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Fletcher: Means case a supreme affirmation of tribal authority
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by: [Matthew L.M. Fletcher](#)

The Supreme Court recently decided not to hear Russell Means v. Navajo Nation, an impressive victory for Indian country. Means, a member of the Oglala Sioux Tribe, faces prosecution before the Navajo tribal courts for allegedly assaulting his family members. He had argued that the Navajo Nation could not have jurisdiction over him because he was not a member of that tribe - he was a nonmember Indian.

In 1990, Means' attorney, John Trebon, successfully argued before the Supreme Court that Indian tribes cannot prosecute nonmember Indians in a case called Duro v. Reina. But in 1991, Congress enacted a law - the "Duro Fix" - that attempted to reverse the Duro decision and reaffirm tribal authority to prosecute nonmember Indians. The Supreme Court upheld that law in the 2004 United States v. Lara in a 7 - 2 decision.

The importance of tribal authority to prosecute nonmember Indians cannot be understated. Inter-marriage between tribes is a longstanding fact in many tribal communities, guaranteeing the presence of a significant population of nonmember Indians on most reservations. Taking away federal recognition of and respect for the convictions of nonmember Indians - like the court did in Duro - created a significant loophole in tribal law enforcement that even a lumbering bear like Congress understood needed quick corrective action.

Means lost every one of his various appeals through tribal and federal courts before he petitioned to the Supreme Court for final review. Many insiders believed that the court would agree to hear the case, which was paired with a similar matter involving the Confederated Salish and Kootenai Tribes titled Morris v. Tanner. Lara seemed to answer the question of whether tribes could prosecute nonmember Indians, but two of the seven justices in the majority - Chief Justice William Rehnquist and Justice Sandra Day O'Connor - are no longer on the court. And, of the remaining five members in the majority, two of them - Justice Anthony Kennedy and Justice Clarence Thomas - said that under a different procedural posturing (an appeal of the tribal court conviction), they would have voted to strike down the Duro Fix. Both the Means and the Morris cases were appeals of tribal court convictions. That left only three justices in the majority, with new Chief Justice John Roberts and Justice Samuel Alito the remaining uncertain votes. In short, a 7 - 2 Lara decision could have turned into a 6 - 3 decision the other way very easily. But that was all mere speculation.

Counsel for Means and Morris could not have expected to win any of their appeals in the tribal courts and lower federal courts because of the decisiveness of the Lara decision. But they brought the cases in a manner strategically designed to attract the court's attention. These cases were premised on the notion that the court is willing to entertain a challenge to the Duro Fix - and all tribal court prosecutions - because Indian tribes are not required by federal statute to appoint counsel for indigent defendants. Moreover, nonmember Indians are unlikely to be able to vote in tribal elections or are not eligible to sit on tribal court juries. Kennedy, the force behind Duro v. Reina, was particularly concerned about tribes that prosecute people without providing these criminal process rights.

Of course, Indian tribes are not states or the federal government. State and federal law enforcement come from a long history and practice of coercing confessions from suspects (one of the reasons to guarantee an attorney and a jury of peers) that is missing from most tribes. In fact, the conviction rate in federal courts is astronomically high because Indian defendants are far more likely to confess to crimes, a result, it is said, of the Indian tradition to admit mistakes in order to allow community healing to begin.

Moreover, Indian tribes often do not have the resources to fund a public defender system; nor do tribal courts sentence the guilty to jail as a matter of course. Finally, recent studies of East Coast state courts suggest that a defendant represented by appointed counsel is more likely to be convicted than a defendant representing themselves without counsel. Means was once fond of reminding people that he had faced upwards of 20 indictments, but was never convicted until the one time he hired an attorney to represent him.

There were reasons why the court didn't agree to hear the Means and Morris cases. First, the court doesn't like to reverse a 7 - 2 decision so quickly after announcing it. With the recent turnover on the court, quick reversals make the court look too much like a political body, subject to the political whims of its members. Second, neither the Means nor the Morris case met the list of due process factors that concern Kennedy. Both defendants were not indigent and they were represented by counsel in tribal court. And Navajo law even provides for nonmember Indians like Means to participate in tribal politics (which he did) and even sit on juries. But the next case in the pipeline to the court might include those factors.

What tribal advocates and policy-makers should now be on the lookout for are appeals of tribal court convictions of nonmember Indians who are indigent, unrepresented, cannot sit on tribal court juries and who are sentenced to even a single day of jail. Means arguably now faces the justice of the Navajo Nation because he didn't meet those requirements. Forward-looking tribes are thinking about funding public defender offices and appointed counsel procedures. And they are wise to do so.

Matthew L.M. Fletcher, Grand Traverse Band of Ottawa and Chippewa Indians, is director of the Indigenous Law and Policy Center at Michigan State University.

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