

**PREPARED STATEMENT OF KEVIN K. WASHBURN
ASSOCIATE PROFESSOR, UNIVERSITY OF MINNESOTA LAW SCHOOL**

ON

LAW ENFORCEMENT IN INDIAN COUNTRY

BEFORE THE

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

THURSDAY, JUNE 21, 2007

Thank you for inviting me to appear before the Committee again.

It seems disingenuous to describe law enforcement and public safety in Indian Country as an urgent crisis because it has been a serious problem not just for years, but for decades. I know that this Committee understands the importance of this issue and I applaud you for taking up the issue today and providing an important forum for discussion and, hopefully, for action.

Some facts related to Indian country are muddy, but this one is clear: the models of criminal justice that are responsible for poor public safety in Indian country have emasculated tribal governmental systems and made state and the federal officials the primary providers of public safety in Indian country. State, county and federal governments have competing priorities that distract them from the importance of public safety on Indian reservations. Tribal governments are the only governments that are singularly concerned about the quality of life on reservations. Until tribal governments are restored to a central role and made primarily responsible for assuring safety on Indian reservations, we are likely to see continued problems. Redressing the serious public safety problems on Indian reservations will not be fully successful until the entire system is reconfigured to give tribal governments primacy over reservation communities. **Both tribal self-governance and public safety are better served when tribes exercise a central role in providing public safety and criminal justice on Indian reservations.**

June 21, 2007

Restoring the law enforcement powers of tribal government is a difficult political challenge. Not only are state and the federal officials likely to object to transferring power to tribes, but tribal leaders are unlikely to come to you to clamor for more authority. It may not be fruitful politically for a tribal leader to say to Congress, "I would like to have greater power to lock up my own people." Moreover, since public safety is perhaps the most dire social problem on American Indian reservations, tribal leaders may not have adequate resources to address the issue successfully. In such circumstances, a tribal leader may think it irresponsible -- and see no advantage politically -- in buying into almost certain failure. Moreover, it is politically expedient for tribal leaders to have someone else to share the blame. States and the federal government seem to be willing villains. Other than an occasional embarrassing report, federal and state officials have little political accountability for the failure of public safety on Indian reservations. Thus, though public safety can improve only through greater tribal involvement, we should not expect to see tribal leaders clamoring for greater public safety authority.

Though we must put tribal governments out front in addressing public safety, it will not be an easy task. We cannot restore tribes greater authority without also helping them obtain the necessary resources to do the job. Because I recognize significant political obstacles to wide-ranging restoration of tribal authority, I would like to focus now on partial solutions or measures that might help improve tribal safety that are nevertheless short of wholesale restoration of tribal authority on Indian reservations. One of the best resources tribal governments can have is cooperation. It is to this resource I will now turn.

Partial Solutions/Improvements

If I leave you with one concrete idea here today, it should be the notion that cooperation among existing law enforcement agencies across all orders of government is crucial in dealing with violent crime in Indian country. Criminal offenders do not respect jurisdictional boundaries. Thus, any reform proposal ought to attempt to foster cooperation among law enforcement agencies.

To illustrate my point, I ask you to indulge me a brief anecdote. In 1998, when I was serving as an Assistant United States Attorney prosecuting violent crimes in Indian country in New Mexico, I had a chance encounter with Rudolph Giuliani who was then serving his second term as Mayor of New York City. Giuliani had presided over a long and steady period of decline in crime in New York, both as Mayor and, before that, as United States Attorney, and he was basking in that success.

In light of the fact that violent crime in Indian country had been increasing steadily throughout the 1990s at the same time that it had been decreasing throughout most of the rest of the country, I asked Giuliani what strategies we might use in Indian country to achieve the successes that New York had achieved in reducing violent crime.

Giuliani pondered the question for a moment. He noted that as Mayor of New York City, he had full control over law enforcement through all five boroughs, covering several million citizens. Combining computer technology and improved crime reporting, his Comp-Stat system could monitor the development of crime on a nearly instantaneous basis and with such focus that it could detect crime problems on a block-by-block basis. This information

June 21, 2007

allowed New York City to deploy police officers swiftly and efficiently to neighborhoods desperately in need of attention and to move those resources again on the very next shift. He made the New York City Police Department a model of responsiveness and coordination.

When I asked Giuliani to bring that experience to bear on Indian country, he correctly realized that such coordination was nearly impossible across such vast expanses of land in Indian country jurisdictions, where no one law enforcement agency has unilateral authority and where police officers are spread very thin. Under such circumstances, such coordination simply could not be achieved in the way that it could under the Comp-Stat system and with a single chain of command. He basically said, "you have a terrific problem ahead of you, kid," and wished me luck.

Giuliani's astute insight about the importance of coordination in public safety came to mind again a couple of years later in the aftermath of the World Trade Center disaster. On 9/11, when fire and rescue personnel could not communicate with one another in the crucial minutes before the towers fell, many lives were lost. In one tragic event, it became clear that the tremendous coordination that Mayor Giuliani had achieved in law enforcement had utterly eluded him in another key area of public safety. It was an important lesson for him, I am sure, and it is an important lesson for all of us.

Because law enforcement authority in Indian country is spread across wide expanses of land and many orders of government (federal, state, tribal, county, and municipal), we will never be able to achieve the level of coordination that Mayor Giuliani's police department achieved in New York City. Indeed, our federal system is designed to spread out such authority among different orders of government. Given limited resources and crisis conditions, however, we must strive to avoid the lack of coordination that plagued the World Trade Center disaster. We must recognize that no single law enforcement agency can address crime alone. Thus, we must work to facilitate cooperation among them.

* * *

One lesson is that law enforcement can be effective in achieving public safety only if there is adequate cooperation between the key actors. I offer the following observations.

I. Most of the law enforcement successes in Indian country have come from careful and effective cooperation between law enforcement authorities.

Law enforcement works best when neither the offender, nor the law-abiding citizen, can detect any gaps in coverage. When a potential offender scans the landscape and considers whether to break the law, he must see a unified front among law enforcement officials. To put it another way, the thin blue line that protects the ordinary citizen from the criminal element cannot be effective if it is a dotted line.

Most citizens in the United States do not care strongly who responds to public safety crises, they just want to know that when they dial 911, they will get the help that they need. It is the job of government to ensure that kind of confidence. Especially in the many rural districts

that include Indian country, effective law enforcement can be achieved only with close cooperation between governments.

The good news is that cooperation between law enforcement agencies is occurring widely in Indian country. This Committee has heard ample testimony of such cooperation, particularly in the methamphetamine context, including tremendous successes at Wind River in Wyoming and with my own tribe, the Chickasaw Nation, in Oklahoma. As tribal organizations build capacity, they are working more and more with their state and federal counterparts.

In most of the states that have federally-recognized Indian tribes, tribal governments have entered agreements with states and/or counties that facilitate cooperation. Many states and the federal government, of course, also provide mechanisms for state-wide recognition of tribal police as law enforcement officers. In other states, these agreements are struck at the local level. These agreements span a range of law enforcement activities, reflecting mutual aid efforts, cross-deputization or cross-commission agreements, extradition, and other cooperative action arrangements. They also sometimes address thorny issues such as liability and sovereign immunity. And in addition to normal law enforcement activity, the agreements also sometimes cover the sharing of information between agencies, such as prior arrests, traffic records, and other criminal history.

Effective cooperative agreements have the ability to simplify complex questions, freeing law enforcement officers to focus on the most important aspects of their jobs. The Committee is well aware of the jurisdictional complexities of Indian country, and I will not belabor them here, but police officers tend to be well-trained in the police sciences, not in ethnology or land surveying. Cooperative agreements tend to allow police officers to focus on public safety and not on highly artificial and arcane legal issues, such as jurisdictional boundary lines.

Still, though cooperation is occurring widely, it is not universal by any means. In many jurisdictions, cooperation is not formalized.

II. Even informal or de facto cooperation between law enforcement agencies can help produce law-abiding behavior and thus serve public safety.

Even in the absence of formal agreements, the appearance of cooperation and coordination between police officers can help to create an effective public safety net. One of my colleagues, a law professor who is a non-Indian, recently illustrated this point well. While working on the Navajo Reservation, she was stopped for driving in excess of the speed limit on a lonely reservation highway. When she mentioned that she was non-Indian and that the tribe might not have jurisdiction, the tribal officer apparently offered to let her wait for a state trooper and have her case adjudicated in the state system, with the attendant delay and other ramifications that such action would entail.¹ Under such circumstances, the mere threat of cooperation between law enforcement officials led the professor to see that objecting to tribal authority would waste her time, would likely not be fruitful, and might

¹ Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047, 1048-49 & n. 7 (2005).

subject her to more severe traffic penalties. She accepted the citation and opted for the tribal process.

One could easily imagine the same scenario involving a state trooper and American Indian violators. Thus, even informal cooperation, or the appearance of it, can help to assure offenders and non-offenders alike that there is no prosecution-free zone in Indian country.

Whether it occurs formally or informally, cooperation often is the norm in Indian country. Cops tend to be able to work with other cops, especially at the street level, primarily because they share a common enemy and they realize that the enemy is not other law enforcement agents.

III. While cooperation and trust between law enforcement agencies can improve public safety, conflict and lack of cooperation among such agencies can only undermine public safety.

Street level police officers may have friendly rivalries with those from other agencies, but they often work well together when responding to a crime or undertaking an investigation. They know that crime control and public safety can be achieved far more successfully when law enforcement agencies work together. Sometimes, however, agencies fail to cooperate. When this happens, public safety suffers.

Some recent events in my own state of Minnesota illustrate the potential for trouble when law enforcement agencies fail to work together. The Mille Lacs Band of Ojibwe Indians exercises some law enforcement functions on its reservation. It also cooperates closely with state and county officials who have law enforcement authority under a 1953 Congressional statute called Public Law 280. In circumstances in which county and tribal law enforcement share authority within the same geographic space, cooperation is key. Indeed, Mille Lacs County and the Mille Lacs Band entered into an agreement in 1998 that provides that each agency shall provide mutual assistance to the other. The 1998 agreement also addresses other important issues, such as how prosecutions will be commenced and how liability for law enforcement torts will be allocated and waives tribal immunity for such actions against the tribe to be tried in the same manner as for municipalities within the state.

As a result of the agreement, tribal police officers have routinely referred criminal activities to the County Attorney for state prosecution. Since the Band employs 19 tribal police officers who are certified law officers under state law, the Band is a significant partner in providing public safety on the reservation. The Band spends approximately \$2 million a year on law enforcement activities and provides a significant law enforcement presence in that part of the County.

Recently, however, the relationship between the County and the Band has deteriorated. The Mille Lacs County Attorney, who is responsible for prosecuting the offenses that arise in Mille Lacs County, has challenged the very existence of the Mille Lacs Reservation itself, arguing that it was disestablished in the early 1900s. In a memo to county employees last year, she ordered all employees to stop referring to Indian land as “reservation” land. This assertion, which conflicts with the County’s own agreement with the tribe, caused an unnecessary rift between the County and the Band. Apparently emboldened by the County

June 21, 2007

Attorney's actions, some of the worst prejudices of some members of one of the local communities were on display at a summer parade after news of the memo circulated. On that day, citizens lining the parade route booed and made obscene gestures toward a float carrying elderly American Indian war veterans.

To a criminal law professor, those boos sound an awful lot like the fabric of the community tearing under the enormous weight of prejudice. While booing elderly Indian veterans may be protected speech under the First Amendment, it suggests trouble ahead to anyone concerned about public safety. Imagine the public safety concerns that arise when a crowd of people feel emboldened to express animus in a way that violates our fundamental social norms of respect for the elderly and honor for our nation's war veterans. Will such people commit acts of violence? If police are called out, will these prejudiced people respect state-certified tribal police officers who are engaged in the routine work of law enforcement in keeping peace?

It is the job of law enforcement officers to build cooperation, not destroy it. Thus, the failure of the county attorney to work toward trust and cooperation may have long term ramifications. This past spring, another occurrence from the same locale stoked great mistrust of the County Attorney by tribal members. In the course of attempting to bring a prosecution for a minor offense, the County arrested a child *victim* of an assault, only 11 years old, who was jailed overnight, and required to appear in court the next day in an orange jail jumpsuit. The incident drew howls of protest in the tribal community. The tribe felt that the arrest of the child victim had the effect of victimizing the child a second time. As a result, the County Attorney has largely lost the confidence of a large number of the people that she is intended to serve. These events raise an important question: what happens when cooperation fails and law enforcement loses the trust of the community it has been given the responsibility to serve?

IV. Cooperation must be encouraged at every step of the process. When it fails, tribal communities must have alternative options.

Congress must work to provide incentives for cooperation among state, federal and tribal law enforcement agencies.

As the previous discussion indicates, however, cooperation may fall short even when strong incentives already exist. Through cooperation, the Mille Lacs County Attorney has 19 additional tribal police officers at her disposal to maintain public safety and respond to crimes. This is a tremendous incentive to cooperate. Yet, the County Attorney seems to have worked to undermine that cooperation and made it difficult for tribal law enforcement officials to work with the County.

In circumstances where positive incentives toward cooperation fail, Congress should create an alternative approach, an escape valve, if you will, for tribes. In Public Law 280 states, for example, Congress should give tribes the full ability to opt out of state Public Law 280 jurisdiction in circumstances in which the tribes have lost confidence in the state officials responsible for public safety. While tribes now have a limited retrocession option, existing law requires states to consent to the exercise of such an option. Giving the state the right to

June 21, 2007

veto a retrocession is ill-advised because it prevents the tribe from going elsewhere if the state is not doing its job. The state ought to have incentive to serve the tribe well.

A tribal option for retrocession, that is, a choice, would further tribal self-government by putting key law enforcement questions in the hands of the tribe and force the state to be responsive to the tribe if it wishes to keep the tribe as a partner. It would also further public safety because it would make the government accountable to the community it is supposed to be serving. If a reservation community believes that the state is doing a good job, then the state can continue. But if the state is doing a poor job, then it can install a federal/tribal system in which tribal officials will be forced to exercise greater accountability for public safety.

To address public safety, Congress should encourage the more robust exercise of existing tribal criminal jurisdiction over misdemeanor offenses by American Indians. Tribal governments are better situated and more responsive to reservation communities. They are thus likely to do a better job in addressing public safety than any federal or state officials can.

For a limited category of offenses, Congress should consider, perhaps on a pilot basis, giving those responsible tribes that are interested in participating a modicum of misdemeanor criminal authority over non-Indians who commit crimes involving Indians on the reservation. With appropriate safeguards, such jurisdiction could resolve many of the continuing problems in Indian country by placing control over law enforcement and criminal justice with the government that is best situated – and best motivated – to address violent crimes and minor narcotics offenses. Accepting the exercise of limited criminal jurisdiction over non-Indians by tribal governments is a very modest step toward addressing a public safety problem that has existed for far too long.

* * *

A final word. Modern federal policymakers have long been interested in furthering tribal self-government because tribal governments are better at providing services to tribal communities. If we wish to promote public safety, it is hard to imagine a better way to do that than by empowering the government that is most interested in providing it. No government has a greater interest in reservation safety than the government that calls the reservation home. Only the tribal government is fully accountable to the reservation community that must live without public safety.

Likewise, it is hard to imagine a subject more crucial to tribal self-government than public safety. A community cannot effectively exercise self-government when it cannot establish an environment in which citizens can safely and vigorously engage in the activities of governance. Effective tribal law enforcement is a key ingredient to reservation public safety.

Scholars can quibble about whether tribal courts should be able to try non-Indians, or whether state or federal courts are fair or effective, but unless we have adequate law enforcement in place, all this quibbling is no more useful than re-arranging office chairs in the World Trade Center on September 10, 2001. We do not need agreement on all jurisdictional issues to create public safety in Indian country, but we do need cooperation among those players whose task is to ensure public safety. Those agencies that do not

June 21, 2007

cooperate ought to be strongly encouraged to do so. If they fail to improve, they should step aside in favor of governments that are more interested in providing public safety.

Thank you for asking me to appear here today.

Disclaimer: The comments expressed herein are solely those of the author as an individual member of the academic community; the author does not represent the University of Minnesota for purposes of this testimony.

Bibliography

A bibliography of Professor Washburn's work in the area of criminal justice in Indian country is set forth below, with brief abstracts of each work:

American Indians, Crime, and the Law, 104 MICHIGAN LAW REVIEW 709 (2006). The federal "Indian country" criminal justice regime, which governs hundreds of federal Indian reservations across the United States, gives federal prosecutors, federal judges, and federal juries the important responsibility of providing criminal justice for serious local crimes on Indian reservations and also for many less serious offenses. Because Indian country offenses are, by definition, local crimes with little national impact, this work is an unusual part of the federal docket. For a variety of reasons, related to history and geography and other factors, federal prosecutors and investigators face numerous practical obstacles in performing their jobs in Indian country. Likewise, because federal grand juries and trial juries for Indian country cases tend to be constituted from the general population of a federal judicial district rather than from within the boundaries of the courts' Indian country jurisdiction, these juries fail to represent fair cross-sections of the Indian country community. Such juries cannot serve the community-representative functions envisioned by the Constitution. As a result, federal Indian country trials operate in a manner inconsistent with basic American norms of criminal justice, such as those set forth in the First and Sixth Amendments to the United States Constitution. And federal Indian country convictions therefore lack important hallmarks of legitimacy and raise serious constitutional concerns. According to this constitutional critique, the federal criminal justice system on Indian reservations should be reconceived to give life to existing federal constitutional norms or repealed in favor of an approach more consistent with constitutional values and modern federal Indian policy. This article may also be viewed online at <http://ssrn.com/abstract=709383>.

Federal Criminal Law and Tribal Self-Determination, 84 NORTH CAROLINA LAW REVIEW 779 (2006). Under the rubric of "tribal self-determination," federal policy-makers have shifted federal governmental power and control to tribal governments in nearly all areas of Indian policy. Normatively, this shift reflects an enlightened view about the role of Indian tribes in Indian policy. As a practical matter, it has also improved services to Indians on reservations by placing functions with tribal service providers who are more knowledgeable and more accountable than their federal counterparts. Despite choosing tribal self-determination as the dominant theme of modern federal Indian policy, felony criminal justice on Indian reservations has been an exclusive federal responsibility, and a highly ineffective enterprise, according to critics, because crime is worse for American Indians than any other ethnic group. The failure to embrace self-determination in federal Indian country criminal justice is curious. Criminal law has a central role in shaping and

expressing community values and identity. And a community that cannot create its own definition of right and wrong cannot be said in any meaningful sense to have achieved true self-determination. Tracing the history of the century-old Indian Major Crimes Act, it is clear that the Act's original purposes, increasing federal control and encouraging assimilation, lack legitimacy in the modern era. As mainstream federal Indian policy has become much more enlightened, the Major Crimes Act has become an embarrassing anachronism. Tribal self-determination strategies in criminal justice might help tribes achieve true self-determination and help Indian country recover from the current criminal justice crisis. This article may be viewed at: <http://ssrn.com/abstract=800828>.

Tribal Self-Determination at the Crossroads, 38 CONNECTICUT LAW REVIEW 777 (2006). The tribal self determination initiative that began transforming federal Indian policy thirty years ago has reached a crossroads. Despite its transformative effects on tribal governments and the widespread belief that self determination has been a successful federal approach to Indian affairs, no new self determination initiatives have occurred, at least at the Congressional level, in several years. This Essay looks to the self determination policy's past for insight about its future and concludes that far more work needs to be done to achieve tribal self determination. Drawing on the author's broader work, it argues that a fruitful subject for further work is in the area of tribal criminal justice. This article may be viewed at: <http://ssrn.com/abstract=869848>.

Tribal Courts and Federal Sentencing, 36 ARIZONA STATE LAW JOURNAL 403 (2004); 17 FEDERAL SENTENCING REPORTER 209 (2005). Under the prevailing federal sentencing guidelines, tribal convictions are currently disregarded in federal sentencing. This article argues that the Sentencing Commission should trust misdemeanor convictions in tribal courts at least as much as it trusts misdemeanor convictions from state, county, and municipal courts. For a variety of institutional reasons, tribal convictions could be considered to have far greater legitimacy than federal and state convictions. This article cites a trend toward use of tribal court convictions by individual federal judges to grant upward departures in federal criminal sentences and argues that the federal sentencing guidelines ought not treat tribal courts like foreign courts. It explains the numerous similarities between tribal courts and other American courts and argues that tribal courts ought to be treated more like domestic courts. A summary of the article appears as Reconsidering the Commission's Treatment of Tribal Courts, 17 FEDERAL SENTENCING REPORTER 209 (2005), and is followed by four separate comments on Professor Washburn's argument by federal judges William C. Canby, Jr., (9th Cir.), Bruce Black (D. N.M.), Charles Kornmann (D. S.D.) and Federal Public Defender Jon Sands (D. Ariz.). The summary version can be viewed at <http://ssrn.com/abstract=779624>.

A Different Kind of Symmetry, 34 NEW MEXICO LAW REVIEW 263 (2004).

There is a national trend within state courts and legislatures toward recognition of tribal criminal judgments of conviction in a variety of contexts related to criminal law. State courts have relied on tribal convictions for purposes of 1) assessment of an offender's general criminal history in sentencing, 2) for use as a predicate offense for prosecution for an aggravated offenses, such as aggravated DWI or domestic violence prosecutions, 3) for driver's license suspension or revocation, 4) for treatment of a juvenile as an adult for purposes of felony prosecution, and 5) for purposes of sex offender registration. This

June 21, 2007

article describes the implications of the increasing recognition of tribal criminal convictions for tribal *civil* judgments. Given that protections for liberty interests are constitutionally prioritized higher than mere property interests, it follows that those states that are willing to rely on tribal criminal convictions in subjecting criminal defendants to greater jeopardy ought to be willing to extend at least as much trust to civil judgments from tribal courts.

Kevin K. Washburn
Associate Professor, University of Minnesota Law School
email: kkw@umn.edu
phone: 612-624-3869
<http://www.law.umn.edu/facultyprofiles/washburnk.htm>