

The Uphill Fight to Force a Cabinet Member to Testify; Justice Department moves to block a deposition of Interior Secretary Sally Jewell.

The National Law Journal (Online)

March 2, 2015 Monday

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THE NATIONAL
LAW JOURNAL

Length: 985 words

Byline: Zoe Tillman

Body

The U.S. Department of Justice is fighting to keep Interior Secretary Sally Jewell from having to answer questions about the government's alleged mismanagement of Native American assets since the early 20th century.

The Choctaw Nation and Chickasaw Nation claim in a lawsuit that the government failed to provide an accounting of trust assets that included more than 1 million acres of timber-rich land. Lawyers for the nations want to depose Jewell about an order she published in 2014 that outlined the U.S. Department of Interior's trust management duties. The feds this month urged a U.S. district judge in Oklahoma to block the request.

"To warrant the testimony of a high-level official, one must identify 'extraordinary circumstances' justifying a deviation from the general rule against such cross-branch intrusions," DOJ lawyers wrote in court papers. The challengers, DOJ said, "have made no attempt to surmount this high hurdle. Nor could they."

Representatives of DOJ and the Interior Department declined to comment.

Jewell, like other cabinet members, is a defendant in hundreds of cases nationwide at any given time. When an agency employee files discrimination claims or a company challenges new regulations, Jewell is often identified as a defendant in her official capacity, but she usually doesn't personally participate.

Courts set a high bar for forcing cabinet members and other top executive branch officials to testify. Judges point to separation-of-powers concerns and practical considerations - agency leaders have busy schedules - in rejecting these demands.

LITIGANTS: Members of the Choctaw Nation, along with the Chickasaw Nation, have accused the Interior Department of mishandling trust assets, including 1 million acres of timber-rich land. AP Photo/Albuquerque Journal, Marla Brose

Lawyers for the Chickasaw and Choctaw nations didn't identify any case in which a sitting cabinet member was ordered to testify. They did highlight cases in which courts compelled the testimony of state and federal officials who had first-hand information that wasn't available elsewhere.

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Bradley Beckworth of Texas firm Nix, Patterson & Roach, a lead attorney for the Choctaw and Chickasaw nations, told the NLJ that Jewell's testimony was necessary because she was the only person who could speak to the substance of her 2014 order and her understanding of DOJ's position. Jewell's order contained "guiding principles" for the Interior Department's management of Native American trusts.

"This isn't the situation where somebody was personally injured in Yellow-stone," Beckworth said. "This is a situation where two sovereign nations had [more than 1 million] acres of land stolen from them by their trustee, and the current person that's in the highest role as trustee has put out an order about her office and what their role must be and how the law is applied to that role."

The Justice Department argues that Jewell lacks personal knowledge about the trust accounting issues at the heart of the case. Department lawyers argued that information about Jewell's 2014 order and its relationship to the Justice Department's litigation positions are irrelevant to the accounting claims.

The government usually wins when it asks courts to shield high-ranking executive branch officials from questioning about official actions, said Stephen Ryan, head of the government strategies practice at McDermott Will & Emery.

"A judge is going to ask you to show why, with particularity, [the official has] to be questioned - are they on the documents, are they integrally involved in the decision, are they the decision-maker?" Ryan said. "You face an uphill battle because the government can't have the head of an agency in a deposition once a week."

Last year, the U.S. Court of Appeals for the D.C. Circuit blocked an order that required Agriculture Secretary Tom Vilsack to appear for a deposition. U.S. Department of Agriculture administrator Shirley Sherrod is suing the late blogger Andrew Breitbart over alleged defamation. Lawyers on both sides wanted Vilsack - who was not a party in the case - to answer questions about Sherrod's departure from the department.

A federal district judge ordered Vilsack to testify, finding he had first-person knowledge and that his testimony would help narrow disputes over information. A D.C. Circuit panel in July reversed that decision. The deposition request, the court said, didn't meet the "extraordinary circumstances" necessary for a cabinet member to be deposed.

In 2010, the Eleventh Circuit ruled that a trial judge was wrong to order Lisa Jackson, then the U.S. Environmental Protection Agency administrator, to appear at a court hearing in a pollution case. The appeals court said the record didn't show a "special need" for Jackson to appear and that a lower-ranking official was an "adequate substitute."

The Justice Department and lawyers for the Choctaw and Chickasaw nations both referenced a 1997 opinion from the U.S. Supreme Court that said President Bill Clinton was not immune against a sexual harassment lawsuit. DOJ said the case presented a situation in which a high-ranking official could be brought into court over personal conduct. Jewell, on the other hand, lacked a personal connection to the accounting case, the government said.

The nations argued that Jewell did have personal knowledge about her "guiding principles" order, so the Clinton ruling worked in their favor.

"The president of the United States can be compelled to testify in a sexual harassment case. Certainly, then, the secretary of the Interior can testify in a case involving two sovereign Indian Nations regarding an order that bears directly on an ultimate issue in this case," lawyers wrote.

The nations are also represented by Oklahoma-based firms Whitten Burrage and the Bullock Law Firm.

U.S. District Judge Lee West in Oklahoma City hasn't indicated when he plans to rule.

Classification

Language: ENGLISH

The Uphill Fight to Force a Cabinet Member to Testify; Justice Department moves to block a deposition of Interior Secretary Sally Jewell.

Publication-Type: Newspaper

Subject: US FEDERAL GOVERNMENT (91%); JUSTICE DEPARTMENTS (90%); TESTIMONY (90%); TRUST ARRANGEMENTS (89%); LAW ENFORCEMENT (89%); LAWYERS (89%); INDIGENOUS PEOPLES (89%); LAW COURTS & TRIBUNALS (78%); NATIVE AMERICANS (78%); SUITS & CLAIMS (78%); AGENCY RULEMAKING (78%); JUDGES (77%); LITIGATION (77%); DEPOSITIONS (77%); DISCRIMINATION (73%); EXECUTIVES (70%); EMPLOYMENT DISCRIMINATION (51%)

Company: NIX PATTERSON & ROACH LLP (52%)

Organization: US DEPARTMENT OF JUSTICE (95%)

Industry: LAWYERS (89%); ACCOUNTING (78%); LITIGATION (77%)

Person: SALLY JEWELL (79%)

Geographic: OKLAHOMA, USA (79%); UNITED STATES (94%)

Load-Date: February 28, 2015

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