



Testimony of Kevin K. Washburn\*

United States Sentencing Commission

Phoenix Regional Hearing

January 20-21, 2010

Thank you for asking my views on the Sentencing Guidelines on the 25<sup>th</sup> Anniversary of the Sentencing Reform Act. I wish to use this time to encourage the Commission to take note of the Tribal Law and Order Act pending in Congress and to use this law as an opportunity, if it is enacted, to reconsider the Commission's treatment of tribal court convictions.

Background

The Sentencing Guidelines direct the courts to consider state and federal prosecutions in calculating a convicted offender's criminal history. As currently written, however, the Guidelines instruct courts not to consider convictions by tribal courts. U.S.S.G. § 4A1.2(i).

The Commission's treatment of tribal convictions for purposes of federal criminal history has long been controversial.<sup>1</sup> In ignoring legitimate tribal convictions and sentences, the Commission's current approach often underestimates a defendant's criminal history. In the worst cases, a defendant with a lengthy tribal criminal history will be treated as a first-time offender in the federal system. As a result, the Commission's current approach undermines the theoretical and normative purposes, both utilitarian and retributive, for using criminal history in sentencing. It also undermines respect for the hard work of the tribal courts, which occupy the front line in providing criminal justice on Indian reservations, and demoralizes tribal judges.

A number of facts have changed since the Commission first considered how to treat tribal convictions and I would argue that it should be reconsidered in light of new circumstances. First, tribal courts have become much more firmly engrained in the fabric of American jurisprudence since. Since we are meeting in Arizona, let me cite a couple of eminent local judges on this point. According to Justice Sandra Day O'Connor, "tribal courts, while relatively young, are

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<sup>1</sup> See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L. J. 403 (2004). A summary of the article appears as *Reconsidering the Commission's Treatment of Tribal Courts*, 17 FED. SENT. R. 209 (2005), and is followed by separate comments on Professor Washburn's argument by federal judges William C. Canby, Jr., (9th Cir.), Bruce Black (D. N.M.), Charles Kornmann (D. S.D.) and Federal Public Defender Jon Sands (D. Ariz.).

developing in leaps and bounds.”<sup>2</sup> Likewise, Ninth Circuit Judge William C. Canby, Jr., has said that “tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago.”<sup>3</sup> These statements were made in the 1990s and developments have continued apace. Tribal courts are, more than ever, a significant part of the nation’s web of judicial systems.

Tribal courts have also gained much wider acceptance in the state courts. State courts throughout the country have begun to rely more and more on tribal criminal convictions in a variety of circumstances. For example, state courts have relied on tribal convictions: 1) for assessment of an offender’s general criminal history in sentencing, and, 2) for use as a predicate offense for prosecution for aggravated offenses, such as aggravated DWI or domestic violence prosecutions, 3) for driver’s license suspension or revocation, 4) for treatment of a juvenile as an adult for purposes of felony prosecution, and 5) for purposes of sex offender registration.<sup>4</sup>

In addition to the state courts, Congress has also evinced more and more respect for tribal courts. In 1993, Congress found that “tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.”<sup>5</sup> In keeping with this sentiment, in 2006, Congress formally recognized tribal court sex offense convictions for purposes of requiring offenders to register as a sex offender under federal law.<sup>6</sup>

In light of the importance of tribal courts in modern American jurisprudence, the Commission’s approach to tribal courts seems antiquated and anachronistic. One could say that the question is whether the Sentencing Commission can continue to treat tribal courts as second-class citizens in the American judicial landscape, when eminent federal judges, state courts, and Congress have recognized the central role that tribal courts are now playing.

Now, a counterpoint: despite the increasing respect for tribal courts across the country and in Congress, reasonable minds could nevertheless object to the use of tribal criminal convictions in the past on the basis that some tribal convictions are the product of proceedings in which the offender has not been afforded government-paid defense counsel. Indeed, existing federal law requires tribal courts to recognize a defendant’s right to counsel, but does not require tribal governments to provide indigent defense counsel. Under the federal Indian Civil Rights Act of 1968, as amended, tribal courts need not provide indigent counsel, but tribal court sentences are limited to one year of imprisonment per offense and a \$5000 fine, essentially limiting tribal courts to misdemeanors.

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<sup>2</sup> Hon. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

<sup>3</sup> Hon. Wm. C. Canby, Jr., *Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. 58 (1995) (statement of Hon. William Canby, Chair of the Ninth Circuit Judicial Task Force on Tribal Courts).

<sup>4</sup> Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N. MEX. L. REV. 263 (2004) (arguing that courts that are so willing to rely on tribal criminal convictions ought to be more than willing to rely on less important tribal civil court judgments).

<sup>5</sup> Indian Tribal Justice Act, 25 U.S.C. § 3601 (1993).

<sup>6</sup> See Sex Offender Registration and Notification Act, 42 U.S.C. § 16911(6). See also Kevin K. Washburn & Virginia Davis, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. OF CRIM. L. 3 (2008) (with Virginia Davis).

Objections to the use of uncounseled tribal convictions are not unreasonable. Indeed, it has been somewhat unclear as a matter of federal law whether it is proper for courts to rely on uncounseled convictions as a basis for sentencing.<sup>7</sup> In light of that lack of clarity, and basic considerations of due process, it is prudent to be cautious in recognizing uncounseled tribal convictions for purposes of federal sentencing.

However, the Sentencing Guidelines have been overbroad, directing the courts to ignore *all* tribal convictions, including those that are the product of proceedings with counsel. The fact is that more and more tribal criminal justice systems have begun to offer indigent defense counsel.

In the past, one could have argued that the overbreadth of this policy had minimal impact on sentencing, since tribal court sentences were limited to misdemeanors. However, the Tribal Law and Order Act will require us to revisit this understanding.

#### The Tribal Law and Order Act

The Tribal Law and Order Act, pending in the House and Senate, and supported by President Obama, is expected to be enacted by Congress this year. If the bill is enacted, it will give the Commission good reason to reconsider the treatment of tribal court convictions.

As currently drafted, the Tribal Law and Order Act will lift the federal limitations on tribal sentencing jurisdiction of one year, in certain circumstances. If the Act becomes law, tribal courts will be authorized under federal law to sentence offenders to a term of up to *three* years of imprisonment. However, the Act will require any tribe wishing to exercise this expanded authority to provide indigent defense counsel. Both developments are salutary. Tribal court authority will increase, but so will the due process protections for tribal defendants.

This development will necessarily prompt reconsideration of the idea that tribal convictions should not count as part of criminal history. If Congress explicitly authorizes tribal courts to convict defendants for felonies and requires tribal courts doing so to provide indigent counsel, the Commission's approach that tribal convictions should be ignored will come under significant pressure. Under such circumstances, the Sentencing Commission should revisit its policy that tribal court convictions ought to be ignored. After enactment of the Tribal Law and Order Act, it may well be that tribal convictions that are the product of legal counsel should be counted.

#### Recommendation

Crime and criminal justice on Indian reservation is a serious matter, and represents a long term American crisis.<sup>8</sup> I urge the Sentencing Commission to use the Tribal Law and Order Act as an opportunity to consider its own role in helping to address these significant problems.

For today, I will offer no firm recommendation on what the outcome ought to be if the Commission reconsidered its current approach to tribal court convictions. I am confident that

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<sup>7</sup> See Matthew Fletcher, *Sovereign Comity; Factors Recognizing Tribal Court Convictions in State and Federal Courts*, 45 COURT REVIEW 12 (2010).

<sup>8</sup> Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

tribal courts would benefit from the scrutiny and concomitant respect that would occur if their counseled convictions were routinely treated the same as state and federal convictions in federal sentencing. I also believe, as a criminal law professor, that counting tribal convictions that were the product of legal counsel would serve the utilitarian and retributive purposes of criminal sentencing, thus improving the accuracy of federal sentencing.

However, I stop short of making a substantive recommendation at this point because the answer must, at least in part, transcend these important policy considerations. The federal government has a long-standing policy of consultation with Indian tribes about matters involve Indian affairs. This policy was re-affirmed by President Obama in an historic meeting with American Indian tribes in November.<sup>9</sup> While the Sentencing Commission may not strictly be within the Executive Branch, it would behoove the Commission to make policy the same way that other federal agencies do so. Indian tribes ought to have a voice in the process of the Commission's consideration. In reconsidering the treatment of tribal court sentences, the Commission should solicit and consider the views of tribal governments. Only after consulting with tribal governments should the Sentencing Commission decide how to treat tribal convictions in the next 25 years of the Guidelines.

Thank you for considering my thoughts.

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<sup>9</sup> PRESIDENT BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: TRIBAL CONSULTATION (NOV. 5, 2009).