States has exclusive jurisdiction over qualifying crimes on 'any Indian reservation' or 'Indian country' within 'any State.' Nowhere did Congress exempt Oklahoma from this rule.
- Congress is the governmental body with the democratic legitimacy and constitutional authority to change statutes in light of new social problems. Unlike courts, Congress can make specific adjustments or changes to laws that take both history and today's realities into consideration.

RESPONDENT, STATE OF OKLAHOMA

- The Creek Nation's former territory was not established as a reservation. When Congress removed the Creeks to present-day Oklahoma, it did not confine them to reservations, but instead granted them land in patent. This Court categorized the Creek Nation's former land as a "dependent Indian community," not a reservation. Unlike a reservation, this land would only retain its status as Indian country as long as it was held communally by the Creek Tribe, or individually by Creek members as restricted (or non-taxable) allotments. This ended over 100 years ago when Congress terminated the Creek patent and removed allotment restrictions.
- The original Major Crimes Act gave federal courts jurisdiction within states over certain crimes committed by Indians only on "reservations." . Dozens of cases show that courts, including the Supreme Court, understood Oklahoma as having general jurisdiction over these crimes.
- Even if this land is decided to be Indian country, Oklahoma had jurisdiction to prosecute petitioner. .When Oklahoma became a new state, Congress gave it jurisdiction over Indians and non-Indians alike. Beginning in 1897, Congress granted territorial courts jurisdiction over all residents regardless of race, abolished tribal courts, declared tribal law unenforceable, and passed many other laws ensuring equality between Indians and their neighbors.

- Even if a Creek reservation existed, Congress disestablished it. Allotment stripped the Creek tribe of "all right, title, and interest" in its land. Congress then permitted sale of these pieces of land to non-Indians, and subjected even Indian- owned land "to taxation and all other civil burdens" imposed by the state of Oklahoma. Congress also determined tribal law to be unenforceable. Congress ended the territorial jurisdiction of tribal governments.
- History supports the argument that the reservation was disestablished. Oklahoma's civil and criminal jurisdiction over Indians has gone unquestioned for a century. The affected tribes have accepted this jurisdiction, telling courts, Congress, and the public that they have no reservations—and this Court and Congress have relied on these statements.
- If the Court rules in favor of petitioner, it would forever change the state of Oklahoma. Oklahoma would lack authority to prosecute crimes involving any Indian in eastern Oklahoma. The effects would not be limited to criminal prosecutions. Federal obligations for health, social welfare, and homeland security would kick in, as would civil obligations, including child placement, adoptions, and taxation.
- The outcome would not just impact Creek Nation, but also the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation and the Seminole Nation, collectively known as the Five Civilized Tribes. Altogether, the former lands of the five tribes make up about 19 million acres—or about 40 percent of Oklahoma's current land.

CREEK NATION FOR PETITIONER

- Oklahoma wrongly argues that the land patent (in fee simple) given to the Creeks in 1852 as part of their removal treaty conditions removed the Creek territory of reservation status.
- But the rule nowhere exists that a tribe cannot possess fee title to a reservation. As the National Congress of American Indians well explains, nineteenth-century reservations rested on various forms of land tenure, with many substantial reservations held by tribes in fee simple. Neither this Court nor Congress has deemed title determinative of reservation status, And in the Nation's case any distinction was insubstantial, as its patent was highly restricted: The Nation could not sell the lands, and the United States retained . . . supervisory power over them.
- It is not surprising that having experienced, at such enormous cost, the willingness of executive branch officials to disregard treaties, statutes, and judicial commands, the Creek insisted on as much protection as possible for their newly reserved lands. More surprising is how Oklahoma distorts this history and argues that a patent intended to provide additional security for the Creek Reservation dismantled it instead.

U.S. DEPARTMENT OF JUSTICE FOR RESPONDENT

- Between 1890 and 1907, Congress passed a series of statutes that prepared the Indian Territory for statehood by placing Indians and non-Indians under the same framework of non-tribal and non-Indian-based laws, abolishing the national territories of the Tribes, and eliminating the Tribes' ability to exercise significant governmental authority. Congress furthered the transformation by making Indians in the Indian Territory citizens of the United States and guaranteeing their right to participate in the framing of the new Oklahoma Constitution.
- If the Court holds that, "the Creek Nation's former territory today constitutes an Indian reservation over which the federal government and the Creek Nation have jurisdiction .. . The federal government would be required, for the first time since statehood, to assume jurisdiction over all crimes involving Indians, with the exception of minor crimes between Indians." This is a massive increase in federal law enforcement presence and responsibility. Many individuals previously prosecuted by the state could challenge their convictions.

SUPREME COURT

- Issue before the Court:
- Was a Creek reservation established, and if so, was it disestablished either by Congress or in other ways?
- In a 5-4 decision, the Court ruled that for the purposes of the Major Crimes Act (MCA), land reserved for the Creek Nation since the 19th century remains "Indian country."

MAJORITY OPINION OF GORSUCH,J.

- Radical textualism or unremarkable application of precedent?
- "We are asked whether the lands these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."
- Strict application of Part 1 of the Solem test.
- Application of second and third Solem Parts would be an improper substitution of "stories for statute".
- In response to dissent's assertion that recognizing a Creek reservation will lead to chaos, the majority stated: "other legal doctrines… protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are free to say what we know to be true… today, while leaving questions about reliance interests, for later proceedings…"

MAJORITY CONTINUED

- In a series of footnotes, Majority rejects Roberts,C.J. narrow reading of bedrock precedent. For example, in footnote six Gorsuch, J rejects the notion that granting statehood to Oklahoma is evidence of Congressional intent to disestablish the Creek reservation. " But the only thing implausible here is the suggestion that "creat[ing] a new State" or enfranchising Native Americans implies an "intent to terminate" any and all reservations within a State's boundaries…This Court confronted—and rejected—that sort of argument long ago in United States v. Sandoval, 231 U. S. 28, 47–48 (1913). The dissent treats that case as a one-off: special because "the tribe in Sandoval, the Pueblo Indians of New Mexico retained a rare communal title to their lands… But Sandoval is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate a broader political community without sacrificing their tribal sovereignty. "

DISSENTING OPINION OF ROBERTS, C.J.

- All governments; federal, state, local and Creek, have been operating for 100 years under the belief that the Creek reservation was extinguished by Congress in a series of treaties and statutes culminating in 1901.
- Well settled Supreme Court precedent requires analysis of not just the text of the treaties and statutes but of all of the surrounding circumstances including contemporaneous understanding and the history of land settlement.
- To accept the majority's result will invite chaos. Settled expectations of over a century will be upended.

SUPREME IRONY

- McGirt is a criminal law case decided by the Supreme Court based on treaty bounderies.
- McGirt is a treaty case which has nothing to do with land title or interest.
- McGirt's liberal majority agreed with the Gorsuch, J. radical textualism.
- Court conservatives rejected Gorsuch,J. textualism and joined Roberts, CJ 'settled expectations' analysis.

DOES IT MATTER?

- Certainly to McGirt. He will be retried in federal court by the U.S.
- Certainly to the State of Oklahoma. Retrials of tribal members convicted of crimes in State and local courts. Revamping law enforcement priorities and protocals going forward. Cross deputization of tribal police.
- Tribal civil regulatory jurisdiction on Creek reservation.
- Other Tribes in Oklahoma
- Other Tribes outside of Oklahoma.

Mary Armistead

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Mary Armistead, Esq., is an Equal Justice Works Crime Victims Justice Corps Fellow at the Legal Project. She works with victims of human trafficking, both labor and sex, by providing direct representation in a variety of civil legal proceedings, including immigration and family court. She also works on capacity-building, education, and policy issues regarding human trafficking. Mary graduated summa cum laude from Queens University of Charlotte, earning a Bachelor's degree in Psychology, and from Albany Law School, where she developed her passion for helping vulnerable immigrant populations through multiple internships in legal service organizations. Mary held a clerkship at the New York State Court of Appeals for one year before working as the Staff Attorney of the Immigration Law Clinic at Albany Law School for three years. As Staff Attorney, Mary both supervised students and maintained a personal docket in providing legal advocacy services and direct representation to detained and non-detained immigrants eligible for humanitarian immigration relief. Her expertise played a critical role in developing law students' ability to provide legal advocacy services and direct representation to clients seeking U.S. immigration status. She also developed the Special Immigrant Juvenile Pro Bono Attorney panel, wherein she connects clients to and supervises attorneys in providing pro bono representation to vulnerable immigrant children.

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Mr. Batson is the Government Lawyer in Residence at the Government Law Center of Albany Law School where he teaches Federal Indian Law. He served in various legal positions in New York State government between 1976 and 2003 where he specialized in municipal law, administrative law and government regulation. From 1978 to 1995 he served as liaison between New York State and the governments of various Indian nations, and represented the State in negotiations on many issues, including land claims and gaming compacts.

Patrick E. Brown

Patrick E. Brown employs his extensive public and private sector legal and public policy experience to craft legal solutions that are innovative and effective in meeting our clients' objectives. Before co-founding the firm in 2001, he served as head of the New York State Court of Appeals in-house legal team. He joined Governor Mario Cuomo's Counsel's Office in 1987, where he provided legal and public policy counsel to the governor and his senior staff.

Patrick uses the law as a powerful tool to protect your interests and will establish a strategic plan to guide you through transactional obstacles, litigation, regulations and administrative process. He has spent the last two decades providing legal and strategic advice to companies of all sizes, unions, hospitals, non-profit organizations, and associations. His expertise in ethics, election law, health care, financial services, economic development, gaming, and Indian law has proved invaluable to our clients.

As general counsel to the New York State Building and Construction Trades Council, Mr. Brown has been in the forefront of the use of Project Labor Agreements (PLA) on public works projects. He represented the trades before the Court of Appeals, where he helped defend the original Tappan Zee Bridge PLA, and was the trades' lead attorney in negotiating the second Tappan Zee Agreement.

Patrick Brown received his Bachelor of Arts in Political Science from SUNY Oneonta in 1978 and his Juris Doctorate summa cum laude from Pace University School of Law in 1983.

Professional Affiliations

- New York State Bar Association
- Chair of the SUNY Oneonta College Council.
- Member of the Advisory Board of the Government Law Center of Albany Law School.
- Elected member of the Ravena-Coeymans-Selkirk School Board.
- Former Member of the Town of Coeymans Zoning Board of Appeals.