



By Richard Lazarus

When Dissent Turns Into Farce

In the Supreme Court bar, there has long been the running joke that if a losing party seeks to reverse a judgment of the Ninth Circuit, the party's counsel need do little more than file a two-sentence brief with the Supreme Court: "The decision below was handed down by the United States Court of Appeals for the Ninth Circuit. For the foregoing reason, the judgment below should be reversed."

A fair response no doubt would be two-fold: the joke isn't that funny; and the Ninth Circuit is not reversed all the time. (In only 17 of 24 cases last term, which was an improvement from 19 of 26 times the immediately preceding term). Ok, that's still a lot.

But a dissenting opinion in a case decided by the full Ninth Circuit en banc last summer, *Karuk Tribe of California v. U.S. Forest Service*, serves as a clear reminder of why that court has prompted jokes, even if poor ones. What is less clear is whether the ridicule the author of that dissent, Judge Milan Smith, sought to cast on his colleagues has instead largely backfired and been largely redirected instead to Judge Smith.

In *Karuk Tribe*, Judge William Fletcher authored an opinion for seven judges addressing the extent of the Forest Service obligations under Section 7 of the Endangered Species Act before allowing mining activities to occur in a listed species' critical habitat. The ma-

majority ruled that Section 7 requires that the Forest Service must first consult with appropriate federal wildlife agencies before approving a "Notice of Intent" filed by a person proposing such mining activities under Forest Service regulations.

Judge Smith authored the dissenting opinion for four judges, which was joined in full only by Chief Judge Alex Kozinski. The other two judges joined the dissent only in part and not the stranger parts.

Judge Smith's dissent can be, generously described, as bizarre. It commences, and I am not joking here, with an illustration from an old version of *Gulliver's Travels*, depicting Gulliver himself strapped down, followed by a quote from the book about "slender ligatures across my body, from my arm-pits to my thighs." Following the opening quote, the first line of the opinion is a one-sentence paragraph that says simply, without elaboration, "Here we go again," perhaps harkening back to then-candidate Ronald Reagan's famous put-down of President Jimmy Carter during their 1980 presidential debate. The opinion then asserts that the majority's ruling in this case, "and some other environmental cases recently handed down by our court," "make poor Gulliver's situation seem fortunate when compared to the plight of those entangled in the ligatures of new rules created out of thin air by such decisions."

But what begins as bizarre devolves several pages later into the theater of the absurd. Portions of the dissent begin with the heading "Brave New World" followed by an immediate quote from Dante's *Divine Comedy*: "Abandon all hope, ye who enter here." Judge Smith then states that "this is not the first time our court has broken from decades of precedent and created burdensome, entangling environmental regulations out of the vapors."

Detailing several past rulings, the dissent then sweeps widely in con-

demning wholesale what Judge Smith characterizes as "our court" "stray[ing]" with lamentable frequency from its constitutionally limited role . . . when it comes to construing environmental law." "The result?" according to Smith, is "the imminent decimation of what remains of the Northwest timber industry" and the suffering of farmers from "inexplicabl[e]" rulings with "absolutely no basis in the statutory text."

Judge Smith is entitled, of course, to dissent and his views on the merits in individual cases may of course have some force. But no judge does his views, his court, or the federal judiciary any service with this kind of exaggerated rhetoric. That is especially true where, as here, the dissent's declarations go far beyond the case or controversy actually before the court and cast aspersions on a wide sweep of prior rulings within the rubric of "environmental law." One might expect to read such over-the-top denunciations in lobbying before Congress by liberal or conservative advocacy or-

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ganizations, but not in a formal published opinion authored by an Article III judge directed against his colleagues.

To be sure, judicial prose need not be lifeless. Several members of our current Supreme Court are often celebrated for their clever and engaging writing style that breathes life into the court's opinions far different from the turgid writing that has long dominated. But these justices are in fact exceedingly talented writers and are able to reason with flair laced with carefully directed and properly confined humor.

Perhaps judges should leave comedy writing to real comedy writers. And members of the Supreme Court bar should do the same in discussing the Ninth Circuit.

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