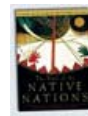




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Fletcher: Supreme Court's clerks find Indian law unimportant

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Posted: December 28, 2007

by: [Matthew L.M. Fletcher](#)

Each year, the U.S. Supreme Court chooses which appeals it wishes to decide. In most years, the court decides to hear fewer than 80 cases out of several thousand appeals. These usually include cases in which there is a split of authority in lower courts (often called a "circuit split," referencing the 13 federal circuit courts of appeals), cases in which a lower court has committed a gross error or cases in which there is a critical constitutional issue at stake. Cases in which there is no split, cases that will affect only a few people, cases involving simple correction of a minor lower court error or cases involving an unimportant issue are unlikely to be heard by the court.

At least, this is true in theory. But Indian law seems to be different. Consider the following examples:

* In the early 1990s, the Western Shoshone National Defense Council brought a claim in federal court alleging that the state of Nevada's hunting regulations had infringed on the tribe's aboriginal rights throughout most of the entire state. The federal 9th Circuit Court of Appeals, in dismissing the claim, applied the incorrect legal standard to the claim - a gross error. When the tribe appealed, the Supreme Court refused to hear the case.

* In the late 1980s, the state of South Dakota brought a similar suit in federal court against the Cheyenne River Sioux Tribe, arguing that the tribe did not have the authority to regulate hunting by small groups of non-Indians on a relatively small strip of land. The tribe won on most of the claims before the 8th Circuit. On South Dakota's appeal to the Supreme Court, the court agreed to hear the case.

In both cases, there was no lower split in lower court authority, so there had to be some other reason for the court to be persuaded to hear the case. In the case of the Western Shoshone, the affected individuals were tribal members, the affected area included much of the entire state of Nevada and the appellate court had made a fundamental error in its analysis. The Supreme Court declined to hear that case. In the Cheyenne River Sioux case, the affected individuals were non-Indians, the affected area was relatively small and the appellate court had merely followed prior precedent. But the Court decided to hear the state of South Dakota's appeal.

Why?

Since the 1980s, more and more justices have resorted to a pool of law clerks for a write-up of each appeal that includes a recommendation of whether the court should hear them using these factors. With the release of the late Supreme Court Justice Harry Blackmun's papers a few years back, the pool memos from the docket years 1986 to 1993 are available for study. The views of Supreme Court clerks in the pool memos are often the only written documentation of the court's views of the vast majority of appeals that are denied.

A review of these few hundred papers demonstrates that the court's process of reviewing potential appeals creates a structural barrier to the fair adjudication of federal Indian law cases. Because more than 80 percent of Indian law cases arise in the West, where there are only three federal circuit courts of appeals, few splits in authority arise, rendering most appeals "splitless." Moreover, Indian law fact patterns tend to apply to one tribe only, limiting the impact of the appeals. In addition, it appears that the Supreme Court's clerks - most of whom are educated in elite East Coast schools (there has never been an American Indian Supreme Court clerk) - do not find Indian law cases to be important, except when the petitioner is a state or local government opposing a tribal interest such as a tribe or a tribal member.

What this means is that the clerks almost never recommend that the court decide to hear a case when the petitioner is an Indian tribe or an Indian because the petition is "splitless" or just unimportant. From 1986 to 1993, the court decided to hear one appeal out of more than 80 filed by Indian tribes and individual Indians.

Conversely, when a state or local government appeals a case it lost to a tribe or a tribal member, the court granted the petition around 75 percent of the time. Perhaps this is part of the explanation for why tribal interests have lost the vast majority of their cases before the court since 1987.

The classic case is a treaty rights case brought by a tribe. If the tribe loses below, the clerks will never find a split in authority because the treaty is unique, with fact situations unlikely to recur in other parts of the country. And Supreme Court clerks almost never find the petitions of Indians and Indian tribes to be independently important enough to be worthy of decision by the court. But if the tribe wins below, the opponents often are state governments, whose appeals are viewed as being important by the clerks almost by definition.

The court should recognize the special relationship that exists between the United States and Indian tribes in this process. The court should also recognize the structural inequity of the appeals process in the context of federal Indian law. But any observer of federal Indian law knows that the court is unlikely to change its habits. A recent study by University of Chicago Law School professors Thomas Miles and Cass Sunstein indicates that the justices tend to vote consistent with their politics, which is not a big surprise. And the court's current lineup may be one of the most conservative ever, which does not bode well for tribal interests.

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