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Judicial Terror Confronts Indian Nations

by David E. Wilkins

As the Bush Administration broadens its constitutionally problematic assault on real and alleged terrorists, both home and abroad, endangering the very rights and liberties it accused Osama bin Laden of savagely attacking, the judicial branch of the government, occupied by a majority of conservative justices, is doing its part to shatter the sovereign rights and economic liberties of indigenous nations.

The High Court's latest salvo, *Chickasaw Nation v. U.S.*, handed down November 27, 2001, brilliantly evidenced this with all the subtlety of one of the U.S. military's 15,000 pound "daisy cutter" bombs being lobbed on the Taliban and al-Qaida tunnel complexed these last several weeks.

Chickasaw Nation centered on whether Indian gaming tribes were exempt from paying gambling related taxes under a provision of the 1988 Indian Gaming Regulatory Act (IGRA) that provided a legislative foundation for the establishment of gaming by tribes to help them generate desperately needed revenue for economic development and self-government. Ironically, state governments are not required to pay similar taxes on their gaming revenue. In a 7-2 ruling (Breyer for the majority; O'Connor and Souter dissenting), the Court held that

Congress had not intended to exempt tribal nations from wagering and occupational taxes.

This decision is problematic for several reasons. First, it fundamentally contradicts the Congress' historic trust responsibility to tribes. That is, since the Supreme court first spoke on this in the 1830s, the federal government has acknowledged a nation-tonation relationship with Indian nations and has sought to assure tribes, however sporadically, that it would act to protect their interests. Trust agents should not be in the business of taxing their trust beneficiaries?

In addition, the decision violates the political and economic sovereignty of tribes. Tribal sovereignty is a recognized historic and legal fact – affirmed in the tribes' preexistence, their treaty relations with foreign nations and the U.S., and in their admitted presence in the Commerce Clause of the Constitution. One sovereign, especially a stronger sovereign, should not be in the business of taxing another sovereign.

It perpetuated other problems as well: It continues the Court's trend of decisions that dramatically favor states' rights over tribal rights; and turns a crucial Indian law doctrine – treaties and statutes should be interpreted liberally in favor of the Indians as a way to facilitate their efforts to overcome the

tremendous disadvantages they have experienced because of the colonial policies of the federal government – on its head.

This ruling is the latest in a continuing parade of Rehnquist Court rulings that in the last several years have stripped or reduced tribal government powers vis-a-vis non-members living or moving about on tribal trust lands or within reservation borders, and that have served to embolden states in their relations with tribal nations, even when Congress has acted to fulfill its trust duty to protect Indians from such threats.

While it is premature to calculate the direct economic implications of this ruling, it is clear, as Justice O'Connor noted in her dissent, that the majority opinion misinterpreted Congressional intent espoused in the IGRA that was expressly aimed at encouraging and supporting tribal economic development by enabling Indian governments to achieve a measure of economic self-sufficiency, since virtually all other attempts to do the same had failed in the last century.

More starkly, this decision gives states, economic behemoths compared to most tribal governments, a major competitive edge over tribes, while disregarding in this instance the inherent and now further reduced doctrine of tribal sovereignty.

Tribal governments, that had only in recent years begun to pull themselves from the brink of political and economic oblivion with the help of federal laws like IGRA, must now face the reality that they will have to pay hefty taxes to the very trustee that enacted the supportive laws in the first place. State governments, by contrast, emerge from this case with yet another judicial victory; one they neither needed nor deserved. Why, after all, should states be exempted from paying such taxes, when tribes, the senior if more vulnerable sovereigns, must pay them?

Congress, as the tribes' trustee, should immediately step forward and move to challenge this ruling or act to amend the IGRA to rectify this fundamental economic imbalance. To not act would send a terrible message to indigenous nations: that once again the federal and state governments are willing to gang up on tribes to deprive them of resources they have struggled to secure.

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