2004

Justice Thomas and Federal Indian Law: Hitting his Stride?

David E. Wilkins
University of Richmond, dwilkins@richmond.edu

Recommended Citation

Wilkins, David E. "Justice Thomas and Federal Law: Hitting His Stride." *Indian Country Today* 23, no. 47 (May 2004): A4.

Justice Thomas and federal Indian law - Hitting his stride?

Wilkins, David.**Indian Country Today; Oneida, N.Y.** [Oneida, N.Y.]31 May 2004: A4.

Abstract

It was Justice [Clarence Thomas], the lone African American, whose voting record on Indian cases is more anti-Indian than even Rehnquist or Scalia, who in his concurring opinion, made several critical points that were most telling. Thomas will never be mistaken for Thurgood Marshall, who wrote several affirmative Indian law rulings, and his intention in crafting his opinion in this case was almost certainly not meant to be transparently supportive of tribal sovereignty. Yet he identified several enigmas in law and policy that, if acted upon by tribal, state and federal policymakers, might lead to a clearer status for indigenous rights and a reduction or outright termination of the still virtually absolute, or plenary, power still wielded by the Congress over tribes.

[Billy Jo Lara], however, despite its recognition of inherent tribal sovereignty, is also a troubling ruling because, as Thomas rightly opined, the majority opinion, written by Justice Breyer, reaffirms congressional plenary (read: virtually absolute) power in relation to tribes by declaring that Congress retains the power under the Treaty and Commerce clauses to either relax or restrict a tribes' inherent sovereignty. But as Thomas noted, and as a close reading of Indian treaties and the Commerce clause reveals, these two powers do not explicitly or even implicitly extend to the Congress such paramount, or I should say, anti-democratic authority, since treaty-making forged diplomatic relations, while commerce decisions cemented economic alliances.

Finally, and almost as peculiar as Thomas' surprising concurrence, was the strange pairing in the dissent of the Court's most conservative ideologue, Justice Antonin Scalia, with arguably the most liberal justice, David Souter, at least in-so-far as Indian law goes. Souter's opinion, joined by Scalia, griped that as "dependent" peoples, tribal nations had been shorn of the power to try those outside their membership. And since Congress, in Souter's words, had effectively "delegated" to tribes the power to punish non-member Indians in 1991, this, in effect, meant that Lara had the right to invoke the Double Jeopardy clause.

Full Text

Since the ascension of the Rehnquist-led conservative majority on the Supreme Court, indigenous nations have been assaulted by a tsunami of rulings that, with a few rare exceptions, have significantly undermined or in some cases flagrantly denied the essential sovereign nature of First Nations.

As the court, the political branches, and the country, for that matter, turned more conservative in the 1990s, as the very nature of federalism was redefined to support the resurrection of a powerful states' rights agenda, and as the court inexorably whittled away the basic governing rights of First Nations, Native peoples, both collectively and individually, sustained devastating losses in cases involving non-Indians, conflicts with state officials, and federal power vis-a-vis tribal governments.

All of which makes the Supreme Court's recent decision, U.S. v. Lara, handed down April 19, a most exciting and yet still deeply-distressing decision. It was exciting because the Court, by a 7 - 2 verdict, held that tribal courts have the inherent sovereign power to criminally prosecute non-member Indians, in this case, one Billy Jo Lara, a Turtle Mountain Chippewa who had married a Spirit Lake Sioux woman, for crimes committed on the Spirit Lake Reservation.

And since a tribes' criminal jurisdiction over tribal members and members of other tribes, though not over non-Indians, derives from their inherent sovereignty and is not a delegated federal authority, the U.S. Constitution's 5th Amendment Double Jeopardy clause, which protects individuals from being tried twice for the same offense, did not apply because the clause does not prevent successive prosecutions by "separate" or "dual" sovereigns.

The Court's explicit recognition of First Nations' inherent power to prosecute non-member Indians, which had been denied by a similarly manned Court 14 years ago in Duro v. Reina, but was quickly restored by Congress less than a year later in 1991, is being touted by many as an important counterweight to much of the Court's recent litigation which dramatically stresses that tribal nations may only exercise those powers specifically retained in ratified treaties or that have been statutorily delegated to them in express congressional acts.

It was also exciting because Associate Justices John Stevens and Clarence Thomas, who concurred with the finding of the majority but gave different reasons why in their separate rulings, raised several important dimensions that warrant further examination. Stevens, for his part, correctly reminded everyone that there was nothing unusual about the acknowledgment of the inherent sovereignty of tribes. He noted that this power of self-governance has "a historical basis," while most states, by contrast, "were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years."

But it was Justice Thomas, the lone African American, whose voting record on Indian cases is more anti-Indian than even Rehnquist or Scalia, who in his concurring opinion, made several critical points that were most telling. Thomas will never be mistaken for Thurgood Marshall, who wrote several affirmative Indian law rulings, and his intention in crafting his opinion in this case was almost certainly not meant to be transparently supportive of tribal sovereignty. Yet he identified several enigmas in law and policy that, if acted upon by tribal, state and federal policymakers, might lead to a clearer status for indigenous rights and a reduction or outright termination of the still virtually absolute, or plenary, power still wielded by the Congress over tribes.

Thomas surprisingly and accurately identified and discussed six major issues:

1) the Court should reexamine the core premises and logic of cases dealing with tribal sovereignty because current precedent both recognizes its existence but simultaneously also denies its force;

2) the U.S. Constitution through the Treaty and Commerce clauses, does not authorize the Congress to wield plenary (read: absolute) power over the meaning and scope of tribal sovereignty;

3) the 1871 congressional law that purported to end treaty-making with tribal nations is "constitutionally suspect;"

4) tribal nations continue as extra-constitutional bodies whose sovereignty is not guaranteed or protected by the U.S. Constitution;

5) federal Indian policy is "to say the least, schizophrenic," and this fact necessarily colors federal Indian law, and finally

6) Thomas concluded that since tribes continue as pre-constitutional and extra-constitutional polities "the federal government cannot regulate the tribes through ordinary domestic legislation" since neither the Treaty or Commerce clauses give the Congress the power to modify tribal sovereignty.

The logical conclusion Thomas should have then reached but never quite articulated, was that the treaty relationship should be renewed since it is evident that diplomatic accords authorized and overseen by the President and carried out with the leadership of First Nations, are the only legitimate means by which the U.S. was recognized as a polity, gained title to lands it now claims, and formed lasting political relationships with many Indian peoples.

Thomas, of course, would probably deny that he was even hinting at the revival of the treaty process - one that has long been called for by Vine Deloria Jr. and by Indian activists since the Trail of Broken Treaties in 1973 - since he said earlier in his opinion that "it is at least arguable" that tribes were no longer recognized as sovereigns once their treaty making days were stifled by the 1871 statute, although many agreements, often described as treaties, continued to be negotiated and ratified by the Congress long after that date.

Thomas' concurrence seems to indicate, unlike his previous Indian law opinions, that he at least has attained an uncluttered understanding of the actual basis on which the U.S. government forged its distinctly political relationship with tribes, and he astutely notes that neither the Treaty nor Commerce clauses empower the Congress to wield absolute plenary power over tribes. These are trenchant observations from a justice not normally associated with such searching ideas, especially in this area of law.

Lara, however, despite its recognition of inherent tribal sovereignty, is also a troubling ruling because, as Thomas rightly opined, the majority opinion, written by Justice Breyer, reaffirms congressional plenary (read: virtually absolute) power in relation to tribes by declaring that Congress retains the power under the Treaty and Commerce clauses to either relax or restrict a tribes' inherent sovereignty. But as Thomas noted, and as a close reading of Indian treaties and the Commerce clause reveals, these two powers do not explicitly or even implicitly extend to the Congress such paramount, or I should say, anti-democratic authority, since treaty-making forged diplomatic relations, while commerce decisions cemented economic alliances.

Second, and equally as unsettling as their reinvigoration of the plenary power doctrine, the majority never satisfactorily explains why tribal nations have inherent authority to try and punish their own citizens and non-member Indians, but are denied that same fundamental right over non-Indians who live on or traverse tribal lands. This racial and political disparity is unfair to those tribal nations who have treaty provisions guaranteeing them such authority over all those who come onto their lands, and who also have the requisite institutions of governance necessary to administer justice to all parties within their borders. That's what sovereign governments do.

Finally, and almost as peculiar as Thomas' surprising concurrence, was the strange pairing in the dissent of the Court's most conservative ideologue, Justice Antonin Scalia, with arguably the most liberal justice, David Souter, at least in-so-far as Indian law goes. Souter's opinion, joined by Scalia, griped that as "dependent" peoples, tribal nations had been shorn of the power to try those outside their membership. And since Congress, in Souter's words, had effectively "delegated" to tribes the power to punish non-member Indians in 1991, this, in effect, meant that Lara had the right to invoke the Double Jeopardy clause.

First Nations, given the overwhelming preponderance of anti-Indian cases in the last decade (and before), are entitled to feel a palpable sense of relief that Lara was decided the way it was. It very easily could have been 7 - 2 against the tribes, or even 9 - 0. Native leaders and their legal analysts should not, however, allow their rapture over this single decision to cause them to believe that the Court has permanently turned an ideological corner and is now prepared to embark on a series of cases more supportive of tribal self-governance. This would seriously misconstrue the ongoing reality that indigenous political and legal status remains fundamentally unstable and that whether we like it or not our governments, resources, and rights are still largely subject to the attitudes and policies of federal, corporate, and increasingly state officials.

David E. Wilkins, Lumbee, is a professor of American Indian Studies at the University of Minnesota and frequently writes guest columns for Indian Country Today.