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Sequoyah v. TVA, 6th Circuit, Docket No. 79-1633: Required Statement For Rehearing En Banc

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMMONETA SEQUOYAH, RICHARD CROWE GILLIAM JACKSON, individually and representing other Cherokee Indians similarly situated; the EASTERN BAND OF CHEROKEE INDIANS; and the UNITED KETOOAH BAND OF CHEROKEE INDIANS, Appellants, v. TENNESSEE VALLEY AUTHORITY, Appellee.	NO. 79-1633 PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC UNDER RULES 35(B) and 40

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional important:

1. The preservation and protection of the right of American Indians to practice their traditional tribal religions, including their right to access to native sacred places, has been found and declared by Congress in the American Indian Religious Freedom Act, 42 U.S.C. 1996, to be of utmost national importance.

2. In this appeal, the Panel announced a new and dangerously restrictive "centrality" standard to be used by this Circuit in a confusing and essentially uncharted area of the law under the Free Exercise Clause of the First Amendment.

3. Where a federal agency is permitted to unearth over 1,100 Indian bodies and retain them in boxes indefinitely in the face of claims of invidious racial discrimination without any judicial scrutiny, this Circuit has abdicated its duties under Article III, Section 2 of the Constitution of the United States.

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The Cherokee plaintiffs (appellants here) request pursuant to Rule 35(b) and 40, F.R.A.P., that this Court enter an order to rehear or rehear en banc this appeal and the Panel's opinion decided and filed on April 15, 1980. As grounds, plaintiffs offer the following points of law and fact which the Panel overlooked or misapprehended.

In a two-to-one decision (Judge Merritt dissenting) the majority members of the Panel affirmed the dismissal of this action by the district court for failure to state a cliam under the free exercise clause of the First Amendment. The Panel's reason for dismissing the action is different than that given the district court.[1/] Neither the Panel nor the district court discussed or gave any reasons for dismissing the equal protection claim raised by the complaint herein as that claim relates to the disinterment of Cherokee bodies.

In their complaint, the Cherokees alleged that the actions of the Tennessee Valley Authority (appellee here) in unearthing, removing and appropriating the remains of their relatives and ancestors, together with their burial possessions and offerings, violated rights secured to the Cherokee by the First and Fifth (equal protection clause) Amendments (App. 8,9). The Cherokee further alleged that the area which will be unnundated by TVA contains many sites considered sacred by traditional Cherokees and which "have great significance to these plaintiff Cherokee in connection with their traditional religion, culture, and

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1/ The district court's opinion is reported at 480 F.Supp. 608 (E.D. Tenn. 1979).

way of life." (App. 5.) The flooding of these irreplaceable holy sites, the Cherokees alleged, "will destroy the sacred sites and other holy places in violation of the rights recognized and guaranteed by the First Amendment." (App. 7.)

The district court granted TVA's motion to dismiss under Rule 12(b)(6), holding that since the Cherokees have no property interest in the land in question, they failed to state a free exercise claim (480 F.Supp. 612). For different reasons, the Panel affirmed the district court, with one Judge dissenting. The Panel's opinion is erroneous for two principal reasons. First, it announced a standard for First Amendment protection much stricter than that sanctioned by the Supreme Court, then improperly made certain evidentiary findings about the nature of a religion which is previously unknown in prior decisional law, based solely upon affidavits, to hold that plaintiffs failed to meet the standard. Second, the Panel completely ignored the separate and distinct cause of action relating to TVA's treatment of Cherokee bodies and alleged violations of equal protection. As will be discussed infra, rehearing is desirable for compelling reasons.

I. THE CENTRALITY STANDARD IS ERRONEOUS AS THE GENERAL CRITERIA TO MEASURE THE LEGAL EFFICACY OF ALL FREE EXERCISE CLAIMS

In this appeal the Panel undertook for the first time in this Circuit to set forth a general legal standard by which to determine the legal efficacy of claims based upon the free exercise clause of the First Amendment. In adopting the standard it did, the Panel so diluted the meaning of the free exercise clause as to render it a virtual nullity. Relying upon language

of Wisconsin v. Yoder, 406 U.S. 205 (1972), Frank v. Alaska, 604 P.2d 1068 (S.Ct.Alaska 1979), and People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), the Panel formulated a "centrality" standard to determine whether plaintiffs stated a constitutionally cognizable First Amendment right. under that standard only those religious beliefs or practices which play a central role in religious ceremonies (Woody), are the cornerstone of religious observance (Frank), and are inseparable from one's way of life (Yoder) are claims which can be based on the free exercise clause. Lesser religious beliefs or practices, if they can be so classified, can not form the basis for cognizable First Amendment claims under the standard.

While the "centrality" of a given religious belief or practice is certainly relevant when weighing the religious interest against that of the state in the compelling state interest test, it is erroneous to apply that standard to determine the efficacy of the claim itself.

The "centrality" standard was derived by the Panel primarily from a phrase in Wisconsin v. Yoder, supra. The Panel recited the phrase "the traditional way of life of the Amish is not merely a matter of personal preference but one of deep religious conviction, shared by an organized group, and intimately related to daily living" (406 U.S. at 216), and adopted that language as the standard by which to measure the legal efficacy of the free exercise claims presented in this case. That phrase, however, was never intended as a general legal standard for determining cognizable free exercise clause claims. Indeed, few

religious beliefs or practices would ever pass muster under a standard description of Amish religion. As the Supreme Court noted at 406 U.S. 236, the Amish showing in that case was one that "probably few other religious groups or sects would make." To require as a general standard that all religious claims under the free exercise clause constitute "deep religious conviction, shared by an organized group and intimately related to daily living" excludes many beliefs already held to be religious.

In Yoder, the Amish claimed that the Wisconsin compulsory school attendance law violated their rights under the First Amendment. The Amish believed that attendance at high school was contrary to Amish religion and way of life. They were opposed to such attendance because it came at a critical time for their adolescent children's period of religious training.

Thus, in Yoder, the Amish had the burden to prove that school non-attendance was religiously based conduct. In order to sustain that burden of proof, the Supreme Court held that they had merely to show something more than "subjective evaluation and rejection of the contemporary secular values accepted by the majority" (216) to rest their claims on a religious basis. The Court stated:

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standard on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected ... their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal

> rather than religious, and such belief does not rise to the demands of the Religious Clauses.

406 U.S. 215-16. Applying that standard the Court then assessed the evidence adduced in that case and found that the Amish sustained their burden of proof. The Yoder language adopted by the Panel merely summarized that evidence. Of Course, the Yoder Court then accorded those evidentiary findings great weight when applying the compelling state interest test to hold that the interests of the Amish outweighed those of Wisconsin.

To buttress its "centrality" standard, the Panel referred to evidence adduced in Frank v. Alaska, 604 P.2d 1068 (S.Ct.Alaska 1979). However, the legal standard used in Frank to determine the efficacy of a free exercise claim was much lower than that now espoused by the Panel:

> [a]bsolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in a religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification.

Id. at 1072-73. The language adopted by the Panel from Frank, like in Yoder, was not the legal standard used in that case but merely the language summarizing the evidence.

The Panel also relied upon the evidence adduced in People v. Woody, 40 Cal.Rptr. 69, 394 P.2d 813 (1964), as opposed to any legal standards applied in that case. The evidence in Woody has no bearing on a general standard to determine the legal efficacy of all free exercise claims. If only those religious beliefs or practices which constitute the "theological heart" of any given religion deserve First Amendment protection,

then most other deeply rooted religious practices will now be subject to infringement by Government at its whim.[2/] Such slender protection would make it impossible to retain the semblance of any religions as they are presently known.

In light of the Panel's standard, many protected practices are now endangered. The sale of religious literature, Murdock v. Pennsylvania, 319 U.S. 105 (1942), refusal to salute the flag, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942), and opposition to Saturday work, Sherbert v. Verner, 374 U.S. 398 (1963), all seem so idiosyncratic that these beliefs could not qualify as free exercise claims in this Circuit. See also, Marsh v. Alabama, 326 U.S. 501 (1945) (distribution of religious literature on private property constituted a free exercise claim); Tucker v. Texas, 326 U.S. 517 (1945) (proselytizing on federal property stated a free exercise claim); Follett v. McCormick, 321 U.S. 573 (1943) (tax on doing business was stricken when applied to sales of religious literature by a Jehovah's Witness, as a tax upon a free exercise right).

The gradations between central and non-central religious beliefs are so infinitesimal and theologically complex that one legal standard can not safely draw such distinctions. Making theological distinctions of this nature has repeatedly been avoided by the Supreme Court. As stated by the late Justice Douglas in Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1952):

2/ For example, in Woody, the Court found that peyote was more important to the Native American Church, than bread and wine sacraments in certain Christian churches. 394 P.2d 817. Does this mean that those Christian observances do not fall within the ambit of the free exercise clause?

> [a]part from narrow exceptions not relevant here [citing polygamy cases] it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.

See also, Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (disputes on dogma); United States v. Ballard, 322 U.S. 78 (1943) (judicial inquiry limited to questions of sincerity); United States v. Seeger, 380 U.S. 163 (1965) (expansive definition of religion). Moreover, to the extent the Panel's standard is based upon the religious practices of one sect (Yoder), it constitutes religious preference contrary to the establishment clause.

Where a belief or practice is rooted in religious belief, it falls within the ambit of the free exercise clause. The significance or centrality of such beliefs to one's religion is relevant only as a factor in the compelling state interest test, and can only be assessed as a factual matter in individual cases. Thus, all the cases cited by the Panel were decided upon exhaustive testimony presented at trial. There is no reason to treat this case differently.

II. THE PANEL ERRED IN TREATING THE DECISION OF THE DISTRICT COURT AS ONE GRANTING SUMMARY JUDGMENT AND IN FAILING TO REMAND TO PERMIT PLAINTIFFS TO OFFER PROOF

After announcing its "centrality" standard, the Panel made evidentiary findings based on affidavits which were attached to plaintiffs' motions for temporary injunctive relief. Several of those affidavits were written in the Cherokee language and translated into English with the assistance of interpreters. From this, the Panel was able to find:

> Examination of the plaintiff's affidavits discloses no such claim of centrality or indispensability of the Little Tennessee Valley to the Cherokee religious observances.
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> It is a difficult and sensitive determination, however, we have looked at "the quality of the claims," as required by Yoder, supra, 406 U.S. at 215, and conclude that plaintiffs have not alleged infringement of a constitutionally cognizable First Amendment right.

(Slip Opinion, pp. 10-11.) Plaintiffs contend the Panel had an insufficient evidentiary basis for making those critical findings of fact, and that it was improper to decide those questions at this stage of the proceedings. The district court dismissed the action below on TVA's motion to dismiss under Rule 12(b)(6), in an opinion that nowhere mentions, cites or refers to anything outside the pleadings (480 F.Supp. 608). As Judge Merritt stated in his dissenting opinion:

> Indeed, the District Court simply held that the Indians have no free exercise claim because the Government now owns the land on which the burial sites are located. The District Court therefore did not explore, develop or find any facts concerning the role that this particular location plays in the Cherokee religion.

(Slip Opinion, p. 13.) Moreover, a review of the hearing transcript before the district court shows that TVA relied exclusively upon its motion to dismiss and admitted that certain issues of fact exist. (Transcript of Hearing, pp. 48-49, 54-56.)[3/]

TVA's motion can only be treated as one for dismissal under Rule 12(b) because the procedural requirements of Rule 56(c)

3/ Where a movant fails to show or take the position that there is no "genuine issue of material fact," but rather relies solely on the pleadings, the motion is functionally the same as and will be treated as a motion to dismiss. Marvasi v. Shorty, 70 F.R.D. 14, 17 (E.D. Pa. 1976).

were not adhered to. Rule 56(c) provides that summary judgment motions "shall be served at least 10 days before the time fixed for the hearing." The procedural requirements of Rule 56 are to be strictly adhered to. Kistner v. Califano, 579 F.2d 1004, 1006 (6th Cir. 1978). In Winfrey v. Brewer, 570 F.2d 761 (8th Cir. 1978), the district court treated a Rule 12(b)(6) motion to dismiss as one for summary judgment, and dismissed the complaint. In reversing the dismissal, the Circuit Court held:

> We begin our analysis with the proposition that the procedural requirements of Rule 56 are to be strictly adhered to. Ailshire v. Darnell, 508 F.2d 526, 528 (8th Cir. 1974). That rule provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for hearing." Fed.R.Civ.P. 56(c). The purpose of this notice provision is to allow the opposing party meaningful opportunity to resist the motion by submitting counteraffidavits.
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> ... absent notice of the district court's intention to treat the motion [to dismiss] as one for summary judgment, we are unpersuaded that a brief filed in response to a motion to dismiss represents the type of meaningful opposition contemplated by Rule 56.

Id. at 764. Compliance with these procedural requirements are mandatory whenever the courts treats a Rule 12(b)(6) motion as one under Rule 56. Davis v. Howard, 561 F.2d 565, 569, 571 (5th Cir. 1977); Torres v. First State Bank of Sierra County, 550 F.2d 1255, 1256-57 (10th Cir. 1977). In this case, TVA served their motion to dismiss or in the alternative for summary judgment on October 24, 1979, two days before the hearing of October 26, 1979. This constitutes clear non-compliance with Rule 56(c). Because of TVA's lateness in serving its brief, plaintiffs had less than two days to respond. The district court then entered its decision on November 2, nine days after service of TVA's

motion. The treatment by the Panel of the district court's dismissal as one granting summary judgment under these circumstances is unfair and prejudicial, particularly where it announced a new standard and refused to remand the case.

In his dissent, Judge Merritt urges that this appeal be reversed and remanded to the district court, "in order to give the Cherokees an opportunity to offer proof concerning the significance and centrality of their ancestral burial grounds in light of the standard we have adopted." (Slip Opinion, p. 13.) This appeal involves a religion which is unknown in prior decisional law. That unwritten religion is virtually unknown to any non-Cherokee and attaches great religious significance to certain beliefs and activities which society generally regards as non-religious. It is all too easy to trod upon a minority religion of this nature where all the facts are not in the record. For example, the Panel stated the rule that affidavits are to be examined in a light most favorable to the plaintiffs, and then proceeded to do the exact opposite by interpreting the affidavits according to Judeo-Christian notions.[4/] Without reviewing the record of live testimony, plaintiffs submit the Panel was unable to determine the religious significance of certain areas in the

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4/ With respect, plaintiffs assume that the Panel members are conditioned or subscribe to the Judeo-Christian tradition, which is God-centered and places great importance on "worship" of the deity as the heart of the religious experience. Reverence for the land and unity with nature are not "central" to that tradition. What the Panel failed to grasp is that Cherokee religion is vastly different from the Judeo-Christian tradition in that Cherokee religion, as alleged below, places great significance on tenets regarding nature, respect for the land and reverence for certain tribal holy places.

Little Tennessee River Valley to the Cherokee race. Such testimony would likely have to be adduced through the assistance of English language interpreters at trial. Of all religions in this country, only the indigenous tribal religions place great significance to certain holy places located on this land. This fact has been well-noted by Congress in two recent laws. The American Indian Religious Freedom Act, 42 U.S.C. 1996, is attached hereto. In Sections 4(c), 4(g), 5 and 10(a) of the Archeological Resource Protection Act of 1979, P.L.96-95, 93 Stat. 721, Congress afforded significant protections for Indians against harm to "religious or cultural sites" caused by archeological excavations on public lands, and required the Secretary of the Interior to implement the Act by a set of uniform rules which "may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469); 42 U.S.C. 1996)." Yet these fundamental acknowledgements by Congress will go unprotected unless the courts are able to undertake the sensitive and complex task of adducing and assessing evidence on the nature of tribal religious claims from the perspective of their meaning to Indians. As Congressman Udall stated:

> For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.5/

5/ Cong. Rec. HG872 (1978) (daily ed. July 18, 1978) (Remarks of Rep. Udall, Co-Sponsor of the American Indian Religious Freedom Act Bill).

Under the liberal rules of notice pleading, plaintiffs were not required to plead evidence, Fannie Chamberlain Mfg. Co. v. Derry Div., 445 F.Supp. 65, 76 (W.D.Pa. 1977); it was enough that they made allegations which, accepted as true, appear in paragraphs 2, 11, 15 and 17 of the complaint. (App. 2, 5, 7.) Any doubts must be resolved in favor of the plaintiffs. In Cruz v. Beto, 405 U.S. 319 (1972) (per curiam), the court reversed and remanded the dismissal of a Buddhist's First and Fourteenth Amendment complaint, "even though the allegations of the complaint are on the borderline necessary to compel an evidentiary hearing." (405 U.S. 322, Concurring Opinion.) See also, Cooper v. Pate, 378 U.S. 546 (1964); Kennedy v. Meachum, 540 F.2d 1057 (10th Cir. 1976); Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976).

III. THE PANEL OVERLOOKED OR IGNORED THE SEPARATE EQUAL PROTECTION ISSUES RAISED IN THE COMPLAINT CONCERNING TVA'S DISINTERMENT AND DETENTION OF OVER 1,000 CHEROKEE BODIES

As noted by amici Indian Tribes, "The disinterment and desecration by TVA of more than one thousand Indian bodies constitutes the largest atrocity committed by federal agents against an Indian tribe within recent memory."[6/] In the complaint, the Cherokees alleged that the above actions by TVA violated rights secured to them by, inter alia, the Fifth Amendment to the United States Constitution, and requested specific relief on this issue. (App. 8-10.) It is well settled that, "the Equal

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6/ See page 3 of Amici Curiae Memorandum of Points of Authorities in support of Appellants' Motion for Injunction Pending Appeal, submitted by the Sioux and Zuni Tribes and a number of Indian and Native Hawaiian groups, and filed by the Clerk on December 14, 1979.

Protection Clause of the Fourteenth Amendment is applicable to the federal government through the medium of the Fifth [Amendment]," Moreno v. U.S. Department of Agriculture, 345 F.Supp. 310, aff'd, 413 U.S. 528, 533 n.5 (1973), and that the "court's approach to the Fifth Amendment equal protection claims has always been precisely the same as equal protection claims under the Fourteenth Amendment." Weinberger v. Weinsenfeld, 420 U.S. 636, 638 (1975). See also, Jimenez v. Weinberger, 417 U.S. 628 (1974); Marshall v. United States, 414 U.S. 416, 422 (1973); Richardson v. Belcher, 404 U.S. 81 (1971); Bolling v. Sharpe, 347 U.S. 497 (1954).

Before this Court, TVA admitted that it has disinterred 1,140 Indian bodies, but claimed that only 185 are Cherokee, and then attempted to justify its retention of those bodies in the face of Cherokee claims of disparate racial treatment.[7/] TVA has disinterred and retained Cherokee bodies, in stark contrast to its treatment of the remains of white Americans. This facially disparate treatment based solely on race has resulted in harm to plaintiffs and infringement upon their religious beliefs relating to Cherokee respect for the dead. Plaintiffs are entitled to sustain these allegations by proof at trial and to offer evidence showing TVA's actions are racially motivated under the criteria of Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 266-268 (1977).

7/ See page 6 of Memorandum of Defendant Appellee in Opposition to Motion of Plaintiff-Appellants for Injunction Pending Appeal, and attachments (undated); and the Cherokees' Motion for Injunction Pending Appeal, dated November 29, 1979.

In its motion to dismiss below, TVA did not address this equal protection claim, and it was ignored by both the district court and the Panel in their respective opinions.

Plaintiffs have alleged a cognizable claim under the equal protection provisions of the Fifth Amendment, and it was error to dismiss that claim solely because of the Panel's holding with respect to plaintiffs' free exercise claim. Such error, astoundingly, has permitted TVA's actions to escape judicial scrutiny.

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 28, 1980, he served appellee Tennessee Valley Authority with two true and correct copies of the foregoing, by mailing the same, United States mail, postage prepaid to:

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