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High Court Denies Rights of Natives

By Barbara L. Creel & John P. LaVelle

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June 26, 2016

June 13 of this year marked a milestone in constitutional law. Fifty years earlier, in 1966, the Supreme Court decided *Miranda v. Arizona*, requiring officers to notify individuals in police custody of their “Miranda rights,” including their right to a court-appointed lawyer if unable to afford one.

Although controversial at first, the *Miranda* decision has since become a standard safeguard against government overreaching in the investigation, interrogation and prosecution of alleged criminal conduct.

Thus, it is the height of irony that on the 50th anniversary of *Miranda*, the Supreme Court chose to issue a decision that guarantees fast-track prosecution of American Indians in federal court by denying them basic protections.

In *United States v. Bryant*, this nation’s highest court condoned the use of prior “uncounseled” tribal court convictions to charge and convict an Indian as a federal habitual domestic violence offender.

If you don’t know what “uncounseled” convictions are, that’s because they are generally unconstitutional if imprisonment is at stake. But in tribal court Native Americans are routinely tried, convicted and jailed without the assistance of counsel, something the Constitution forbids in state or federal court.

The *Bryant* decision creates a blatant disparity in the availability of legal protections against unfair and unjust prosecutions. While the Sixth Amendment right to counsel forbids the government from prosecuting and imprisoning non-Indians on the basis of prior uncounseled convictions obtained in state or federal court, *Bryant* gives federal prosecutors free rein to use uncounseled tribal court convictions to single out Indians for conviction and imprisonment.

At the core of the court’s reasoning is the fact Indian tribes, as sovereign nations predating the United States, are not restricted by the Bill of Rights and hence are not required to provide defendants with basic protections that are required in state and federal court.

While a separate federal statute – the 1968 Indian Civil Rights Act – mandated some protections in tribal court proceedings, the right to appointed counsel was specifically left out. Instead, Congress chose to provide the Indian only the right to obtain counsel “at his own expense,” for a sentence of up to a year in prison.

For many indigent Native Americans on impoverished reservations across the United States, this “right” is all but impossible to exercise.

Most disturbing is the court’s disregard of the racial inequity left in the wake of Bryant. Federal prosecutors are now licensed to target Indians – and only Indians – who faced prosecution without assistance of counsel in tribal court proceedings. This is because ICRA allows tribal courts to imprison Indians without the benefit of counsel but does not impact non-Indians, who are entitled to court-appointed counsel in state, federal, and now tribal court, thanks to a recent amendment to ICRA.

Justice Ruth Bader Ginsburg, who wrote Bryant, denigrates Indian people’s civil rights, citing the need to protect Native women from domestic violence. But Department of Justice statistics show most domestic violence perpetrators in Indian country are non-Indians, and the Bryant decision leaves intact their constitutional rights, including the right to appointed counsel.

Sovereign Indian nations suffer from centuries of oppressive policy imposed in the name of federal “plenary power.” Domestic violence is a scourge on all of our Native nations. But the solution cannot be at the expense of Indian people’s civil rights, by allowing the federal government to target Indians, as a class, for “easy” prosecution and imprisonment.

The Bryant decision is a wolf in sheep’s clothing. It pretends to respect tribal sovereignty and protect Indian women, but it does neither.

Instead, it joins the long list of Supreme Court decisions that expose Indians to the federal government’s intrusive power over Native people’s lives.

June 13 may have been a day to celebrate your Miranda rights. But for American Indians, it will now be a day to mourn the tragic loss of the most basic constitutional protection against unjust prosecution by the federal government.

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