

2-10-2016

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Recommended Citation

John P. LaVelle, *Uncounseled convictions a threat to Indians*, (2016).

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‘Uncounseled’ convictions a threat to Indians

By John P. LaVelle

**Albuquerque Journal
February 10, 2016**

The fairness of federal sentencing is an issue dividing many who care about justice in Indian country, not just my University of New Mexico law faculty colleagues Barbara Creel and Kevin Washburn (“Are feds too tough? Or is New Mexico too soft?” — Jan. 24).

The Supreme Court is now poised to address a key issue in the debate: whether a tribal court conviction that did not give the Indian defendant representation by a lawyer can be used to increase the sentence when the Indian is later prosecuted on a federal domestic assault charge.

The issue arises because as “domestic dependent nations,” tribes are free from the constraints of the Constitution unless Congress provides otherwise. Congress did so in 1968, passing the Indian Civil Rights Act.

Yet despite later reforms, ICRA still does not require that tribal-court defendants be given government-paid lawyers, a disparity that raises constitutional concerns when federal prosecutors argue these “uncounseled” convictions should be used against Indians later charged with other crimes.

Of course, Congress could fix this problem by funding tribal programs giving defendants adequate legal representation. Such support is part of Congress’s historic “trust responsibility” to Indian tribes.

But until Congress acts, tribal sovereignty and Indian rights remain at stake.

In the past, tribes have fought against legal theories and policy maneuvers that threatened to condemn a disproportionate number of Indians to long sentences in federal prison, or even the death penalty.

The 1883 Ex parte Crow Dog decision, for example, is praised by Indian rights advocates as a victory for tribal sovereignty, precisely because the Supreme Court refused to impose federal jurisdiction on a tribal member accused of crime on a reservation.

Likewise, imposition of the Major Crimes Act two years later, in defiance of the court’s decision, is widely denounced as a defeat for Indian rights and an attack on tribal sovereignty.

Today, the issue is clouded by arguments about the need for aggressive law enforcement to deal with domestic violence in Indian country. It's unclear, therefore, whether the call for tough federal sentences for Indians accused of domestic assault will again spawn a decision harming tribal sovereignty and rationalizing discrimination in the name of protecting Indians from themselves.

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