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# Comment re Rule 10 of the Minnesota General Rules of Practice for the District Courts

Kevin Washburn  
*University of New Mexico*

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SCHOOL  
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SMALL SCHOOL.  
BIG VALUE.

March 13, 2017

Michael Johnson  
Senior Legal Counsel  
State Court Administration  
125H Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King, Jr. Blvd.  
Saint Paul, MN 55155  
LegalCounselRules@courts.state.mn.us

Re: Rule 10 of the Minnesota General Rules of Practice for the District Courts

Dear Mr. Johnson:

I am a law professor and former dean of the University of New Mexico. I have also served in several federal positions, including most recently, as the principal executive branch policy-maker in the field of federal Indian affairs, as the Senate-confirmed Assistant Secretary - Indian Affairs at the U.S. Department of the Interior. I served in this role through most of the second term of the Obama Administration. I write on behalf of myself only, and not any institution with which I am affiliated.

I began my academic career as law professor at the University of Minnesota, teaching federal Indian law, among other subjects. In 2002, I was involved in the effort, led by the Minnesota Tribal Court/State Court Forum, to petition for the Minnesota Supreme Court to adopt a strong rule for recognition of tribal court orders and judgments.<sup>1</sup> Back then, I testified on behalf of such a rule before the Supreme Court. I am grateful that the Court, back then, was willing to entertain the initiative.

Though I view the effort in 2002 and 2003 as an important first step, I was disappointed by the content of the rule that was ultimately adopted. Rule 10 fell short in two primary ways, which I illustrated in an article by comparing Rule 10 to its Arizona counterpart.<sup>2</sup> First, Rule 10.01 simply instructed district courts to abide by federal and state statutes that mandated enforcement of tribal court orders and judgments.<sup>3</sup> Rule 10.01 could have gone farther by incorporating clear procedures for adhering to these federal and state statutes.<sup>4</sup> Second, Rule 10.02 left district court

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<sup>1</sup> Mary Jo Brooks Hunter, Eric Janus, Scott A. Taylor & Kevin K. Washburn, *Written Statement by Law Professors Urging Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders & Judgments in State Courts* (Oct. 15, 2002).

<sup>2</sup> Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing & Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 Wm. Mitchell L. Rev. 479 (2004).

<sup>3</sup> *Id.* at 485-88.

<sup>4</sup> *Id.* at 488-89.

judges somewhat at sea by declining to provide them meaningful guidance on when tribal judgments deserved respect.<sup>5</sup> Rule 10.02 should have, instead, created a presumption in favor of recognition and clarified a limited list of appropriate considerations for denying recognition.<sup>6</sup> Rule 10.02 also could have provided clear procedures for hearings.<sup>7</sup> Finally, Rule 10.02 seemed “uniquely designed to make errors . . . unreviewable.”<sup>8</sup> In sum, Rule 10 was far less helpful than the rule in Arizona, which was much more respectful of tribal courts and tribal court judgments, and also provided clearer guidance to state trial court judges.

Today I write to support the Forum’s petition for the Court to take the next step. In my comments in 2002, my colleagues and I explained that economic growth in Indian country had resulted in increasing economic activity on Indian reservations and corresponding increases in tribal governmental capabilities and services, including courts. At that time, the federal government had, for almost two decades, embraced tribal courts and demonstrated support for their development. Consequently, tribal courts were exercising greater and greater jurisdiction, and their dockets were growing quickly. Fifteen years later, both of those basic points remain valid.<sup>9</sup> Tribal courts are handling more and more cases, and they continue to garner more and more support from Congress and the Supreme Court.

In Congress, support for tribal courts is not a difficult political issue, or particularly partisan.<sup>10</sup> The U.S. Congress and the Supreme Court have acted forcefully and unambiguously to embrace tribal courts in the criminal context. Indeed, in 2010, in part in response to my own scholarly criticisms,<sup>11</sup> Congress restored felony criminal jurisdiction to tribal courts.<sup>12</sup> I was honored to be in the East Room of the White House when President Obama signed the bill. This was viewed as an important step forward in tribal sovereignty because it placed trust in tribal courts to accomplish justice on Indian reservations. In 2013, Congress went further; it restored tribal criminal jurisdiction even over non-Indians in limited circumstances related to domestic violence.<sup>13</sup> These acts of Congress, signed by the President, reflect confidence in tribal courts. Moreover, just last year, in *United States v. Bryant*,<sup>14</sup> the Supreme Court held that a tribal criminal court conviction could be used as a predicate offense in a subsequent federal

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<sup>5</sup> *Id.* at 489-93.

<sup>6</sup> *Id.* at 490.

<sup>7</sup> *Id.* at 492.

<sup>8</sup> *Id.* at 493.

<sup>9</sup> See Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 Wm. & Mary Bill Rts. J. 137, 156 (2015) (noting increases in funding for tribal courts over the past 40 years).

<sup>10</sup> See, e.g., Press Release, Senator Lisa Murkowski (R - AK), *Murkowski Announces Interior Provision in Year-End Omnibus Bill to Benefit Alaska* (Dec. 18, 2015) (highlighting \$10 million in new tribal court funding for P.L. 280 states).

<sup>11</sup> See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709 (2006).

<sup>12</sup> Pub.L. 111–211, 124 Stat. 2258 (enacted July 29, 2010).

<sup>13</sup> Violence Against Woman Reauthorization Act, Pub. L. No. 113-4, 127 Stat. 54 (enacted March 7, 2013).

<sup>14</sup> 579 U.S. \_\_\_\_ (2016).

prosecution. In *Bryant*, trust in tribal courts apparently was not viewed by the Supreme Court as controversial. *Bryant* was a unanimous decision.

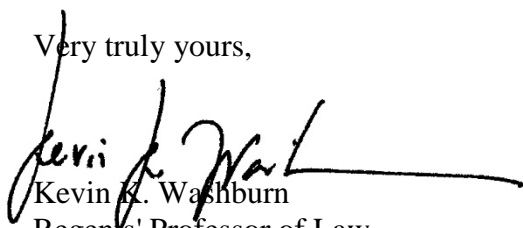
Given the American constitutional mandate for protection of life, liberty and property -- in that order -- the Minnesota Supreme Court should find comfort that the three constitutional branches of the federal government have trusted tribal courts in the criminal context. Rule 10 operates primarily in state civil cases, the stakes of which, at least under the traditional constitutional order, are considered relatively lower than for criminal cases.

Experience in Minnesota also supports greater trust of tribal courts. When Rule 10 was adopted, effective for 2004, it was a very cautious and conservative approach to the recognition of tribal court judgments. Tribal courts have lived up to the limited trust that the Court showed them at that time.

The Forum has now presented the Court an opportunity to revisit the matter, in keeping with actions in other states and the federal government, and demonstrate greater trust in tribal courts, and clearer standards for when trust is appropriate and when it is not. The Forum's proposed amendments represent progress. The proposed amendments offer a significant step in the right direction, toward true comity and more consistent jurisprudence.

Based on my experience and knowledge of tribal justice systems, I believe it is time to amend Rule 10. I believe the Forum's proposed amendments adequately address Rule 10's shortcomings, and I strongly urge the Court to adopt them. Thank you for considering my views.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin K. Washburn", with a long horizontal flourish extending to the right.

Kevin K. Washburn  
Regents' Professor of Law  
University of New Mexico School of Law  
Minnesota Bar Number #342348 (inactive)