The Supreme Court's Shrinking Indian Law Caseload

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Observers of federal Indian law often chuckle when they read in Bob Woodward's 1979 book, "The Brethren," about how U.S. Supreme Court Justice William Brennan once referred to United States v. Antoine, a 1977 case about the prosecution of a pair of Coiville Reservation Indians, as a "chickens--c-- case. Or how Justice John Marshall Harlan referred to 1970's Toohannahpah v. Hickel as a "peewee" case. Indian law advocates chuckle because, as Colorado Law School dean David Getches has written, the Supreme Court accepts far more Indian law cases for review than would be expected.

In the 1997 term alone, the court heard five Indian law cases, a remarkable percentage. On average, the court has accepted between two and four cases every year during the Rehnquist era, beginning in 1986. This number doesn't seem particularly significant, until one considers that the number of the cases the court heard in the 1985 term - the last year of the Warren Burger court - was 159 cases and the caseload has been declining ever since. In the 2005 term - Chief Justice John Roberts' first year - the court decided only 80 cases.

In 1991, H.W. Perry Jr. interviewed five Supreme Court justices and more than 60 of their former clerks in a study to determine what makes a case "certworthy," or worthy of being granted certorari. In Perry's book, "Deciding to Decide: Agenda Setting in the United States Supreme Court," one of the justices, who identified him- or herself as a "Westerner," referred to Indian law cases as "crud cases" worthy of assignment only to junior justices.

But in the same breath, the Westerner justice said, "Actually, I think the Indian cases are kind of fascinating. It goes into history and you learn about it, and the way we abused some of the Indians, we, that is the U.S. government." That justice then noted that, on the Rehnquist court, there were three Westerners and they all had a special interest in Western water law and in Indian law. Chief Justice William Rehnquist and Justice Sandra Day O'Connor are both from Arizona and Justice Anthony Kennedy is from California. Given that the Supreme Court's "Rule of Four" states that it takes the vote of four of the nine justices to grant certorari in any given case, it would appear that in many Indian law cases, the three Westerners needed only one more vote to grant "cert." Perhaps this helped to explain why the court heard so many Indian law cases during the Rehnquist era.

But Rehnquist and O'Connor are no longer on the court. They've been replaced by Chief Justice Roberts and Justice Samuel Alito, neither of whom could be called Westerners. The only "Westerner" justice that remains is Kennedy. Two Indian law cases have been accepted this term already, but upon closer reflection, one realizes they are not cases about federal Indian law principles, but rather are cases about statutory interpretation and administrative law. In the 2005 term, the court heard only one Indian law case, Wagnon v. Prairie Band of Potawatomi Indians - and that case had been granted certorari during the 2004 term, when all three Westerners sat on the court.

Is Indian law no longer a favorite of Supreme Court certorari decisions? Consider the cases that the Roberts court has refused to hear: Cayuga Indian Nation v. Pataki, where the 2nd Circuit Court of Appeals struck down Cayuga land claims amounting to more than $200 million; South Dakota v. Department of Interior and Utah v. Shilwets Band of Paiute Indians, two claims from states arguing that the federal law allowing the BIA to take land into trust for Indian tribes was unconstitutional; and Means v. Navajo Nation and Morris v. Tanner, two cases arguing that the federal statute affirming that tribes have criminal jurisdiction over nonmember Indians was unconstitutional. While there were plausible reasons for the court to deny certorari in these cases, perhaps the sole Westerner remaining on the court can no longer garner the votes. For the eight non-Westerners on the court, perhaps Indian law simply isn't "certworthy."

If the court began to hear fewer Indian law cases, many Indian law advocates might argue that it wouldn't necessarily be a bad development. At a recent conference at the University of North Dakota School of Law, professor Alex Skibine remarked that since 1988, the Supreme Court has decided 33 of 44 Indian law cases against tribal interests. And, much of the work the Tribal Supreme Court Project, run by the Native American Rights Fund and National Congress of American Indians, is dedicated to persuading the court not to grant cert in many cases.

We'll see how the Roberts court develops. As many observers know, the chief justice argued two Indian law cases before the Supreme Court - Alaska v. Native Village of Venetie (on behalf of the state of Alaska) and Rice v. Cayetano (on behalf of the state of Hawaii), both of which were devastating losses for Indian country - so we know he is knowledgeable about some aspects of Indian law. Only time will tell.

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