Tribal Courts and Federal Sentencing

Kevin Washburn

University of New Mexico

Follow this and additional works at: http://digitalrepository.unm.edu/law_facultyscholarship

Recommended Citation

Available at: http://digitalrepository.unm.edu/law_facultyscholarship/510
TRIBAL COURTS AND FEDERAL SENTENCING

Kevin K. Washburn†

INTRODUCTION

Because of their unique relationship to the federal government, and because of the peculiar federal criminal justice regime that applies in Indian country, American Indians and tribal governments are affected by the federal sentencing guidelines perhaps more profoundly than any other distinct group in America. Unlike most Americans, who face federal prosecution only for offenses that have a particular federal nexus, such as narcotics, racketeering or terrorism, American Indians in Indian country are subject to federal prosecution for numerous felonies, including homicide, larceny, burglary, and rape, which would not rise to the level of federal prosecution outside of Indian country. Federal prosecution and sentencing constitute an important part of the framework of the community in Indian country, a place where crime rates tend to be high and law enforcement tends to be uneven.

Since their adoption in 1987, the United States Sentencing Guidelines have drawn criticism from a wide variety of perspectives. Scholars and federal judges alike have raised practical complaints, arguing that the guidelines unduly restrict judicial discretion and produce sentences that do not adequately account for individual circumstances.¹ Scholars of the

† Associate Professor, University of Minnesota Law School. The author wishes to express his appreciation to Norman Bay, Kevin Blackwell, Kathleen Bliss, Christopher Chaney, Sam Deloria, Donald Dripps, Richard Frase, Philip Hogen, Diane Humetewa, Magdeline Jensen, Brian Matula, Donald Molloy, Marlys Pecora, Tom Peckham, Lawrence Piersol, Celia Rumann, Jon Sands, Nancy Scott, John Steer, Tracy Toulou, Elizabeth Rodke Washburn, Sam Winder and the participants of a faculty workshop at the University of Minnesota Law School. The research support that made this article possible was graciously provided by Dean Tom Sullivan and Dean Alex Johnson of the University of Minnesota Law School.

criminal justice system have raised structural critiques, arguing that the contraction of judicial sentencing discretion simultaneously expanded the authority of prosecutors, and that the guidelines have undermined the traditional role of defense counsel in advocating zealously for their clients. Scholars have also attacked the guidelines from a critical race perspective, arguing that the guidelines produce disparately long sentences for African-Americans and Hispanics, and from a feminist perspective, attacking them as being constructed for males and unfair for females. Finally, many commentators have argued that the guidelines simply are too harsh, resulting in unduly long sentences. Despite the range of critical review,
however, few commentators have analyzed the guidelines in the important context of federal criminal justice in Indian country.\textsuperscript{8}

In our federalist system, the United States has a particular, but limited, role in criminal justice; state governments handle most of the routine offenses.\textsuperscript{9} In Indian country, our governmental structure provides a similar duality between the federal and tribal governments,\textsuperscript{10} but with two substantial differences. First, although the United States theoretically shares criminal jurisdiction with tribal governments, federal jurisdiction in Indian country is far more pervasive because federal law has largely ousted tribal jurisdiction for all felony offenses. Second, unlike state courts, whose convictions and sentences are given due respect by the United States

minimums, or both) force them to impose heavier sentences than they would otherwise have chosen"). Using data from the United States Department of Justice, some commentators have explained that “[o]ffenders sentenced under the federal sentencing guidelines are more likely to go to prison and to stay there longer than were offenders sentenced for crimes committed before the guidelines took effect in November 1987.” NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTIONS AND CORRECTIONS 261 (2d ed. 2002) (citing U.S. DEP’T OF JUST., FEDERAL PRISON TERMS INCREASING UNDER SENTENCING GUIDELINES (1992)).


9. As a statement of the current state of affairs, this statement is not particularly controversial. However, following United States v. Lopez, 514 U.S. 549 (1995), there has been a greater debate raging as to legitimate scope and authority of the federal government to address crimes that otherwise might be considered “routine.” In other words, the statement in the text may not be true not just as an empirical matter, but also as a legal conclusion. See generally Peter J. Henning, Misguided Federalism, 68 Mo. L. Rev. 389 (2003). But see Richard W. Garnett, The New Federalism, the Spending Power and Federal Criminal Law, 89 CORNELL L. REV. 1, 34–39 (2003) (arguing that the Commerce Clause is only one source of federal power and that other sources may offer authority over criminal offenses).

Sentencing Commission ("Commission") in sentencing for subsequent federal offenses, past offenses adjudicated by tribal courts are ignored in the federal sentencing process.

In light of the overwhelming acceptance of the norm of tribal self-governance in federal Indian policy, the Commission's decision not to credit the legitimate work of tribal courts in adjudicating misdemeanor sentences is surprising. This article critically evaluates this peculiar and unexplained policy. Part I describes the current federal policy toward tribal governments with particular emphasis on tribal courts and explains the role of tribal courts in the unique federal criminal justice regime that governs Indian country. Part II describes the Federal Sentencing Guidelines with particular attention to the provisions on criminal history. Part II also evaluates the Commission's current position that tribal courts ought to be treated like foreign courts rather than state courts for purposes of criminal history calculations. Part III evaluates the Commission's treatment of tribal courts in light of the broader context of federal Indian policy and the actions of federal judges, state courts, and legislatures. Part III also explains some of the inconsistency of the current stance toward tribal courts with regard to federal sentencing policy and explains the consequences of this policy for tribal courts and Indian communities. Part IV suggests reforms to the Commission's policy on tribal courts that would position the Commission more in line with the mainstream of federal Indian policy and ensure that tribal court adjudications and sentences are accorded whatever respect they are due.

I. THE STATUS OF TRIBAL COURTS IN FEDERAL LAW AND POLICY AND IN FEDERAL CRIMINAL JUSTICE

Although tribal governments have existed in one form or another for centuries, they evolved dramatically in the latter half of the twentieth century. To a significant degree, this development can be attributed to the re-emergence of an ally once lost. In the last thirty years, the United States has forsaken its on-again, off-again hostility toward Indian tribes and has broadly and comprehensively embraced a new official policy that favors federal support of tribal self-governance. With the broad support of the United States government, tribal governments have thrived.

The White House took the lead in supporting tribal governments. Since Richard Nixon first outlined a detailed policy in favor of tribal self-determination in 1970, virtually every American president has voiced strong support for the notion that tribal governments should be encouraged,
supported and even honored by the federal government.\textsuperscript{11} In keeping with presidential directives, the United States Department of Justice has an official policy on “Indian Sovereignty and Government-to-Government Relations with Indian Tribes” indicating that “[t]he Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting [tribal] self-governance.”\textsuperscript{12} Numerous executive branch and independent agencies have followed suit.\textsuperscript{13}

Though the executive branch led the way, Congress adopted the tribal self-determination policy as its own in the very beginning and has worked aggressively to insure that the policy is reflected in the laws of the United States. Congress has created or amended programs throughout the federal government to accommodate and embrace tribal self-determination, including the full range of so-called Indian programs at the Departments of the Interior and Health and Human Services.\textsuperscript{14}

\begin{itemize}
\item[] 11. \textit{See generally} President Clinton’s Memorandum of Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (Apr. 29, 1994) (stating that “I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments”); President George Bush’s Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (1991) (noting the “administration’s policy of fostering tribal self-government and self-determination.”); President Reagan’s Statement on Indian Policy, 1 PUB. PAPERS 96 (1983) (asserting that “[t]his administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes”); President Nixon’s Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (1970) (stating that “[s]elf-determination among the Indian people can and must be encouraged”).
\item[] 13. Though there are far too many to list here, for a sense of the range, consider: U.S. DEP’T OF TRANSP., INDIAN RESERVATIONS ROADS PROGRAM, TRANSPORTATION PLANNING PROCEDURES AND GUIDELINES (1999); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 5-14.310(D) (2001) (requiring consultation with tribes regarding civil litigation brought on behalf of tribes under the federal trust responsibility); U.S. DEP’T OF ENERGY, AMERICAN INDIAN POLICY (2000) (requiring consultation on energy projects); FED. EMERGENCY MGMT. AGENCY, FINAL AGENCY POLICY ON GOVERNMENT-TO-GOVERNMENT RELATIONS WITH AMERICAN INDIAN AND ALASKA NATIVE GOVERNMENTS (1998) (requiring consultation with tribes on emergency management actions).
\end{itemize}
Congress has not, however, limited the tribal self-determination policy to traditional areas of Indian policy; it has amended a range of general federal programs and statutes affecting Indians that are not generally conceived as "Indian programs," particularly in the area of environmental, natural resources and cultural resources laws.\(^{15}\) To provide but one example, the Environmental Protection Agency is literally required to treat Indian tribes "as states" for a range of functions.\(^{16}\)

Congress has specifically singled out tribal courts and has repeatedly expressed its confidence in, and support of, these growing institutions.\(^{17}\) Among other developments, Congress has required all courts in the United States to grant full faith and credit to certain kinds of tribal court judgments.\(^{18}\)

Nowhere is the federal government's policy in favor of tribal self-determination more visible than in the federal courts. In 1985, in *National Farmers Union Insurance Cos. of Indians v. Crow Tribe*,\(^{19}\) the United States Supreme Court adopted a rule requiring exhaustion of tribal court review of federal questions regarding the scope of tribal jurisdiction, making tribal courts, if not masters of their own domains then, at least, gatekeepers to the federal courts for questions of their own jurisdiction.

---


17. In 1991, an independent federal commission, the United States Commission on Civil Rights, urged Congress to increase the funding of tribal courts in amounts equal to the funding provided to state courts. U.S. COMMISSION ON CIVIL RIGHTS: THE INDIAN CIVIL RIGHTS ACT 72–73 (1991). In 1993, Congress responded by enacting the Indian Tribal Justice Act, 25 U.S.C. § 3601(5) (2000) (indicating 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"). Congress also established an Office of Tribal Justice Support within the Bureau of Indian Affairs and authorized annual appropriations up to $50 million for assistance to tribal courts. 25 U.S.C. §§ 3611-14, 3621b (2000). Seven years later, in 2000, Congress enacted the Indian Tribal Justice Technical and Legal Assistance Act, 25 U.S.C. § 3651 (2000) (finding that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments"). While Congress has been rather long on policy pronouncements, and short on actual appropriations, it has strongly expressed the view that tribal courts are worthy of respect and encouragement.


under federal law. The Court took this action on its own initiative as a matter of federal common law and without any express legislative direction by Congress, though the Court noted, “Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.”  

Lest that decision be thought a fleeting fancy, the Court reaffirmed this approach two years later and extended the doctrine of tribal court exhaustion to diversity cases brought to the federal courts.  

In light of these actions, and the implementation of similar approaches in the lower federal courts, tribal courts have become an integral part of the fabric of our nation’s judicial system. That is not to say that the tribal court jurisdiction is exceedingly broad. In cases such as *Strate v. A-I Contractors*, and *Nevada v. Hicks*, in which the issue involved on tribal court jurisdiction over non-Indians, the Supreme Court has indicated that it will require exhaustion of tribal court consideration of its own jurisdiction only where the tribal court’s jurisdiction is relatively clear or at least likely.  

In civil matters, and to a much greater degree in criminal matters, tribal courts speak with the clearest authority when they are addressing issues that affect only tribal members, or that at least have a very strong and direct effect on tribal members. Indeed, tribal courts can truly be characterized as courts of general jurisdiction only when they are dealing with purely internal matters, such as matters between tribal members. Within their area of competent jurisdiction, however, federal law has insured that tribal

---

20. *Id.* at 856.  
22. *See* *Penn v. United States*, 335 F.3d 786, 789–90 (8th Cir. 2003) (holding that a tribal court judge is entitled to the same absolute judicial immunity that shields federal and state court judges); *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849–52 (8th Cir. 2003); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507–09 (10th Cir. 1997) (affirming stay of federal court proceedings to allow tribal court to determine its own jurisdiction in a case involving a nuclear tort claim under the Price Anderson Act); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542, 1546 (10th Cir. 1995) (reversing district court’s failure to abstain in favor of a tribal court proceeding in a case involving the right of a tribe to tax mining activities). Several federal courts have also reached out to tribal courts in a more informal manner. Indeed, the Eighth, Ninth and Tenth Circuits, and even many state courts, have worked cooperatively with tribal courts to increase understanding. *See, e.g.*, *JUDICIAL COUNCIL OF THE NINTH CIRCUIT, FINAL REPORT OF THE TASK FORCE ON TRIBAL COURTS* (Aug. 20, 1997).  
Tribal courts have an even more definitive role in the area of criminal justice. Though the federal Indian country criminal justice regime has been described as complex, the place and authority of tribal courts within that regime is clear. Even on Indian reservations, tribal courts do not possess jurisdiction over non-Indians, but tribal courts do possess jurisdiction over crimes committed by tribal members and other Indians. Though tribal court jurisdiction over Indians is certain, it is also substantively limited; it extends only to misdemeanors. For what is likely the largest category of

27. See Hicks, 533 U.S. at 402 (Stevens, J., concurring) (stating that “the question whether tribal courts are courts of general jurisdiction is fundamentally one of tribal law”).

28. See generally Clinton, Development of Criminal Jurisdiction over Indian Lands, supra note 10.


31. The source, but not the existence, of tribal court jurisdiction over non-member Indians is uncertain at this time. Congress believes tribal authority over non-member Indians to be inherent within the tribes. E.g., 25 U.S.C. § 1301(2) (2000). The Supreme Court has given some indication that it believes that such authority is not inherent. Duro v. Reina, 495 U.S. 676, 684–88 (1990). Lower courts have wrestled with the question as to whether it is inherent or congressionally-delegated, with the Ninth Circuit holding that tribal authority is inherent and the Eighth Circuit holding that tribal authority was delegated by Congress. Compare United States v. Enas, 255 F.3d 662, 666–71 (9th Cir. 2001) (en banc), with United States v. Lara, 324 F.3d 635, 637–40 (8th Cir. 2003), cert. granted (Sept. 30, 2003). See also United States v. Weaselhead, 156 F.3d 818, 821–24 (8th Cir. 1998). By the time this article is published, the Supreme Court will likely have resolved this issue in the Lara case.

32. Some would disagree with the characterization of tribal criminal jurisdiction as limited to misdemeanors by noting that tribes may, for example, prosecute even serious offenses such as murder. Under the most recent amendments to the Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (2000), tribal criminal court sentences are limited to no more than one year of imprisonment and a fine of no more than $5000. 25 U.S.C. § 1302(7), amended by Pub. L. No. 99-570, Tit. IV, § 4217, 100 Stat. 3207 (1986). Thus, although a tribe may indeed have the authority to prosecute one of its members for murder, federal law limits the tribal sentence to one year. § 1302(7); Clinton, Development of Criminal Jurisdiction over Indian Lands, supra note 10, at 971 (characterizing the Indian Civil Rights Act as limiting tribal jurisdiction and noting that when it was originally passed, one provision, “while not expressly limiting the crimes cognizable in tribal courts, limited the punishments which the tribal courts could impose to six months’ imprisonment or a $500 fine”). Because federal law classifies crimes by reference to the maximum term of imprisonment authorized for the crime, and explicitly defines a crime punishable by one year or less of imprisonment as a misdemeanor (see 18 U.S.C. § 3559(a)(6)–(9) (2000)), then federal law would characterize crimes over which tribal courts exercise jurisdiction as misdemeanors. Under this scheme, no tribal offense could meet the federal definition of “felony.” See also U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(o) (2002) (“felony offense’ means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed”). Thus, it is correct as a matter of federal law to say that tribal court jurisdiction is limited to
crime in Indian country, misdemeanor offenses committed by one Indian against another, federal or state courts generally lack jurisdiction over such offenses.\textsuperscript{33} Tribal court jurisdiction is therefore generally exclusive in this respect.\textsuperscript{34}

Felony offenses by Indians against Indians, on the other hand, are handled exclusively by the United States. A short list of approximately twenty such offenses, characterized in federal law as the "major crimes," are prosecuted exclusively by federal prosecutors in federal courts.\textsuperscript{35} This jurisdictional scheme creates what is, in effect, a partnership between federal courts and tribal courts in Indian country. Federal courts handle the major crimes (felonies) and the tribal courts must handle all other offenses (misdemeanors).\textsuperscript{36}

The important and well-defined role of tribal courts in the Indian country criminal justice scheme bears emphasis. Tribal courts have long exercised criminal misdemeanor jurisdiction. The fact that Congress has left the tribes with exclusive jurisdiction over misdemeanor offenses is evidence that it expects tribal courts to exercise misdemeanor jurisdiction. Thus, the United States presumes that tribal courts exist and are competent to prosecute misdemeanors—this presumption is a key component of the

\begin{itemize}
  \item[33.] Tribal court jurisdiction over misdemeanor offenses committed by Indians against non-Indians is also exclusive, but only if it is exercised. \textit{See} General Crimes Act, 18 U.S.C. § 1152 (2000) (giving the United States jurisdiction over certain crimes involving Indians, but excepting those for which an Indian tribe has already punished the defendant).
  \item[34.] The United States has jurisdiction over only one misdemeanor offense involving Indians. Under the Major Crimes Act, 18 U.S.C. § 1153 (2000), the United States possesses jurisdiction over assault against an individual who has not attained the age of sixteen years, 18 U.S.C. § 113(a)(5) (2000), an offense defined as a Class A misdemeanor in the United States Code. 18 U.S.C. § 3559(a)(6).
  \item[35.] 18 U.S.C. § 1153 (providing for federal prosecution of murder, manslaughter, kidnapping, maiming, sex abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of sixteen years, arson, burglary, robbery, and felony larceny). Note that the only misdemeanor within the Major Crimes Act is assault against an individual who has not attained the age of sixteen years.
  \item[36.] The United States Department of Justice takes the position that the United States may also prosecute any other federal criminal offense in which situs is not an element of the offense, such as narcotics offenses. \textit{United States Attorneys' Manual, Criminal Resource Manual} 678, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00678.htm (last visited Feb. 9, 2004).
\end{itemize}
federal criminal justice regime in Indian country. If tribal prosecutors and tribal courts do not act, these offenses will go unpunished.

To provide an example of how the federal-tribal criminal justice system functions in practice, consider the Navajo Nation. The Navajo Nation courts heard 27,602 criminal cases in a recent twelve-month period. The United States prosecutes far fewer, but much more serious, offenses. In 2003, the United States Attorney's Office in Arizona prosecuted 487 cases that arose on the Navajo Nation, of which 169 were sex offenses, 118 were aggravated assaults (such as assault with a weapon, with the intent to commit murder, or assault resulting in serious bodily injury), and 98 were homicides. In sheer numbers, this federal-tribal criminal justice partnership, thus, is somewhat one sided with the tribal courts handling the vast majority of the cases. While it is difficult to estimate the significance of the misdemeanor work performed by the tribal courts, the evidence might lead one to conclude that the role of tribal courts is exceedingly important. Without active tribal courts, a large number of misdemeanor offenses would go unpunished, creating prosecution-free zones for misdemeanors.

Congress indicated in 2000 that "the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed

37. A handful of Indian tribes lacking tribal courts, primarily in Oklahoma, have courts authorized by Congress and organized by the Department of the Interior called "Courts of Indian Offenses" to hear civil and misdemeanor cases. These federal administrative courts exist to ensure that reservations without tribal courts are provided an alternative forum for hearing certain civil and criminal disputes. Peter Nicolas, American-Style Justice in No Man's Land, 36 GA. L. REV. 895, 965–66 (2002). For a complete listing of the current courts of Indian offenses, see 25 C.F.R. § 11.100(a) (2003).


39. See Russell Means v. Dist. Ct.-Chinle Judicial District, 26 INDIAN L. REP. 6083, 6084 (Navajo 1999). The Navajo Nation courts adjudicated those cases during its fiscal year 1998, which runs the same as the federal fiscal year, October through September. Id. Driving while intoxicated and crimes against persons (such as assault and battery) together constituted over 12,000 cases and forty-four percent of the caseload. Id. The next largest categories were offenses against the family, intoxicating liquor offenses and offenses against public order, each of which accounted for more than 2000 cases and around eight percent of the remaining caseload. The Navajo Nation Supreme Court characterized this information as evidence that tribal courts are "addressing the serious criminal and social problems of drunk driving, assaults and batteries (including aggravated assault and battery with deadly weapons), sex offenses against children, disorderly conduct, and public intoxication." Id.

in the United States as a whole[.]” The Department of Justice found that Native Americans experience violent crime at the rate of about one violent crime victim in every eight residents. This compares to a rate of one in sixteen for African Americans and one in twenty for whites. In such a high crime environment, many would agree that one of the most important components of crime control is insuring that misdemeanor offenses are addressed.

In summary, as Congress and the Supreme Court have expressed in federal statutory and common law, and as Justice O’Connor has explained, tribal courts “have an increasingly important role to play in the administration of the laws of our nation.” With this background, let us turn to the role of tribal courts in the federal sentencing regime.

II. THE STATUS OF TRIBAL COURTS IN FEDERAL SENTENCING

A. The Development of the Sentencing Guidelines

In federal courts, sentencing proceeds in accordance with sentencing guidelines authorized by Congress in 1984. When Congress sought the creation of the guidelines, it delegated to the United States Sentencing Commission (“Commission”) the important (and exceedingly difficult) responsibility of formulating actual guidelines. In the guidelines, which the Commission first issued in 1987 and has amended annually, the

---

43. See, e.g., Dan M. Kahan, Reciprocity, Collective Action, and Community Policing, 90 CAL. L. REV. 1513, 1527–30 (2002). Even those who are critical of “order-maintenance” policing and the broken windows approach would likely concede, for example, that more serious misdemeanors, such as assault, driving while intoxicated and domestic violence, ought to be addressed routinely. Cf. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (Harvard 2001).
Commission attempted to provide for a variety of differing sentencing goals, not all of which are necessarily consistent with one another. The Sentencing Reform Act directed the Commission to create sentences that “reflect the seriousness of the offense,” “promote respect for the law,” and “provide just punishment.”\textsuperscript{47} In addition, the sentences were supposed to “afford adequate deterrence to criminal conduct,” “protect the public from further crimes of the defendant” and “provide the defendant with needed . . . correctional treatment.”\textsuperscript{48}

To give effect to these goals, the Commission determined that the length of a defendant’s sentence should be based on two primary determinants: the seriousness of the offense and the seriousness of the offender’s past criminal record. In the table or grid formulated by the Commission to activate this approach, the seriousness of the instant offense constitutes the vertical axis and the defendant’s past criminal record constitutes the horizontal axis. By making criminal history one of only two primary determinants, the Commission gave enormous weight to the past criminal conduct of a defendant.

This approach is justified on the basis of the utilitarian theory that an offender’s criminal history is a good predictor of the risk that he will commit a crime in the future.\textsuperscript{49} Thus, using criminal history as a principal basis for sentencing was intended to assure that a person with a long criminal history, who is presumably likely to re-offend, will remain in prison longer and, thus, be incapacitated from committing further crime.\textsuperscript{50}

Heavily weighting criminal history can also be justified from a retribution or “just desert” rationale on the theory that the person with a criminal history is more culpable than a person with a lesser criminal history.\textsuperscript{51} This theory is partially justified by “notice;” that is, a person who commits another criminal act is far more likely to have a sense of the consequences of the criminal act than a first-time offender might have. It might also be justified on the basis of character of the offender. One who has committed many previous offenses may be demonstrating his true criminal character; for the person who has no criminal history, the offense may simply represent a single and aberrational failure of moral intuition.\textsuperscript{52}

\textsuperscript{50} \textit{Id.} at 593–95.
\textsuperscript{51} \textit{Id.} at 595–98.
\textsuperscript{52} \textit{Id.} at 596–603.
After determining that the defendant’s past criminal record would constitute one of the two principal determinants of the length of a sentence, the Commission then had to determine which portions of the defendant’s past criminal history to count and which to exclude. Ultimately, the Commission decided to exclude certain minor offenses, such as disorderly conduct, trespassing and public intoxication, from consideration in criminal history. The Commission also excluded from consideration sentences that have grown stale with the passage of time, including sentences that were served fifteen years prior to the instant offense. As to most other offenses, the Commission counts the offense and gives it a value based on the length of sentence that accompanied the conviction. In other words, the Commission determines the severity of the past offense based not on the crime of conviction, but on the length of the sentence received.

Such an approach gives enormous weight to the prior court’s estimate of the seriousness of the offense. For an offense such as assault, a court in Texas may, for example, routinely render a much greater sentence than a court in Minnesota. By measuring criminal history based on the length of each of the prior sentences, rather than on the objective facts of the offenses, the guidelines methodology requires the conclusion that an assault conviction in, in this example, Texas, which is punished more severely, is more serious as a matter of criminal history than the same conviction in Minnesota, where the sentence is likely to be less severe. This approach thus gives enormous respect to the courts where the past convictions occurred and, by inference, to the communities who are expressing their subjective moral judgments as to those crimes through their criminal justice processes. In using an objective approach based on the length of sentence, the Commission therefore credited the subjective different conclusions of each community as to the seriousness of past offenses.

Given the importance of the community in determination of criminal history, the Commission also had to determine whether sentences from courts outside the federal system, including foreign courts, tribal courts, and state courts (including county and municipal courts), should be included in a defendant’s criminal history. On this issue, the Commission initially took an inclusive approach. In its preliminary draft of the guidelines, the Commission indicated that sentences from tribal courts would be given the same weight as those issued by state and federal courts. The Commission

---

54. Id. at § 4A1.2(e).
55. Id. at § 4A1.1.
indicated that it would count sentences from foreign courts as long as the foreign conviction reflected conduct that would also be considered criminal if it occurred in the United States.\textsuperscript{57}

This inclusive approach was consistent with the Commission’s philosophy that criminal history was an important factor in determining culpability and that individuals with similar levels of culpability should receive similar sentences, thus reducing unwarranted disparity in sentencing. Indeed, if the purpose of measuring criminal history is to insure that offenders with similar records are treated similarly, and therefore, fairly, defendants with lengthy criminal histories should be treated similarly no matter where the original conviction was adjudicated. In keeping with its inclusive approach, the Commission also chose to count convictions and sentences from state courts at all levels, failing to make any relevant distinctions between federal, state, county or municipal courts.

In the final draft of the guidelines, however, the Commission abruptly changed course. Although it included in the criminal history calculation sentences from all levels of state courts,\textsuperscript{58} the Commission chose a different path for sentences from tribal courts or foreign courts. Without explanation,\textsuperscript{59} the Commission determined that sentences from tribal courts or foreign courts should be considered only in extraordinary circumstances. Under the guidelines as enacted, tribal and foreign court sentences are not routinely counted in criminal history computations,\textsuperscript{60} but constitute a “favored” basis for upward departure.\textsuperscript{61} Sentences from tribal courts and foreign courts may be used only if the defendant’s criminal history score fails to reflect adequately the seriousness of the defendant’s past criminal

\begin{itemize}
\item \textsuperscript{57} Id.
\item \textsuperscript{58} See U.S. SENTENCING GUIDELINE MANUAL § 4A1.2(c)(1) (noting that local ordinance violations are counted if they are also criminal offenses under state law) and § 4A1.2, application n.12.
\item \textsuperscript{59} The Commission has apparently never explained this abrupt change in course and its final decision as to how to consider tribal court sentences. In discussing the matter with persons who were aware of Commission deliberation during or soon after adoption of the final guidelines, I am told that the concern for using tribal court judgments was based on a lack of trust of tribal court procedural protections. Conversations and correspondence with Magdeline E. Jensen, Chief Federal Probation Officer (Arizona) (October 2, 2002) and Assistant Federal Public Defender Jon M. Sands (Arizona) (September 25, 2002) (on file with author). I am grateful to them for their assistance on understanding this issue. The legitimacy of such concerns will be discussed in greater detail below.
\item \textsuperscript{60} U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(i) (stating that “[s]entences resulting from tribal court convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category)”; see also id. § 4A1.2(h) (stating that “[s]entences resulting from foreign convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category)”).
\item \textsuperscript{61} See id. § 4A1.3(a); United States v. Drapeau, 110 F.3d 618, 619–20 (8th Cir. 1997).
\end{itemize}
history and the sentencing judge is willing to use such records as a basis for increasing the defendant's criminal history score above the level set by the guideline calculation. Such upward departures are exceedingly rare, occurring in fewer than one percent of federal sentences.

In the absence of any explanation, it is not entirely clear why the Commission chose such an approach for tribal sentences. In the series of nationwide hearings that the Commission held in 1986 and 1987 while it was developing the guidelines, few witnesses addressed tribal issues. Little consensus appears from the testimony of the witnesses at such hearings.

Apparently the only tribal representative to testify in any of the hearings was an Assistant Attorney General of the Navajo Nation. She criticized federal prosecutors, testifying that “federal prosecution has been, in the eyes of most Indian tribes, . . . woefully lacking” and noting that “crimes often go unpunished and felony declinations are extremely high.” She testified as to her experience that defendants are prosecuted tribally in many cases because the federal government often fails to prosecute. To make this point, she indicated that a homicide case declined by the United States Attorney’s Office might be pursued by the tribal prosecutors so that the criminal offense would not fall through the cracks and go unpunished.

She specifically asked the Commission to recognize that “the local Indian communities do have a large and direct stake in [the federal] sentencing process.” If the Commission heard the tribal representative’s plea for recognition of tribal communities in the sentencing process, the Commission never acted upon that request in any way in issuing the guidelines.

Another key witness, who was the Federal Public Defender in New Mexico at the time of her testimony and who regularly defended illegal alien defendants and Indians, cautioned the Commission against considering either foreign sentences or tribal court sentences. She raised the fact that “most of the tribal judges are not lawyers” and that “counsel in tribal courts

---

63. In the years 1997–2001, federal judges used upward departures in only .6 to .8% of cases. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 51, Figure G (6th ed. 2001).
64. United States Sentencing Commission, Regional Public Hearing, Denver, Colorado, November 5, 1986, Transcript, 163, 166 (testimony of Donna Chavez, Assistant Attorney General, Navajo Nation Dep’t of Justice).
65. Id.
66. Id. at 173–74.
67. Id. at 169.
68. Id. at 220, 221–26 (foreign sentences) and 226–32, 239–42 (testimony of Federal Public Defender Tova Indritz).
is rare” and further recommended that “only counseled convictions should be counted in any event, including convictions in federal and state courts.”69 The Federal Public Defender also raised general concerns about due process in tribal courts, including concerns that “quality varies widely from one tribe to another” and that tribal courts are “poorly funded and have limited access to training.”70

When the guidelines were issued in final form in 1987, the Commission failed to explain which testimony it credited or why it reached its conclusion as to tribal courts. As a result of its determination, tribal courts are now treated exactly like foreign courts under the guidelines. And tribal and foreign court sentences are treated dramatically differently than state court sentences.

In sum, when state governments exercise their inherent governmental powers through criminal prosecutions, the Commission—and thus federal courts—respect that exercise of power in subsequent federal proceedings. And, as noted above,71 the guidelines do not ask courts to look behind the record of those prior offenses to try to determine whether the Texas sentences were too harsh or the Minnesota sentences were too lenient; the Commission adopted a model that trusts the judgment of the community and the court that issued that sentence in the prior adjudication. When tribal courts and foreign courts exercise the same kinds of power, the Commission discourages the federal courts from according similar respect to those actions.

Two questions arise regarding the wisdom of Commission policy with respect to tribal courts. First, are tribal courts so similar to foreign courts that they should be treated the same by the Commission? Second, are tribal courts so dissimilar to state courts that they should be treated differently by the Commission? These questions are addressed in the next two sections.

B. Comparing Tribal Courts and Foreign Courts

At first glance, treating tribal courts like foreign courts seems symmetrical and, perhaps, respectful. By treating Indian nations like foreign nations, one might conclude offhand that the Commission is simply being respectful of tribal sovereignty and elevating Indian tribes to a status akin to a foreign nation. The authority of tribal courts, like the authority of foreign courts, arises from a source of sovereignty that is foreign to the

---

69. Id. at 228–29.
70. Id. at 228.
71. See supra note 54.
states and the United States. Indeed, the Supreme Court has often noted that tribal governments and tribal sovereignty pre-existed the United States.\footnote{E.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (describing Indian tribes “as separate sovereigns pre-existing the Constitution”); Talton v. Mayes, 163 U.S. 376, 384 (1896) (recognizing the Cherokee Nation’s powers of government as existing before the U.S. Constitution); see Cherokee Nation v. Georgia. 30 U.S. (5 Pet.) 1, 16 (1831).} However, Chief Justice John Marshall famously held that tribes are not foreign nations, and are more correctly denominated “domestic dependent nations,”\footnote{Cherokee Nation, 30 U.S. (5 Pet.) at 17.} but tribes sometimes long to be restored to full “nationhood.”\footnote{For some of the arguments in favor, see Steven Paul McSloy, American Indians and the Constitution: An Argument for Nationhood, 14 AM. INDIAN L. REV. 139, 173–74 (1989).}

With regard to foreign courts, sound reasons exist for taking a cautious approach toward counting foreign sentences in the federal sentencing process. There is a wide variance in the operation of foreign courts. While some foreign courts operate in a fashion similar to American courts, others may operate far differently and may occupy a far different place in the structure of foreign governments. Some foreign courts may have dramatically different conceptions of what process is due a criminal defendant. Foreign courts may also have different views of the relative seriousness of any given offense.\footnote{Consider an Islamic country, such as Malaysia, that has included punishment such as death by stoning for a woman’s commission of adultery or other countries that reportedly cut off the hands of a thief. See Diane Marie Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 IND. L.J. 809, 852–56 (2000) (describing practice in some Islamic countries of classifying crimes according to the degree to which they offend Allah). See also United States v. Winson, 793 F.2d 754 (6th Cir. 1986) (expressing concern for using foreign convictions as predicates for the offense of felon in possession of a firearm because it might require recognition of a military tribunal adjudication in Nicaragua as well as condemnations of political prisoners in Poland).} Moreover, length of sentence may not translate to a useful measure of the seriousness of an offense.\footnote{For example, the popular press has recently given a great deal of attention to the treatment of one of the 9/11 hijacking co-conspirators in German courts; the defendant was sentenced to the maximum of fifteen years imprisonment under German law for his conviction on more than 3000 counts of accessory to murder. See Desmond Butler, First Conviction in 9/11 Attacks, N.Y. TIMES, Feb. 20, 2003, at A1. For a short description of the German sentencing regime, see Carol D. Rasnic, Making the Criminal Defendant’s Punishment Fit the Crime: The Contrast Between German and U.S. Laws of Sentencing, 7 N.Y. INT’L L. REV. 62, 69 (1994).} For a variety of reasons, all of which are based primarily on the tremendous diversity of foreign courts, it makes sense to create a presumption in the guidelines against counting foreign sentences in computing a defendant’s criminal history in federal courts. Because of the variation in foreign courts, we simply may not be able to trust the results in
foreign courts to the same degree that we trust convictions from state and federal courts. The decision not to count foreign sentences reflects the view that foreign courts, as a category, are not to be trusted routinely, for all the reasons just indicated.

Thus, while treating tribal courts like foreign courts may have seemed sensible at first blush, viewed in this light, treating tribal courts like foreign courts may reflect something other than respect for tribal sovereignty. It may reflect suspicion and mistrust of the processes and results of criminal justice in tribal courts.

In light of the rhetoric of every American president since Richard Nixon and the increasing respect for tribal courts in various federal laws and Supreme Court decisions, any federal policy that reflects mistrust of the role and judicial processes of tribal courts on matters clearly within their jurisdiction seems out of step with the direction of modern federal Indian law and policy. Thus, consideration must be given as to the differences between tribal courts and foreign courts.

Tribal courts differ from foreign courts in several respects. To note just a few, unlike foreign courts, tribal courts have an integral role to play in the criminal justice regime within the boundaries of the United States. Offenders travel to and from Indian reservations far more freely and often than between the United States and foreign nations. It is likely far easier for federal courts to obtain cooperation, such as obtaining records, from tribal courts, all of which are located within the continental boundaries of the United States and are subject to the “superior sovereignty” of the United States.78

As noted above, the structure of the federal Indian country criminal justice system reflects a partnership between the federal government and the various tribal governments as to criminal justice and public safety. If the United States is viewed as a single large community, the role of tribal courts is essential to maintenance of public safety and public order in this community. Foreign courts lack such an important role in the domestic life

77. See supra notes 11–18 and accompanying text (discussing presidential, congressional, and Supreme Court support for tribal self-governance and self-determination); see also infra notes 164–201 and accompanying text (discussing federal and state judicial actions representative of respect for tribal self-governance and self-determination).

of the United States.\textsuperscript{79} Thus, from the viewpoint of federal Indian policy and in light of the structure of federal criminal justice, tribal courts play a far different role in the United States than do foreign courts. Given these tremendous differences, treating them the same is difficult to justify.

While the justification for treating tribal courts in a manner identical to foreign courts is difficult to understand—it has not been explained or defended by the Sentencing Commission—such analysis begs the question of how tribal court sentences ought to be treated. As noted above, just as the Commission determined that foreign sentences were not to be considered routinely, the Commission implicitly expressed full confidence in state court sentences, even those of municipal and juvenile courts.\textsuperscript{80} One obvious alternative to treating tribal courts like foreign courts is treating tribal courts like state courts.

To consider this alternative, we must first consider why the Commission (and therefore the federal courts) trusted state court sentences enough to use them in computation of criminal history in the federal sentencing process.

\section*{C. Tribal Courts and State Courts}

Of the various concerns about foreign courts noted above, perhaps the most compelling concern is the wide diversity of the processes and values within the various foreign courts and the lack of any universally accepted belief about what constitutes a court. One might very well have the same concern about tribal courts, particularly in light of the fact that more than 562 federally-recognized Indian tribes and native villages exist in the continental United States and Alaska.\textsuperscript{81} However, tremendous diversity in state jurisdictions exists within the United States as well. The fifty states, the District of Columbia, Puerto Rico and other jurisdictions, all have diverse approaches to criminal justice.

While the United States Supreme Court has imposed a great deal of uniformity on criminal procedure in state courts,\textsuperscript{82} we know as a matter of

\begin{itemize}
  \item \textsuperscript{79} One could easily argue that the guidelines need not treat all foreign courts identically, \textit{cf.} United States v. Simmons, 343 F.3d 72 (2d Cir. 2003) (affirming a district court’s upward departure based on Canadian convictions without inquiring into the process through which those convictions were obtained), but that is an argument for another day.
  \item \textsuperscript{80} \textit{E.g.}, U.S. SENTENCING GUIDELINES MANUAL \textsuperscript{\textsection} 4A1.2(d) (2002).
  \item \textsuperscript{81} \textit{See} Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68180 (Dec. 5, 2003) (listing 562 tribes recognized and eligible for Bureau of Indian Affairs Services Funding).
\end{itemize}
fact that the criminal justice systems within states remain quite diverse, even on some relatively important issues. Some states, for example, impose the death penalty. Others do not. Some states require grand jury indictments; others do not. Some states require unanimous verdicts by juries of twelve persons to obtain conviction. Other states vary from these requirements. Some states elect their judges. Other states use different types of processes involving appointments or appointments and elections. Even in the specific area of criminal sentencing, states have adopted a wide range of diverse approaches.

Given the diversity among foreign courts, state courts, and tribal courts, what then is common to state courts that allows the Commission to trust those courts, but is lacking in foreign courts? One answer may be the fact that states and their courts are recognized in the United States Constitution in, for example, the Full Faith and Credit Clause. This answer begs the question of why the federal Sentencing Commission trusts state court criminal sentences. It explains generally that American courts are required to respect judgments of the various state courts in civil proceedings, but does not explain why the Commission ought to adopt state court criminal judgments for federal sentencing purposes. No one would argue that the federal government is constitutionally required to consider state criminal records for purposes of federal sentencing. One could easily imagine a federal sentencing structure that did not rely on prior state criminal records, but used only federal records. Moreover, this structural answer does not effectively distinguish state courts from tribal courts which, federal statutes and common law make clear, are legitimate under federal law.

83. See Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002) (noting that thirty eight states have capital punishment).
84. In Hurtado v. California, 110 U.S. 516, 538 (1884), the Supreme Court famously held that the Fifth Amendment right to a grand jury does not apply to the states. Numerous states have since declined to use grand juries. See Bryan H. Wildenthal, The Road to Twinning: Reassessing the Disincorporation of the Bill of Rights, 61 OHIO ST. L.J. 1457, 1476 (2000) (noting that “many if not most states” had abandoned the use of grand juries by the mid-twentieth century).
85. BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION, 1998 (2000); Robert H. Miller, Comment, Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries, 146 U. PA. L. REV. 621, 629 & n.45 (1998) (noting that “[m]any states have... accepted the Court’s invitation to depart from their twelve-person jury standards and unanimity requirements in civil and criminal cases.”)
87. See Reitz, supra, note 1 at 226-27 (noting that approximately twenty state jurisdictions have adopted guideline sentencing regimes and discussing the differences).
88. U.S. CONST. art. IV, § 1.
The more likely explanation as to why the federal government trusts state court sentences enough to make them an integral part of federal sentencing is the notion that the state courts share common fundamental values with the federal courts. The Commission can be confident that the state courts share such values by virtue of the Fourteenth Amendment and the Supreme Court’s determination that this amendment incorporates much of the Bill of Rights into state proceedings. Because state courts must now meet most of the federal standards of procedural protection found in the federal Bill of Rights, the Commission can have confidence in the quality of the convictions reached and sentences meted out in state courts. Under Supreme Court jurisprudence, the Fourteenth Amendment can be viewed as a federal mandate that the values of state courts may not deviate in certain material respects from the values of federal courts.

Prior to the adoption of the Fourteenth Amendment, the Bill of Rights however did not apply to states. In *Barron v. Baltimore,*\(^9^9\), decided in 1833, the Supreme Court explicitly held that the protections found in the Bill of Rights do not apply to state governments; the Bill of Rights applied only to exercises of authority by the federal government.\(^9^0\)

Following the Civil War, the Fourteenth Amendment was enacted, requiring states (and their courts) to provide due process and equal protection and to protect the privileges and immunities of citizens of the United States. Although the Fourteenth Amendment did not explicitly incorporate the Bill of Rights, it has been deemed to incorporate the key provisions of the Bill of Rights in numerous Supreme Court cases. Indeed, the extent of that incorporation was years in development and has long been a matter of controversy, with Justice Black famously arguing in favor of total incorporation,\(^9^1\) and Justice Frankfurter famously opposed.\(^9^2\) Throughout the debate, the Court has consistently adopted the selective incorporation approach and it spent several decades in the mid-Twentieth Century gradually incorporating most of the relevant Bill of Rights provisions, at least those that are relevant to criminal justice.\(^9^3\)

The Supreme Court seems to have settled on the notion that the Fourteenth Amendment incorporates those portions of the Bill of Rights that are in some sense “basic in our system of jurisprudence” or represent

---

89. 32 U.S. (7 Pet.) 243 (1833).
90. *Id.* at 250–51.
92. *See, e.g., id.* at 67 (Frankfurter, J., concurring); *see also* Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).
“fundamental principles of liberty.” While not all of the components of the Bill of Rights apply to state courts, each of the provisions that is necessary for “fundamental due process” does apply. These protections are not merely aspirational; they are guaranteed to varying extent by the federal courts. Not only may a defendant appeal a question of federal constitutional law by petitioning the United States Supreme Court, a defendant may also seek the privilege of habeas corpus for unlawful detention by a state court or even pursue civil actions under Section 1983.

In short, there are myriad reasons why the Sentencing Commission might trust the accuracy and the fairness of state court sentences. While this analysis has never been made explicit by the Commission, this analysis implicitly serves as the basis of the Commission’s assumption that all state sentences may be considered in each defendant’s criminal history analysis. The Commission can have substantial confidence that even though a state court conducts a trial and renders a sentence under a different source of inherent sovereignty, state court sentences have been rendered in a manner substantially similar to the way in which a federal court renders a sentence, or at least in a manner that does not differ as to any fundamental issue of due process. Accordingly, the Commission and the federal courts can trust the accuracy and fairness of the judgment adequately to use it as a basis of sentencing for a federal crime.

Just as the Supreme Court held in Barron v. Baltimore that the Bill of Rights does not apply of its own force to state courts, the Supreme Court has held that the Bill of Rights does not apply of its own force to tribal courts. However, most of the Bill of Rights protections, which were incorporated into the Fourteenth Amendment and therefore applied to states during the last 130 years, have also been applied to tribes in a federal statute enacted in 1968 called the Indian Civil Rights Act.

In addition to the freedoms of speech, assembly and exercise of religion set forth in the First Amendment, the Indian Civil Rights Act incorporated most of the criminal procedure protections found in the Bill of Rights, such as:

as the Fourth Amendment’s warrant requirements and the proscription against unreasonable searches and seizures, \( \text{100} \) the Fifth Amendment’s prohibition on double jeopardy, \( \text{101} \) compelled self-incrimination, \( \text{102} \) and deprivation of life, liberty or property without due process, \( \text{103} \) the Sixth Amendment’s rights to notice, a speedy and public trial, the right to confront witnesses, the right to compulsory process, and the right to counsel, \( \text{104} \) the Eighth Amendment’s proscriptions on excessive bail, excessive fines, or cruel and unusual punishment \( \text{105} \) and even the Fourteenth Amendment’s requirement of equal protection. \( \text{106} \) In addition, Congress provided the same remedy for deprivation of rights by tribal courts and tribal governments that are available against states for a state court’s deprivation of rights, that is, petitioning the courts of the United States for a writ of habeas corpus. \( \text{107} \)

When the Indian Civil Rights Act was enacted, the Supreme Court had not yet rendered its decision in *Duncan v. Louisiana*, \( \text{108} \) holding that the Fourteenth Amendment incorporated the Sixth Amendment right to a jury trial. Likewise, the Court had not yet rendered its decision in *Benton v. Maryland*, \( \text{109} \) holding that the Fourteenth Amendment incorporates the Fifth Amendment’s prohibition of double jeopardy which prevents a state from prosecuting a defendant twice for the same offense. Finally, the Court had not yet rendered its decision in *Schilb v. Kuebel*, \( \text{110} \) in which the Court made explicit its assumption that the Fourteenth Amendment incorporates the Eighth Amendment’s prohibition on excessive bail.

The Indian Civil Rights Act was enacted toward the end of the period of seemingly interminable litigation spawned by the ambiguous language of the Fourteenth Amendment. The Incorporation Controversy, as this litigation is collectively known, reached a crescendo during the Warren Court era. Thanks to several of the Supreme Court decisions noted above, it was not long after enactment of the Indian Civil Rights Act that state courts

---

100. § 1302(2).
101. § 1302(3).
102. § 1302(4).
103. § 1302(8).
104. § 1302(6). *But see* discussion at note 141 infra and accompanying text (noting the Act’s lack of provision for indigent defense counsel).
106. § 1302(8).
107. § 1303; *see also* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996) (stating that federal habeas review extends beyond mere imprisonment to the tribal punishment of banishment from reservation).
were held to all of the same high standards of due process required of tribal courts. But the timing is noteworthy and it bears emphasis: tribal courts were required by Congress to provide numerous protections to criminal defendants while state courts were still arguing in the Supreme Court that some of these same protections need not be provided.

Currently, the nature of those protections is virtually identical. While for states these requirements are constitutional, springing from the Fourteenth Amendment and its interpretation in Supreme Court decisions, and for tribes these requirements are by federal statute, springing from the Indian Civil Rights Act, the end result is that state and tribal courts must offer virtually identical procedural protections to criminal defendants.

Though tribal courts and state courts traveled different paths, they reached the same destination; both courts must today provide most of the protections set forth in the Bill of Rights. As a result, the modus operandi of tribal courts is not fundamentally different than that of state courts. Indeed, most tribal judicial systems are structured very much like the state and federal court systems and state and federal law heavily influence tribal court procedures. "[S]ome tribal courts operate as nearly exact replicas of state courts."

Commentators have occasionally challenged the quality of tribal courts, but these are the same kinds of criticisms frequently raised against rural state courts and it has not been argued that sentences from such courts should be discounted.

Empirical evidence suggests that tribal courts routinely hear the same kinds of misdemeanor cases that state courts handle. In the Means decision in 1999, the Navajo Nation Supreme Court reported the range of criminal cases handled in its lower courts in one recent year. The court noted that more than twenty percent of the cases were adjudications of the

111. Two distinctions in the nature of those protections exist and they will be discussed below.

112. Nell Jessup Newton, Tribal Court Praxis, One Year in the Life of Twenty Indian Tribal Courts, 22 AM. INDIAN L. REV. 285, 294 (1998). Dean Newton further illustrated her point by noting that the Oneida tribal court hired two retired judges from New York's highest court to serve as tribal judges. Id. at 294 n.37; see also Hon. Tom Tso, The Process of Decision Making in Tribal Courts, 31 ARIZ. L. REV. 225, 227 (1989); cf. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (noting that "some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts").

113. See supra notes 68–70 and accompanying text.


116. Id.; see supra note 39 and accompanying text.
offense of driving while intoxicated and more than twenty percent were adjudications of crimes against persons, such as simple assault. The court summarized the criminal work of the lower Navajo courts as “addressing the serious criminal and social problems of drunk driving, assaults and batteries (including aggravated assault and battery with deadly weapons), sex offenses against children, disorderly conduct, and public intoxication.”

Under the federal sentencing guidelines, public intoxication is never counted, no matter the court of conviction, but these and the other offenses described by the Navajo court are the same kinds of offenses that likely are high in state courts with jurisdiction over areas with similar unfortunate socio-economic profiles. In other words, it is fair to conclude that many tribal courts and state courts handle the same or similar kinds of cases.

The successful development of tribal courts has been noted widely and approvingly. In the federal courts, it has been fashionable for nearly half a century to claim that tribal courts are “improving.” In 1959, in a case called *Williams v. Lee,* the United States Supreme Court noted improvements in the Navajo Nation justice system. Since that time, federal courts and federal judges have often made similar pronouncements.

Lest the talk of “improvements” in tribal courts seem condescending, note that the Supreme Court has worked diligently during the same period of time to “improve” the quality of justice meted out in state courts. Since the time of the Fourteenth Amendment and the gradual piecemeal incorporation of the protections of the Bill of Rights, state courts have also improved dramatically during the same period.

Despite the putative fairness of state courts, for Native Americans, the use of state court sentences and not tribal court sentences has produced a

---

118. *Id.* at (slip op. 5–6).
120. *Id.* at 222 n.9.
121. Justice O’Connor has explained that “tribal courts, while relatively young, are developing in leaps and bounds.” Hon. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts,* 33 TULSA L.J. 1, 2 (1997); see also *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) (asserting that “tribal courts today are infinitely more competent and better staffed than they were thirty or even fifteen years ago”).
122. See *supra* notes 108–10 and accompanying text.
123. As a practical matter, tribal courts and state courts go about the routine work of “improving” in very similar fashion. For several years tribal judges have been taking basic and advanced judicial education courses side by side with state court judges at the National Judicial College in Reno, Nevada. See National Judicial College website, available at http://www.judges.org/about/ (last visited Feb. 25, 2004).
cruel irony in at least one state with substantial Indian country jurisdiction, South Dakota. A recent study there suggests that Native Americans who are prosecuted by state authorities for crimes that occur outside Indian reservations receive disparate treatment as compared to Whites.\footnote{124} Among the findings are that state courts gave Indian defendants sentences that were, on average, approximately two years longer than those given to Whites,\footnote{125} that Indians were denied bond far more often,\footnote{126} and received fewer suspended sentences.\footnote{127}

Thus, for Native American defendants prosecuted in state courts in South Dakota, the arguments about fairness and trustworthiness of the state courts may ring hollow. Since the federal sentencing guidelines generally use the length of sentence in weighing the seriousness of criminal history,\footnote{128} and since the sentencing judge does not routinely evaluate the fairness of the length of the sentence before using it as part of the criminal history calculation, Indian federal defendants in South Dakota who have state court criminal records may believe use of the disparate state record is unfair. They may wish to seek downward departures by arguing that, in the aggregate, South Dakota state sentences overestimate the seriousness of their criminal history.

\section*{D. The Effect of the Limited Right to Counsel in Tribal Court on Sentencing Under the Guidelines}

Many state courts provide procedural protections greater than the federal minimum standards.\footnote{129} Numerous tribal courts also provide protections for criminal defendants that are greater than federal minimum standards.\footnote{130} Nevertheless, different federal standards for criminal procedure apply to states and to tribes. There are two important substantive differences in the protections applied by tribal courts under the Indian Civil Rights Act and

\begin{itemize}

\item \footnote{125} Braunstein & Feimer, supra note 124, at 180 (noting that Indians received aggregate sentences that were 832 days longer than those for Whites and actual sentences that were 667 days longer).

\item \footnote{126} Id. at 177.

\item \footnote{127} Id. at 181–82.

\item \footnote{128} See supra note 54 and accompanying text.

\item \footnote{129} See, e.g., Alabama v. Shelton, 535 U.S. 654 (2002) (noting that most states provide a right to appointed counsel that is more generous than the federal constitutional minimum).

\item \footnote{130} See infra notes 141–43 and accompanying text.
\end{itemize}
those applied by state courts because of incorporation of the Sixth Amendment by the Fourteenth Amendment.

The first key difference in criminal procedural protections is that the right to a jury trial is much broader in tribal court than in state courts. In tribal court, a defendant is entitled to a jury trial if he is accused of an offense that is punishable by any term of imprisonment and, thus, has a right to a jury trial even for petty offenses.\textsuperscript{131} In contrast, a defendant in state court has a constitutional right to a jury trial only if he is charged with a felony or a misdemeanor punishable by a term of imprisonment of at least six months.\textsuperscript{132} If a jury is viewed as a greater protection for the defendant from arbitrary prosecutorial power, tribal courts are thus somewhat more protective of defendants than state courts, at least in the area of petty offenses.

The second key distinction between state courts and tribal courts, however, makes it impossible to conclude that tribal courts are always more protective of defendants. Although Congress included in the Indian Civil Rights Act a right to counsel to assist in the defense of criminal charges, Congress pointedly refused to impose on tribal governments the principle first announced in \textit{Johnson v. Zerbst},\textsuperscript{133} and applied to the states in \textit{Gideon v. Wainwright},\textsuperscript{134} that such counsel must be provided at government expense.\textsuperscript{135} Accordingly, unlike state courts, tribal courts are under no federal requirement to provide indigent defense counsel or public defenders for tribal misdemeanants.

Congress likely declined to apply the \textit{Gideon} principle to tribal courts for a couple of reasons. First, Congress was likely attempting to be sensitive to resource issues of tribal governments. Providing indigent defense counsel is expensive. On Indian reservations, where poverty runs high, a substantial number, and perhaps nearly all, of the defendants would require indigent counsel. When the Indian Civil Rights Act was enacted in 1968, there were fewer than 25 Indians practicing law in the entire country and none of them were practicing in Arizona and New Mexico to name a couple states with vast amounts of Indian country.\textsuperscript{136} Requiring defense counsel would have

\begin{itemize}
\item \textsuperscript{131} 25 U.S.C. § 1302(10).
\item \textsuperscript{132} See \textit{Duncan v. Louisiana}, 391 U.S. 145 (1968).
\item \textsuperscript{133} 304 U.S. 458, 463 (1938).
\item \textsuperscript{134} 372 U.S. 335, 343 (1963).
\item \textsuperscript{135} See 25 U.S.C. § 1302(6) (prohibiting tribes from denying "any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense") (emphasis added).
\end{itemize}
not only dramatically increased the costs of public safety at a location where public safety was already a problem; the absence of available attorneys might have simply prevented any prosecutions from occurring.

Second, Congress was also likely willing to make such a compromise in light of the fact that it limited tribal court jurisdiction to misdemeanors and maximum sentences of six months imprisonment and a $500 fine, limits that have since been raised. At the time of enactment of the Indian Civil Rights Act, the United States Supreme Court had not extended the right to indigent counsel in state courts to misdemeanor proceedings. As in other cases discussed above, nearly twenty states continued to resist the notion that counsel needed to be provided to indigent defendants who had not been charged with felonies. It was not until five years after the Indian Civil Rights Act, when 

Argersinger v. Hamlin 

was decided in 1972, that the Supreme Court held that the Sixth Amendment right to indigent counsel as applied to states through the Fourteenth Amendment (and Gideon) extended even to petty misdemeanors. As a result, tribal courts were not required to provide indigent counsel, a provision that was not amended when tribal jurisdiction was extended from petty misdemeanors to full misdemeanors in 1986.

Those concerned with the quality of justice in tribal courts frequently point to the lack of provision for indigent defense counsel in the Indian Civil Rights Act. While this might be thought a serious flaw by those concerned with the rights of criminal defendants in tribal courts (and it may be a serious flaw), there are several reasons that this concern would not prohibit counting of tribal courts sentences in the federal sentencing context.

First, circumstances have changed dramatically in Indian country since 1968. A substantial number of tribal governments now exceed the bare requirements of the Indian Civil Rights Act and provide indigent counsel to tribal defendants. In some tribal courts, it is a matter of practice. In

137. In 1986, these limits were increased to a maximum of term of imprisonment of one year and/or a maximum fine of $5000. 25 U.S.C. § 1302(7), as amended by Pub. L. No. 99-570, Tit. IV, § 4217, 100 Stat. 3207 (Oct. 27, 1986). The purpose was nominally to give tribes more resources to address the traffic of illegal narcotics on Indian reservations.

138. See supra notes 108–110 and accompanying text.


140. See supra note 137.

141. See, e.g., Vincent C. Milani, Note, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 AM. CRIM. L. REV. 1279 (1994); see also supra note 68 and accompanying text.

142. Milani, supra note 141, at 1297 & n.95 (stating that “many of the more developed tribal court systems do attempt to provide counsel for criminal defendants”).
others, it is a statutory right provided by the tribal code.\textsuperscript{143} As to staffing of indigent counsel, dozens of tribes have specific positions or offices designated as the “tribal public defender.”\textsuperscript{144} Still others have legal aid offices in which legal aid attorneys also serve as indigent defense counsel.\textsuperscript{145} Some tribes use “advocates,” persons who generally do not have sufficient legal training to sit for a state bar examination, but may be a member of a tribal bar or otherwise be recognized and trained to represent tribal defendants in tribal court proceedings.\textsuperscript{146} Another approach is to require members of the tribal bar to take such appointments in order to meet

\begin{itemize}
\item \textsuperscript{143} See, e.g., Confederated Salish & Kootenai Tribe Laws Codified, §§ 1-2-401(1) and (2), which provide:
\end{itemize}
\begin{quote}
Every person appearing as a party before Tribal Court, except as otherwise provided for proceedings associated with Small Claims, has a right to be represented by an attorney or other person admitted to practice before the Court at the person’s own expense. (2) An indigent defendant accused of a criminal offense punishable by imprisonment has a right to representation by the Tribal Defender’s Office.
\end{quote}
\begin{itemize}
\item \textsuperscript{144} In United States v. Red Bird, 146 F. Supp.2d 993 (D. S.D. 2001), affirmed, 287 F.3d 709, 716 (8th Cir. 2002), a federal judge in South Dakota observed:
\end{itemize}
\begin{quote}
The Rosebud Sioux Tribe, obviously determined to protect the rights of its indigent Rosebud tribal members, had and has a public defenders’ office to provide legal representation at the expense of the tribe. In that sense, the Rosebud Tribe is unusual in providing an attorney admitted to practice. Most tribes within the jurisdiction of the United States District Court for the District of South Dakota, Central and Northern Divisions, do not provide this right. Defendants in these other courts are “represented” by an “advocate,” a non-lawyer, and the Court takes judicial notice of that.
\end{quote}
\begin{itemize}
\item \textsuperscript{145} This court’s observations about the indigent counsel on the reservations within its jurisdiction in South Dakota probably cannot be generalized to all Indian tribes. The reservations in South Dakota are among the very poorest in the United States and it is perhaps surprising that even one of these has chosen to provide indigent defense by licensed attorneys. In an effort to test this assumption the author hired a research assistant to test whether other tribes provide indigent counsel. The research assistant informally contacted over seventy Indian tribes and determined that more than two-dozen provide indigent defense by state-licensed attorneys. For many of the others, the court did not routinely exercise criminal jurisdiction or was not responsive.
\end{itemize}
\begin{itemize}
\item \textsuperscript{146} Id. For example, the Confederated Salish & Kootenai Tribal Defender’s Office was established in 1993 and has four public defenders, some of whom also handle civil legal aid matters. The tribe has two prosecutors.
\end{itemize}
\begin{itemize}
\item \textsuperscript{146} The Navajo Nation Bar Association administers a bar examination annually and currently has over 400 members. The Navajo Nation Supreme Court allows attorneys to practice before the Navajo courts, but it also allows “tribal court advocates,” who lack formal law school training, to appear in some cases. Advocates must first pass the Navajo Nation bar examination. See generally Navajo Nation Bar Association website at http://www.navajolaw.org (last visited Feb. 25, 2004).
\end{itemize}
their pro bono requirements.\textsuperscript{147} In summary, tribes use a variety of methods of providing some form of defense counsel for indigent defendants.\textsuperscript{148}

In the American justice system in general, "quality representation for all criminal defendants remains more of an aspiration than a reality."\textsuperscript{149} The statement is likely to be just as true in tribal justice systems. However, for those tribes that routinely provide attorneys to indigent defendants in tribal courts, just as their state and federal counterparts do, lack of counsel is not a legitimate basis for refusing to count their sentences.

Even for tribes that do not provide indigent defense counsel, there is probably a legal basis for using such sentences if the Commission wished. For a while, it was thought to be unlawful for a federal court to count such a sentence in computing a defendant's criminal history. Some might still argue that federal law prohibits the counting of sentences in cases in which a defendant lacked counsel. The law currently is not entirely clear on this point.

In \textit{Argersinger v. Hamlin},\textsuperscript{150} the Supreme Court first held that defendants are constitutionally entitled to counsel before being sentenced to any term of imprisonment, including for petty misdemeanors. In \textit{Scott v. Illinois},\textsuperscript{151} the Court made clear that the right attached only in cases in which "authorized imprisonment" is imposed. At the time of adoption of the guidelines, it was widely believed, in accordance with these cases and the Supreme Court's holding in 1980 in \textit{Baldasar v. Illinois},\textsuperscript{152} that it was unconstitutional to consider uncounseled misdemeanor convictions in sentencing for a subsequent offense. After adoption of the guidelines, the lower federal courts demonstrated confusion as to whether \textit{Baldasar} prohibited consideration of uncounseled tribal misdemeanor sentences even in the context of upward departures.\textsuperscript{153}

\textsuperscript{147} Navajo Nation Pro Bono Rules of 1996, Rule III.A.1 (authorizing the Navajo Nation courts to appoint Navajo Nation Bar Association members as counsel for indigent defendants in criminal proceedings).

\textsuperscript{148} One final means of indigent defense worth noting is law school clinical work. Several law schools have been involved in the past with providing indigent defense in tribal court. Currently the University of Washington School of Law provides indigent defense on the Tulalip Indian Reservation through the University's Tribal Court Criminal Defense Clinic. See http://www.law.washington.edu/clinics/tribal.html (last visited Feb. 24, 2004).


\textsuperscript{150} 407 U.S. 25, 37 (1972).

\textsuperscript{151} 440 U.S. 367, 382 (1979).

\textsuperscript{152} See Baldasar v. Illinois, 446 U.S. 222 (1980).

\textsuperscript{153} \textit{Compare} United States v. Norquay, 987 F.2d 475, 482 (8th Cir. 1993) (holding that \textit{Baldasar} prohibits using tribal convictions obtained in the absence of counsel as a basis for enhancing a sentence) and United States v. Brady, 928 F.2d 844, 854 n.17 (9th Cir. 1991).
In 1994, in *Nichols v. United States*, the Supreme Court overruled *Baldasar*, and held that an uncounseled misdemeanor conviction may be considered in computing criminal history for sentencing purposes, but only if the conviction resulted in no sentence of imprisonment for which counsel would have been required under the Constitution. It is not entirely clear how this principle applies to the use of uncounseled tribal court convictions resulting in imprisonment because the Court’s precise rationale for all of these cases is somewhat muddled. The early cases suggest that it is simply unfair to imprison a person based on a conviction in which the defendant was without counsel. In his concurrence in *Baldasar*, Justice Marshall indicated that an uncounseled conviction is “not sufficiently reliable” to support imprisonment for a subsequent offense.

In a more recent case, the Court showcased the confusion about the reason for the rule on uncounseled convictions. In *Alabama v. Shelton*, the Court indicated that the “key Sixth Amendment inquiry” is “whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable,” but it also noted that the “critical point” in *Nichols* was that the right to counsel was absolute in felony cases. In other words, as a constitutional matter the Supreme Court generally prohibits consideration of a prior sentence when the prior sentence was uncounseled and resulted in a sentence of imprisonment. It is unclear whether the Court reaches this result for the formalistic reason that the sentence thereby is simply “invalid” or for the substantive reason that the conviction, being uncounseled, is unreliable.

Though the matter may be subject to some debate, it is probably fair to conclude that the Court has adopted the former, rather than the latter, construction. *Nichols* should probably be read for the proposition that a

(holding the same), with *United States v. Claymore*, 978 F.2d 421, 424 (8th Cir. 1992) (using the defendant’s ten prior tribal court convictions as a basis for increasing his criminal history category by one level).

155. See *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that a defendant has no constitutional right to counsel where no sentence of imprisonment was imposed).
156. The sentencing guidelines offer little guidance or interpretation of the Supreme Court cases, merely noting in the background section to the definition of “prior sentence” that “[p]rior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.” U.S.S.G. § 4A1.2, cmt. background (2001).
157. See *id.; see also Argersinger v. Hamlin*, 407 U.S. 25 (1972). Both cases are pre-guidelines cases.
158. 446 U.S. at 227–28.
160. *Id.* at 667.
161. *Id.* at 664.
sentence resulting in imprisonment may be counted under the guidelines if it was rendered in a lawful and valid manner.\textsuperscript{162} Under this theory, even uncounseled tribal court convictions resulting in imprisonment might lawfully be counted in federal sentencing.\textsuperscript{163} The Shelton and Nichols cases, taken together, would seem to indicate that the Sixth Amendment right to counsel is satisfied as long as the defendant is represented by counsel for the offense for which he is then being sentenced and that the prior conviction may lawfully be considered as long as it was valid when issued.

The fact that the Commission has legal authority to consider tribal sentences that were reached without indigent counsel does not necessarily mean that doing so is a good policy decision. But that question is a different one than the question as to whether to count tribal court sentences in general. The former question will be discussed more below.

Despite the difference in requirements for indigent counsel among tribal and state courts, a difference that is minimized by the fact that many tribal courts offer indigent counsel even though it is not required, tribal courts and state courts share many more similarities than differences. Such is the effect of the imposition of most of the key provisions of the Bill of Rights. In light of the practical similarities between the proceedings in tribal courts and misdemeanor cases in state courts, and the substantial similarity in the federal minimum due process requirements that apply to each forum, it is difficult to defend the notion that tribal courts ought to be treated more like foreign courts than like state courts. Because of the Indian Civil Rights Act and the Fourteenth Amendment, tribal courts simply have much more in common with the courts of Arizona or Montana than with foreign courts, even those of Australia, Canada and the United Kingdom, which share common legal roots with American courts.

\textsuperscript{162} Accord Shelton, 535 U.S. at 664 ("[T]he critical point [in Nichols] was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned."). Note also that, as a class, courts have allowed the counting of cases in which uncounseled misdemeanors resulted in sentences of imprisonment where a defendant exercised his right to waive counsel, as long as the waiver was knowing and intelligent. U.S. v. Logan, 250 F.3d 350, 377 (6th Cir. 2001).

\textsuperscript{163} On the other hand, one might read Nichols to say that it is inconsistent with due process in federal courts to consider sentences of imprisonment in which the defendant was not represented by counsel, even if the sentence was lawful when rendered. Justice Marshall, for example, might have said that such sentences are not sufficiently reliable to serve as part of the basis for a subsequent federal sentence. Under this reading, tribal sentences for uncounseled convictions likely would not be counted. Although tribal courts differ with state and federal courts in this limited but important regard, the difference may not be relevant for purposes of federal sentencing. Under this approach, tribal sentences resulting in imprisonment could generally be counted, but not if they were uncounseled.
A. Placing the Commission’s Approach to Tribal Courts in a Broader Context

In the past thirty years, the federal government has proceeded along a unitary path with respect to Indian tribal governments and their courts. Every President since Richard Nixon has embraced the notion that Indian tribal governments should have a far greater role in federal policies affecting them. The Executive branch and independent agencies have followed the President’s lead. Congress has enacted numerous laws implementing this philosophy, many of which single out tribal courts for particular attention. The Supreme Court has independently taken a complementary approach toward tribal courts and the lower federal courts have followed suit.

In summary, most of the key institutions of the federal government have agreed that federal policymakers should shift decision making to tribal governments where possible, should give respect to tribal institutions, and at a minimum, should consult with and seek the guidance of tribal governments on matters that peculiarly affect Indian people. Over the past thirty years, this federal policy, which was described originally as a policy of “Indian self-determination” and more recently as “Indian self-governance,” has achieved unanimous approval across the three principal branches and even the fourth branch of government. Curiously, the United States Sentencing Commission has taken a contrary approach.

164. See supra note 11 and accompanying text.
165. See supra notes 12–13.
166. See supra notes 19–25.
167. See supra note 19–24 and accompanying text.
168. The phrase, used to describe the independent agencies, apparently originates with a Roosevelt appointee. See George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 NW. U. L. REV. 1557, 1585 & n.116 (1996) (quoting FRANKLIN D. ROOSEVELT, THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT iii–v (1937)).
169. The Commission can claim membership in the Third (or Judicial) Branch, but it probably is more correct to consider it a member of the so-called Fourth Branch. In the Sentencing Reform Act, the statute that created the Commission, Congress described it as “an independent commission in the judicial branch of the United States.” 28 U.S.C. § 991(a) (2000). While the Commission may be located for administrative purposes within the Third Branch, the members of the Commission are “independent” in that they serve fixed terms of six
In one respect, the chief constituency of the Commission is the federal judiciary. It is, after all, federal judges who apply the guidelines. One way to evaluate the Commission’s policy is to look at the actions of the federal courts. If the activity of federal judges in using tribal court records as a basis for upward departure is any guide, many of the judges who apply the guidelines seem not to share the Commission’s lack of respect for tribal court sentences.

Despite the general rarity of upward departures, federal judges have often used the existence of a lengthy tribal criminal history to justify an upward departure in Indian country cases. In each of the cases in which they have done so, judges have not felt the need to evaluate the processes of years and are removable by the President only for cause. *Id.*; 28 U.S.C. § 992(a)–(b) (2000). Many would argue that this makes the Commission an independent commission or, in other words, a member of the “Fourth Branch” of government. For the analysis herein, it matters not whether the Commission is a component of the Judicial Branch, the Executive Branch, or is an independent agency. The highest officials in the Judicial Branch and in the Executive Branch have adopted federal norms in favor of tribal self-governance. *See supra* notes, 19–21, 164 and accompanying text. Most “independent” agencies and commissions that have considered the matter have also adopted similar policies. *See supra* note 13 and accompanying text.

170. *See supra* note 63 and accompanying text.

171. *See United States v. Lonjose*, 42 Fed. Appx. 177, 178 (10th Cir. 2002) (affirming one-category increase in criminal history based on five prior uncounseled misdemeanor tribal court convictions and noting that the defendant’s tribal court record included at least thirteen prior uncounseled convictions); *United States v. Preacher*, 2001 WL 1439861 (9th Cir. 2001) (affirming one-category increase in criminal history based on ten to fourteen tribal court convictions); *Teeple v. United States*, 15 Fed. Appx. 323, 324 (6th Cir. 2001) (affirming upward departure based on tribal court convictions on district court’s assertion that of the “hundreds and hundreds of people [the court] had sentenced over the last 27 years, [defendant had] one of the most extensive criminal records . . . for anyone 22 years of age”); *United States v. Antelope*, 2000 WL 967973 **1 (8th Cir. 2000) (affirming upward departure in criminal history on the basis of twenty one tribal court convictions); *United States v. Waugh*, 207 F.3d 1098, 1102 (8th Cir. 2000) (affirming a two category upward departure on the basis of unspecified number of tribal court convictions involving frequent “alcohol inspired assultive behavior”); *United States v. G.L.*, 143 F.3d 1249, 1255 (9th Cir. 1998) (affirming upward departure apparently based on convictions that included a tribal juvenile adjudication of assault); *United States v. Juvenile PWM*, 121 F.3d 382, 384 (8th Cir. 1997) (reversing sentencing on other grounds but noting that the district court apparently properly relied on nine tribal court dispositions as measures for upward departure); *United States v. Drapeau*, 110 F.3d 618, 620 (8th Cir. 1997) (affirming one category upward departure in criminal history on the basis of defendant’s four tribal convictions for assault and battery and one for violence to a police officer); *United States v. Early*, 1996 WL 337206 (9th Cir. 1996) (affirming upward departure from criminal history category II to category VI based on conduct underlying eleven tribal court assault charges); *United States v. Burke*, 80 F.3d 314, 316 (8th Cir. 1996) (reversing sentence on other grounds, but noting that the defendant had fifteen prior countable convictions and more than forty prior tribal court convictions); *United States v. Claymore*, 978 F.2d 421, 428 (8th Cir. 1992) (departing upward to criminal history category II based on defendant’s ten prior tribal court convictions).
the particular tribal courts that produced the sentences.\textsuperscript{172} Many of these decisions come from federal courts in Circuits where federal judges have a keen awareness of the tribal courts and, presumably, have a sense of the quality of tribal courts and their judges and processes.\textsuperscript{173}

Likewise, federal district court judges have not hesitated to use tribal convictions as predicates for the transfer of juvenile offenders to adult status. The federal juvenile delinquency statute mandates the transfer of a juvenile accused of a violent felony if he has been previously found to have committed an offense that would have been considered a violent felony offense if the defendant had been an adult at the time it occurred.\textsuperscript{174} The same statute provides for discretionary transfer to adult status if such transfer is in the interest of justice based on a number of factors, including the juvenile’s prior delinquency record.\textsuperscript{175} Federal courts have routinely considered tribal juvenile records of violent offenses a sufficient basis for mandatory transfer.\textsuperscript{176} However, because the facts of such cases usually justify discretionary transfer, appeals courts have not had to reach the question of whether the tribal convictions are predicates for mandatory transfers. In any event, federal judges have found the records created by tribal courts to be trustworthy, even in the context of serious ramifications for youthful defendants.

Consider a more typical case involving an upward departure based on a tribal court record. In \textit{United States v. Drapeau},\textsuperscript{177} the defendant was convicted of “assault resulting in serious bodily injury to a one-year-old child.”\textsuperscript{178} The prosecution arose when a babysitter notified child protective services after noticing numerous bruises and injuries on the child’s body. After a jury trial, the defendant, who was the boyfriend of the child’s mother, was convicted. At sentencing the district court departed upward from criminal history category II to criminal history category III on the basis of four tribal court convictions for assault and battery and one tribal court conviction for assault of a tribal police officer. As a result of the upward departure, Drapeau faced a sentencing range of fifty-seven to

\begin{thebibliography}{99}
\bibitem{172} See cases cited \textit{supra} note 171.
\bibitem{173} See \textit{supra} note 22.
\bibitem{175} \textit{Id}.
\bibitem{176} See \textit{United States v. Juvenile Male MC}, 322 F.3d 482, 485 & n.4 (8th Cir. 2002) (affirming a juvenile’s transfer to adult status in a homicide case and noting but not evaluating the district court’s determination holding that a tribal conviction for aggravated assault was a predicate offense for a mandatory transfer under the federal statutory scheme); \textit{United States v. Juvenile JG}, 139 F.3d 584, 586 & n.2 (8th Cir. 1998).
\bibitem{177} 110 F.3d 618 (8th Cir. 1997).
\bibitem{178} \textit{Id.} at 619.
\end{thebibliography}
seventy-one months, rather than fifty-one to sixty-three months. The district court judge sentenced the defendant to sixty-three months, a sentence that the judge could have reached without departing upward. The Eighth Circuit, with Judge Murphy authoring the opinion, affirmed the conviction, ruling that tribal court convictions are entirely appropriate as a basis for upward departure.\footnote{179} 

Even state courts and legislatures, though they have long competed with tribal courts for jurisdiction,\footnote{180} have begun to embrace the notion that tribal court dispositions are worthy of reliance in state criminal proceedings and for other purposes.\footnote{181} A number of states, including Michigan,\footnote{182} Montana,\footnote{183} New Mexico,\footnote{184} Wisconsin,\footnote{185} and Wyoming,\footnote{186} allow prior tribal court convictions to serve as predicate convictions to enhance charges for subsequent state prosecutions for driving under the influence of alcohol.\footnote{187} Arkansas,\footnote{188} Georgia,\footnote{189} Idaho,\footnote{190} Iowa,\footnote{191} Maine,\footnote{192} Maryland,\footnote{193} Massachusetts,\footnote{194} Michigan\footnote{195} and Ohio\footnote{196} honor tribal court dispositions in the context of state criminal proceedings.

\footnote{179}{Judge Murphy is a former Chair of the United States Sentencing Commission.}
\footnote{180}{Id. at 619–20.}
\footnote{181}{Williams v. Lee, 358 U.S. 217, 220, 222 (1959).}
\footnote{182}{The increasing trust among state and tribal courts is attributable to numerous cooperative endeavors. For several years, tribal judges have been trained side-by-side with state court judges at the National Judicial College in Reno, Nevada. \textit{See supra} note 123.}
\footnote{184}{State v. Spotted Eagle, 71 P.3d 1239, 1244–45 (Mont. 2003).}
\footnote{185}{N.M. \textsc{Stat. Ann.} § 66-8-102(M) (Michie 2000).}
\footnote{186}{State v. Schuman, 520 N.W.2d 107, 108–09 (Wis. Ct. App. 1994) (applying a state statute allowing use of tribal court convictions), \textit{rev. denied}, 524 N.W.2d 142 (Wis. 1994).}
\footnote{187}{WYO. \textsc{Stat. Ann.} § 31-5-233 (Michie 2003).}
\footnote{188}{It should be noted, however, that states are not necessarily consistent in their faith in tribal court convictions and sentences. For example, though Michigan allows them to serve as predicate sentences for driving under the influence cases, Michigan does not necessarily use past tribal court sentences in counting a defendant’s criminal history for purposes of sentencing guidelines for the broad panoply of criminal offenses. \textit{See Hon. Michael F. Cavanagh, \textit{Michigan’s Story: State and Tribal Courts Try to Do the Right Thing}, 76 U. \textsc{Det. Mercy L. Rev.} 709 (1999).} In this article by a Michigan Supreme Court justice, the jurist noted, with apparent chagrin, that the 1998 Michigan legislature enacted sentencing guidelines that counted state and federal sentences for purposes of scoring criminal history but omitted sentences from tribal courts. \textit{Id.} at 715.}
\footnote{189}{ARK. \textsc{Code Ann.} § 12-12-903(12)(A)(iii) (Michie 2002).}
\footnote{190}{GA. \textsc{Code Ann.} § 42-1-12(A)(7) (Harrison 2002).}
\footnote{191}{IDAHO \textsc{Code} § 18-8303(18) (Michie 2002).}
\footnote{192}{IOWA \textsc{Code Ann.} § 692A.2 (West 2002).}
\footnote{193}{James A. Billings & Crystal L. Bulges, Comment, \textit{Maine’s Sex Offender Registration and Notification Act: Wise or Wicked?}, 52 ME. \textsc{L. Rev.} 175, 198, 203 (2000).}
\footnote{194}{MD. \textsc{Code Ann.}, \textsc{Criminal Procedure} § 11-701(b)(4) (2002).}
\footnote{195}{MASS. \textsc{Gen. Laws Ann.} ch. 6, §178C (West 2002).}
\footnote{196}{MICH. \textsc{Comp. Laws Ann.} § 28.722(a)(i) (West 2002).}
\footnote{197}{OHIO \textsc{Rev. Code Ann.} § 2950.01(D)(1)(f) (West 2002).}
sentences for purposes of requiring registration in their sex offender registries. And other states rely on tribal convictions in a variety of other contexts, such as treating them as predicate offenses for enhancement of sentences in domestic violence prosecutions, serving as a predicate for suspension or revocation of a driver's license, finding probation violations and even computing criminal history for sentencing purposes. In sum, in a number of matters of great importance, state legislatures and courts are willing to show trust toward tribal courts.

Overall, the Commission's position toward tribal courts seems contrary to federal Indian policy as applied by the Supreme Court, Congress, the Executive branch and many of the independent federal agencies. Even putting aside federal Indian policy, in light of the fact that numerous state legislatures and courts are beginning to credit tribal courts criminal convictions for various important purposes, the Commission's position on tribal courts seems anachronistic even from a criminal justice perspective. Simply being out of step with the vast majority of other policy-making governmental entities within the United States, standing alone, is perhaps not necessarily a reason to change the policy. To determine whether the guidelines should be amended, one should consider the justifications of the existing policy, and the ramifications of the existing policy on the communities that it affects most. The next two sections address these issues.

B. Justifications for Current Federal Sentencing Policy and Tribal Courts

As noted above, it is not clear why the Commission adopted the position it did as to tribal courts. It is apparent, however, that the current sentencing scheme is difficult to square with federal sentencing policy. The federal sentencing guidelines ostensibly were created to reduce disparity in federal sentencing and to insure that each defendant is sentenced with due

---

198. ARIZ. REV. STAT. ANN. § 13-3601.01 (West 2002).
201. Kansas, for example, does so in its burglary statute. KAN. STAT. ANN. § 21-4711(e) (2001).
202. See discussion supra notes 64–71 and accompanying text.
203. Sentencing guidelines came about largely due to the work of a federal judge, Marvin Frankel, who lambasted the discretionary system for producing unfair sentences and argued for a determinate system of sentencing. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).
regard to his culpability, as measured by the current offense and previous offenses.\textsuperscript{204} The current policy simply fails to meet the goals of accuracy and fairness that are among the stated bases for having sentencing guidelines. Absent an upward departure by the court, which is a relatively unusual action,\textsuperscript{205} a defendant with a lengthy tribal criminal history who lacks any state or federal convictions will be routinely treated as a first-time offender by the federal courts. This means that, on average, an Indian defendant receives a shorter sentence than his criminal history score might otherwise justify. This creates a disparity between defendants who are otherwise similarly situated.

Most federally prosecuted Indian offenses are serious violent offenses, such as murder, rape, or aggravated assault, that likely carry lengthy sentences.\textsuperscript{206} Because federal sentences are already widely perceived to be unduly lengthy,\textsuperscript{207} and because it is unlikely that violent Indian offenders are walking away from federal courts with anything but fairly substantial federal sentences, one probably need not be concerned that sentences are too short under the current policy.\textsuperscript{208}

Nevertheless, the accuracy of the federal sentences under the current scheme is highly suspect. Under current Commission policy, in the average case, a defendant with a lengthy tribal criminal history will be sentenced in the same manner as a first time offender, unless the court takes the extraordinary step of an upward departure.\textsuperscript{209} For example, if an eighteen-year-old neophyte participates in an offense with a thirty-five-year-old


\textsuperscript{205} \textit{See supra} note 63.


\textsuperscript{207} \textit{Supra} note 7 and accompanying text.

\textsuperscript{208} On the other hand, if sentences for criminal defendants are too lengthy, policymakers should address that problem directly and not gratuitously insult tribal courts by underestimating criminal history by ignoring tribal convictions.

\textsuperscript{209} As suggested in note 63, upward departures are exceedingly rare as a statistical matter. A common justification for upward departures in Indian country cases, however, is the fact that the defendant’s criminal history score fails to reflect the seriousness of that defendant’s criminal history. \textit{See supra} note 171 and accompanying text.
hardened offender with a lengthy adjudicated history of tribal offenses, and if they are prosecuted federally for the same offense, the eighteen-year-old likely will receive the same sentence as the repeat offender. This outcome hardly seems fair from the standpoint of the younger offender and it hardly seems consistent with Marvin Frankel’s vision of a sentencing regime that treats similarly-situated individuals similarly.

This outcome is also difficult to square with the Sentencing Commission’s own sentencing principles. In drafting the guidelines, the Commission declined to adopt a single overarching theory of the purpose of sentencing.\(^{210}\) Rather it drew upon theories of “just dessert” as well as utilitarian theories of deterrence, incapacitation and rehabilitation.\(^{211}\) According to the Commission’s “just dessert” rationale for using criminal history as a key basis of sentencing, “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”\(^{212}\) Such a justification is impossible to rationalize with failure to use tribal court sentences. Similarly, the Commission has justified the use of criminal history by explaining that one of the best predictors of future criminal conduct is past criminal conduct.\(^{213}\) It has argued, therefore, that use of criminal history is an important means of crime control through incapacitation of likely future offenders.\(^{214}\) If the “just dessert” theory, or any of the utilitarian theories, are accurate, the high crime rate involving Indians would seem to justify the use of these theories in the context of tribal criminal records. Thus, in myriad ways, the Commission’s policy on tribal courts is impossible to square with its own rhetoric concerning the goals of sentencing.

212. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL, Criminal History, pt. A, introductory cmt. The Commission also noted other purposes that are difficult to square with the failure to count tribal court sentences. For example, “[G]eneral deterrence of criminal conduct indicates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.” Id.
213. SUPPLEMENTARY REPORT, supra note 210, at 42.
214. Id.
C. Ramifications of the Commission’s Tribal Courts Policy on Tribal Governmental Institutions and Tribal Communities

The Commission’s existing policy on tribal courts seems to have two serious negative ramifications. One is related to the tribal courts and tribal institutions; the other is related to the tribal community.

Under the current structure of Indian country criminal justice, which makes tribal courts and federal courts partners in the provision of criminal justice within Indian communities, the Commission policy suggests that the federal courts and the tribal courts are not equal partners. The current guidelines approach means, in essence, that the courts of the United States should not routinely grant comity to tribal courts and indeed, should ignore the lawful work of the tribal courts. In addition to the demoralizing message it sends to the tribal courts, it undermines the authority of the tribal courts within tribal communities. The Commission’s policy contains a message that can be characterized at best as paternalistic and demeaning: “tribal courts may be lawful but they are not relevant in federal Indian country criminal justice.” At worst, the implication of the guidelines is that tribal courts lack legitimacy.

Such a message from the Commission is at odds with the repeated conclusions of Congress that tribal courts are legitimate and important institutions. In these times of pervasive federal initiatives in favor of tribal self-government, the problem identified in the federal sentencing guidelines extends in some measure beyond sentencing to the whole structure of Indian country criminal justice.215

The current federal criminal justice regime paternalistically informs tribes that felony offenses within Indian reservations are not matters for tribal governments. Though this approach seems difficult to defend in this post-modern era of Indian law, it can perhaps be supported best on the theory that tribal governments lack the resources to provide adequately for criminal justice and, thus, need the assistance of the federal government.

Ironically, the problem presented by the guidelines is most acute when an offender has already been a burden at the tribal level and the tribal courts have attempted to address the problem. In exercising jurisdiction in cases arising in Indian country, the federal court stands in the place of a tribal court that would theoretically otherwise possess felony jurisdiction to address the serious justice and public safety issues raised by criminal prosecutions.

On the theory that the federal criminal justice system in Indian country is justified on the basis of superior federal resources, the involvement of

---

215. This is an issue that the author will take up in a future article.
federal authorities is perhaps most defensible when a federal court is sentencing a defendant who is a repeat offender and has been recognized as such by a tribal court. In those circumstances, the federal court, in effect, is serving a supporting role to the tribal community that, by itself, has been unsuccessful in handling the troublesome offender. Thus, it is particularly ironic that the federal court would ignore the work of the tribal court as to such defendants. Indeed, a defendant with a lengthy tribal criminal history is, by definition, a person who has been a burden to the tribal community, tribal public safety officials and even the tribal courts. It is exactly such Indian defendants whom the United States has the greatest moral authority to prosecute.

The Commission’s policy of ignoring the hard work of the tribal courts is surely most painful in those cases in which tribal courts have been most involved. If the justification for federal involvement is the superior federal resources, then the federal courts should credit the work that tribal courts have done with regard to the same defendant. As noted, individual federal judges have done so on numerous occasions. Because of the lack of clarity, though, judges have sometimes engaged in contortions to credit tribal court sentences.

Aside from this serious institutional problem with the guidelines, a practical one has also arisen. During the 1990s, while the national crime rate fell dramatically across the country, the violent crime rate involving Indians continually increased. A Native American is two-and-a-half times more likely than a member of the general population to be a victim of a violent crime and twice as likely to be victimized than an African American. “American Indian women are victims of violent crime nearly 50% more than black males, who are commonly considered the most victimized class of U.S. citizens.” The rural crime rate for Indians is

---

216. See supra note 171 and accompanying text.
217. See United States v. Thin Elk, 321 F.3d 704 (8th Cir. 2003) (ostensibly departing upward on the basis of the victim’s “extreme psychological injury,” but noting the defendant’s extensive tribal criminal history and increasing the sentence using the horizontal criminal history axis rather than the vertical axis of seriousness of offense); see also United States v. Fast Horse, 57 Fed. Appx. 739 (9th Cir. 2003) (affirming district court’s reliance on past conduct as reflected in tribal court convictions for an upward departure, though explicitly declining to base upward departure on tribal court convictions).
219. GREENFIELD & SMITH, supra note 42, at v; see also Hearing, supra note 42, at 10.
twice as high as for Whites.\textsuperscript{221} Crime on Indian reservations is becoming a serious public safety problem as evidenced by the surprising level of support recently expressed on the Navajo Reservation for the federal death penalty following a string of serious homicide cases\textsuperscript{222}.

If the Sentencing Commission’s determination to use criminal history in sentencing is believed to further goals of crime control through greater incapacitation of recidivists, then there is no place that needs such control more than Indian reservations.

IV. HARMONIZING FEDERAL SENTENCING WITH CURRENT NATIONAL POLICIES FAVORING TRIBAL SELF-GOVERNANCE: CREATING RESPECT FOR TRIBAL COURTS IN THE FEDERAL SENTENCING GUIDELINES

While this article is critical of current Commission policy, the Commission itself has expressed the notion that the guidelines constitute a living document.\textsuperscript{223} It has recognized that the guidelines may very well need to be revised periodically.\textsuperscript{224} It has also recently taken laudable steps to consider the impact of the guidelines on Native Americans.\textsuperscript{225} In light of the fact that the guidelines can and should evolve, what steps might be

\textsuperscript{221} Most of the data combine numbers from urban and rural settings, which is not as useful for analyzing effects on Indian reservations, which tend not to be urban. Nevertheless, the figures for rural areas indicate that there is a serious public safety problem even in Indian reservations with federal jurisdiction. The figures have come to light because several Indian reservations under federal jurisdiction have suffered multiple homicides in recent years. See Zack, supra note 218 (noting that five homicides occurred in a ten-month period among the 5000 residents of the Red Lake Chippewa Reservation in Northern Minnesota); see also infra note 222.


\textsuperscript{223} Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3925 (1987) (noting that the Commission sees its task as ongoing and it will continually gather and analyze data).

\textsuperscript{224} See U.S. SENTENCING GUIDELINES MANUAL § 1A5, policy statement (providing that “[t]he Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions”).

taken to hasten their evolution in a manner consistent with modern federal Indian policy?

One obvious solution is simply to eliminate the section of the guidelines that indicates, “[s]entences resulting from tribal court sentences are not counted”\(^\text{226}\) and simply to change the default rule to one of routine consideration of tribal court sentences like state sentences. By making the criminal history for any individual defendant more accurate, such a solution would further the stated purposes of federal sentencing that, as highlighted above,\(^\text{227}\) are not being met. It would also address the current policy’s apparent lack of respect for tribal courts, harmonizing sentencing policy with congressional initiatives and Supreme Court decisions evincing respect for tribal courts.

However, if the purpose of reform is to adopt a policy more consistent with federal policies in favor of tribal self-governance, the proper approach might be less definitive. While the guidelines should certainly be modified to create a default rule that tribal sentences will be considered with the same level of respect that the Commission accords to state courts, it might be considered inconsistent with current federal policy to adopt a unilateral directive from the federal government to the tribal governments telling them how their sentences will be used in federal courts. The most fundamental principle of tribal self-government is that it is each tribal government’s right to choose the public policies that best serve its own governmental purposes.

Under this principle, and consistent with the current notions of the United States’ government-to-government relationship with Indian tribes, the better approach to the treatment of tribal court sentences is to give individual tribal governments the ultimate power to determine whether their tribal court sentences should be used in subsequent federal sentencing proceedings. In other words, the Commission should modify the guidelines to create a default rule of respect for tribal court sentences, but tribes should have the right to “opt out” of the scheme by indicating that their sentences should not be considered in federal sentencing. This opportunity to opt out would serve federal Indian policy goals of making the tribe the ultimate decision-maker; it would ensure that tribal courts receive proper respect in the absence of a tribal decision to exclude them from consideration.\(^\text{228}\)

\(^{226}\) See U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(i).

\(^{227}\) See supra notes 210–214 and accompanying text.

\(^{228}\) Of course, under any sentencing regime that requires tribal court documents, tribal governments and their courts may also retain an informal measure of control related to the level of cooperation with federal probation officers who prepare sentencing reports. Federal courts may rely on sentences from other jurisdictions only if they are supported by reliable information. Cf. U.S.S.G. § 4A1.3 (2003). As the custodians of these documents, tribes may well have the ability to control their release.
Admittedly, this “tribal option” approach is not entirely consistent with the sentencing policy argument that failure to count tribal criminal history produces inaccuracy in sentencing. Indeed, it is difficult to square with either a utilitarian (or deterrence or incapacitation) rationale or the “just desert” rationale for counting tribal sentences in criminal history. Those arguments would presumably suggest a hard and fast rule rather than a mere default rule.

However, sacrificing the underlying sentencing principles to some degree is necessary to account for tribal sovereignty and tribal self-governance. Reasonable accommodations for tribal sovereignty and tribal self-governance should trump sentencing policy, particularly when the case is federal, only because it arises in Indian country and Indian defendants are being sentenced. The tribal governmental interest in such cases is clear and it is powerful. Some tribal justice systems may not share the same goals as the federal sentencing regime and may well wish to opt out of participation in the federal sentencing system. Consistent with its stated commitment to self-determination, the United States should accord respect to such decisions of tribal governments.

The approach outlined here elevates the general principles of tribal self-governance and self-determination above the narrow and particular needs of sentencing policy, but moves sentencing policy in a direction more consistent with the federal sentencing regime’s rational search for objective information about criminal history. Thus, such an approach will improve the accuracy of sentences when tribal convictions are counted.

Such a “tribal option” approach has been used by Congress, in similar form, in other instances in the federal criminal justice system. Examples include provisions regarding the imposition of the death penalty for offenses on Indian lands, the federal “three strikes law” for crimes arising

---

229. This approach also might help to avoid perverse consequences. Tribes that view current federal sentences as draconian might otherwise be tempted to nullify valid tribal charges or to use procedures that are constitutionally infirm to prevent tribal sentences from being used by federal authorities in later federal proceedings.

230. A debate is raging as to the wisdom of further reducing the sentencing discretion of federal judges, an area in which Congress has been active lately. See Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). While this Article does not take the position that judicial discretion should be narrowed in general, it does take the position that whatever level of deference applies to state court sentences should apply in like manner to tribal court sentences, unless tribal governments determine otherwise. There is simply no rational justification for the Commission to treat tribal courts and state courts differently.

in Indian country, and the provision lowering the age at which a juvenile can be treated as an adult from age fifteen to age thirteen.

One potential objection to the “tribal option” approach is that, on its face, it seems to give tribal governments greater control over federal consideration of tribal sentences than states have over federal consideration of state sentences—the sentencing guidelines do not allow states to opt not to allow the federal courts to consider state misdemeanor sentences for subsequent federal sentencing.

For several reasons, however, this objection is not well-founded. First, tribal governments have a fundamentally different relationship with the United States than state governments have. While substantial constitutional limits on federal criminal prosecutorial power prevent the federal government from displacing state governments for purposes of routine felony prosecutions, Congress has unilaterally and explicitly authorized the exercise of power on Indian reservations that it could never exercise outside federal reservations. Thus, the federal government, with the blessing of the Supreme Court, has unilaterally displaced tribal governments that might otherwise have wished to exercise such power. And it has unilaterally limited the criminal justice authority of tribal governments to misdemeanors. Thus, in some sense, the United States is standing in the tribe’s shoes when it prosecutes on the reservation. Given

232. Violent Crime Control and Law Enforcement Act of 1994, Title VII, § 70001, (codified at 18 U.S.C. § 3559(c)(6)) (providing for mandatory life imprisonment for persons convicted of their third serious violent felony or drug offense, but providing each tribe with criminal jurisdiction the option as to whether the provision will apply to Indian country offenses occurring within the tribe’s jurisdiction).

233. See id. at Title XIV, § 140001, now codified at 18 U.S.C. § 5032. Federal law generally provides that a juvenile at least fifteen years old may be treated as an adult under the federal criminal laws under certain circumstances. This section of the 1994 amendments provides that a juvenile thirteen years old may be treated as an adult if he commits particular crimes of violence or possesses a firearm during the commission of an offense. The tribal option provision allows the relevant tribal government to determine whether the juveniles can be transferred at age thirteen or whether the age fifteen serves as the absolute floor for federal juvenile transfers for cases arising in Indian country.


the unilateral nature of this federal action, tribes ought to have some power to moderate how much they wish to participate in a system that was, after all, forced upon them.

States, in contrast to tribes, are directly represented in Congress. To a far greater degree, states have voluntarily consented to the guidelines regime, and can make their voice heard if they wish to change the manner in which state sentences are used in criminal history calculations. While it would be possible to limit the recommendations herein to sentencing in federal cases arising in Indian country, such limitations are by no means necessary.

Tribal governments, like some of the states, pre-existed the United States.\textsuperscript{237} Yet, whereas the states joined together voluntarily to create the United States and its various instrumentalities, such as, ultimately, the Sentencing Commission, the tribes were not part of that compact. Given that the current official federal policy toward tribes embodies a notion of tribal self-governance, it is entirely appropriate for the Commission to adopt an approach that is respectful of tribal prerogatives, even if the approach is slightly different than the approach it takes toward states. Precedent for such action is well-established; Congress recognized that tribes ought to be treated differently than states in 1994 when it created a tribal option as to the federal death penalty, but offered no such option to the large minority of states that have refused to authorize the death penalty in their state criminal justice systems.\textsuperscript{238}

As for the legitimate concern about the lack of a federal requirement for provision of indigent defense counsel in tribal courts, the Commission might indicate that it will consider only those tribal convictions and sentences resulting in imprisonment in which a defendant had been represented by counsel. Such a determination is not required under federal law.\textsuperscript{239} Nevertheless, given the importance of the institutional role of defense counsel in the American criminal justice system, it would be perfectly justifiable for the Commission to make a normative conclusion that federal judges should not rely upon sentences of imprisonment that were rendered without counsel. While such an approach might have the practical indirect effect of broadening the requirement on tribes to provide indigent counsel, it would do so only for those tribes wishing to have their tribal court sentences counted in federal sentencing, making it a purely tribal decision. Such an approach would address the issue in a manner that is not disrespectful to tribal courts.

\textsuperscript{237} See supra note 72 and accompanying text.
\textsuperscript{238} See supra note 231 and sources therein setting forth debate on such questions.
\textsuperscript{239} See supra notes 150–156 and accompanying text.
Such a caveat would provide a meaningful justification for picking and choosing between tribal sentences without gratuitously offending tribal courts merely because of their status as tribal courts. Indeed, if concern about the lack of indigent counsel in tribal courts is the principal objection to use of tribal court convictions and sentences in federal sentencing, such an approach would effectively and thoroughly address this concern. Moreover, such an approach would be easy to administer. As the Supreme Court has noted, “failure to appoint counsel . . . will generally appear from the judgment roll itself, or from an accompanying minute order.”

For those who continue to be concerned about the quality of justice in tribal courts, counting tribal court sentences would create additional scrutiny of those sentences by attorneys representing defendants in subsequent federal proceedings. It would create a strong incentive for defense counsel to evaluate the tribal court processes. Such scrutiny would likely heighten the care taken by tribal courts, particularly when adjudicating offenses by recidivists.

CONCLUSION

Congress has imposed many of the burdensome strictures of the Bill of Rights on tribal courts just as the American people (and the Supreme Court) have, through the Fourteenth Amendment, imposed the same burdens on the state courts. For tribal courts, which serve tribal communities with cultures and traditions that are different than those of the states and the federal government, the imposition of the Bill of Rights has taken a toll on tribal cultural integrity. Within the narrow and carefully circumscribed areas in which they exercise jurisdiction under federal law, tribal courts now have an obligation to their communities to mete out justice in a manner consistent with their own community traditions and values, but also a manner that is consistent with the federal requirements of due process as defined in the Indian Civil Rights Act.

While Indian tribes may not necessarily be pleased with this intrusion on their traditional and customary practices, they have endured this imposition for thirty-five years. Perhaps for this reason, tribal courts have gained, more and more in recent years, the trust of Congress and the Supreme

---

Court. In shouldering the heavy burdens of providing American-style procedural protections, tribal courts may have had to turn their backs, to some degree, on tribal cultural values, but one might say that they therefore have paid the heavy price of admission to the elite club of American judicial legitimacy.

Though the tribal courts have paid the same heavy price that states have paid (and indeed these costs may have seemed even higher from the standpoint of tribal cultural integrity), the Sentencing Commission has nevertheless barred them from admission. If a federal agency is unwilling to recognize the legitimacy of tribal courts when they behave in accordance with federal legal restrictions and in a fashion much like state and federal courts, perhaps tribal courts should be freed of the heavy imposition on cultural integrity that comes with the Indian Civil Rights Act. Since federal agencies lack the power to free tribal courts from the strictures of the Indian Civil Rights Act, federal agencies should recognize, as most do, what is implicit in the Indian Civil Rights Act: tribal courts that behave in accordance with this law are deserving of respect.

The United States Sentencing Commission stands as perhaps the only important federal governmental agency with official policies that continue to cast doubt on the legitimacy of the tribal courts. The Commission should change its tribal courts policy and recognize that the sentences of tribal courts are entitled to the same respect as state courts sentences in the federal sentencing regime.

In keeping with the analysis herein, the Commission should first abolish Section 4A1.2(i), which prevents tribal court sentences from being used in the routine calculation of criminal histories. This action would create a default rule in respect of tribal court sentences. Second, consistent with federal policies in favor of tribal self-governance, the Commission should give tribes the option of changing the default rule by declining to cooperate in federal sentencing.