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Plainly Wrong: The High Court Takes the Low Road

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The high court takes the low road

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ABSTRACT (ABSTRACT)

The court's most recent salvo in the Long case is no exception. I wrote about this case in April in this paper when the court had just heard oral arguments. My column was titled "A matter of disrespect" [Vol. 27, Iss. 47] because in reading the transcript of the oral arguments, it was plainly evident in the questions raised by Chief Justice John Roberts and Justice Antonin Scalia that they had very little respect for the legitimacy of tribal courts or their decisions.

The question that must be asked: Why are tribal courts treated differently than non-Indian courts? Not willing to confront this head-on, Roberts and his conservative brethren danced around it by issuing a laundry list of alleged rationales to justify their findings: "Tribal sovereignty, it should be remembered, is a 'sovereignty outside the basic structure of the Constitution.' ... 'The Bill of Rights does not apply to Indian tribes.' ... Indian courts 'differ from traditional American courts in a number of significant respects.' ... And non-members have no part in tribal government - they have no say in the laws and regulations that govern tribal territory."

Roberts also reiterated one of his predecessor's (William Rehnquist) most damning and bizarre arguments against tribal sovereignty: the idea that Native nations, "by virtue of their incorporation into the American republic," had somehow "lost" their right to govern non-Indians. This argument has never made any factual sense because indigenous nations, by definition, were the first peoples and were the ones who did the "incorporating" of the late-arriving non-Indians. All these "new arrivals" should, using the Roberts/Rehnquist logic, be subject to indigenous jurisdiction, not vice versa.

FULL TEXT

Headnote

Plainly wrong

June is typically a harried month for the U.S. Supreme Court, as it hands down a dizzying array of opinions as its session comes to an end. Last month, the court issued rulings on the death penalty, the Second Amendment and the Exxon Valdez oil spill. These were all high-profile cases; and the court's decisions, as always, pleased some (conservatives were overjoyed in the second Amendment case) and infuriated others (liberals, Alaska Natives and environmentalists were appalled at the Exxon ruling).

But as with most every term since the 1970s, the high court also delivered an opinion, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, that strikes at the heart of Indian country and indigenous sovereignty. In short, the court held in a 5 - 4 decision that tribal courts lack jurisdiction to judicially decide a discrimination claim concerning a non-Indian bank's sale of fee land that it owned within a reservation.

Federal Indian law rulings rarely attract national media attention, given the relatively slight numbers of Native peoples. This is a shame. For a close reading of this case, and many of the major Indian law cases, helps us understand what constitutes justice (or injustice), whether the U.S. supports multicultural diversity, and addresses

the complicated terrain of intergovernmental relations - with Native nations being situated alongside the federal and state governments as the original, though now diminished, sovereign governments.

The court's most recent salvo in the Long case is no exception. I wrote about this case in April in this paper when the court had just heard oral arguments. My column was titled "A matter of disrespect" [Vol. 27, Iss. 47] because in reading the transcript of the oral arguments, it was plainly evident in the questions raised by Chief Justice John Roberts and Justice Antonin Scalia that they had very little respect for the legitimacy of tribal courts or their decisions.

I feared that Roberts and Scalias sarcastic tone and mocking laughter would have a negative effect and sensed that this would likely translate to a judicial defeat for the Long family (the Indian-owned cattle corporation), the Cheyenne River Sioux tribal court, and all similarly situated tribal judicial systems. Unfortunately, my concerns have been realized.

The chief justice, writing for the conservative majority (Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito), used less overtly insulting language than he had during his condescending questioning of the Long family attorney in April, but the gist of the ruling amounted to the same thing: Tribal courts are still recognized as wielding sovereign authority, but this authority does not extend over non-Indians or non-Indian businesses even when those individuals are engaging in bona fide and palpably consensual transactions with Native individuals or Native corporations, as the tribal court and two lower federal courts had found.

The question that must be asked: Why are tribal courts treated differently than non-Indian courts? Not willing to confront this head-on, Roberts and his conservative brethren danced around it by issuing a laundry list of alleged rationales to justify their findings: "Tribal sovereignty, it should be remembered, is a 'sovereignty outside the basic structure of the Constitution.' ... 'The Bill of Rights does not apply to Indian tribes.' ... Indian courts 'differ from traditional American courts in a number of significant respects.' ... And non-members have no part in tribal government - they have no say in the laws and regulations that govern tribal territory."

There is a significant amount of truth to the first three statements, although the fourth one is far less accurate. A number of tribal nations have non-Indians working for them, and sometimes they are in policy-making positions. But why should any of these facts be sufficient to justify the denial of tribal court authority over non-Indian business, particularly those doing direct business with Native people?

Roberts also reiterated one of his predecessor's (William Rehnquist) most damning and bizarre arguments against tribal sovereignty: the idea that Native nations, "by virtue of their incorporation into the American republic," had somehow "lost" their right to govern non-Indians. This argument has never made any factual sense because indigenous nations, by definition, were the first peoples and were the ones who did the "incorporating" of the late-arriving non-Indians. All these "new arrivals" should, using the Roberts/Rehnquist logic, be subject to indigenous jurisdiction, not vice versa.

Justice Ruth Ginsburg, writing for John Paul Stevens, David Souter and Stephen Breyer, dissented from the court's major point that overturned the tribal court's judgment awarding the Long's \$750,000 in damages, plus interest. The dissenters were able to plainly see that the bank had acted in a racially discriminatory manner toward the Longs by forcing on them harsher financial terms than it had given to the non-Indians to whom it later sold the land.

Ultimately, Ginsburg raised the question that is most troubling about the majority's opinion: "Why should the tribe

lack comparable authority to. shield its members against discrimination by those engaging in on-reservation commercial relationships - including land-secured lending - with them?"

This profound lack of respect by the high court for Native judicial authority is, of course, nothing new. It is a reminder, along with the paucity of national media coverage of this important decision, that Native nations and their judicial bodies will continue to struggle in their efforts to gain broader institutional respect by their non-Native counterparts.

Sidebar

ALL THESE "NEW ARRIVALS" SHOULD, USING THE ROBERTS/REHNQUIST LOGIC, BE SUBJECT TO INDIGENOUS JURISDICTION, NOT VICE VERSA.

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