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November 10, 2011

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: Roman Cavanaugh, Jr. vs. United States of America

Dear Clerk,

Enclosed for filing please find a Motion for Leave to Proceed in Forma Pauperis and a Petition for Writ of Cetiorari

Sincerely,

Alexander F. Reichert

Alexander F. Reichert
AFR/bld

Enclosures
Cc: Client
Donald B. Verrilli, Jr.

Alexander F. Reichert — *Licensed in ND, SD, and MN*
Kelly M. Armstrong — *Licensed in ND*
Jay D. Knudson — *Licensed in ND and MN*
Troy R. Morley — *Licensed in ND and MN*
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Ronald A. Reichert, Retired

No. 11-7379

IN THE SUPREME COURT OF THE
UNITED STATES

ROMAN CAVANAUGH, JR., PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Roman Cavanaugh, Jr., by and through his attorney, Alexander F. Reichert, asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. No affidavit is attached in so as much as the United States District Court for the District of North Dakota and United States Court of Appeals for the Eighth Circuit appointed counsel for the Petitioner under the Criminal Justice Act of 1964.

Dated this 10th day of November, 2011.

Alexander F. Reichert
(ND #05446)
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Attorney for Petitioner

No. 11-7379

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 2011

ROMAN CAVANAUGH, JR.
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 117 of Title 18 requires specified mandatory sentences for "any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least two separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner." The question presented is:

1. Whether the United States Constitution precludes the use of prior, uncounseled, tribal court misdemeanor convictions as predicate convictions to establish the habitual offender element of Section 117?

PARTIES TO THE PROCEEDING

Roman Cavanaugh, Jr. is the Petitioner in this case.

The United States of America is the Respondent in this case.

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No. 11-7379

IN THE SUPREME COURT OF THE
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OCTOBER TERM, 2011

ROMAN CAVANAUGH, JR.
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Roman Cavanaugh, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 6, 2011.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is published at 643 F.3d 592. The opinion of the United States District

Court for the District of North Dakota is published at 680 F.Supp. 1062 (2011). (Pet. App. B).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its decision on July 6, 2011. (Pet. App. A). A petition for rehearing and rehearing en banc was denied on August 12, 2011. (Pet. App. D). This Court has jurisdiction under 18 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves a criminal charge under 18 U.S.C. § 117, which is reproduced in the appendix to this petition. (Pet. App. C).

STATEMENT OF THE CASE

Cavanaugh is an enrolled member of the Spirit Lake Sioux Tribe. The relevant facts in this case are undisputed: Cavanaugh had previous convictions in Spirit Lake Tribal Court for domestic abuse entered on March 21, 2005, April 6, 2005, and January 14, 2008. In all three cases, pursuant to tribal law, he was advised of his right to retain counsel at his own expense, but was unable to afford counsel. He was indigent at the time and was not given nor advised of a right to court-appointed counsel. Thereafter, Cavanaugh was charged in Federal Court for the offense of domestic assault by a habitual offender under 18 U.S.C. § 117. As an element of a § 117 offense, the government must prove Cavanaugh received a "final conviction on at least two separate occasions in Federal, State, or Indian tribal court proceedings" for certain abuse offenses. 18 U.S.C. § 117(a). The federal district

court dismissed the indictment against Cavanaugh because although Cavanaugh received prior misdemeanor abuse convictions in tribal court on three separate occasions, Cavanaugh had not received appointed counsel in any of the proceedings that resulted in the convictions. The district court found the use of these convictions in federal court violated the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. IT IS A VIOLATION OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION TO USE UNCOUNSELED TRIBAL COURT CONVICTIONS TO ESTABLISH AN ELEMENT OF 18 U.S.C. § 117(A). MR. CAVANAUGH'S UNCOUNSELED TRIBAL COURT CONVICTIONS VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In the decision below, the federal court of appeals held that a prior uncounseled tribal conviction could be used as an element of a Section 117 charge. However, the Sixth Amendment gives an indigent criminal defendant the right to court-appointed counsel, and Cavanaugh was denied this right by the appeals court. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Supreme Court of the United States has aptly addressed this issue:

> That Government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the wide spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our State and National Constitutions and laws laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.

Id. at 344.

The right to court-appointed counsel was extended to misdemeanor cases through *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The same right was later reaffirmed in *Scott v. Illinois*, 440 U.S. 367 (1979), when the Court held that the right to court-appointed counsel is violated when a defendant is sentenced to any term of incarceration without the opportunity for court-appointed counsel. Nevertheless, this right to court-appointed counsel was never reflected in the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302(a)(6). Most of the rights guaranteed in the Bill of Rights were afforded to Indian defendants through the passage of the ICRA in 1968, but the right to court-appointed counsel for an indigent defendant was absent.

There is a split in the circuits in this area of law that needs to be resolved, namely, that United States citizens who fall within the jurisdiction of the tribal court can be convicted in tribal court and then charged in federal court by using the same uncounseled tribal court convictions as an essential element of the federal court offense. In its opinion, the Eighth Circuit stated, "We note an apparent inconsistency in several cases dealing with the use of arguably infirm prior judgments to establish guilt, trigger a sentencing enhancement, or to determine a sentence for a subsequent offense." *United States v. Cavanaugh*, 643 F.3d 592, 594 (2011). The matter is of immediate concern in order to maintain Cavanaugh's constitutional rights.

The split in the circuits is between the Eighth, Ninth, and Tenth Circuit Courts of Appeals. In 1989, the Ninth Circuit Court of Appeals held in *United States v. Ant*, 882 F.2d 1389, that although a guilty plea was entered in accordance with the tribal code and ICRA, acceptance of a guilty plea violated defendant's Sixth Amendment rights, and thus was not admissible in a federal prosecution. The Ninth Circuit relied on *Burgett v. Texas*, 389 U.S. 109, 115 (1967), in determining that the admission of such a prior conviction was "inherently prejudicial" and thus unconstitutional. In July 2011, the Tenth Circuit held in *United States v. Shavanaux*, 647 F.3d 993, that the use of a defendant's uncounseled tribal court convictions in a prosecution under Section 117 did not violate the Sixth Amendment right to counsel. In its opinion, the Tenth Circuit primarily relied upon *Talton v. Mayes*, stating that "tribal exercise of inherent power is constrained only by the supreme legislative authority of the United States." 163 U.S. 376, 384 (1896). The important distinction this Court needs to resolve in the split circuits is whether an uncounseled tribal court conviction should be considered an infirm conviction in federal court.

The case at hand is extremely important because it could affect a large number of United States citizens. According to the United States Census Bureau, in Census 2000 4.3 million people, or 1.5 percent of the total U.S. population, reported that they were American Indian or Alaska Native. (Pet. App. E at 3). The ratio of American Indians and Alaska Natives living below the official poverty level in 1999 to that of all people was two to one. (Pet. App. E at 14). Over thirty-two

percent of Sioux, Navajo, and Apache were in poverty in 1999. Id. In 2000, about thirty-four percent of the American Indian and Alaska Native population lived in American Indian areas. According to the statistics, a significant number of United States Indians are living on reservations and in poverty, and could easily experience the same tribal convictions and subsequent federal indictments as Cavanaugh.

A. Cavanaugh Was Denied Court-Appointed Counsel In Tribal Court, A Right Which Is Afforded An Indigent Defendant In State And Federal Courts.

There are many protections that are guaranteed to American citizens in the Bill of Rights, and some of these rights have been extended to American Indians in tribal courts through the Indian Civil Rights Act, 25 U.S.C. § 1302. One important exception that was not extended to American Indians in tribal courts was the right to court-appointed counsel. In one of the most influential decisions of the century, the United States Supreme Court held in *Gideon v. Wainwright*, that the Sixth Amendment requires courts to furnish counsel for indigent criminal defendants in felony cases. 372 U.S. at 355.

The federal indictment against Cavanaugh alleged that he had three prior convictions in Spirit Lake Tribal Court for domestic abuse. Yet, the Spirit Lake Nation Law and Order Code does not authorize court-appointed counsel at tribal expense. Cavanaugh was merely told for the tribal court charges of domestic abuse that he has the right to hire an attorney at his own expense, which is in accordance with the Indian Civil Rights Act, but does not satisfy the safeguards of the Sixth Amendment right to court-appointed counsel.

Just four years after *Gideon*, the Supreme Court in *Burgett v. Texas*, 389 U.S. 109 (1967), held that the Sixth Amendment was violated when an uncounseled conviction was offered in a subsequent prosecution for similar contact under a recidivist statute stating:

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect *suffers anew* from the deprivation of that Sixth Amendment right.

Id. at 115 (emphasis added). Under this precedent, an uncounseled conviction could not be offered to establish that the defendant had "been before convicted of the same offense, or one of the same nature." Id. at 111 n.3 (quoting the state statute at issue).

In 1968 Congress passed the ICRA which afforded Indian defendants most of the constitutional rights given to American citizens in other forums. Absent from the ICRA was the right to court-appointed counsel. At the time of its enactment, this was the proper state of the law. Because tribal courts have misdemeanor jurisdiction, *Gideon* did not provide lawyers for Indians in tribal court just as the Constitution did not provide for lawyers in any other misdemeanor prosecution in the United States.

Later, in 1980, the Supreme Court distinguished the *Burgett* line of cases to allow use of an uncounseled conviction in a prosecution for a felon in possession of a firearm in *Lewis v. United States*, 445 U.S. 55 (1980). Still, the main distinction between *Lewis* and *Burgett* is that *Lewis* addressed a status offense that was

intended to be "a sweeping prophylaxis... against misuse of firearms." 445 U.S. at 63. Consequently, *Lewis* is in distinct contrast to *Burgett* because it focused on the mere fact of conviction under federal gun laws, and not on reliability. 445 U.S. at 66.

In *Nichols v. United States*, 511 U.S. 738 (1994), the Supreme Court distinguished *Burgett* and its progeny to hold that an uncounseled misdemeanor for which no jail sentence was imposed could be used to calculate a defendant's sentence under the United States Sentencing Guidelines. The Court used *Scott v. Illinois*, 440 U.S. 367 (1979), to guide its decision, holding that an uncounseled misdemeanor for which no jail sentence was imposed did not violate the Sixth Amendment, and as a result, *Burgett* and its progeny did not prevent the prior conviction from being used at sentencing in a later case. Id. at 743 n.9.

Based on all of the cases decided until this point in time, the general rule is that an uncounseled conviction cannot be used in federal court. Still, this rule does not apply to the use of an uncounseled conviction in a "sweeping prophylaxis ... against misuse of firearms" (as in *Lewis*), or at sentencing where the uncounseled misdemeanor did not receive a sentence of imprisonment (as in *Nichols*).

Since the federal indictment against Cavanaugh is based on uncounseled tribal convictions, this Court should affirm the district court's decision that the government may not rely on Mr. Cavanaugh's uncounseled tribal convictions to establish a violation of § 117. The Section 117 violation does not fall under a "sweeping prophylaxis" because a prophylaxis works prospectively to avert a future

evil, as it did in *Lewis* to prevent felons from having guns. Section 117 is in complete dissimilarity from *Lewis* because it operates completely retroactively, only creating the present offense because the defendant has done the same thing before. Cavanaugh's Section 117 violation also doesn't fall under the *Nichols* exception because jail time was imposed in each of Cavanaugh's sentences for domestic abuse, unlike in *Nichols*.

B. This Court Should Adopt The Eighth and Ninth Circuits' Reasoning Because Unlike The Tenth Circuit, The Eighth and Ninth Circuits Held That An Uncounseled Tribal Court Conviction Was Constitutionally Infirm To Establish An Element Of A Federal Offense.

The primary distinction that the Tenth Circuit in *Shavanaux* made from the Ninth Circuit in *Ant* is that the Ninth Circuit held that if tribal convictions complied with ICRA's provisions, then even though the defendant never had the opportunity to court-appointed counsel, it would not violate the Sixth Amendment as an element of a new federal prosecution.

The Tenth Circuit in *Shavanaux* asserted that the *Talton* Court acknowledged and reasoned "[i]t follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the [F]ith [A]mendment, which... had for its sole object to control the powers conferred by the Constitution on the national government." 163 U.S. at 384. The Tenth Circuit held that because the Bill of Rights does not constrain Indian tribes, Shavanaux's prior uncounseled tribal convictions could not violate the

Sixth Amendment because the prior tribal convictions were not constitutionally infirm, and were obtained in accordance with ICRA.

However, as soon as the tribal charge is used as an element of a federal offense, this automatically triggers the Bill of Rights and all other protections afforded citizens because Cavanaugh is no longer a tribal defendant in tribal court but a defendant as a citizen in United States Federal Court.

The Tenth Circuit recognized the fact that they were at odds with the Ninth Circuit in making their decision, however they attributed this to the fact that *Ant* overlooked the *Talton* line of cases. *Shavanaux*, 647 F.3d 997-98. The Court in *Talton* explained that rather than being subject to the United States Constitution, the tribal exercise of inherent power is constrained only by "the supreme legislative authority of the United States." 163 U.S. at 384.

An earlier guilty plea has been held to be admissible in a subsequent federal prosecution, even for proceedings are in different jurisdictions, if the earlier guilty plea was made under conditions consistent with the United States Constitution. On the other hand, there is direct authority in *Elkins v. United States*, 364 U.S. 206 (1960), supporting the proposition that evidence from a prior proceeding obtained in violation of the United States Constitution cannot be used in a subsequent federal prosecution. The Supreme Court rejected the "silver platter" doctrine in *Elkins* ruling that evidence obtained by state officials in violation of the Fourth Amendment is inadmissible in a subsequent federal prosecution. Id.

If Cavanaugh's uncounseled tribal court conviction had been obtained in a federal court, not only would it be constitutionally infirm, but it would be inadmissible in a subsequent federal prosecution.

C. The District Court Was Correct In Holding That Tribal Court Convictions Based On The Denial Of Appointed Counsel Cannot Be Used As An Element Of Section 117(A) In Federal Court.

Although Cavanaugh's prior tribal convictions arguably qualify as predicates under 18 U.S.C. § 117, because he was convicted and sentenced to jail without the assistance of counsel, the government may not now rely on those convictions to create a new offense. There are many protections that are guaranteed to American citizens in the Bill of Rights, and some of these rights have been extended. In general, a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1971); *Loper v. Beto*, 405 U.S. 473 (1972); *United States v. Custis*, 511 U.S. 485 (1994).

The rationale for this holding is that such convictions do not comport with the protections of the Sixth Amendment, so introducing them in a federal prosecution violates "anew." *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011). To permit a conviction that violates the Sixth Amendment to be used against a person to support guilt for another offense would erode the very principle set forth in *Gideon*. *United States v. Tucker*, 404 U.S. 443, 449 (1972); *Burgett*, 389 U.S. at 114.

The district court in the case at hand determined the analysis by the Ninth Circuit in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) to be controlling. The defendant in *Ant* was charged with assault and battery in tribal court, to which the defendant later plead guilty to without being represented by an attorney. Id. at 1391. About three months later in January 1987 a federal indictment was filed charging Ant with voluntary manslaughter, under 18 U.S.C. §§ 1112 and 1153 for "unlawfully and willfully" killing the victim in the case. Ant subsequently moved to suppress his tribal court guilty plea arguing that his lack of counsel under the Sixth Amendment was violated. Id. The ultimate legal issue for the Ninth Circuit to decide in *Ant* was "whether an uncounseled guilty plea, made in tribal court in accordance both with tribal law and the ICRA, but which would have been unconstitutional if made in a federal court, can be admitted as evidence of guilt in a subsequent federal prosecution involving the same criminal acts." Id. The Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation of Montana has a similar law to that of the Spirit Lake Sioux Tribe, stating "[a]ny Indian charged with an offense, *at his option and expense*, may be represented in tribal court by professional legal counsel, or, by a member of the Tribe." Id. at 1392 (emphasis added). Since *Ant* was not provided the opportunity for court-appointed counsel in tribal court and thus the proceedings did not meet constitutional requirements, the Ninth Circuit suppressed the uncounseled tribal court guilty plea in the federal case. Id. at 1395-96.

Despite the attempts by the United States' to distinguish *Ant* from the case at hand, *Ant* is directly on point and should have weight in the analysis of Cavanaugh's circumstances. Like the defendant in *Ant*, Cavanaugh was charged with domestic abuse in tribal court, to which he plead guilty, having the opportunity to be represented by an attorney except at his own expense. The current federal indictment alleging violation of 18 U.S.C. § 117, domestic assault by a habitual offender, was filed against Cavanaugh, and the ultimate legal issue in Cavanaugh's case is the same as in *Ant*, "whether an uncounseled guilty plea, made in tribal court in accordance both with tribal law and the ICRA, but which would have been unconstitutional if made in a federal court, can be admitted as evidence of guilt in a subsequent federal prosecution involving the same [previous] criminal acts." Id. at 1391. It is the use of the tribal court pleas as an element which unsettled the court in *Ant* as they were concerned the defendant was unaware that his tribal court plea could be used against him in the following federal charge because he was not represented by counsel. *United States v. Cavanaugh*, 643 F.3d 592, 604 (2011). This is also a concern in Cavanaugh's case, perhaps more so, as he was unaware without the aid of counsel that his prior convictions, which stretched over a number of years unlike the single event in *Ant*, could lead to federal prosecution for the same acts.

In the instant case, the district court noted that tribal court convictions may be permissible for the purpose of sentencing enhancement, impeachment or as evidence under Rule 404(b). But, the court was quick to point out that these

ancillary matters differ greatly from the United States introducing the tribal court convictions as substantive evidence to prove an essential element of an offense. (Pet. App. B). Using a violation of the Sixth Amendment to support guilt for another offense would erode the very principles set forth in *Gideon*.

II. IT IS A VIOLATION OF EQUAL PROTECTION TO DENY COURT-APPOINTED COUNSEL TO INDIANS BASED ON THEIR RACE. IT IS ALSO A VIOLATION TO USE UNCOUNSELED CONVICTIONS IN TRIBAL COURT AS AN ELEMENT OF A FEDERAL OFFENSE.

Besides violating Cavanaugh's Sixth Amendment rights and right to due process, relying on his uncounseled tribal court convictions violates the Equal Protection Clause because it denies him, as an Indian, equal protection of the laws. The arguments listed previously outline a defendant's right to counsel. However, a defendant in tribal court does not have this absolute right. The Spirit Lake Nation Law and Order Code, the tribe which Cavanaugh was a member, does not authorize court-appointed counsel but merely allows a defendant the opportunity for an attorney at his own expense.

The Fourteenth Amendment to the United States Constitution affords citizens equal protection under the law,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein thy reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. XIV.

Cavanaugh is considered an Indian under the law, but he is also considered a citizen of the United States of America. Since tribal courts have jurisdiction over Indians only, the only defendants to be charged under Section 117 based on uncounseled court convictions would be Indians. It is a legal certainty that a Caucasian, African-American, or Hispanic defendant will not be charged based on uncounseled tribal convictions.

When Congress seeks to treat one race different from another, as it did in the instant case, that statute must pass strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). In order to pass strict scrutiny, the legislation must serve a compelling government interest and "must be narrowly tailored to further that interest." Id. at 235. While it may be argued that Section 117 serves a compelling government interest in the safety of its people, it is far from being narrowly tailored to further that interest. Therefore, Section 117 does not pass the strict scrutiny test.

In the thirty-eight years since *Argersinger*, no federal court has taken up the issue of whether indigent Indians in tribal court are entitled to court-appointed counsel. Congress itself has recognized the problems created by the lack of adequate counsel in tribal courts. In 25 U.S.C. § 3651 Congress found that:

> There is both inadequate funding and an inadequate coordinating mechanism to meet the technical and underlying needs of tribal judicial systems and this lack of adequate technical and legal assistance funding impairs their operation...the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.

25 U.S.C. § 3651 (8)-(11). These findings show Congress's lack of confidence in the tribal court system as well as their recognition of the importance of legal assistance to both tribal courts and the individuals served by the courts.

In *United States v. Lara*, 541 U.S. 193, 209 (2004), the Court was addressing a double jeopardy issue and specifically did not address whether Lara was afforded due process because of the failure of the tribe to appoint counsel. The decision in *Lara* shows that the inquiry of the validity of a tribal court conviction without counsel is still an open question.

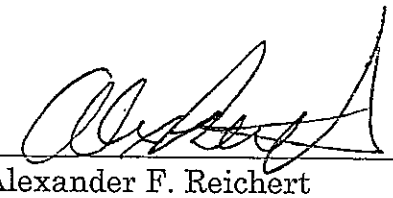
It is time to recognize Indians as full citizens of the United States and require court appointed counsel as *Gideon* and its progeny demand. Regardless of Congress's intent in enacting 18 U.S.C. § 117, the statute is still unconstitutional *as applied* to Cavanaugh. (emphasis added). It is within Congress's power to enact laws, but the constitutionality of those laws is left to the federal courts. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (parenthetical omitted).

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

Dated this 10th day of November, 2011.



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No.

IN THE SUPREME COURT OF THE UNITED STATES

ROMAN CAVANAUGH, JR., PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PROOF OF SERVICE

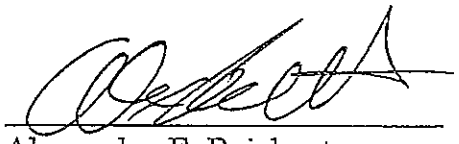
I, Alexander F. Reichert, do swear or declare that on this date, November 11, 2011 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Donald B. Verrilli, Jr.
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 10, 2011.



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this comment should be construed as a motion to continue, the court's decision to proceed to trial was not unreasonable or an abuse of discretion. The case had been pending for many months, and Bonilla–Siciliano had ample time to organize a defense. In the colloquy on the morning of trial, he identified no potential witnesses or expected testimony and gave no other reason to justify a delay. The court did allow Bonilla–Siciliano to make an offer of proof through his own testimony and exhibits. Under these circumstances, we conclude the court's conduct was not egregious or fundamentally unfair.

* * *

The judgment of the district court is affirmed.

UNITED STATES of America,
Plaintiff–Appellant,

v.

Roman CAVANAUGH, Jr.,
Defendant–Appellee.

No. 10–1154.

United States Court of Appeals,
Eighth Circuit.

Submitted: Oct. 19, 2010.

Filed: July 6, 2011.

Rehearing and Rehearing En Banc
Denied Aug. 12, 2011.

Background: Defendant was charged with domestic assault by habitual offender, based on prior convictions in Native–American tribal courts. The United States District Court for the District of North Dakota, Ralph R. Erickson, Chief Judge, 680 F.Supp.2d 1062, dismissed indictment. Government appealed.

Holding: The Court of Appeals, Melloy, Circuit Judge, held that, as matter of first impression, defendant's uncounselled prior convictions in tribal court could be used to enhance federal charge.

Reversed and remanded.

Bye, Circuit Judge, dissented and filed opinion.

1. Indians ⇐106, 119, 147

Native–Americans are citizens of the United States, entitled to the same constitutional protections against federal and state action as all citizens, but the Constitution does not apply to restrict the actions of Native–American Indian tribes as separate, quasi–sovereign bodies.

2. Indians ⇐300

If a tribe elects not to provide for the right to appointed counsel through its own laws, Native–American defendants in tribal court have no Constitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year. U.S.C.A. Const.Amend. 6; Indian Civil Rights Act of 1968, § 202(a)(6), (b), 25 U.S.C.A. § 1302(a)(6), (b).

3. Criminal Law ⇐1715

Federal and state courts cannot constitutionally impose any term of incarceration at the time of a conviction unless a defendant received, or validly waived the right to, counsel. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1766

Sixth Amendment requires court–appointed counsel for indigent state and federal defendants. U.S.C.A. Const.Amends. 6, 14.

5. Criminal Law ⇐1715

Right to counsel is violated when a defendant is sentenced to any term of incarceration; it is the actual deprivation of liberty, not the jeopardy of a deprivation of liberty, not some lesser form of punishment, and not any particular length of incarceration, that triggers the protections of the Sixth Amendment. U.S.C.A. Const. Amend. 6.

6. Sentencing and Punishment ⇐100

Regardless of whether reliability–based concerns exist, it is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings.

7. Sentencing and Punishment ⇐1318

Native–American defendant's uncounselled prior convictions in tribal court could be used to enhance federal charge of domestic assault by habitual offender, in absence of actual constitutional violation and in absence of any other allegations of irregularities or claims of actual innocence surrounding tribal court convictions; Sixth Amendment right to counsel did not apply to tribal proceedings, even if defendant was indigent and therefore would have had such right in state or federal court. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 117; Indian Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

8. Constitutional Law ⇐3297
Indians ⇐261

Federal criminal statutes with respect to Native–American tribes, though relating to Native–Americans as such, do not violate the equal protection requirements of the Fifth Amendment because distinctions based upon tribal affiliation are not invidious race–based distinctions, but are distinctions based upon the quasi–sovereign status of Native–American Indian tribes under federal law. U.S.C.A. Const. Amend. 5.

West Codenotes
Negative Treatment Reconsidered
18 U.S.C.A. § 117(a)

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Before RILEY, Chief Judge, MELLOY and BYE, Circuit Judges.

MELLOY, Circuit Judge.

Roman Cavanaugh, Jr., was charged for the offense of domestic assault by a habitual offender, 18 U.S.C. § 117. As elements of the offense, the government must prove Cavanaugh received "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for certain abuse offenses. *Id.* § 117(a). Below, the district court dismissed the indictment because, although Cavanaugh had received prior misdemeanor abuse convictions in tribal court on three separate occasions, Cavanaugh had not received the benefit of appointed counsel in the proceedings that resulted in the convictions.

The issues presented in this appeal are whether the Fifth or Sixth Amendments to the United States Constitution preclude the use of these prior tribal-court misdemeanor convictions as predicate convictions to establish the habitual-offender elements of § 117. Cavanaugh's prior convictions resulted in actual incarceration that, pursuant to *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), would have been unconstitutional in violation of the Sixth Amendment right to appointed counsel if the convictions had originated in a state or federal court.

The district court, recognizing that the Sixth Amendment imposes no duty on Indian tribes to provide counsel for indigent defendants, noted that the prior convictions were valid at their inception and that the prior terms of incarceration were not in violation of the United States Constitution, tribal law, or the Indian Civil Rights Act, 25 U.S.C. § 1302. The court, nevertheless, held that the uncounseled convictions were infirm for the purpose of proving the habitual-offender, predicate-conviction elements of the § 117 offense in these subsequent federal court proceedings.

The government appeals, and we reverse. In doing so, we note an apparent inconsistency in several cases dealing with the use of arguably infirm prior judgments to establish guilt, trigger a sentencing enhancement, or determine a sentence for a subsequent offense. Ultimately, however, we are persuaded in this case that the predicate convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117.

I. Background

Cavanaugh is an enrolled member of the Spirit Lake Sioux Tribe and a repeat domestic-abuse offender. He was convicted in the Spirit Lake Tribal Court of misdemeanor domestic abuse offenses in March 2005, April 2005 (two counts), and January 2008. In all three cases, he was advised of his right to retain counsel at his own expense, but he did not do so. He alleges in the present case that he was indigent at the time of his prior convictions.[1] Importantly, Cavanaugh does not allege any irregularities in the proceedings that led to his prior tribal-court convictions beyond the absence of counsel. The Spirit Lake Tribal Court provides an appeal procedure, but Cavanaugh did not appeal his tribal-court convictions. Neither Cavanaugh nor the government state whether officials actually advised Cavanaugh of his right to appeal his tribal-court convictions. Cavanaugh, however, does not assert deprivation of tribal appellate rights as an irregularity or infirmity surrounding his prior convictions.

The conduct giving rise to the present offense involved Cavanaugh's assault of his common-law wife who is also the mother of his child. On the night of the offense, Cavanaugh and the victim were together in a car with children, Cavanaugh was driving, both adults were intoxicated, and Cavanaugh and the victim began fighting. In the course of the fight, Cavanaugh grabbed the victim's head, jerked it back and forth, and slammed it into the dashboard. He also threatened to kill her. Cavanaugh then pulled the car into a field, where the victim jumped from the vehicle and hid. Cavanaugh eventually drove away. Authorities subsequently arrested Cavanaugh and charged him with the present offense.

In reaching its decision that Cavanaugh's prior tribal-court convictions could

1. The record is devoid of evidence regarding Cavanaugh's indigency. The district court assumed he was indigent at the time of his prior convictions, and we will do the same. The government argued below and in its brief to our court that the question of Cavanaugh's indigency at the time of his prior offenses need only be addressed if it is determined that use of an uncounseled tribal-court conviction would be impermissible. Given our resolution of the case, we need not address this question and may assume his indigency. In addition, although the record before the district court failed to prove that Cavanaugh had been incarcerated for his prior convictions, Cavanaugh asserted that he had been incarcerated, the district court assumed Cavanaugh had been incarcerated, and on appeal, the government concedes this point.

not be used to satisfy the elements of § 117, the district court reviewed relevant federal caselaw regarding the permissible and impermissible uses of prior convictions. The court also addressed at some length the conditions of heightened violence and drug and alcohol abuse on Indian lands when compared to national averages. The court reviewed the legislative history of § 117, and noted concern with the high level of recidivism associated with domestic abusers as well as the often-increasing severity of such offenders' subsequent violent acts. The court concluded that Congress passed § 117, in part, as a gap-filling measure to capture repeat misdemeanor domestic-abuse offenders in a federal recidivist scheme that, generally, had applied only to persons convicted of felonies. The district court's review of the legislative history makes it clear that situations involving facts like those alleged in Cavanaugh's case are precisely the type of situations Congress intended to bring within the bounds of § 117.

The court also noted at some length the shortcomings of tribal justice systems caused by a lack of resources, the ongoing lack of resources to overcome these shortcomings, the evolving relationship between federal criminal jurisdiction and tribal jurisdiction, and the changes in the general policies of the United States towards tribal justice systems over the decades. The court ultimately concluded that, although uncounseled tribal misdemeanor convictions could result in actual incarceration in tribal facilities, such incarceration involved no violation of the United States Constitution because the Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes and because the Indian Civil Rights Act does not impose upon tribes a duty to provide counsel for indigent misdemeanor defendants. The court held, nevertheless, that such convictions could not be used in federal courts to prove the elements of a criminal offense because the right to counsel applies in federal courts and because use of such convictions would, essentially, give rise anew to a Sixth Amendment violation by imposing federal punishment, in part, based upon the uncounseled conviction.

II. Discussion

A. Validity of Cavanaugh's Prior Convictions

[1] Although the district court did not find Cavanaugh's tribal-court convictions invalid from their inception, Cavanaugh argues they were invalid from their inception because the tribal court did not provide court-appointed counsel. This argument is without merit. Although Indians are citizens of the United States entitled to the same constitutional protections against federal and state action as all citizens, the Constitution does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir.1967) ("The guarantees of the Due Process clause relate solely to action by a state government and have no application to actions of Indian Tribes, acting as such.") (internal citations omitted).

[2] Congress, however, enjoys broad power to regulate tribal affairs and limit or expand tribal sovereignty through the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2. *See United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d

420 (2004). Pursuant to this authority, Congress passed the Indian Civil Rights Act, selectively applying some, but not all, protections from the Bill of Rights to situations where an Indian tribe is the governmental actor. *See* Pub. L. No. 90–284, Title II, § 202, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. § 1302). As currently amended by the Tribal Law and Order Act of 2010, Pub. L. No. 111–211, Title II, § 234(a), 124 Stat. 2279 (2010), the Indian Civil Rights Act only requires the appointment of counsel for indigent criminal defendants in tribal court for prosecutions that result in a term of incarceration greater than one year. *See* 25 U.S.C. § 1302(a)(6), (b), & (c)(2).[2] Accordingly, if a tribe elects not to provide for the right to appointed counsel through its own laws, Indian defendants in tribal court have no Constitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year.

[3] The tension inherent in the present case arises when such a conviction—valid at its inception as a matter of federal and tribal statutory law and as a matter of Constitutional law—is brought into federal or state court in an effort to establish or enhance a term of federal or state incarceration. This tension exists because the tribal-court ability to impose a term of incarceration of up to one year based upon an uncounseled conviction is inconsistent with *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). These cases, as explained more fully below, hold that federal and state courts cannot constitutionally impose *any* term of incarceration at the time of a conviction unless a defendant received, or validly waived the right to, counsel.

The government argues that, because Cavanaugh's prior convictions were valid from their inception, the convictions should be valid for use in federal court to prove the elements of the present § 117 violation. Cavanaugh argues that, because the convictions would have been invalid if obtained in state or federal court, where the Sixth Amendment does apply, we should treat his prior convictions as infirm for use in federal court. These arguments raise two separate issues. First, whether Cavanaugh is correct that state or federal convictions, in and of themselves, would have been invalid for the purpose of proving a subsequent § 117 violation had they arisen in these circumstances or whether such state or federal convictions would be valid for such purposes (with only the prior terms of incarceration, rather than the convictions themselves, being unconstitutional). *See Lewis v. United States*, 445 U.S. 55, 66–67, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) ("We recognize, of course, that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes.... The Court, however, has never suggested that an uncounseled conviction is invalid for all purposes." (internal citations omitted)). Second, assuming such state or federal convictions would be infirm as § 117 predicates, whether a similar, but otherwise valid tribal conviction should be treated as infirm for such purposes even though it technically was not unconstitutional.

2. At the time of Cavanaugh's tribal convictions, which preceded the Tribal Law and Order Act of 2010, tribal courts were restricted to impose no sentences of incarceration greater than one year. Now, tribal courts may impose longer sentences (up to three years for individual offenses). 25 U.S.C. § 1302(b). The Tribal Law and Order Act of 2010, however, now mandates court appointed counsel if a tribe imposes a sentence greater than one year. *Id.* § 1302(c)(2).

As to the first question, we believe it is helpful to address the relevant Supreme Court and Eighth Circuit precedent involving the scope of the Sixth Amendment right to counsel and also those cases addressing limitations on the uses of arguably infirm prior judgments for recidivist or enhancement purposes. This review, however, does not provide a conclusive answer to the question of whether an uncounseled state or federal conviction could be used to prove the elements of a § 117 violation in this situation. This review does, in our view, provide guidance for answering the question of whether we should treat an otherwise valid tribal-court conviction as invalid for present purposes.

B. Sixth Amendment Right to Counsel and Limitations on the Use of Uncounseled State or Federal Convictions.

[4] The Supreme Court interpreted the Sixth Amendment as requiring court-appointed counsel for indigent federal defendants in *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In *Betts v. Brady*, 316 U.S. 455, 471–72, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), the Court held that this Sixth Amendment right did not apply as against the states. The Court reconsidered the holding of *Betts*, however, in *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and held that this Sixth Amendment right to counsel applies as against the states through the Fourteenth Amendment. *Gideon* described the fundamental nature of this right by explaining how the absence of counsel called into question the reliability of any resulting conviction:

> "Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Gideon, 372 U.S. at 345, 83 S.Ct. 792 (quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

[5] Subsequently, in a line of cases that culminated with *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the Court explained the limitations of this right. The circuits, however, found *Argersinger* to be unclear, and in *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), the Court revisited the issue, clarifying *Argersinger* and unambiguously holding that the right to counsel is violated when a defendant is sentenced to any term of incarceration: it is the actual deprivation of liberty, not the jeopardy of a deprivation of liberty, not some lesser form of punishment, and not any particular length of incarceration that triggers the protections of the Sixth Amendment. *Scott*, 440 U.S. at 373–74, 99 S.Ct. 1158 (affirming an uncounseled conviction not resulting in imprisonment and stating, "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"); *see also Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance.").

Our court, and other courts, have put *Scott* into practice by vacating sentences, but leaving convictions intact, where the

government obtained convictions and sentences of incarceration without providing counsel. *See, e.g., United States v. White,* 529 F.2d 1390, 1394 (8th Cir.1976) ("Although the conviction is valid, we cannot affirm his 90–day suspended prison term since appellant did not clearly waive his right to counsel.... Therefore, we vacate the 90–day suspended sentence but affirm the conviction and $50 fine."); *see also United States v. Ortega,* 94 F.3d 764, 770 (2d Cir.1996) ("At the outset, we reject defendants-appellants' contention that their state court convictions are invalid. Under *Scott,* the Sixth Amendment protects an uncounseled misdemeanor defendant not from a judgment of conviction but from the imposition of certain types of sentences. The appropriate remedy for a *Scott* violation, therefore, is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself."). This treatment of *Scott,* however, fails to answer the question of whether or how a subsequent court might be able to make use of such a conviction for enhancement purposes or to prove the elements of a recidivist offense.

After *Gideon,* and before *Scott,* the Supreme Court initially determined that several different uses of infirm prior convictions were impermissible during subsequent proceedings if the earlier convictions were obtained in violation of the right to counsel. In *Burgett v. Texas,* 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), for example, the Court held that an uncounseled prior felony conviction could not be used to enhance a defendant's punishment pursuant to a recidivist statute. In *United States v. Tucker,* 404 U.S. 443, 444, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), the Court held a sentencing judge could not consider a prior uncounseled felony conviction in setting a federal sentence pursuant to the then-prevailing, federal sentencing regime. Also, in *Loper v. Beto,* 405 U.S. 473, 484, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), the Court held prosecutors could not impeach a defendant with a prior, uncounseled felony conviction. These cases seem to have reflected a general belief that it was necessary to prevent erosion of the "principle" of *Gideon* and that the earlier deprivation of counsel, essentially, flowed through to the subsequent proceeding to make any future punishment or enhancement of punishment obtained in reliance on the earlier conviction a new violation of *Gideon.* For example, the Court in *Burgett* stated:

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person *either to support guilt or enhance punishment* for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Burgett, 389 U.S. at 115, 88 S.Ct. 258 (internal citation omitted) (emphasis added).

The penultimate case in this line of cases arguably was *Baldasar v. Illinois,* 446 U.S. 222, 227–28, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), in which the Court held, post-*Scott,* that an uncounseled misdemeanor conviction that resulted in no term of incarceration (and therefore, as per *Scott,* involved no deprivation of constitutional rights) nevertheless could *not* be used to enhance a subsequent Illinois misdemeanor into a felony under the state's enhancement statute. *Baldasar,* however, was a fractured opinion within which the plurality opinion merely referenced the rationale of the concurrence, but in which there were separate concurrences without wholly consistent explanations for their results. One of the concurrences based its

conclusion in part on reliability concerns, noting, "We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has the guiding hand of counsel at every step in the proceedings against him, his conviction is not sufficiently reliable to support the severe sanction of imprisonment." *Baldasar*, 446 U.S. at 227, 100 S.Ct. 1585 (Marshall, J., concurring) (internal citation omitted).

If *Baldasar* had been the last word on this subject, Cavanaugh's position would, indeed, be strong in this appeal. *Baldasar* actually precluded the use of a prior uncounseled conviction even though the prior conviction did not involve a constitutional violation; Cavanaugh, similarly, seeks to preclude the use of his prior uncounseled conviction even though his prior conviction did not involve a constitutional violation. Further, to the extent *Baldasar* rested on reliability concerns, the absence of counsel arguably would result in the same type of reliability concern regardless of whether the denial of counsel occurred in state, federal, or tribal court or actually resulted in a constitutional violation.

Baldasar was not the last word, however, because in 1994, the Court held that an uncounseled conviction *could* be used for enhancement purposes, expressly overruling *Baldasar*. *See Nichols v. United States*, 511 U.S. 738, 748–49, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) (according criminal history points pursuant to the then-mandatory United States Sentencing Guidelines for an earlier uncounseled misdemeanor DUI conviction to determine a Guideline range for a subsequent federal drug offense, shifting the mandatory Guidelines range upward by approximately two years, and stating, "Today we adhere to *Scott v. Illinois* ... and overrule *Baldasar*"). In *Nichols*, the uncounseled prior conviction, like the prior conviction in *Baldasar* had not resulted in a constitutional violation because it had not resulted in a term of incarceration. An important rationale from *Nichols*, that seemingly cannot be reconciled with the language quoted above from *Burgett*, was that the subsequent use of the conviction for enhancement purposes did not change the penalty for the prior conviction; rather, the subsequent sentence punished only the subsequent offense.[3] *See Nichols*, 511 U.S. at 746–47, 114 S.Ct. 1921 ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in Baldasar, '[t]his Court consistently has

3. *Compare Nichols*, 511 U.S. at 757–58, 114 S.Ct. 1921 (Blackmun, J., dissenting):

> The Court skirts *Scott*'s actual imprisonment standard by asserting that enhancement statutes "do not change the penalty imposed for the earlier conviction," ... because they punish only the later offense. Although it is undeniable that recidivist statutes do not impose a second punishment for the first offense in violation of the Double Jeopardy Clause ..., it also is undeniable that Nichols' DUI conviction directly resulted in more than two years' imprisonment. In any event, our concern here is not with multiple punishments, but with reliability. Specifically, is a prior uncounseled misdemeanor conviction sufficiently reliable to justify additional jail time imposed under an enhancement statute? Because imprisonment is a punishment "different in kind" from fines or the threat of imprisonment, ... we consistently have read the Sixth Amendment to require that courts decrease the risk of unreliability, through the provision of counsel, where a conviction results in imprisonment. That the sentence in *Scott* was imposed in the first instance and the sentence here was the result of an enhancement statute is a distinction without a constitutional difference.

Id. (internal citations omitted).

sustained repeat-offender laws as penalizing only the last offense committed by the defendant.' " (quoting *Baldasar*, 446 U.S. at 232, 100 S.Ct. 1585)).

Further, not only did *Nichols* reject the theory that some portion of a subsequent punishment could be viewed as having been "caused" by a prior conviction, the majority in *Nichols* appears to have rejected arguments that formed one of the foundations for *Gideon*—arguments based on concerns about prior convictions' reliability. We reach this conclusion because the *Nichols* majority made no express reference to reliability concerns and only arguably addressed the issue by distinguishing the sentencing context from guilt determinations. Meanwhile, a separate concurrence by Justice Souter discussing such concerns garnered no support from any of the other Justices,[4] and the dissent in *Nichols* rested primarily upon reliability concerns.[5]

The Court subsequently made reference again to reliability concerns, this time in *Alabama v. Shelton*, 535 U.S. 654, 667, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). In *Shelton*, the court held that an uncounseled conviction resulting in a suspended term of incarceration violated the Sixth Amendment. There, the Court distinguished *Nichols* as a case arising in the sentencing context. *Id.* at 665, 122 S.Ct. 1764. The Court rejected a broad argument that sequential proceedings must always be analyzed separately for Sixth Amendment purposes such that only immediate incarceration raises Sixth Amendment concerns. *Id.* at 666, 122 S.Ct. 1764. Rather, the Court stated that the Sixth Amendment applies at the time a defendant is adjudicated guilty of an offense, whether actual incarceration is imposed contemporaneously with the finding of guilt, or later following some subsequent triggering event. *Id.* at 663–64, 122 S.Ct. 1764. The court also rejected the argument that the provision of counsel at a subsequent hearing surrounding the revocation of the suspended sentence and imposition of a term of incarceration could make up for the absence of counsel at the guilt phase. The Court stated:

> We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address *the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.* Deprived of counsel

4. *Id.* at 752–53, 114 S.Ct. 1921 (Souter, J., concurring in the judgment) (downplaying reliability concerns because, even pursuant to the then-mandatory Sentencing Guidelines, sentencing courts possessed some discretion in the form of downward departures, stating, "Under the Guidelines, then, the role prior convictions play in sentencing is presumptive, not conclusive, and a defendant has the chance to convince the sentencing court of the unreliability of any prior valid but uncounseled convictions in reflecting the seriousness of his past criminal conduct or predicting the likelihood of recidivism.").

5. In the dissent, Justice Blackmun, joined by Justices Stevens and Ginsburg, argued that any distinction between allowing direct incarceration at the time of an uncounseled conviction and allowing future incarceration based upon the prior uncounseled conviction was a distinction without meaning and that only a complete ban on incarceration "caused" by uncounseled convictions could logically preserve the rule of *Gideon*. The dissent stated:

> Given the utility of counsel in [misdemeanor] cases, the inherent risk of unreliability in the absence of counsel, and the severe sanction of incarceration that can result directly *or indirectly* from an uncounseled misdemeanor, there is no reason in law or policy to construe the Sixth Amendment to exclude the guarantee of counsel where the conviction subsequently results in an increased term of incarceration.

Id. at 763, 114 S.Ct. 1921 (emphasis added).

> when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to "the crucible of meaningful adversarial testing[.]" The Sixth Amendment does not countenance this result.

Id. at 667, 122 S.Ct. 1764 (internal citations omitted) (emphasis added). Although *Shelton* emphasized reliability concerns, it also emphasized the presence of an actual Sixth Amendment violation, and the incarceration at issue was incarceration for the underlying offense.

[6] Subsequently, in 2004, our court rejected an argument by the government that *Nichols* would permit the use of a prior uncounseled conviction for the purpose of assigning criminal history points under the then-mandatory Guidelines regime where the prior conviction had resulted in actual incarceration in violation of *Scott*. *See United States v. Charles*, 389 F.3d 797, 799 (8th Cir.2004) ("The government, however, misreads *Nichols*. The Court's holding was limited to the use of an uncounseled misdemeanor conviction, valid under *Scott* because *no prison term was imposed*. Charles disputes the use of convictions as to which a jail term was imposed, and as to which he thus had a constitutional right to counsel under *Scott*.") (internal citation omitted). By emphasizing this distinction, we believe our circuit recognized that, regardless of whether reliability-based concerns exist, it is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings.

Nichols and *Shelton*, however, do not necessarily answer all questions regarding permissible uses of prior convictions. *Shelton* was a direct appeal involving the imposition of the original suspended sentence. The references to future imprisonment in *Shelton* were references to activation of the original sentence, not references to use of the conviction to determine guilt or assess punishment for some different crime. *Nichols* was a sentencing case pursuant to the then-mandatory Guidelines, which permitted at least a modicum of discretion and, therefore, differed from the present case and the government's present attempt to prove the actual elements of a subsequent federal offense. In this regard, we emphasize that *Nichols* relied, to a large extent, on the fact that the subsequent use of the prior conviction was merely to determine a sentence pursuant to the Guidelines rather than to establish guilt. *Nichols*, 511 U.S. at 747, 114 S.Ct. 1921 ("Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt."). The Supreme Court specifically noted that, traditionally, in the sentencing process, judges considered not only convictions but "a defendant's past criminal behavior, even if no conviction resulted from that behavior," and that the Court previously had upheld consideration of such facts. *Id.* (citing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)).

Post-*Nichols*, then, it is arguable that the fact of an actual constitutional violation is, perhaps, not only an important factor for determining when a prior conviction may be used for sentence enhancement purposes, but a required or controlling factor. It also seems clear that, where the subsequent use is to prove the actual elements of a criminal offense, *Nichols* is of questionable applicability, given that Court's emphasis on the differences between sentencing and guilt determinations.

Added to this developing, but incomplete body of authority, there exists another line of cases that address the use of prior convictions or prior civil adjudications to establish the actual elements of subsequent offenses. These cases, however, reach results that are difficult, if not impossible, to reconcile with one another, much less with the cases just discussed. Among these cases, the government relies in particular on *Lewis v. United States*, 445 U.S. 55, 67, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), a case that predated *Nichols* and permitted the use of a prior uncounseled conviction to prove an element of an offense even though the prior conviction had resulted in incarceration in violation of *Scott*. *Lewis* held specifically that a prior uncounseled felony conviction could be used to support a subsequent, federal conviction for possession of a firearm by a felon (pursuant to a felon-in-possession statute that was a predecessor to 18 U.S.C. § 922). *Id.* The Court held such a use permissible because the later federal criminal prosecution served merely as the enforcement mechanism for a "civil" firearms restriction. *Id.* (stating that the prior conviction was being used only to enforce an "essentially civil disability through a criminal sanction" and "not [to] 'support guilt or enhance punishment'" (quoting *Burgett*, 389 U.S. at 115, 88 S.Ct. 258)). Discussing the "reliability" rational (that carried weight prior to *Nichols*, in cases such as *Burgett*, *Tucker*, and *Beto*), the court in *Lewis* stated, "The federal gun laws, however, focus not on reliability but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons." *Id.* at 67, 100 S.Ct. 915.[6]

Reaching an outcome difficult to reconcile with *Lewis*, the Court in *United States v. Mendoza–Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987), later held that, in a prosecution for illegal re-entry following a deportation, where the "prior deportation is an *element of the crime*," *id.* at 833, 107 S.Ct. 2148 (emphasis added), a defendant may, during the later criminal proceedings, attack the prior civil adjudication that led to the deportation. *Id.* at 841–42, 107 S.Ct. 2148. The alleged constitutional infirmity with the prior civil adjudication in *Mendoza–Lopez* was a due-process violation based on a denial of any meaningful procedure for appellate review of the deportation ruling. The Court stated, "[a] statute [that] envisions . . . a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, . . . does not comport with the constitutional requirement of due process." *Id.* at 837, 107 S.Ct. 2148. *Mendoza–Lopez* dis-

6. A dissent in *Lewis* characterized the majority's distinction in this regard as unconvincing:

> The Court's attempt to distinguish *Burgett*, *Tucker*, and *Loper* on the ground that the validity of the subsequent convictions or sentences in those cases depended on the *reliability* of the prior uncounseled felony convictions, while in the present case the law focuses on the mere *fact* of the prior conviction, is unconvincing. The fundamental rationale behind those decisions was the concern that according any credibility to an uncounseled felony conviction would seriously erode the protections of the Sixth Amendment. Congress' decision to include convicted felons within the class of persons prohibited from possessing firearms can rationally be supported only if the historical fact of conviction is indeed a reliable indicator of potential dangerousness. As we have so often said, denial of the right to counsel impeaches "the very integrity of the fact-finding process." And the absence of counsel impairs the reliability of a felony conviction just as much when used to prove potential dangerousness as when used as direct proof of guilt.

Lewis, 445 U.S. at 72, 100 S.Ct. 915 (Brennan, J., dissenting, joined by Justices Marshall and Powell) (internal citations omitted).

tinguished *Lewis* based on language from *Lewis* recognizing that "a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm," *Lewis*, 445 U.S. at 67, 100 S.Ct. 915. Read broadly, however, *Mendoza–Lopez* stands for the proposition that certain constitutional infirmities in underlying proceedings make use of the judgment from such a proceeding infirm for the purpose of proving an element of a subsequent criminal charge. Broadly read, *Lewis* stands for the proposition that "status" is all that matters and questions surrounding the reliability of the conviction imposing that status cannot justify barring the use of that conviction to prove the elements of a subsequent offense.

Taken together, these cases—up to and including *Nichols* and *Mendoza–Lopez*—fail to provide clear direction as to whether an uncounseled misdemeanor conviction obtained in violation of *Scott* could be used to prove the elements of a § 117 offense. *Nichols* falls short in answering the question because it did not involve a guilt-phase determination and because there was no actual *Scott* violation at issue in *Nichols*. Further, as the opinion in *Shelton* demonstrates, there may be limits to the theory that subsequent impositions of terms of incarceration punish only the subsequent acts (rather than alter punishment for the earlier offense). Finally, *Lewis* and *Mendoza–Lopez* fall short because it is not clear if § 117 is more akin to the firearms restriction involved in *Lewis* (for which "status" and the fact of conviction were all that mattered and infirmities in the underlying conviction were held to be immaterial) or the illegal reentry following deportation involved in *Mendoza–Lopez* (for which infirmities in the underlying civil judgment precluded proof of the subsequent offense, but in which the violation at issue was not analogous to the present case).

C. Use of Cavanaugh's Tribal Conviction

[7] The ultimate question in the present case, however, is not whether a prior conviction involving a *Scott* violation may be used to prove a § 117 violation. It is whether an uncounseled conviction resulting in a tribal incarceration that involved no actual constitutional violation [7] may be used later in federal court. In this regard, we note that none of the previously discussed cases precluded the use of a prior conviction for any purpose in the absence of an actual violation of the United States Constitution.[8] As per *Nichols*, then, we believe it is necessary to accord substantial

7. It perhaps would be more appropriate to refer to the proceedings that led to Cavanaugh's prior convictions as lying "outside the bounds of the United States Constitution" rather than as "not involving a violation of the United States Constitution." In this regard, we note that Cavanaugh states in his brief that using the present convictions would be akin to accepting prior convictions from Iran. Although presented with rhetorical flare, his point is not lost on this panel. As a practical matter, however, even without reaching any constitutional questions, it is clear the language of the present statute would not allow the use of such convictions, it references only federal, state, and tribal convictions. *See Small v. United States*, 544 U.S. 385, 387, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005) (refusing to read into a statute an intent to use convictions from foreign jurisdictions). Further, this is a not a case involving allegations of other gross irregularities or abuses as Cavanaugh undoubtedly intended to suggest would be present in the courts of the cited foreign state. Here, Cavanaugh's counsel stated clearly at oral argument that Cavanaugh alleges no irregularities with his tribal-court proceedings other than the denial of counsel (which was not a violation of any tribal or federal law).

8. *Baldasar* serves as the exception to this statement, but, as already noted, the Court expressly overruled *Baldasar* in *Nichols*.

weight to the fact that Cavanaugh's prior convictions involved no actual constitutional violation. Even assuming the cases discussed above collectively would preclude use of a prior state or federal conviction in the present circumstances, we do not believe we are free to preclude use of the prior conviction merely because it *would have been* invalid had it arisen from a state or federal court.

Our approach is, admittedly, categorical in nature rather than firmly rooted in the reliability concerns expressed in *Gideon*. Further, it fails to accord any special weight to the unique reason for why there was no constitutional violation in Cavanaugh's prior proceedings—the "gap" in the right to counsel caused by incomplete extension of Sixth Amendment coverage to Indian tribes through the Indian Civil Rights Act. Still, we believe the Court's emphasis in *Nichols* on the existence or absence of a prior constitutional violation was clear, and, as we recognized in *Charles*, we believe the Court held the technical validity of a conviction was a more important factor than the *Gideon*-type reliability concerns that always arise when counsel is absent.

Also, although we do not believe *Lewis* or *Mendoza–Lopez* directly control in the present context, we do not read either case as precluding the use of Cavanaugh's prior convictions. To the extent the present situation is akin to *Lewis*, in which the Court emphasized that the defendant could have moved to vacate his convictions prior to committing the latter offense, we note that Cavanaugh does not allege he attempted to vacate his prior convictions at any time prior to these proceedings. In fact, he does not even allege he pursued an appeal, and he alleges neither that he was innocent of the tribal charges nor that there were any other irregularities in the tribal proceedings. Further, to the extent Cavanaugh's case is akin to *Mendoza–Lopez*, where the court held a deprivation of appellate rights could preclude subsequent use of a civil adjudication to establish guilt, Cavanaugh does not allege any irregularities related to a deprivation of appellate rights, and, in any event, we do not view *Mendoza–Lopez* as fully reconcilable with *Lewis*.

Other courts have disagreed as to whether prior tribal court proceedings should be *treated* as involving constitutional violations where a similar absence of counsel would have violated the Sixth Amendment had it occurred in federal or state court. *Compare State v. Spotted Eagle*, 316 Mont. 370, 71 P.3d 1239, 1245–46 (2003) (refusing to treat a tribal proceeding as though it involved a Sixth Amendment violation) *with United States v. Ant*, 882 F.2d 1389, 1394 (9th Cir.1989) (treating a tribal proceeding as though it had involved a Sixth Amendment violation). In *Ant*, the Ninth Circuit held that it was impermissible to use a prior, uncounseled, tribal-court guilty plea to prove the underlying facts for a subsequent federal manslaughter charge. *Ant*, 882 F.2d at 1395. *Ant* differed from the present case in that the federal proceedings in *Ant* arose out of the same alleged incident as the tribal proceedings at issue in the case. Also, the government in *Ant* sought to use the guilty plea from tribal proceedings to prove, not the fact of a prior conviction, but rather the truth of the matters asserted in the plea. The court in *Ant* ultimately held it was necessary to suppress the guilty plea from tribal court because, although the guilty plea was not obtained in violation of tribal law or the Indian Civil Rights Act, "the tribal court guilty plea was made under circumstances which would have violated the United States Constitution were it applicable to tribal proceedings...." *Id.* at 1390. The court also noted that its holding would not "unduly prejudice" the

government because the government could still prove the facts by other means. *Id.*

In the Montana case, the state sought to use the *fact* of a prior tribal-court conviction to enhance a state DUI charge to felony status. *Spotted Eagle,* 71 P.3d at 1241. The Montana Supreme Court expressed the need to avoid "interfering with the tribal courts and the respective tribe's sovereignty," stressed that the tribal-court conviction was valid from its inception, and noted that, "Nothing of record indicates that the proceedings were fundamentally unfair or that Spotted Eagle was in fact innocent of the tribal charges." *Id.* at 1245. The court refused to treat the tribal convictions as invalid merely because, "had [they] been obtained in a federal or state court, they would [have been] invalid at their inception pursuant to *Scott.*" *Id.* at 1243. This determination seemingly is consistent with our conclusion and *Nichols.*

In discussing interference with tribal sovereignty, however, the court in *Spotted Eagle* made two points, only one of which we find convincing. The court noted that general principles of comity required the Supreme Court of Montana to "give full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws, not the Sixth Amendment standard that applies to proceedings in Montana." *Id.* at 1245. The court, however, also discussed the risk of "imposing inappropriately sweeping standards upon diverse tribal governments, institutions, and cultures" and imposing "an insurmountable financial burden on many tribal governments." *Id.* Regarding this latter statement, we see no such risk inherent in Cavanaugh's position. Precluding the use of an uncounseled tribal conviction in federal court would in no manner restrict a tribe's own use of that conviction; it would simply restrict a federal court's ability to impose additional punishment at a later date in reliance on that earlier conviction.

In any event, the most we take from these two cases is that Supreme Court authority in this area is unclear; reasonable decision-makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply. Accordingly, as a matter of first impression, we hold that, in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation.

D. Equal Protection

Cavanaugh also presents an equal protection argument that is not fully fleshed out in his brief. He argues that, because the present issue may arise only in relation to prior offenses committed by Indians, § 117 as applied in this situation impermissibly singles out Indians because of their race and permits only Indians to be convicted of § 117 violations based upon prior, uncounseled convictions.

[8] In *United States v. Antelope,* 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977), the Court held that federal criminal statutes did not violate the "equal protection requirements implicit in the Due Process Clause of the Fifth Amendment" because distinctions based upon tribal affiliation were not invidious race-based distinctions; they were distinctions based upon " 'the quasi-sovereign status of [Indian tribes] under federal law.' " *Id.* at 644, 646, 97 S.Ct. 1395 (quoting *Fisher v. District Court,* 424 U.S. 382, 390, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976)). As noted, Cavanaugh has not fully argued this issue,

and as such, he has presented no meaningful opportunity for us to address equal protection issues in this case. We note only that, when the Supreme Court issues an opinion with reasoning that appears to undercut an earlier decision, lower courts must continue to apply the earlier ruling in factual contexts analogous to the earlier case until such time that the Supreme Court itself overturns the earlier case. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' ") (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). Here the rule of *Antelope* appears to be directly on point, and as such it would seem that we must apply *Antelope* unless and until the Court decides that certain distinctions related to Indians are race-based and merit greater scrutiny.

III. Conclusion

We reverse the judgment of the district court.

BYE, Circuit Judge, dissenting.

I agree with my panel colleagues' observation as to the Supreme Court's jurisprudence failing to provide clear direction in determining whether the Sixth Amendment precludes a federal court from using an uncounseled tribal court misdemeanor conviction to prove the elements of a subsequent federal offense. The majority's opinion exhaustively covers the subject matter and aptly describes the tension in the decisions which we must consider. I can also agree the lack of clarity means reasonable decision-makers are likely to differ on the conclusions they reach with respect to allowing or prohibiting such use of an uncounseled tribal court conviction. I disagree with the conclusion reached by the majority, however, and therefore respectfully dissent.

The Sixth Amendment requires courts to furnish counsel for indigent criminal defendants whenever they face the possibility of a deprivation of liberty; the failure to provide counsel in such situations violates the Due Process Clause. *See Gideon v. Wainwright*, 372 U.S. 335, 339–45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (requiring counsel for indigent defendants facing felony charges); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (extending the rule in *Gideon* to any criminal charge which actually leads to imprisonment for any period of time). In *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court said "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense ... is to erode the principle of that case." *Id.* at 115, 88 S.Ct. 258. After *Burgett*, the Supreme Court nonetheless eroded *Gideon* by allowing uncounseled convictions to be used to enhance a sentence in a subsequent conviction. *See Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) ("Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt.").

I do not believe, however, the Supreme Court has eroded the other half of *Gideon*, that is, the prohibition on using an uncounseled conviction to support guilt for another offense. In *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198

(1980), the Supreme Court held such a use was permissible only because the uncounseled conviction was being used to support what the Court characterized as an "essentially civil disability," i.e., the prohibition on a felon's possession of a firearm. *Id.* at 67, 100 S.Ct. 915. The Court justified the use of an uncounseled conviction to impose a criminal sanction to enforce a civil disability by explaining Congress could rationally include uncounseled convicted felons "among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness." *Id.*

Section 117 of Title 18 cannot be characterized as merely imposing a civil disability on a certain class of potentially dangerous persons—the statute is clearly aimed at recidivist criminal behavior where prior offenses are necessary and integral elements of a subsequent federal offense. In such a situation, I submit, the reliability of a prior conviction matters. *See United States v. Mendoza–Lopez*, 481 U.S. 828, 833, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987) (prohibiting the use of an uncounseled deportation proceeding to prove "an element of the crime" in a subsequent criminal prosecution).

There remains the problem that an uncounseled misdemeanor conviction obtained in tribal court does not directly implicate the Sixth Amendment. I nonetheless believe such a conviction should be treated as involving a constitutional violation where it is used to prove an element of an offense in a subsequent federal court proceeding where the Sixth Amendment *is* implicated. As to such a proposition, I find persuasive *United States v. Ant*, 882 F.2d 1389 (9th Cir.1989), where the Ninth Circuit prohibited the use of an uncounseled tribal court guilty plea to prove the elements of a subsequent federal charge because "the tribal court guilty plea was made under circumstances which would have violated the United States Constitution were it applicable to tribal proceedings." *Id.* at 1390. In this case, the district court correctly observed, "[t]he issue before the Court is not to question the validity of the tribal court proceedings or question the tribal justice system, but instead to evaluate whether the convictions satisfy constitutional requirements for use in a federal prosecution in federal court." *United States v. Cavanaugh*, 680 F.Supp.2d 1062, 1075 (D.N.D.2009). I am not convinced by the majority opinion's attempts to distinguish *Ant* on the ground the federal prosecution for manslaughter involved therein arose out of the same alleged incident involved in tribal court. In my view, the key in both cases involves the use of the prior proceeding to prove an element of a subsequent federal offense. *See Burgett*, 389 U.S. at 115, 88 S.Ct. 258 (prohibiting the use of a "conviction obtained in violation of *Gideon v. Wainwright* to be used against a person ... to support guilt ... for another offense").

I respectfully dissent.

Paula KINGMAN; Calvin Kingman, Plaintiffs–Appellees,

v.

DILLARD'S, INC., Defendant–Appellant.

No. 10–2636.

United States Court of Appeals, Eighth Circuit.

Submitted: April 14, 2011.

Filed: July 6, 2011.

Rehearing Denied Aug. 17, 2011.

Background: Department store patron and her husband brought personal injury

created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, or to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

3. Amendment of the Judgment is deferred pending notification of Plaintiffs' position with regard to remittitur.

UNITED STATES of America, Plaintiff,

v.

Roman CAVANAUGH, Jr., Defendant.

Case No. 2:09–cr–04.

United States District Court, D. North Dakota, Northeastern Division.

Dec. 18, 2009.

Background: Defendant who was charged with committing a domestic assault within Indian country following at least two final convictions for offenses that would be, if subject to Federal jurisdiction, assault, sexual abuse, or serious violent felony against a spouse or intimate partner moved to dismiss the indictment.

Holdings: The District Court, Ralph R. Erickson, Chief Judge, held that:

(1) indictment was sufficient;

(2) Congress did not exceed its power under the Indian Commerce Clause; and

(3) use of defendant's prior uncounselled tribal court convictions to establish element of the offense violated defendant's rights to counsel and due process.

Motion granted in part and denied in part.

1. **Indians** ⇐303

Indictment charging defendant with domestic assault within Indian country following at least two final convictions for offenses that would be, if subject to Federal jurisdiction, assault, sexual abuse, or serious violent felony against a spouse or intimate partner was sufficiently clear to allow defendant to prepare a defense and to plead double jeopardy to any future prosecution for the alleged domestic assault, and thus, indictment was sufficient; although indictment did not specify that alleged prior assault convictions were committed against a spouse or intimate partner, it specifically alleged defendant had at least two prior convictions, identified by court and date, for "domestic abuse" that would be, if subject to Federal jurisdiction, assault, sexual abuse, or serious violent felony. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 117(a); Fed.Rules Cr.Proc.Rule 7(c), 18 U.S.C.A.

2. **Indictment and Information** ⇐71.2(3, 4)

An indictment is sufficient if it allows a defendant to prepare a defense and plead double jeopardy to any future prosecution. U.S.C.A. Const.Amend. 5; Fed. Rules Cr.Proc.Rule 7(c), 18 U.S.C.A.

3. Indictment and Information ⇐60

An indictment is insufficient as a matter of law if it does not allege an essential element of the crime charged. Fed.Rules Cr.Proc.Rule 7(c), 18 U.S.C.A.

4. Indictment and Information ⇐60, 75(1)

When determining whether an essential element has been omitted from an indictment, a court must not insist that a particular word or phrase appear in the indictment; rather, an indictment is sufficiently pled if the element is alleged in a form that substantially states the element. Fed.Rules Cr.Proc.Rule 7(c), 18 U.S.C.A.

5. Indians ⇐103

Unlike states, Indian tribes are domestic dependent nations, that is, they do not have complete sovereignty, have no external sovereignty, and have only as much internal sovereignty as has not been relinquished by them by treaty or explicitly taken by Act of the United States Congress.

6. Commerce ⇐6
Indians ⇐106

Unlike the Interstate Commerce Clause, which is limited to specific areas of commerce, the Indian Commerce Clause permits Congress to regulate broadly and with exclusive plenary power in the field of Indian affairs. U.S.C.A. Const. Art. 1, § 8, cl. 3.

7. Commerce ⇐6, 82.6
Indians ⇐261

Congress did not exceed its power under the Indian Commerce Clause in enacting the statute making it a federal crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 117.

8. Indians ⇐103, 274(3)

As a limited sovereign, Indian tribes have retained certain inherent powers; as a consequence, tribal courts have jurisdiction over many misdemeanor crimes committed on tribal lands by one Indian against another Indian.

9. Indians ⇐277, 278

Tribal courts do not have jurisdiction over crimes committed by non-Indians, even if the crime occurs within tribal lands.

10. Indians ⇐213, 220

Even though Indians are citizens of the United States, the United States Constitution does not apply in tribal courts; instead, the Indian Civil Rights Act or tribal law governs tribal proceedings. Indian Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

11. Indians ⇐213, 220

Under the Indian Civil Rights Act, unless tribal law provides otherwise, an indigent defendant in tribal court has no right to a court-appointed attorney. Indian Civil Rights Act of 1968, § 202(6), 25 U.S.C.A. § 1302(6).

12. Constitutional Law ⇐4669
Indians ⇐261

In the prosecution of the defendant under the statute making it a federal crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, the use of the defendant's prior tribal court convictions in cases in which there was no right to court-

appointed counsel and the defendant was not represented by counsel to establish the prior-conviction element of the offense violated the defendant's Sixth Amendment right to counsel and his right to due process. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. § 117(a).

13. Criminal Law ⇐1710, 1750

The Sixth Amendment gives a criminal defendant the right to counsel and the corresponding right to waive the right to counsel and proceed pro se. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐1751, 1773

A waiver of the Sixth Amendment right to counsel must be voluntary, intelligent, and knowing.; this standard is met if a court informs the defendant of the dangers and disadvantages of self-representation and the record evidences the defendant knew and understood the disadvantages. U.S.C.A. Const.Amend. 6.

15. Constitutional Law ⇐2454
Federal Courts ⇐1142

The constitutionality of a federal law is left to the Courts, and ultimately resides in the United State Supreme Court.

16. Constitutional Law ⇐4669
Criminal Law ⇐374, 1852

The introduction of uncounselled tribal court convictions in federal court as proof of an essential element of a federal crime violates a defendant's right to counsel and due process. U.S.C.A. Const. Amends. 5, 6.

West Codenotes

Unconstitutional as Applied

18 U.S.C.A. § 117(a)

Janice M. Morley, U.S. Attorney's Office, Fargo, ND, for Plaintiff.

Alexander F. Reichert, Reichert Law Office PC, Grand Forks, ND for Defendant.

ORDER ON MOTION TO DISMISS THE INDICTMENT

RALPH R. ERICKSON, Chief Judge.

Before the Court is Defendant Roman Cavanaugh, Jr.'s motion to dismiss the indictment. Cavanaugh raises three issues: (1) the indictment is fatally defective for failure to list an essential element of the offense; (2) Section 117(a) of Title 18, United States Code, is unconstitutional as it exceeds Congress's power; and (3) Section 117(a) of Title 18, United States Code, violates the United States Constitution by permitting the use of uncounseled tribal court convictions to be offered as substantive evidence to prove an essential element of a federal charge. The Court held a hearing and took arguments from the parties on November 24, 2009. The Court, having considered the briefs filed by the parties, the evidence at the hearing, and the arguments of counsel, now issues this memorandum opinion and order.[1]

SUMMARY OF DECISION

The indictment is sufficiently pled such that it would allow Defendant Cavanaugh to prepare a defense and plead double jeopardy to any future prosecution for the alleged domestic assault charge; therefore, Defendant's motion to dismiss on the ground that the indictment fails to allege an essential element is DENIED. *See United States v. Mallen*, 843 F.2d 1096, 1103 (8th Cir.1988). Unlike the Interstate Commerce Clause, which generally im-

1. The third issue raised by Defendant disposes of this case. In light of the lack of legal guidance construing the offense charged in this case or definitively resolving the issue posed, the Court has addressed each of the issues for completeness of the record.

pacts state regulation, the Indian Commerce Clause permits Congress to broadly regulate in the field of Indian affairs, and Congress was within its power to enact 18 U.S.C. § 117 as it applies to Indian country; therefore, Defendant's motion to dismiss on the ground of an invalid exercise of Congress's power is DENIED. *See United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). Finally, 18 U.S.C. § 117 as it applies in this case allows for the use of uncounseled tribal court convictions to prove an essential element of the federal crime in violation of the United States Constitution; therefore, Defendant's motion to dismiss the indictment on the ground it violates due process and the Sixth Amendment right to counsel is GRANTED. *See United States v. Ant*, 882 F.2d 1389 (9th Cir.1989).

ANALYSIS

I. SUFFICIENCY OF THE INDICTMENT

[1] Cavanaugh contends the indictment is fatally defective because it does not allege an essential element of the offense—that is, the prior assault convictions were committed "against a spouse or intimate partner." The United States maintains that the indictment fully and fairly apprises Cavanaugh of the charge against him, and if Cavanaugh believes the indictment lacks specificity the appropriate relief is through a bill of particulars.

The indictment in this case charges as follows:

> On or about July 7, 2008, in the District of North Dakota, in Indian country, and within the exclusive jurisdiction of the United States,
>
> ROMAN CAVANAUGH JR.,
>
> a person who shares a child in common with and has cohabitated with Amanda L. Luedke [sic] as a person similarly situated to a spouse, did commit a domestic assault against Amanda L. Luedtke, which assault resulted in substantial bodily injury.
>
> This domestic assault was committed after ROMAN CAVANAUGH JR. was convicted on at least two separate prior occasions in Spirit Lake Tribal Court for the following offenses that would be, if subject to Federal jurisdiction, any assault, sexual abuse, and serious violent felony:
>
> 1. Domestic Abuse, Spirit Lake Tribal Court, Fort Totten, North Dakota, conviction entered on or about January 14, 2008;
> 2. Two counts of Domestic Abuse, Spirit Lake Tribal Court, Fort Totten, North Dakota, conviction entered on or about April 6, 2005; and
> 3. Domestic Abuse, Spirit Lake Tribal Court, Fort Totten, North Dakota, conviction entered on or about March 21, 2005:
>
> In violation of Title 18, United States Code, Section 117(a)(1).

[2–4] Rule 7(c), Fed.R.Crim.P., provides that an indictment must be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment is sufficient if it allows a defendant to prepare a defense and plead double jeopardy to any future prosecution. *United States v. Mallen*, 843 F.2d 1096, 1103 (8th Cir.1988). Even so, an indictment is insufficient as a matter of law if it does not allege an essential element of the crime charged. *United States v. Jenkins-Watts*, 574 F.3d 950, 968 (8th Cir.2009). When determining whether an essential element has been omitted, a court must not insist that a particular word or phrase appear in the indictment. *United States v. Redzic*, 569 F.3d 841, 845 (8th Cir.2009); *Mallen*, 843 F.2d at 1102. Rather, an indictment is sufficiently pled if

the element is alleged "in a form" that substantially states the element. *Id.*

The essential elements of the charged offense include: (1) a domestic assault, which is defined in 18 U.S.C. § 117(b); (2) committed within Indian country; and (3) by a person who has at least two prior convictions for assault, sexual abuse, or a serious violent felony against a spouse or intimate partner. Cavanaugh contends that to meet the pleading requirement of the third element, the indictment must specifically allege that the predicate convictions involve a spouse or intimate partner and that the failure to do so renders the indictment fatally flawed.

The indictment specifically alleges Cavanaugh has at least two prior convictions for "domestic abuse" that would be, if subject to Federal jurisdiction, considered an assault, sexual abuse, or serious violent felony.[2] The indictment further lists the court of conviction as well as the date of conviction. It does not allege, however, that the predicate convictions occurred between Cavanaugh and a spouse or intimate partner. Nonetheless, a conviction for domestic abuse necessarily implies an offense against a family or household member, including persons involved in a romantic or sexual relationship. *See Cross v. Bruton*, 249 F.3d 752, 753 n. 2 (8th Cir.2001) (definition of "domestic abuse" under Minnesota law is an offense against persons who are presently residing together or have resided together in the past or persons involved in a significant romantic or sexual relationship); *Black's Law Dictionary* (8th ed. 2004) (defining domestic violence/abuse as violence between members of a household; an assault or other violent act committed by one member of a household against another).

While the Court agrees the United States would be required to establish at trial that Cavanaugh has at least two prior convictions for assault, sexual abuse, or a serious violent felony *against a spouse or intimate partner*, the Court finds the allegations are sufficiently clear to allow Cavanaugh to prepare a defense and to plead double jeopardy to any future prosecution for the alleged domestic assault occurring on or about July 7, 2008. *Mallen*, 843 F.2d at 1103 (concluding the indictment is sufficient when it allows a defendant to prepare a defense and plead double jeopardy to any future prosecution). Accordingly, Cavanaugh's motion to dismiss the indictment for failure to allege an essential element is DENIED.

II. CONGRESS'S POWER TO ENACT 18 U.S.C. § 117

Cavanaugh contends 18 U.S.C. § 117 is an unconstitutional exercise of power by Congress because it exceeds the powers granted to Congress under the Interstate Commerce Clause. The United States argues in its brief that the Necessary and Proper Clause grants Congress the authority to enact the statute at issue. At the hearing, the United States conceded the Necessary and Proper Clause is not an appropriate basis of authority in this case, but that the enactment is constitutional because it falls within Congress's power under the Indian Commerce Clause.

The United States Constitution grants Congress broad general powers to legislate with respect to Indian tribes. *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The United States Supreme Court describes the powers as "plenary and exclusive." *Id.* The sources of the power are traditionally

2. The statute requires at least two prior convictions in order for a person to qualify as a habitual offender. The indictment in this case specifies three separate prior convictions in Spirit Lake Tribal Court for domestic abuse.

found in the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2. *Id.* (citations omitted). The Supreme Court has said the function of the Indian Commerce Clause "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citations omitted). In contrast, the "treaty power" does not literally authorize Congress to legislate, but it can authorize Congress to address "matters" over which "Congress could not deal." *Id.* at 201, 124 S.Ct. 1628 (quoting *Missouri v. Holland,* 252 U.S. 416, 433, 40 S.Ct. 382, 64 L.Ed. 641 (1920)).

Thus, "[f]rom the early days of the Republic, Congress has exercised its power over commerce with the Indians in Indian country." *United States v. Houser,* 130 F.3d 867, 872 (9th Cir.1997), *cert. denied,* 524 U.S. 910, 118 S.Ct. 2074, 141 L.Ed.2d 150 (citation omitted). Congress's power under the Indian Commerce Clause is not subject to the same restrictions applicable under the Interstate Commerce Clause:

> It is ... well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.

Id. at 872–73 (quoting *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989)); *see Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 61–62, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (explaining "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause," but also stating it can find "no principled distinction" between the two commerce clauses for purposes of Congressional power to abrogate states' Eleventh Amendment immunity).

The Court has been unable to find any other courts that have construed 18 U.S.C. § 117. Thus, before examining the statute at issue in this case, a look at the history of other federal statutes governing Indian affairs provides helpful insight. The first Indian Trade and Intercourse Act, passed on July 22, 1790, provided that only the federal government could punish offenses committed *against* Indians by "any citizen or inhabitant of the United States." *United States v. Wheeler,* 435 U.S. 313, 324, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Notably, it did not mention crimes committed *by* Indians. *Id.* Approximately 27 years later, Congress extended federal criminal jurisdiction to crimes committed within Indian country by any Indian, but excepted offenses committed in Indian country by one Indian against another. *Id.* Then in 1834 Congress enacted the direct progenitor of what is now known as the Indian Country Crimes Act or the General Crimes Act, now codified at 18 U.S.C. § 1152, which makes federal enclave criminal law generally applicable to crimes in Indian country.[3] *Id.* Again, Congress carried forward the "Indian–against–Indian"

3. Today, 18 U.S.C. § 1152 provides as follows:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

exception, recognizing the tribes have exclusive jurisdiction over such offenses. *Id.* In another recognition of tribal sovereignty, in 1854 Congress added another exception to federal jurisdiction by providing that federal courts would not try an Indian who has been punished by the local law of the tribe. *Id.* Thus, for many years Congress declined to deprive Indian tribes of their sovereign power to punish offenses by members of the tribes.

Congress modified its stance with regard to jurisdiction to prosecute Indian–against–Indian crime following the United States Supreme Court's decision in *Ex Parte Crow Dog,* 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). In *Ex Parte Crow Dog,* the Supreme Court decided the tribe possessed exclusive jurisdiction to try an Indian for the murder of another Indian in Indian country, which certainly was in line with the legislation in effect at that time. However, Congress, in response to the Supreme Court's decision and "in order to curb a perceived lawlessness" in Indian country, enacted what is commonly referred to today as the Indian Major Crimes Act, codified at 18 U.S.C. § 1153. *United States v. Wadena,* 152 F.3d 831, 840 (8th Cir.1998); *see Keeble v. United States,* 412 U.S. 205, 211–12, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (quoting remarks of Rep. Cutcheon, 16 Cong. Rec. 936 (1885)) ("Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under (federal criminal) laws and taught to regard life and the personal property of others.' "); *St. Cloud v. United States,* 702 F.Supp. 1456, 1462 n. 12 (D.S.D. Dec.1, 1988) ("Congress' goal in passing the Major Crimes Act clearly was to prevent lawlessness in Indian lands and to plug gaps in criminal jurisdiction.").

The Indian Major Crimes Act provides the federal courts with exclusive jurisdiction over certain enumerated crimes committed in Indian country.[4] It does not contain an exception for Indians punished under tribal law. Today, the Indian Major Crimes Act grants federal jurisdiction for 15 enumerated crimes. 18 U.S.C. § 1153.

Additionally, Congress enacted the Assimilative Crimes Act, 18 U.S.C. § 13, in order to fill another void in federal criminal law.[5] *United States v. Howard,* 654

4. The offenses listed in 18 U.S.C. § 1153 have been expanded over the years. Today, the statute provides as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

5. 18 U.S.C. § 13 provides, in relevant part:

> (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or

F.2d 522, 524 (8th Cir.1981). Thus, where there does not exist any congressional enactment to punish an act or omission on federal enclaves, including Indian country, state law may be "assimilated." *Id.* While the Assimilative Crimes Act may not be used to redefine federal criminal law, it may be used to punish conduct violating state law on federal land. *Id.; see Williams v. United States,* 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). The Supreme Court has declared the statute's purpose is to conform the criminal law of federal enclaves to that of local law except in cases of specific federal crimes. *Acunia v. United States,* 404 F.2d 140, 142 (9th Cir.1968) (citing *United States v. Sharpnack,* 355 U.S. 286, 289–95, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958)).

Each of these three statutes has been upheld against constitutional challenges. *See e.g., United States v. Antelope,* 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (the Indian Major Crimes Act does not violate equal protection); *Keeble v. United States,* 412 U.S. 205, 210 n. 9, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (reiterating the constitutionality of the Major Crimes Act); *Sharpnack,* 355 U.S. at 296–97, 78 S.Ct. 291 (upholding the constitutionality of the Assimilative Crimes Act); *Houser,* 130 F.3d at 873 (Congress has the authority under the Indian Commerce Clause to pass 18 U.S.C. § 1152); *United States v. Keys,* 103 F.3d 758, 762 (9th Cir.1996) (holding that "[j]ust as the Indian Major Crime Act is within Congress's authority to regulate Indian criminal activity in Indian Country, the Federal Enclaves Act is within Congress's power to regulate crimes committed by or against Indians in Indian country."); *United States v. Lomayaoma,* 86 F.3d 142, 146 (9th Cir.1996), *cert. denied,* 519 U.S. 909, 117 S.Ct. 272, 136 L.Ed.2d 196 (the Indian Major Crimes Act was a constitutional exercise of power by Congress under the Indian Commerce Clause).

With this background in mind, the offense at issue in this case, domestic assault by a habitual offender, does not fall within the offenses listed in the Indian Major Crimes Act, nor is it a federal statute of general applicability. Federal statutes of general applicability are those in which the situs of the offense is not an element of the crime. *Wadena,* 152 F.3d at 841; *United States v. Pemberton,* 121 F.3d 1157, 1164 (8th Cir.1997) (describing crimes of general applicability as those that Congress has declared illegal regardless of where they occur). Instead, 18 U.S.C. § 117 applies only (1) to domestic assault committed within the special maritime and territorial jurisdiction of the United States or Indian country and (2) by a person with at least two prior convictions for assault, sexual abuse, or a serious violent felony. 18 U.S.C. § 117(a).

In challenging the constitutionality of 18 U.S.C. § 117, Cavanaugh relies upon Supreme Court cases striking down federal laws not meeting the requirements of the Interstate Commerce Clause. Those cases include *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (the Violence Against Women Act, 42 U.S.C. § 13981), and *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (the Gun–Free School Zones Act of 1990, 18 U.S.C. § 922(g)). However, *Morrison* and *Lopez* have nothing to do with Indian country and relationships between the United States and various tribes.

[5, 6] If the statute at issue was one of general applicability, the Court agrees with Cavanaugh that the focus would be on

District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

the Interstate Commerce Clause and those cases Cavanaugh cites. But, as evident in the other statutes passed by Congress regulating Indian affairs, Indian tribes have a unique relationship with the federal government. Unlike states, Indian tribes are "domestic dependent nations"—that is they "do not have complete sovereignty, have no external sovereignty, and have only as much internal sovereignty as has not been relinquished by them by treaty or explicitly taken by Act of the United States Congress." *United States v. Consol. Wounded Knee Cases,* 389 F.Supp. 235, 240 (D.Neb. Jan. 17, 1975). Unlike states, Indian tribes had no connection with and no involvement in the drafting and adoption of the United States Constitution and the Bill of Rights. *United States v. Gregg,* No. CR 04–30068, 2005 WL 1806345, at *1 (D.S.D. July 27, 2005). And finally and most importantly for purposes of this case, unlike the Interstate Commerce Clause, which is limited to specific areas of commerce, the Indian Commerce Clause permits Congress to regulate broadly and with exclusive plenary power in the field of Indian affairs. *Lara,* 541 U.S. at 200, 124 S.Ct. 1628.

[7] The most recent United States Supreme Court case analyzing Congress's power under the Indian Commerce Clause upheld Congress's authority to adjust tribal sovereignty in criminal matters without considering the traditional three categories of activities Congress may regulate under the Interstate Commerce Clause. *Lara,* 541 U.S. at 200–07, 124 S.Ct. 1628. The Court thus finds *Lopez* and *Morrison* inapplicable as they addressed general applicability statutes. If history is any indication, if it is within Congress's plenary power to regulate crimes committed by or against an Indian in Indian country, then Congress surely did not exceed its power under the Indian Commerce Clause in enacting 18 U.S.C. § 117, as applied to Indian country. After carefully considering the unique status of Indian tribes, the function of the Indian Commerce Clause, and Congress's plenary power to regulate in Indian country, Congress was within its power to enact 18 U.S.C. § 117. Cavanaugh's motion to dismiss the indictment on the ground that Congress exceeded its authority to enact 18 U.S.C. § 117 is DENIED.

III. PRIOR UNCOUNSELED TRIBAL COURT CONVICTIONS

The indictment alleges Cavanaugh was convicted in tribal court on three prior occasions for domestic abuse, and, therefore, qualifies under federal law as a habitual offender for the alleged domestic assault that occurred on or about July 7, 2008, in Indian country. Cavanaugh asserts it is a violation of his right to due process to allow uncounseled tribal court convictions to be used as predicate offenses to support a federal charge. The United States contends the language of 18 U.S.C. § 117(a) does not require that a person be represented by counsel in the underlying conviction and this Court should not read a requirement into the statute that is not there. The United States further argues due process is not implicated because the tribal court convictions complied with the Spirit Lake Code and the Indian Civil Rights Act.

1. Relationship Between Federal Court and Tribal Court

In order to give due consideration to the merits of Cavanaugh's argument, the Court believes a review of the historical background of tribal sovereignty and the tribal justice system is important. Tribal governments have existed in one form or another for centuries. In the late 1800s, the Bureau of Indian Affairs established the Courts of Indian Offenses, or "C.F.R. courts." Vincent C. Milani, *The Right to Counsel in Native American Indian Trib-*

al Courts; Tribal Sovereignty & Congressional Control, 31 Am.Crim. L.Rev. 1279, 1281 (1994). The judges were Indians appointed by the BIA and the purpose of the courts was to promote acculturation on the reservation and to help "civilize" the Indians. *Id.* At this time, federal policy with regard to Indians was one of assimilation. Then the Indian Reorganization Act of 1934 was passed, which paved the way for tribes to develop tribal courts and phase out C.F.R. courts. *Id.* The Indian Reorganization Act "signaled a major shift in federal Indian policy from assimilation to self-determination." *Id.* As a result, tribal court judges became "responsible" to the tribe instead of the BIA. *Id.* The tribes, therefore, were given greater autonomy to develop their own tribal judicial systems. *Id.* While the modern version of tribal courts has moved more closely toward the Anglo–American concept of a court, their history, nature, jurisdiction, and relationship to the federal courts continue to set them apart from other American courts.

[8] Courts long ago recognized the "quasi-sovereign" status of Indian tribes when Chief Justice John Marshall declared Indian tribes "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 5 Pet. 1, 8 L.Ed. 25 (1831). This dependent status led to the emergence of plenary power by Congress over Indian affairs while still acknowledging a tribe's sovereignty. As a limited sovereign, Indian tribes have retained certain "inherent powers." *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (explaining that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians explicitly lost by virtue of their dependent status."). As a consequence, tribal courts have jurisdiction over many misdemeanor crimes committed on tribal lands by one Indian against another Indian.

[9] Tribal courts, however, do not have jurisdiction over crimes committed by non-Indians, even if the crime occurs within tribal lands. *See Greywater v. Joshua*, 846 F.2d 486, 493 (8th Cir.1988) (tribal court's exercise of criminal jurisdiction is limited to governing the internal rules by which tribal members live and enforcing criminal laws against only tribal members); Am. Jur. Indians *Offenses By or Against Non–Indians* § 143 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978)). Congress has imposed other jurisdictional limitations, including the Indian Major Crimes Act, 18 U.S.C. § 1153, which, as discussed earlier, grants to the federal courts exclusive jurisdiction over certain enumerated crimes committed on tribal lands by and against Indians, and the Indian Civil Rights Act of 1968, which limits the maximum penalty that tribal courts can impose upon criminal defendants, 25 U.S.C. § 1302(7). Thus, unlike most Americans, who face federal prosecution only for offenses that have a particular federal nexus, American Indians in Indian country are subject to federal prosecution for numerous felonies, such as murder, incest, assault, child abuse or neglect, arson, burglary, robbery, which would not rise to the level of federal prosecution outside of Indian country. *See* 18 U.S.C. § 1153.

Even with the limitations, Congress has acknowledged the importance of tribal justice systems. 25 U.S.C. § 3651(5)-(6) (declaring tribal justice systems "an essential part of tribal governments" and "the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands."). While recognizing the significance of tribal courts, Congressional findings in 2000 indicate "the rate of violent crime committed in Indian country is approximately twice the rate of violent crime committed in the United States as a whole." 25 U.S.C. § 3651(3).

The Department of Justice estimates that American Indians experience violent crime at the rate of about one violent crime in every eight residents. Lawrence A. Greenfeld and Steven K. Smith, *American Indians & Crime,* Bureau of Justice Statistics, United States Department of Justice (Feb.1999). This compares to a rate of one in sixteen for African Americans; one in twenty for whites; and one in 34 for Asians. *Id.*

Additionally, there is little dispute that alcohol and drug abuse in Indian country is widespread. Over half of American Indian victims said the offender was under the influence of alcohol, drugs, or both. *Id.* Moreover, an estimated three in four American Indian victims of family violence reported they believed the offender was drinking at the time of the offense. *Id.* The rate of child abuse and neglect is also higher in Indian country. On a per capita basis, the Department of Justice estimates there is one substantiated report of child abuse or neglect for every 30 American Indian children under the age of 14. *Id.* This compares with one child victim for every 58 children of any race. *Id.* Thus, while Congress's self-determination policy is laudable and the importance of the tribal courts is not to be minimized, it is apparent that systemic problems of a social and political nature continue to plague Indian Country. American Indian tribes continue to remain in dire need of economic rehabilitation as well as assistance in crime control and social programming. A fully functioning tribal court with a strong and independent judiciary is an integral component of addressing these social ills.

Furthermore, Congress has recognized that the operation of tribal courts is impaired, both in terms of technical and legal assistance, due to lack of adequate funding and coordination. 25 U.S.C. § 3651(8). Consequently, the development of the jurisdictional scheme we have today creates what is, in effect, a partnership between federal courts and tribal courts for prosecuting crimes committed in Indian country. Essentially, federal courts handle the "major" crimes, i.e. felonies while tribal courts handle the lower level offenses. Tribal courts retain jurisdiction over a majority of the offenses committed in Indian country. Because of the dichotomy Congress has created, the two justice systems—tribal court and federal court—function mostly independently.

In the Court's experience, the tribal courts are overwhelmed by problems rising out of a lack of adequate funding, a lack of adequately trained personnel, and a lack of true judicial independence. This gives rise to a justice system that provides uneven legal services, at best. The problem is exacerbated by a lack of adequate resources for treatment, rehabilitation, and even incarceration. Many tribal jails are antiquated facilities suitable only for warehousing inmates. To describe the overall state of the facilities available to the tribal courts as wanting is an understatement. The Court recognizes that many of the tribes have taken herculean efforts to make do with judicial resources that state and federal courts would deem create a constitutional crisis. In short, many tribal courts are so short of resources and personnel that they constitute a national embarrassment. Given the lack of economic activity on many reservations, the tax base is inadequate to solve the institutional problems, thus any solution must necessarily involve a greater commitment on the part of the United States to see that a functioning tribal court system exists throughout Indian country. Where justice is uncertain, delayed, or denied entirely, it is completely predictable that economic stability will be difficult to obtain or maintain. The plain truth is that business owners will not locate businesses in places where the communities lack general order

or where predictability of results in contractual or civil suits does not exist. If anyone intends to address the fundamental needs in Indian county, it is essential that the court system be one of the first areas addressed. Without a fully functional judiciary, with clear jurisdictional lines and uniform quality, social and economic progress will remain elusive.

2. The United States Constitution and Tribal Court

When an offense is committed in Indian country and jurisdiction is determined, few constitutional problems arise so long as the prosecution and conviction remain exclusively in either tribal or federal court. However, significant constitutional issues tend to arise when tribal court convictions cross over into the federal judicial system. While many protections guaranteed to Americans in the Bill of Rights have been extended to American Indians in tribal court through the Indian Civil Rights Act, 25 U.S.C. § 1302, one notable exception is the right to court-appointed counsel.[6] Over forty years ago, the United States Supreme Court decided the Sixth Amendment requires courts to furnish counsel for indigent criminal defendants in felony cases. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Since then, the Supreme Court clarified that defense counsel must be appointed in any criminal prosecution, whether classified as petty, misdemeanor, or felony, that actually leads to imprisonment if even for a brief period. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *see Scott v. Illinois*, 440 U.S. 367, 373–74, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) (holding a defendant is not entitled to counsel merely because the criminal charge he faces authorizes imprisonment; rather, the right to counsel applies only when the defendant is actually sentenced to prison).

[10, 11] Even though Indians are citizens of the United States, the United States Constitution does not apply in tribal courts. Felix Cohen, *Handbook on Federal Indian Law* § 4.01[2][a] (2005); *Talton v. Mayes*, 163 U.S. 376, 384, 16 S.Ct. 986, 41 L.Ed. 196 (1896); *Tom v. Sutton*, 533 F.2d 1101, 1102–03 (9th Cir.1976) (due to their sovereign status, Indian tribes are vested with the inherent power to adopt their own constitution). Instead, the Indian Civil Rights Act or tribal law governs tribal proceedings. The Indian Civil Rights Act provides only that no tribe shall "deny to any person in a criminal proceeding the right ... *at his own expense* to have the assistance of counsel." 25 U.S.C. § 1302(6) (emphasis added). Consequently, unless tribal law provides otherwise, an indigent defendant in tribal court has no right to a court-appointed attorney.

At least one legal scholar has pondered whether Congress, if authorized to, ought to impose a right to counsel in tribal courts. Vincent C. Milani, *The Right to Counsel in Native American Indian Tribal Courts; Tribal Sovereignty and Congressional Control*, 31 Am.Crim. L.Rev. 1279, 1291 (1994). One view is that Congressional restraint ought to be exercised out of concern for tribal sovereignty, recognition of the differences among numerous tribes, and the limitations placed upon tribal responsiveness to the needs of their

6. The Indian Civil Rights Act also does not prohibit the establishment of religion, nor does it require jury trials in civil cases. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Congress intentionally did not extend in wholesale fashion the Bill of Rights, as had initially been proposed, in order to recognize the commitment to the goal of tribal self-determination and to fit the "unique political, cultural, and economic needs of tribal governments." *Id.* at 62, 98 S.Ct. 1670.

members by insufficient funding. *Id.* at 1291–92. This article was written at a time when the practice of most federal courts was to deny the admission of uncounseled tribal court convictions as substantive evidence of guilt or as a factor to enhance sentence in a subsequent federal proceeding. *Id.* at 1300.

Today, the Sentencing Guidelines allow for consideration of tribal court convictions when determining the adequacy of criminal history and courts have the discretion to consider uncounseled tribal convictions when sentencing a defendant in federal court. *See* USSG § 4A1.2(I); *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) (uncounseled misdemeanor conviction, which did not result in a prison sentence, can be used to enhance a defendant's punishment for a subsequent conviction); *United States v. Drapeau*, 110 F.3d 618, 620 (8th Cir.1997) (concluding district court appropriately applied an upward departure to reflect the defendant's tribal offenses).

The fact that Congress has left the tribes with exclusive jurisdiction over misdemeanor offenses committed by one Indian against another Indian in Indian country is evidence that it presumes tribal courts exist and are competent to prosecute misdemeanors.[7] On the other hand, felony offenses by Indians against Indians are handled exclusively by the United States. Thus, Congress has created a scheme, which, in part, ensures that an Indian charged with a felony is afforded all of the protections of the United States Constitution.

3. Tribal Court Convictions under 18 U.S.C. § 117

[12] This background now brings us to the remaining issue presently before the Court: Whether prior uncounseled misdemeanor tribal court convictions can be used as substantive evidence to prove an essential element of a federal crime. The crime at issue, domestic assault by an habitual offender, states, in relevant part:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or
>
> (2) an offense under chapter 110A,. .

18 U.S.C. § 117(a). In this case, the indictment alleges Cavanaugh has three prior convictions in Spirit Lake Tribal Court for domestic abuse. The Spirit Lake Nation Law and Order Code does not authorize court-appointed counsel at tribal expense. (Doc. # 51–2). Instead, defendants in Spirit Lake Tribal Court are advised that they have the right to an attorney at their own expense, which is in accordance with the Indian Civil Rights Act. (*Id.;* Doc. 51–3). Cavanaugh signed a written "Statement of Rights" in which he acknowledged he was advised of his right to counsel at his expense. Thus, it is clear Cavanaugh understood he was entitled to have an attorney represent him at his own expense. There is no evidence to indicate Cavanaugh's tribal court convictions were invalid under tribal law or the Indian Civil Rights Act. The issue thus is whether a tribal court conviction that complies with tribal law and the Indian Civil Rights Act, but not the United States Constitution, can be used to estab-

7. The maximum penalty tribal courts may impose upon criminal defendants is fine of $5,000, one year in prison, or both. 25 U.S.C. § 1302(7).

lish an essential element of a federal crime.[8] The Court finds it cannot.

[13, 14] The United States argues Cavanaugh's valid waiver of the right to counsel in tribal court renders the convictions valid for purposes of the federal offense. But, the Sixth Amendment gives a criminal defendant the right to counsel and the corresponding right to waive the right to counsel and proceed pro se. *United States v. Armstrong*, 554 F.3d 1159, 1165 (8th Cir.2009). A waiver of the right to counsel "must be voluntary, intelligent, and knowing." *Id.* This standard is met if a court informs the defendant of the dangers and disadvantages of self-representation and the record evidences the defendant knew and understood the disadvantages. *Id.*

The standard for waiver of the right to counsel in federal court was not met in the tribal court proceedings because Cavanaugh had no right to a court-appointed lawyer; therefore, his only option was to come up with the money to pay a lawyer or proceed *pro se*. In contrast, the federal system does not force an indigent defendant to proceed *pro se*. As aptly noted by the United States Supreme Court: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.... That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Gideon*, 372 U.S. at 344, 83 S.Ct. 792. The issue before the Court is not to question the validity of the tribal court proceedings or question the tribal justice system, but instead to evaluate whether the convictions satisfy constitutional requirements for use in a federal prosecution in federal court.

The Court finds the analysis of the Ninth Circuit in *United States v. Ant*, 882 F.2d 1389 (9th Cir.1989) persuasive in this case. In *Ant*, the defendant, an American Indian, pled guilty to assault and battery in tribal court and was sentenced to six months in jail. The defendant was not represented by a lawyer, although he was likely advised of his right to a lawyer. Subsequently, a federal indictment charged the defendant with voluntary manslaughter. The defendant moved to suppress his confession and guilty plea from tribal court, arguing exclusion was appropriate because his right to counsel under the Sixth Amendment was violated and his confession was involuntary in violation of the Fifth Amendment. The Ninth Circuit analyzed whether the guilty plea was made under conditions consistent with the United States Constitution. 882 F.2d at 1393–94. Because the defendant was not provided the opportunity for court-appointed counsel in tribal court and thus the proceedings did not meet constitutional requirements, the Ninth Circuit suppressed the uncounseled tribal court guilty plea. *Id.* at 1395–96.

The United States attempts to distinguish Ant on the basis that the same offense was involved in both tribal court and federal court. The Court does not find this distinction significant. The argument, however, highlights a primary issue in this case. The uncounseled tribal court convic-

8. Neither party has expressly indicated whether the tribal court sentenced Cavanaugh to a term of imprisonment for any of the three domestic abuse offenses. The Sixth Amendment right to counsel attaches when a defendant is actually imprisoned. *Argersinger* 407 U.S. at 37, 92 S.Ct. 2006; *Scott*, 440 U.S. at 373–74, 99 S.Ct. 1158 (1979). Because the United States has not argued otherwise, the Court assumes the tribal court convictions would be constitutionally infirm if obtained in state or federal court.

tions in the present case are necessary to prove an essential element of a federal crime. They are not being offered in this case for purposes of sentencing enhancement, for purposes of impeachment, or as evidence under Fed.R.Evid. 404(b). The Court is unable to contemplate another situation in which it would permit a party to introduce evidence obtained in violation of the United States Constitution and allow it to be offered as substantive evidence to prove an essential element of a federal offense. Adherence to the requirements of the United States Constitution is just as compelling as the circumstances in *Ant.* To permit a conviction that violates the Sixth Amendment to be used against a person to support guilt for another offense would erode the very principle set forth in *Gideon. United States v. Tucker,* 404 U.S. 443, 449, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas,* 389 U.S. 109, 114, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

The United States also points to the plain language of the federal statute at issue in this case and contrasts it with the Gun Control Act of 1968, 18 U.S.C. § 922(g)(9), which prohibits any person convicted in any court of a misdemeanor crime of domestic violence from possessing a firearm. In defining the term "misdemeanor crime of domestic violence", the Gun Control Act does not allow an earlier misdemeanor conviction to count as a predicate offense unless the defendant was represented by counsel or knowingly and intelligently waived the right to counsel. 18 U.S.C. 921(a)(33)(B)(i).

The Court acknowledges that when Congress passed 18 U.S.C. § 117, Congress did not place the same restrictions of requiring legal representation or waiver of the right to a lawyer before the conviction could count as a predicate offense. The legislative history indicates the federal offense was created, in part, to prevent serious injury or death of American Indian women and to allow tribal court convictions to count for purposes of a federal prosecution, particularly because the Indian Major Crimes Act does not allow federal prosecutors to prosecute domestic violence assaults unless they rise to the level of serious bodily injury or death. 151 Cong. Rec. S4873–74 (May 10, 2005).

[15, 16] Nevertheless, in exercising its powers, Congress is not free to ignore constitutional rights. *See Bridges v. Wixon,* 326 U.S. 135, 161, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (noting Congress may not ignore resident aliens' constitutional rights in the exercise of its plenary power of deportation). The constitutionality of a federal law is left to the Courts, and ultimately resides in the United State Supreme Court. *Sable Communications of California, Inc. v. F.C.C.,* 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("To the extent that the federal parties suggest we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution"). Thus, to the extent the United States contends the statute is constitutional because Congress had a legitimate reason for filling the gap between tribal and federal law in the area of domestic violence, the courts are not foreclosed from conducting an independent analysis of the facts bearing on an issue of constitutional law. The Court, in its independent view finds the introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violate a defendant's right to counsel and due process. Thus, to the extent that 18 U.S.C. § 117 allows for the use of such convictions in such a manner, it is unconstitutional.

The Court's decision today does not seek to bind upon tribal courts the protections

of the Sixth Amendment. It simply stands for the proposition that tribal convictions introduced in a federal court to prove an essential element of a federal crime must be in compliance with the United States Constitution. Such a result not only complies with the protections guaranteed to individual citizens by the Constitution but it puts all defendants indicted under 18 U.S.C. § 117 on the same playing field. As it stands now, American Indians are the only group of defendants that could face conviction under 18 U.S.C. § 117(a) as a result of underlying convictions for which they had no right to court-appointed counsel. While recognizing the unique status of tribes and tribal sovereignty, this Court does not believe it must give deference to tribal convictions if the result is to accord American Indians less than the minimum protections guaranteed by the Constitution. After all, American Indians indicted under the Indian Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction, so should they under 18 U.S.C. § 117(a). There is simply no compelling reason to sacrifice constitutional order by allowing an essential element to be established by use of an uncounseled conviction solely because the defendant happens to be Indian. In the courts of the United States a person's constitutional rights should not be limited merely by accident of birth.

For the foregoing reasons, Cavanaugh's motion to dismiss the indictment on the ground that the use of prior uncounseled tribal court convictions as substantive evidence to prove an essential element of the crime violates the Constitution is GRANTED.

CONCLUSION

For the foregoing reasons, Cavanaugh's motion to dismiss the indictment is denied in part and granted in part. Because the Court finds, under the circumstances of this case, it would violate the Constitution to allow uncounseled tribal court conviction to be used as substantive evidence to prove an element of the federal charge, the indictment against Cavanaugh is hereby DISMISSED.

IT IS SO ORDERED.

CUMIS INSURANCE SOCIETY, INC., Plaintiff,

v.

MERRICK BANK CORPORATION, et al., Defendants.

In re: CardSystems Solutions, Inc., Debtor.

Nos. Civ. 07-374-TUC-CKJ, Civ. 09-180-TUC-CKJ, 4-06-bk-515-JMM.

United States District Court, D. Arizona.

Jan. 11, 2010.

Background: Insurer brought action against bank, third—party transaction processor sponsored by bank, and others to recover losses suffered by insured credit unions as result of processor's security breach. Bank moved for summary judgment.

Holdings: The District Court, Cindy K. Jorgenson, J., held that:

(1) bank's summary judgment affidavit listing total payouts to credit unions could not be considered;

(2) credit unions had released bank of all liability resulting from security breach; and

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 7. Assault

18 U.S.C.A. § 117
§ 117. Domestic assault by an habitual offender 1
Effective: January 5, 2006

Currentness

(a) **In general.**--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction--

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) **Domestic assault defined.**--In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

Credits

(Added Pub.L. 109-162, Title IX, § 909, Jan. 5, 2006, 119 Stat. 3084.)

Notes of Decisions (4)

Current through P.L. 112-28 approved 8-12-11

Footnotes
1 Section was enacted without corresponding amendment to analysis.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1154

United States of America

Appellant

v.

Roman Cavanaugh, Jr.

Appellee

Appeal from U.S. District Court for the District of North Dakota - Fargo
(2:09-cr-00004-RRE-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 12, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

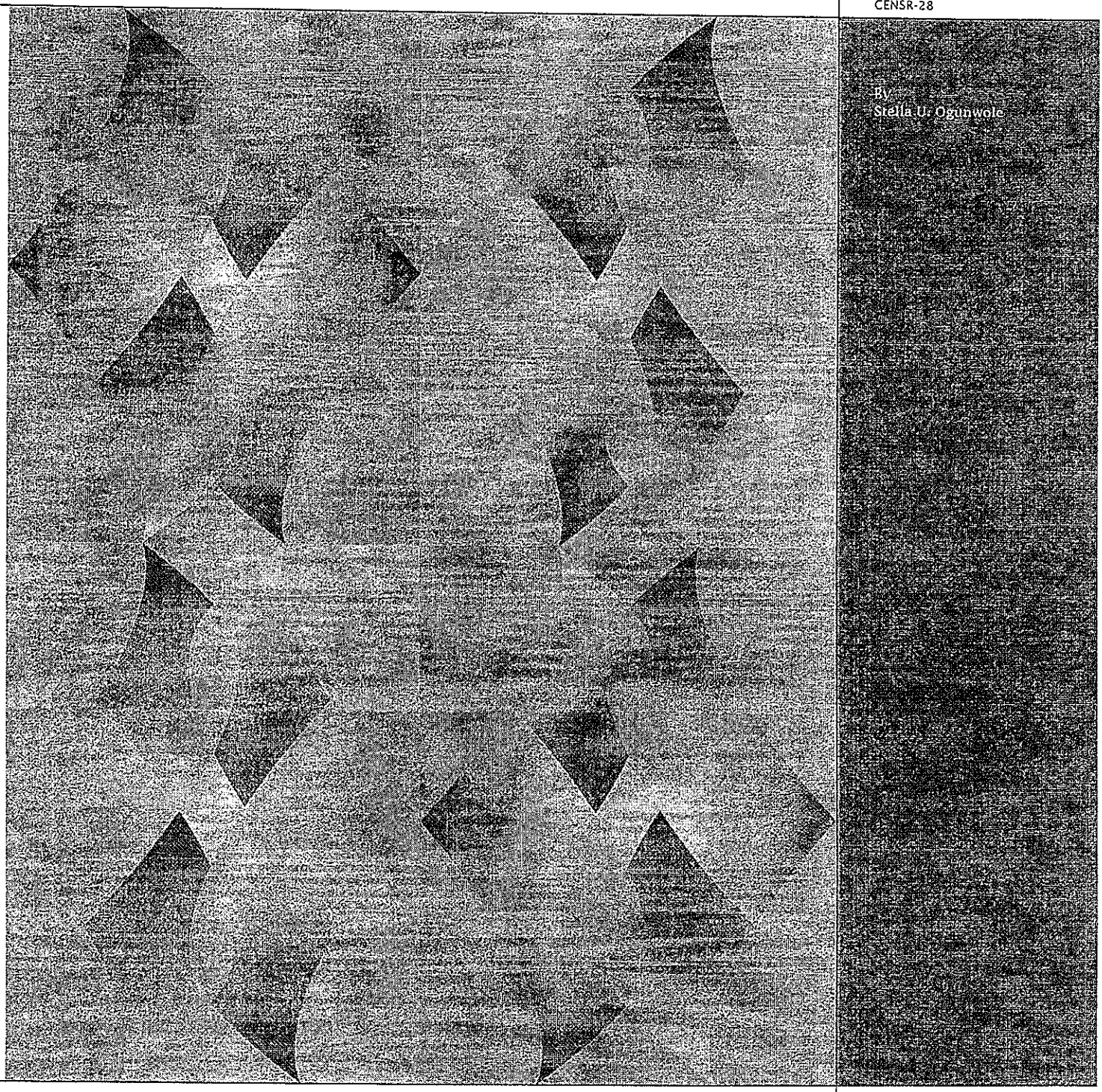
tables App. E

We the People: American Indians and Alaska Natives in the United States

Census 2000 Special Reports

Issued February 2006

CENSR-28



By
Stella U. Ogunwole

U S C E N S U S B U R E A U

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Economics and Statistics Administration
U.S. CENSUS BUREAU

United States Census 2000

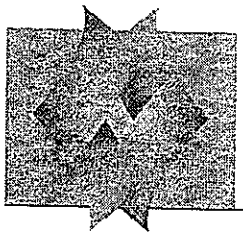
Acknowledgments

This report was prepared by **Stella U. Ogunwole**, under the supervision of **Claudette E. Bennett**, Chief, Racial Statistics Branch, and **Jorge del Pinal**, Assistant Division Chief, Special Population Statistics, Population Division. **John F. Long**, then Chief, Population Division, provided overall direction.

General direction was provided by **Judy G. Belton**, Chief, Race and Hispanic Origin Review Branch, Population Division. Within the Race and Hispanic Origin Review Branch, **Linda M. Chase** provided principal statistical assistance, and additional assistance was provided by **Yvonne J. Gist**, **Debra A. Niner**, and **Paula L. Vines**. The contents of the report were reviewed by **Marjorie F. Hanson**, Population Division. **E. Marie Pees** and **Steve Smith**, Population Division, provided computer programming support.

Burton Reist and **Jeanne Waples** of the Decennial Management Division provided decennial policy review of this report. **Andrew D. Keller**, under the guidance of **Philip M. Gbur** of the Decennial Statistical Studies Division, conducted sampling review.

Jan Sweeney, **Theodora Forgione**, **Jamie Peters**, **and Mary Stinson** of the Administrative and Customer Services Division, **Walter C. Odom**, Chief, provided publications and printing management, graphics design and composition, and editorial review for print and electronic media. General direction and production management were provided by **Susan L. Rappa**, Chief, Publications Services Branch.



We the People: American Indians and Alaska Natives in the United States

This report provides a portrait of the American Indian and Alaska Native population in the United States and discusses the largest specified tribal groupings, reservations, Alaska Native village statistical areas (ANVSAs), and areas outside reservations and ANVSAs (outside tribal areas) at the national level.[1] It is part of the Census 2000 Special Reports series that presents demographic, social, and economic characteristics collected from Census 2000.

In Census 2000, 4.3 million people, or 1.5 percent of the total U.S. population, reported that they were American Indian and Alaska Native. This number included 2.4 million people, or 1 percent, who reported only American Indian and Alaska Native as their race. Table 1 shows the number of people reporting a single detailed tribal grouping and a tally of the number of times the grouping was reported.[2]

Census 2000 reported on six major race categories: White, Black or African American, American Indian or Alaska Native, Asian, Native Hawaiian or Other Pacific Islander, and Some Other Race.[3] The term "American Indian or Alaska Native" refers to people having origins in any of the original peoples of North and South America (including Central America) who maintain tribal affiliation or community attachment. It includes people who reported American Indian and Alaska Native or wrote in their principal or enrolled tribe. When the terms "American Indian" and "Alaska Native" are used separately in this report, they refer to two distinct populations.

This report presents data for the following American Indian tribal groupings:

Apache	Iroquois
Cherokee	Lumbee
Chippewa	Navaho
Choctaw	Pueblo
Creek	Sioux

This report presents data for the following Alaska Native tribal groupings:

Alaskan Athabascan
Aleut
Eskimo
Tlingit-Haida

This report also presents Census 2000 data for the single-race American Indian and Alaska Native population for those who lived inside and those who lived outside tribal areas.

The data collected by Census 2000 on race can be divided into two broad categories: people who reported only one race and people who reported more than 1 of the 6 major race categories. People who responded to the question on race by indicating only one race are referred to as the single-race population. For example, respondents who reported their race as only American Indian or Alaska Native and/or wrote in one or more tribes, would be included in the single-race American Indian population, which is identified as American Indian and Alaska Native alone in tables in this report.[4] Individuals who reported a specific race and one or more other major races are referred to as the race-in-combination population. For example, respondents who reported they were American Indian and Alaska Native ***and*** White, or American Indian and Alaska Native ***and*** Black or African American ***and*** Asian, would be included in the

[1] Tribal grouping refers to the combining of individual American Indian tribes into their general tribal grouping, such as Fort Sill Apache, Jicarilla Apache, and Mescalero Apache into the general Apache tribe, or combining individual Alaska Native tribes, such as American Eskimo, Eskimo, and Greenland Eskimo, into the general Eskimo tribe.

[2] The data contained in this report are based on the sample of households that responded to the Census 2000 long form. As with all surveys, estimates may vary from the actual values because of sampling variation or other factors. All comparisons made in this report have undergone statistical testing and are significant at the 90-percent confidence level unless otherwise noted.

[3] The Census 2000 question on race included 15 separate response categories and three areas where respondents could write in a more specific race group. The response categories and write-in answers can be combined to create the five race categories specified by the Office of Management and Budget (OMB) plus Some Other Race. In addition to White, Black or African American, American Indian or Alaska Native, and Some Other Race, 7 of the 15 response categories are Asian and 4 are Native Hawaiian or Other Pacific Islander.

[4] Respondents reporting a single American Indian or Alaska Native tribal grouping, such as "Apache" or "Alaskan Athabascan," would be included in the American Indian and Alaska Native single-race population. Respondents reporting more than one tribal grouping, such as "Apache and Cherokee" or "Alaskan Athabascan and Eskimo and Aleut," would also be included in the American Indian and Alaska Native alone population.

Table 1.
American Indian and Alaska Native Population by Selected Tribal Grouping: 2000

(Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)

Tribal grouping	American Indian and Alaska Native alone		American Indian and Alaska Native alone or in combination	
	Number	Percent of U.S. population	Number	Percent of U.S. population
Total	2,447,989	0.87	4,315,865	1.53
American Indian, one tribal grouping[1]	1,770,046	0.63	2,883,803	1.02
Apache	57,199	0.02	104,556	0.04
Cherokee	302,569	0.11	875,276	0.31
Chippewa	110,857	0.04	159,744	0.06
Choctaw	88,692	0.03	173,314	0.06
Creek	40,487	0.01	76,159	0.03
Iroquois	47,746	0.02	89,371	0.03
Lumbee	52,614	0.02	59,488	0.02
Navajo	276,775	0.10	309,575	0.11
Pueblo	59,621	0.02	73,687	0.03
Sioux	113,713	0.04	167,869	0.06
Alaska Native, one tribal grouping[2]	96,998	0.03	120,766	0.04
Alaska Athabascan	14,700	0.01	18,874	0.01
Aleut	12,069	-	17,551	0.01
Eskimo	47,239	0.02	56,824	0.02
Tlingit-Haida	15,212	0.01	22,786	0.01
One or more other specified tribal groupings[3]	755,799	0.27	1,279,089	0.45
Tribal grouping not specified[4]	452,697	0.16	1,017,222	0.36

- Rounds to zero.

[1] The alone population includes people who reported only one American Indian tribal grouping. The corresponding alone-or-in-combination population includes people who reported one American Indian tribal grouping and one or more races.

[2] The alone population includes people who reported only one Alaska Native tribal grouping. The corresponding alone-or-in-combination population includes people who reported one Alaska Native tribal grouping and one or more races.

[3] The alone population includes people who reported one or more American Indian or Alaska Native tribal groupings not listed above or elsewhere classified and no other race, and people who reported 2 or more of the 14 specific tribal groupings listed above (Apache through Sioux and Alaska Athabascan through Tlingit-Haida) and no other race. The corresponding alone-or-in-combination population includes people who reported one or more other specified tribal groupings regardless of whether they also reported another race.

[4] The alone population includes people who checked the box "American Indian or Alaska Native" only. The corresponding alone-or-in-combination population includes people who checked the box "American Indian or Alaska Native" regardless of whether they also reported another race.

Note: For the 14 specific tribal groupings listed (Apache through Sioux and Alaska Athabascan through Tlingit-Haida), the alone population includes people who reported that one tribal grouping only. The corresponding alone-or-in-combination population also includes people who reported one or more tribal groupings and one or more races.

Source: U.S. Census Bureau, Census 2000 special tabulation.

American Indian and Alaska Native in-combination population.[5]

In addition to reporting one or more races, American Indians and Alaska Natives could report one or more tribes.[6] People who checked the American Indian or Alaska Native response category on the census questionnaire and wrote in their tribe as Red Lake Band of Chippewa Indians or Minnesota Chippewa, for example, would be included in the Chippewa tribal grouping, or the single-race and single-tribal-grouping population. Respondents who reported their race only as American Indian and Alaska Native and wrote in more than one of the American Indian

[5] The race-in-combination categories use the conjunction ***and*** in bold and italicized print to link the race groups that compose the combination.

[6] Like race, the information on tribe is based on self-identification. Tribes include federally or state-recognized tribes, as well as bands and clans. Some of the entries, such as Iroquois, Sioux, Colorado River, and Flathead, represent nations or reservations.

UNDERSTANDING DATA ON RACE AND HISPANIC ORIGIN FROM CENSUS 2000

Census 2000 incorporated the federal standards for collecting and presenting data on race and Hispanic origin issued by the Office of Management and Budget (OMB) in October 1997, considering race and Hispanic origin to be two separate and distinct concepts. For Census 2000, the questions on race and Hispanic origin were asked of every individual living in the United States, and answers were based on self-identification.

Data on race have been collected since the first U.S. decennial census in 1790. The question on race on Census 2000 was different from the one on the 1990 census in several ways. In 2000, respondents were asked to select one or more race categories to indicate their racial identities. Additionally, three separate categories Indian (Amer.), Eskimo, and Aleut were combined into one category and renamed American Indian or Alaska Native.* Because of the changes, the Census 2000 data on race are not directly comparable with data from the 1990 census or earlier censuses. Caution must be used when interpreting changes in the racial composition of the U.S. population over time.

Because Hispanics or Latinos may be any race, data in this report for American Indians and Alaska Natives overlap with data for Hispanics. Among American Indians and Alaska Natives who reported only one race, approximately 15.0 percent were Hispanic. The question on Hispanic origin in Census 2000 was similar to the 1990 question, except for its placement on the questionnaire and a few wording changes. For Census 2000, the question on Hispanic origin was asked directly before the question on race, while in 1990, the question on race preceded questions on age and marital status, which were followed by the question on Hispanic origin. Additionally, in Census 2000, a note was included on the questionnaire asking respondents to complete both the question on Hispanic origin and the question on race.

* A more detailed discussion of these changes is provided in Elizabeth M. Grieco and Rachel C. Cassidy, 2001, *Overview of Race and Hispanic Origin: 2000*, U.S. Census Bureau, Census 2000 Brief, C2KBR/01-1. This report is available on the U.S. Census Bureau's Internet site at <www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

and Alaska Native tribes would still be included in the single-race population. For example, a respondent who reported his or her race as only American Indian and Alaska Native, and wrote in White Mountain Apache and Minnesota Chippewa, would be included both in Apache and Chippewa tribal groupings. Because no other race was reported, this respondent would also be included in the single-race American Indian and Alaska Native population.

Respondents who reported more than 1 of the 6 major race categories and wrote in their tribe as Red Lake Band of Chippewa Indians or Minnesota Chippewa, for example, would be included in the race in-combination and single-tribal-grouping (Chippewa) population.

People who indicated more than 1 of the 6 races and wrote in more than one of the American Indian and Alaska Native tribes would be included in the race in-combination and in-combination tribal-groupings population.[7]

In the text and figures of this report, population characteristics are shown for American Indians and Alaska Natives who reported only one race and one tribe. This presentation does not imply that it is the preferred method of presenting or analyzing data. The U.S. Census Bureau uses a variety of approaches. Table 2 summarizes characteristics for the single-race American Indian and Alaska Native population, American Indians and Alaska Natives who reported two or more races, and people who reported they were American Indian or Alaska Native regardless of whether they also reported another race. Data for the American Indian and Alaska Native single-race population, the American Indian and Alaska Native population regardless of whether they reported any other race, and the detailed tribal groupings are in Summary File 4, shown at <www.census.gov/prod/cen2000/doc/sf4.pdf>.

[7] A more detailed description and presentation of the race and tribal grouping combinations for the American Indian and Alaska Native population is provided in *American Indian and Alaska Native Tribes for the United States, Regions, Divisions, and States: 2000*, U.S. Census Bureau, PHC-T-18. This product is available on the U.S. Census Bureau's Internet site at <www.census.gov/population/www/cen2000/phc-t18.html>.

Two companion reports provide more information on these concepts and populations. The Census 2000 Brief *The American Indian and Alaska Native Population: 2000* analyzes population data collected from the short-form questions in Census 2000. It shows the American Indian and Alaska Native population distribution at both the national and subnational levels, as well as tribal groupings at the national level.[8] In addition, the Census 2000 Brief *Overview of Race and Hispanic Origin: 2000* provides a complete explanation of the race categories used in Census 2000 and information on each of the six major race groups and the Hispanic-origin population at the national level.

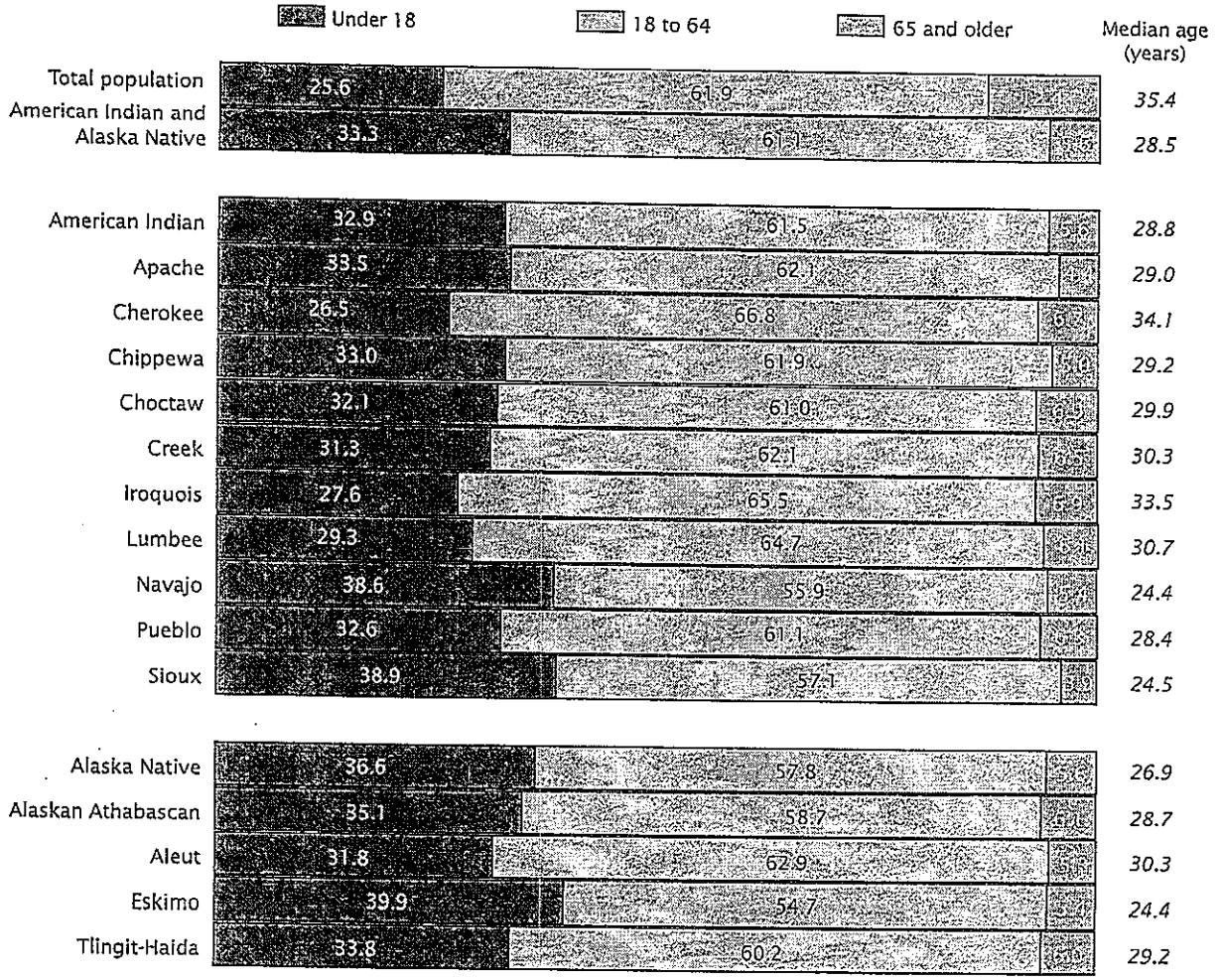
[8] Stella U. Ogunwole, 2002, *The American Indian and Alaska Native Population: 2000*, U.S. Census Bureau, Census 2000 Brief, C2KBR/01-15. This report is available on the U.S. Census Bureau's Internet site at <www.census.gov/prod/2002pubs/c2kbr01-15.pdf>.

The American Indian and Alaska Native population was younger than the total population.

- About 33 percent of the American Indian and Alaska Native population was under age 18, compared with 26 percent of the total population. In the older age group, 5.6 percent of the American Indian and Alaska Native population, compared with 12.4 percent of the total population, was 65 and older.
- The percentage under age 18 of American Indian tribal groupings ranged from 26 percent to 39 percent. The corresponding percentage among the Alaska Native tribal groupings ranged from 32 percent to 40 percent.
- Less than 10 percent of all American Indian tribal groupings were 65 and older.
- The median age of 29 years for American Indians and Alaska Natives was about 6 years younger than the national median of 35 years.

Figure 1.
Selected Age Groups and Median Age: 2000

(Percent distribution. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 special tabulation.

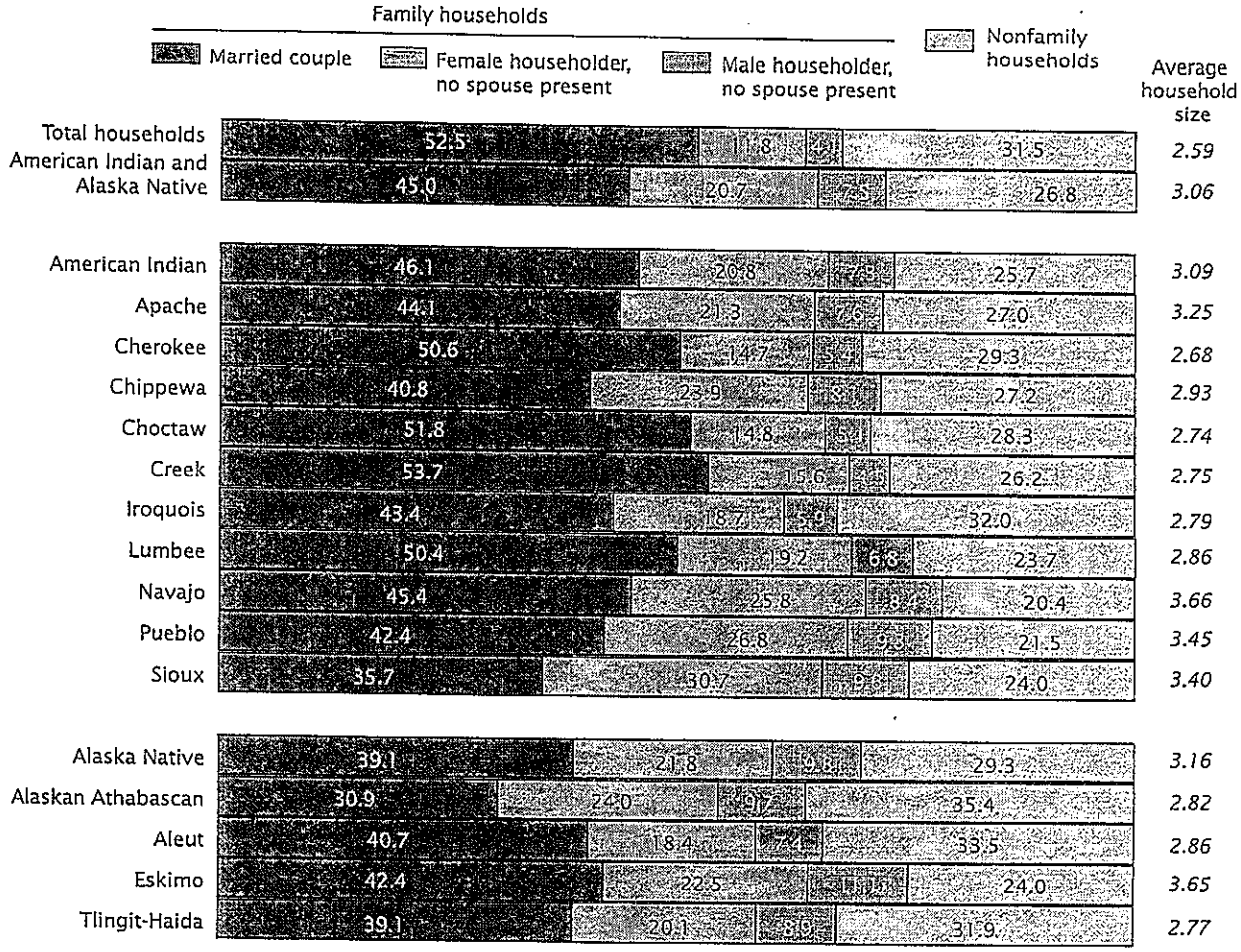
Seventy-three percent of American Indian and Alaska Native households were family households, compared with 68 percent of all households.

- American Indians and Alaska Natives had a higher percentage of family households maintained by a woman with no husband present and a higher percentage of family households maintained by a man with no wife present than the total population.
- Household type varied among the American Indian tribal groupings. The percentage of family households ranged from 68 percent to 80 percent.
- Twenty-five percent or more of Sioux, Pueblo, and Navajo households were family households maintained by women with no husband present.
- Among the Alaska Native tribal groupings, the percentage of family households ranged from about 65 percent to 76 percent. Forty-two percent of Eskimo households were married-couple families, which exceeded the 31 percent of Alaskan Athabascan households.

Figure 2.

Household Type and Average Household Size: 2000

(Percent distribution of households. Households are classified by the race and tribal grouping of the householder. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 special tabulation.

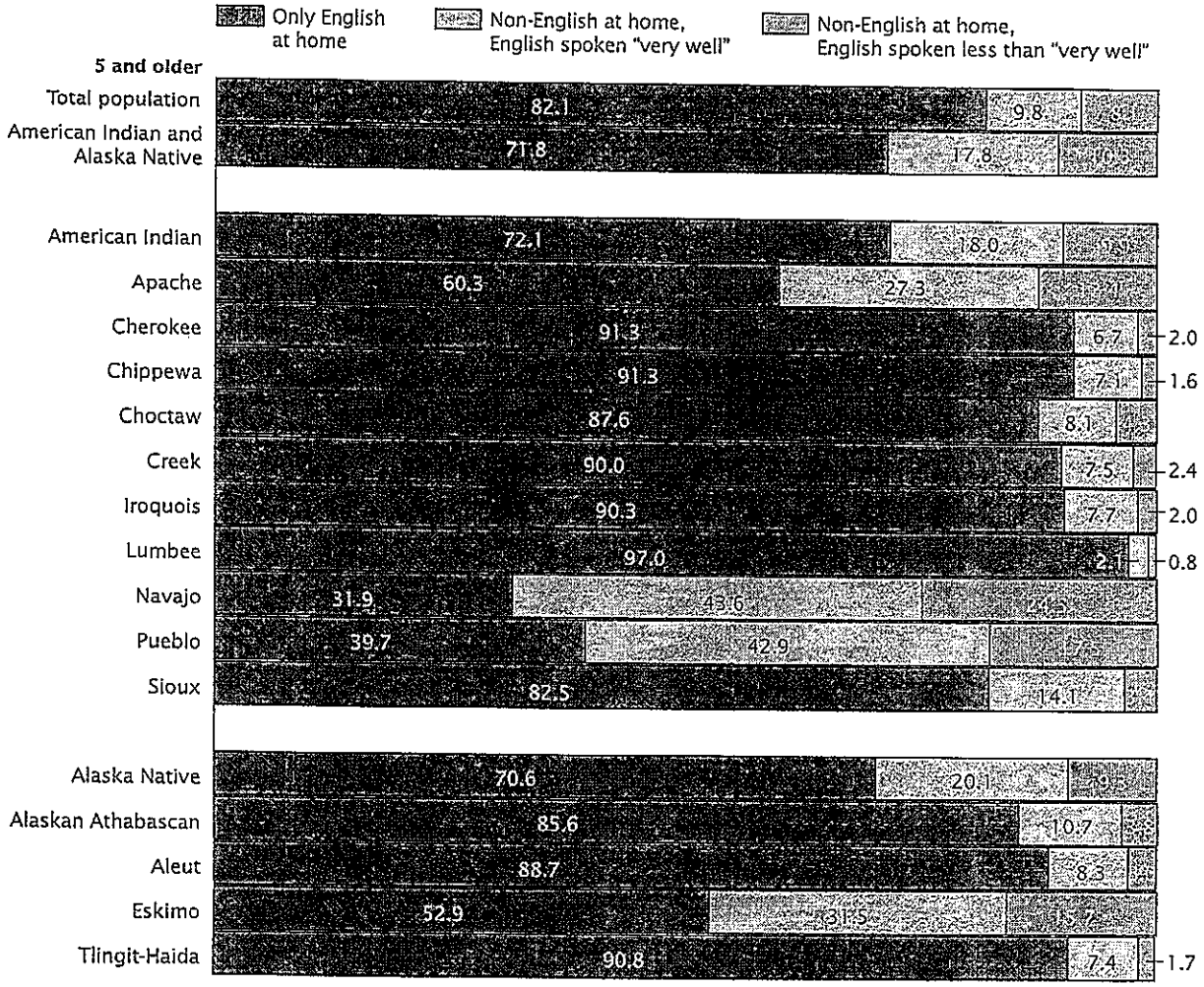
Most American Indians and Alaska Natives spoke only English at home.

- Seventy-two percent of individuals 5 years and older who reported their race as American Indian and Alaska Native spoke only English at home; 18 percent spoke a language other than English at home, yet spoke English "very well"; 10 percent spoke a language other than English at home and spoke English less than "very well."
- Ninety percent or more of Cherokee, Chippewa, Creek, Iroquois, Lumbee, and Tlingit-Haida spoke only English at home.
- Navajo had the highest percentage who spoke a language other than English at home and reported they spoke English less than "very well" (25 percent).
- Ninety-one percent of Tlingit-Haida spoke only English at home, compared with 53 percent of Eskimo.

Figure 3.

Language Spoken at Home and English-Speaking Ability: 2000

(Percent distribution of population 5 and older. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



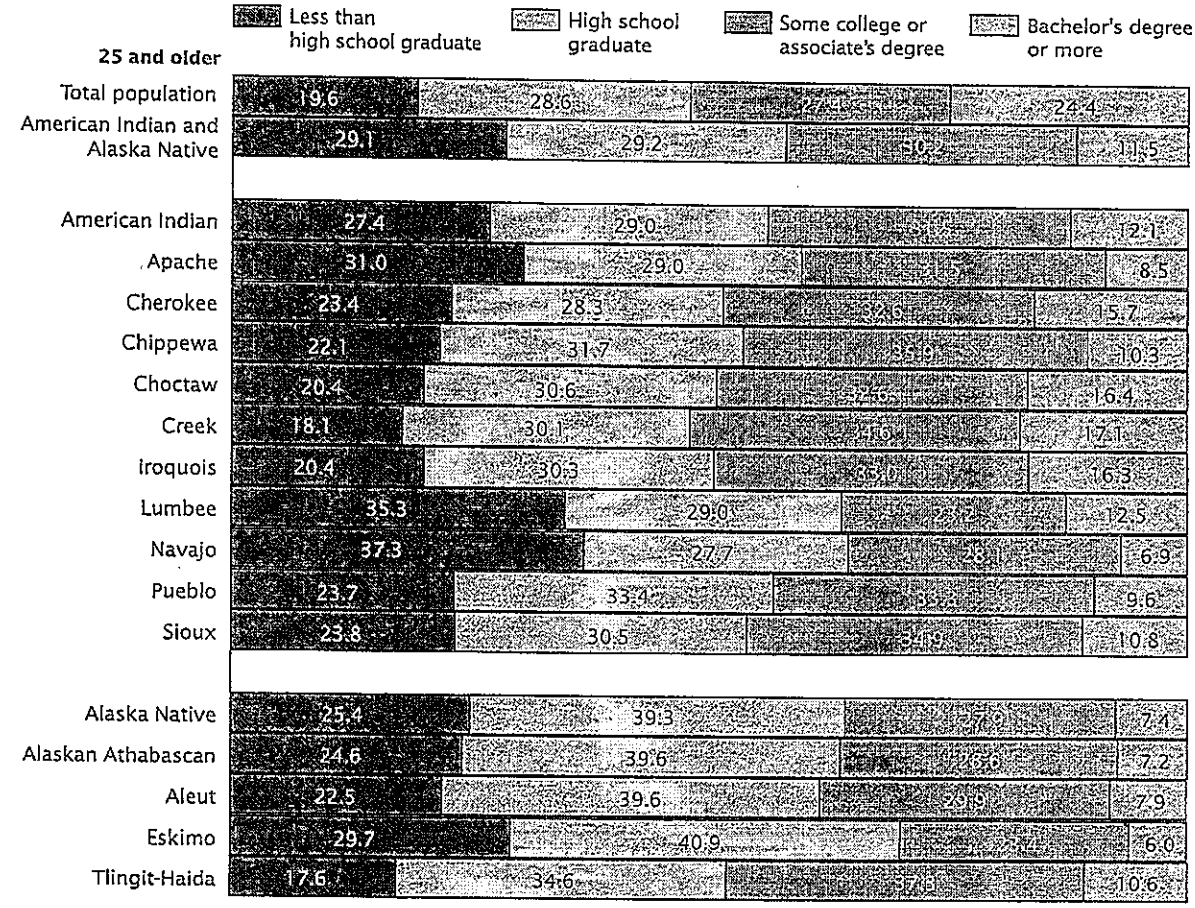
Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 special tabulation.

Seventy-one percent of American Indians and Alaska Natives were at least high school graduates.

- The educational levels of American Indians and Alaska Natives were below those of the total population in 2000. Seventy-one percent of American Indians and Alaska Natives 25 and older had at least a high school education, compared with 80 percent of the total population. Eleven percent of the American Indian and Alaska Native population had at least a bachelor's degree, compared with 24 percent of all people.
- Educational attainment varied among the American Indian tribal groupings. About 80 percent of Creek, Choctaw, and Iroquois had at least a high school education. The percentages of the tribal groupings with at least a bachelor's degree ranged from 7 percent to 17 percent.
- Seventy-five percent of Alaska Natives had at least a high school education. Among Alaska Native tribal groupings, 82 percent of Tlingit-Haida had at least a high school education and 11 percent had at least a bachelor's degree, in contrast with 70 percent and 6 percent, respectively, of Eskimos.

Figure 4.
Educational Attainment: 2000

(Percent distribution of population 25 and older. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)

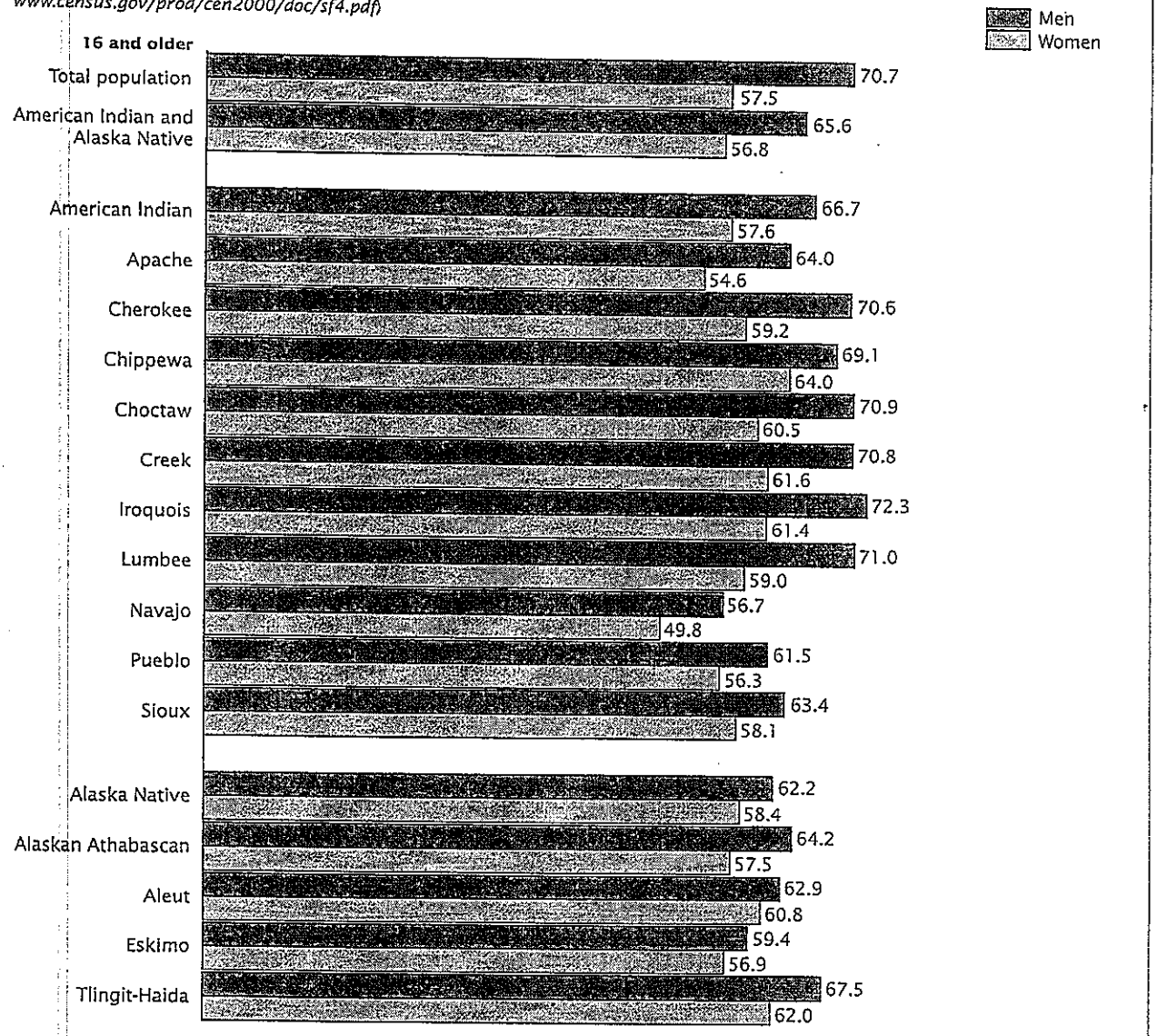


Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 special tabulation.

American Indians and Alaska Natives participated in the labor force at a lower rate than the total population, and labor force participation varied by tribal groupings.

- The labor force participation rate for American Indian and Alaska Native men (66 percent) was lower than that of all men (71 percent), while the rate for American Indian and Alaska Native women (57 percent) was slightly lower than for all women (58 percent).
- Among the American Indian tribal groupings, Cherokee, Chippewa, Choctaw, Creek, Iroquois, and Lumbee men had labor force rates higher than those of American Indian and Alaska Native men. Navajo had the lowest labor force participation rate for men (57 percent) and women (50 percent).

Figure 5.
Labor Force Participation Rate by Sex: 2000
(Percent of specified population 16 and older that is in the labor force. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



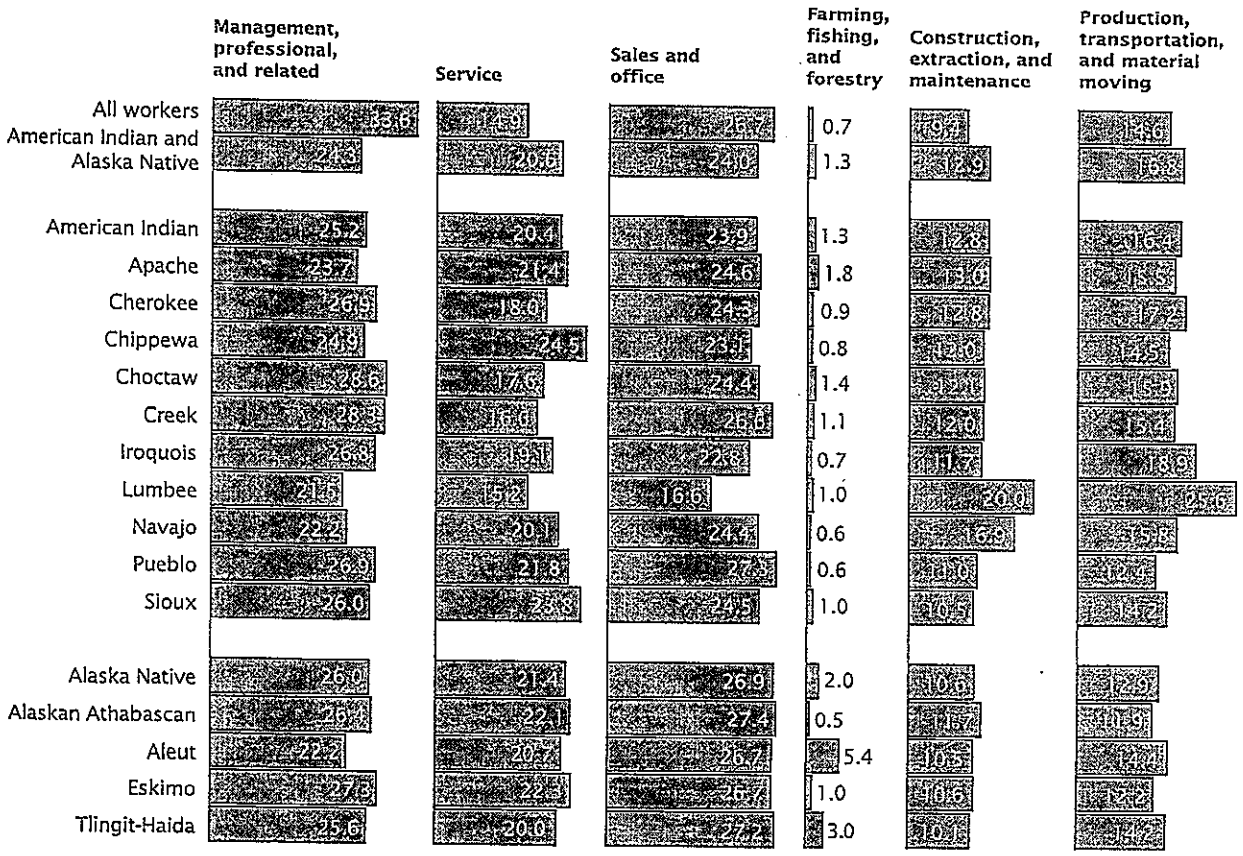
Source: U.S. Census Bureau, Census 2000 special tabulation.

American Indians and Alaska Natives were less likely than the total population to be employed in management, professional, and related occupations.

- The distribution of employed American Indians and Alaska Natives among the six major occupation groups differed from that of the total population. Higher proportions of American Indians and Alaska Natives were employed in service; construction, extraction, and maintenance; production, transportation, and material moving; and in farming, fishing, and forestry jobs. Lower proportions were employed in management, professional, and related jobs; and sales and office jobs.
- Among the American Indian tribal groupings, between 22 percent and 29 percent of all groups were employed in management, professional, and related jobs. Similarly, between 15 percent and 25 percent were employed in service jobs.
- Lower proportions of Alaska Natives than American Indians were employed in production, transportation, and material moving jobs and construction, extraction, and maintenance jobs. Higher proportions of Alaska Natives than American Indians were employed in sales and office jobs and farming, fishing, and forestry jobs.
- Among Alaska Native tribal groupings, between 22 percent and 27 percent were employed in management, professional, and related jobs.

Figure 6.
Occupation: 2000

(Percent distribution of employed civilian population 16 and older. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



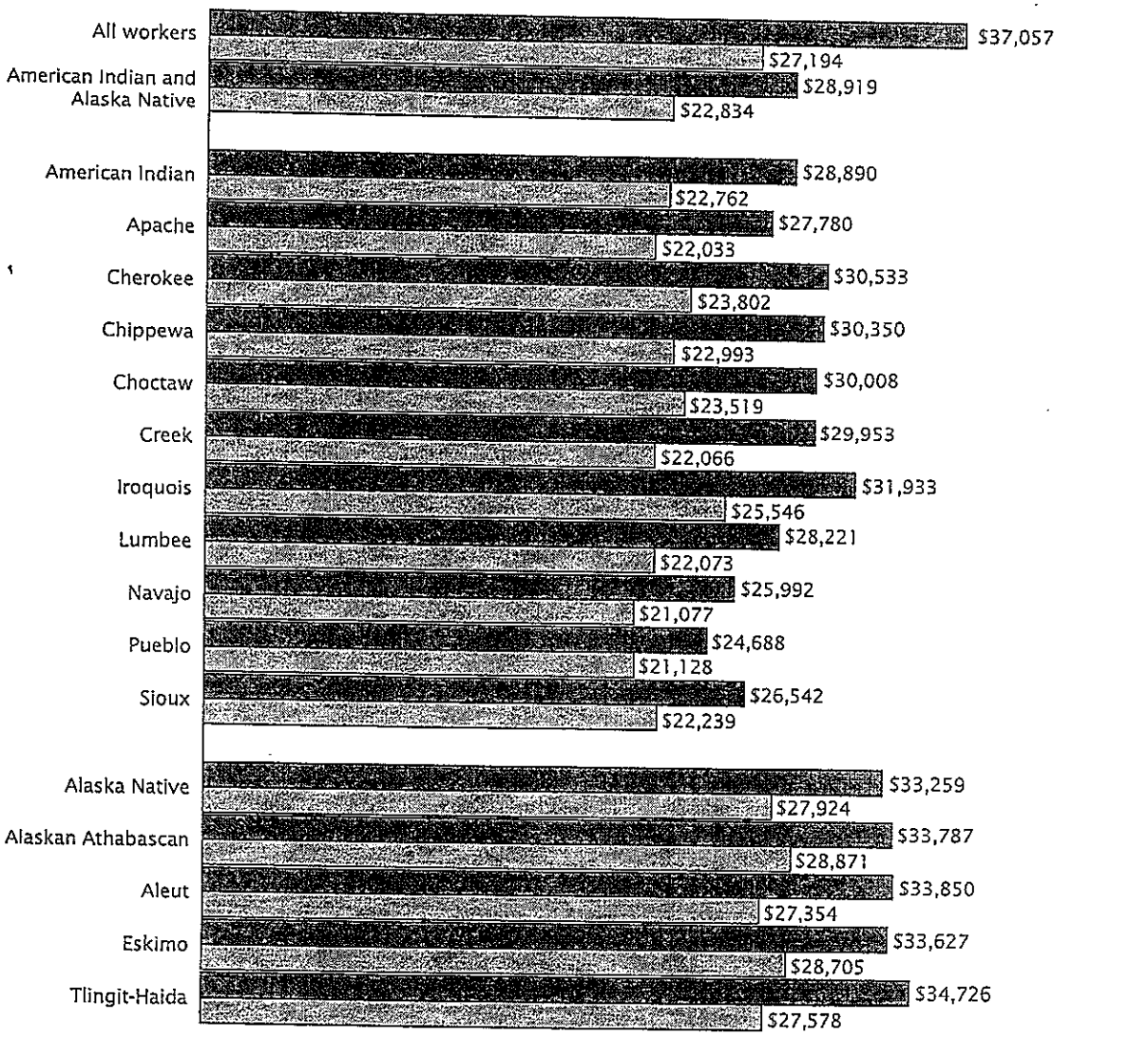
Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 special tabulation.

Overall, American Indians and Alaska Natives who worked full-time, year-round earned less than the total population.

- The median earnings of American Indian and Alaska Native men ($28,900) and women ($22,800) who worked full-time, year-round were substantially below those of all men ($37,100) and women ($27,200).
- Among the tribal groupings for men, Iroquois, Cherokee, Chippewa, Choctaw, and Creek had median earnings of about $30,000.
- The median earnings of Alaska Native men and women were higher than those of American Indians. The median earnings for men for each of the Alaska Native tribal groupings were comparable. The median earnings for women also were comparable across Alaska Native tribal groupings.

Figure 7.
Median Earnings by Sex: 1999

(For employed, full-time, year-round workers 16 and older. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



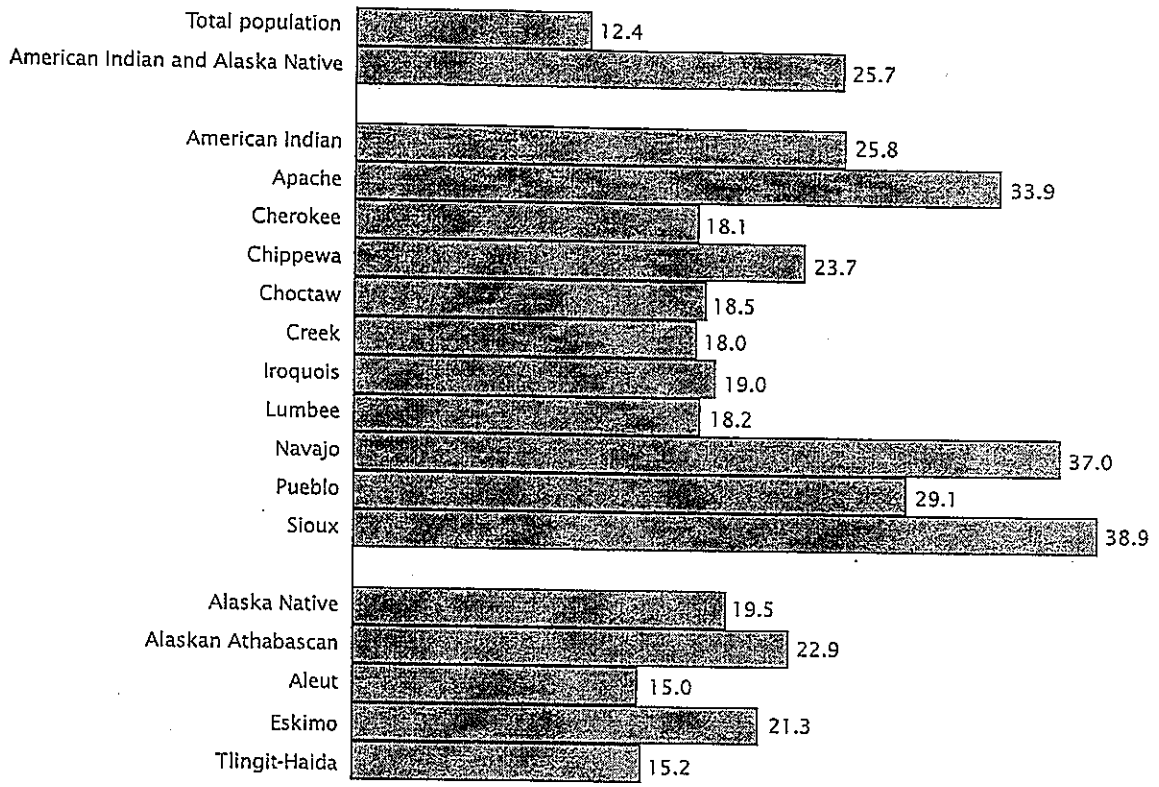
Source: U.S. Census Bureau, Census 2000 special tabulation.

A higher ratio of American Indians and Alaska Natives than the total U.S. population lived in poverty.

- The ratio of American Indians and Alaska Natives living below the official poverty level in 1999 to that of all people was more than 2.
- Among the American Indian tribal groupings, roughly 18 percent of Creek, Cherokee, and Lumbee were in poverty (about 8 percentage points lower than the percentage for all American Indians). Over 32 percent of Sioux, Navajo, and Apache were in poverty in 1999.
- Alaska Natives, with 20 percent, had a lower percentage in poverty than the 26 percent of American Indians.
- More than one-fifth of Alaskan Athabascans and Eskimos lived in poverty in 1999.

Figure 8.
Poverty Rate: 1999

(Percent of specified group in poverty. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



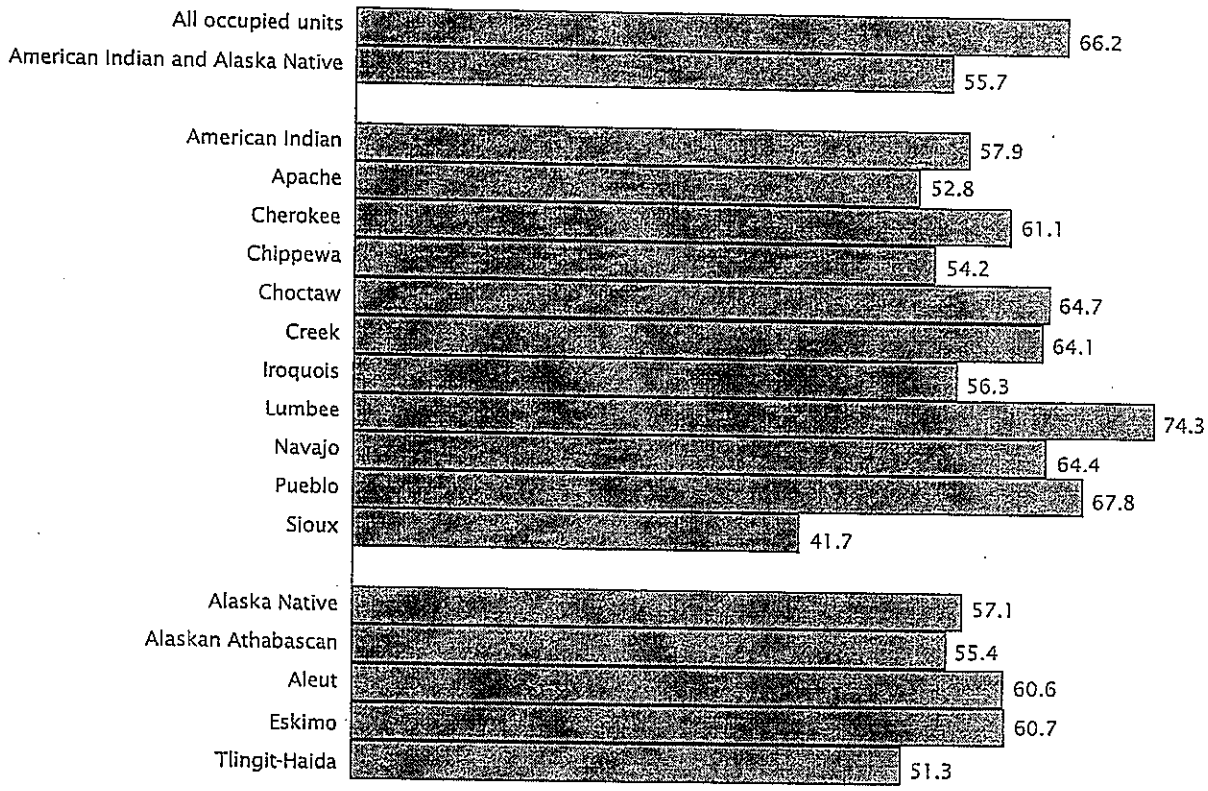
Note: Poverty status was determined for everyone except those in institutions, military group quarters, or college dormitories, and unrelated individuals under 15 years.
Source: U.S. Census Bureau, Census 2000 special tabulation.

More than one-half of American Indian and Alaska Native-occupied housing units were owner-occupied.

- Fifty-six percent of American Indian and Alaska Native householders were homeowners, compared with 66 percent of total householders.
- Homeownership rates varied among the American Indian tribal groupings and ranged from 42 percent for Sioux to 74 percent for Lumbee. Cherokee, Choctaw, Creek, Lumbee, Navajo, and Pueblo all had homeownership rates of 60 percent or higher.
- Among the Alaska Native tribal groupings, homeownership rates were 50 percent or more for Alaskan Athabascan, Aleut, and Eskimo householders.

Figure 9.
Homeownership Rate: 2000

(Percentage of occupied housing units. Housing tenure is shown by the race and tribal grouping of the householder. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



Source: U.S. Census Bureau, Census 2000 special tabulation.

One-third of American Indians and Alaska Natives lived on reservations and designated statistical areas.

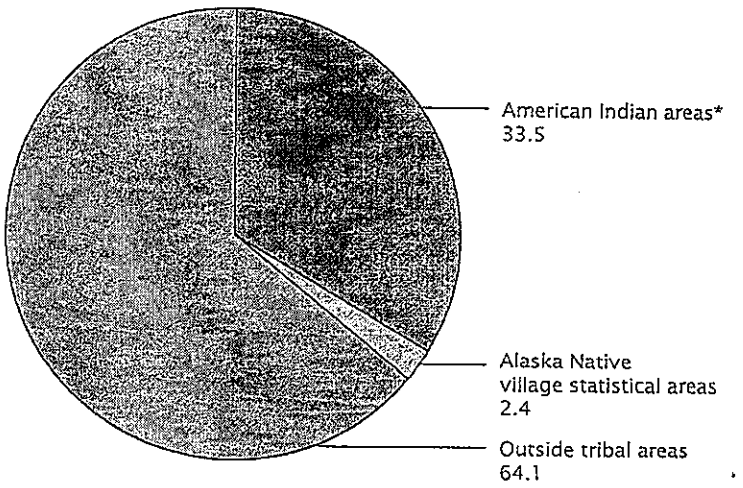
- In 2000, about 34 percent of the American Indian and Alaska Native population lived in American Indian areas (AIAs).[9]
- Two percent of the American Indian and Alaska Native population lived in ANVSAs, while 64 percent lived outside these tribal areas.[10]

[9] American Indian areas include American Indian reservations and/or off-reservation trust lands (federal), Oklahoma tribal statistical areas (OTSAs), tribal designated statistical areas (TDSAs), American Indian reservations (state), and state designated American Indian statistical areas (SDAISAs). Selected characteristics for the single-race American Indian and Alaska Native population living in large specific American Indian reservations are provided in Table 3.

[10] Selected characteristics for the single-race American Indian and Alaska Native population living in large specific ANVSAs are provided in Table 3.

Figure 10.
American Indian and Alaska Native Population by Place of Residence: 2000

(Percent distribution. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)

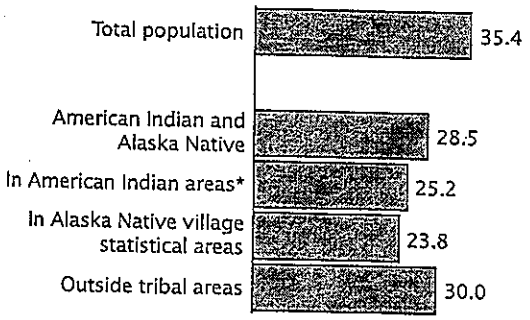


*Includes federal reservations and/or off-reservation trust lands (20.9 percent), Oklahoma tribal statistical areas (9.3 percent), tribal designated statistical areas (0.1 percent), state reservations (0.04 percent), and state designated American Indian statistical areas (3.2 percent).
Source: U.S. Census Bureau, Census 2000 Summary File 4.

The American Indian and Alaska Native population living on tribal lands was relatively young.

Figure 11.
Median Age by Place of Residence: 2000

(Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



* Includes federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.
Source: U.S. Census Bureau, Census 2000 Summary File 4.

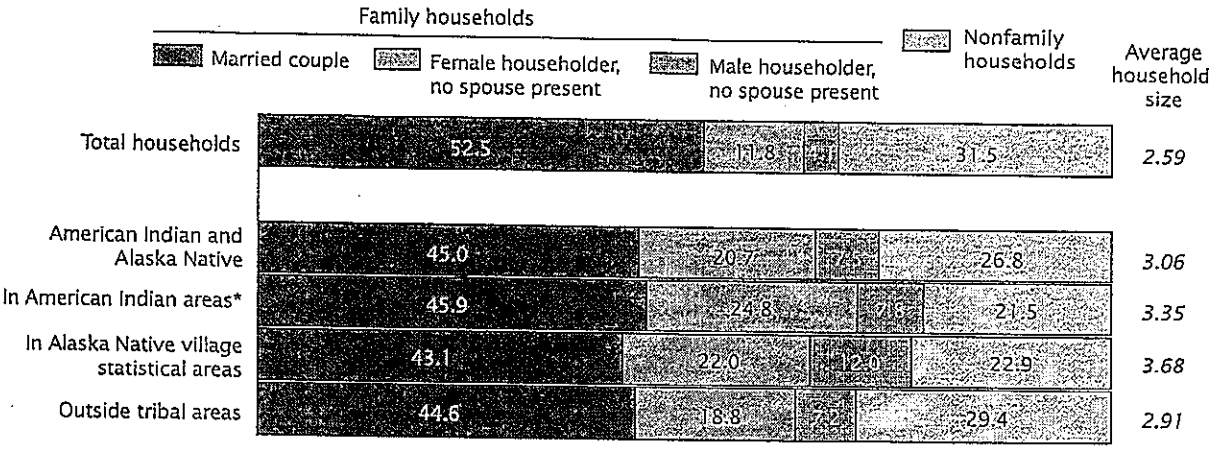
- The median age of American Indians and Alaska Natives living in AIAs (25 years) was younger than that of the total population (35 years), of all American Indians and Alaska Natives (29 years), and of those living outside tribal areas (30 years).
- The median age of American Indians and Alaska Natives living in ANVSAs was younger (24 years) than those living outside tribal areas (30 years).

The largest proportion of family households was found in tribal areas.

- Overall, 73 percent of all American Indian and Alaska Native households were family households, compared with 68 percent of all U.S. households. By place of residence, the percentages of American Indian and Alaska Native households in AIAs and those in ANVSAs that were family households were greater than the percentage of family households outside tribal areas (71 percent).
- The proportion of family households maintained by women with no husband present in AIAs was more than twice that of all households. Married-couple family households represented a lower proportion of households outside tribal areas than in AIAs and all U.S. households.

Figure 12.
Household Type and Average Household Size by Place of Residence: 2000

(Percent distribution of households. Households are classified by the race of the householder. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



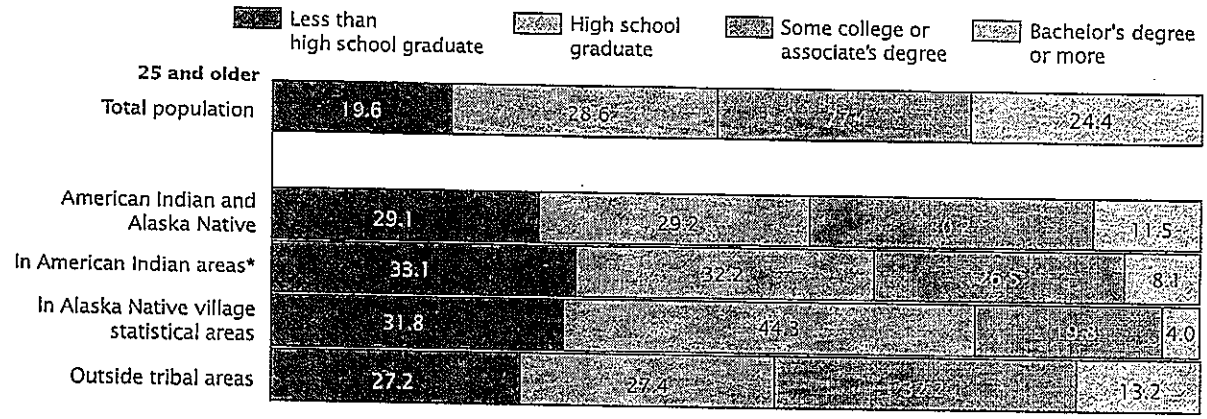
* Includes federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.
Source: U.S. Census Bureau, Census 2000 Summary File 4.

Educational attainment of American Indians and Alaska Natives varied by place of residence.

- Seventy-one percent of the American Indian and Alaska Native population, 73 percent of their counterparts living outside tribal areas, and 80 percent of the total population had at least a high school education. The percentage for American Indians and Alaska Natives in AIAs was somewhat lower, 67 percent.
- A lower percentage of American Indians and Alaska Natives residing in ANVSAs had at least a high school education, compared with those living outside tribal areas (68 percent and 73 percent, respectively).
- The percentages of adults with at least a bachelor's degree among American Indians and Alaska Natives living outside tribal areas (13 percent), the American Indian and Alaska Native population (12 percent), and the total population (24 percent) were higher than those of adults living in AIAs (8 percent) and ANVSAs (4 percent).

Figure 13.
Educational Attainment by Place of Residence: 2000

(Percent distribution of population 25 and older. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



* Includes federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.
Note: Some percentages do not sum to 100.0 due to rounding.
Source: U.S. Census Bureau, Census 2000 Summary File 4.

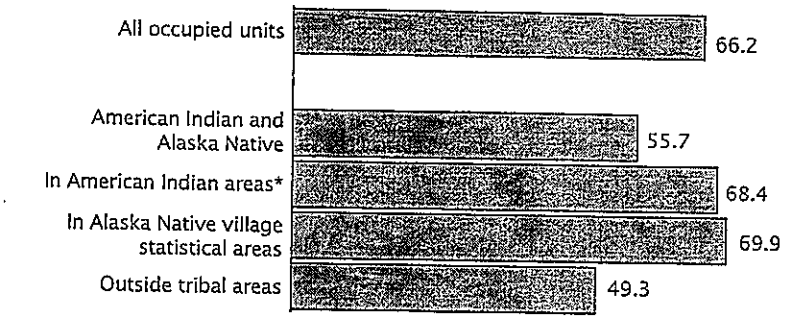
American Indians and Alaska Natives living on tribal lands were more likely to live in owner-occupied housing than those living outside tribal areas.

- More than half (56 percent) of occupied housing units with an American Indian and Alaska Native householder were owned, compared with about two-thirds (66 percent) of all occupied housing units in the United States.
- The homeownership rates of the American Indian and Alaska Native population residing in AIAs and of those residing in ANVSAs were roughly 20 percentage points higher than that of their counterparts living outside tribal areas.

Figure 14.

Homeownership Rate by Place of Residence: 2000

(Percentage of occupied housing units. Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)



* Includes federal reservations and/or off-reservation trust lands, Oklahoma tribal statistical areas, tribal designated statistical areas, state reservations, and state designated American Indian statistical areas.

Source: U.S. Census Bureau, Census 2000 Summary File 4.

ACCURACY OF THE ESTIMATES

The data contained in this report are based on people in the sample of households that responded to the Census 2000 long form. Nationally, approximately 1 out of every 6 housing units was included in this sample. As a result, the sample estimates may differ somewhat from the 100-percent figures that would have been obtained if all housing units, people within those housing units, and people living in group quarters had been enumerated using the same questionnaires, instructions, enumerators, and so forth. The sample estimates also differ from the values that would have been obtained from different samples of housing units, and hence of people living in those housing units, and people living in group quarters. The deviation of a sample estimate from the average of all possible samples is called the sampling error.

In addition to the variability that arises from sampling, both sample data and 100-percent data are subject to nonsampling error. Nonsampling error may be introduced during any of the various complex operations used to collect and process data. Such errors may include not enumerating every household or every person in the population universe, failing to obtain all required information from the respondents, obtaining incorrect or inconsistent information, and recording information incorrectly. In addition, errors can occur during the field review of the enumerators' work, during clerical handling of the census questionnaires, or during the electronic processing of the questionnaires.

While it is impossible to completely eliminate error from an operation as large and complex as the decennial census, the Census Bureau attempts to control the sources of such error during the data collection and processing operations. The primary sources of error and the programs instituted to control error in Census 2000 are described in detail in *Summary File 4 Technical Documentation* under Chapter 8, "Accuracy of the Data," located at <www.census.gov /prod/cen2000/doc/sf4.pdf>.

Nonsampling error may affect the data in two ways: first, errors that are introduced randomly will increase the variability of the data and, therefore, should be reflected in the standard errors; and second, errors that tend to be consistent in one direction will bias both sample and 100-percent data in that direction. For example, if respondents consistently tend to underreport their incomes, then the resulting estimates of households or families by income category will tend to be understated for the higher-income categories and overstated for the lower-income categories. Such biases are not reflected in the standard errors.

All statements in this Census 2000 Special Report have undergone statistical testing and all comparisons are significant at the 90-percent confidence level unless otherwise noted. The estimates in the tables and figures may vary from actual values due to sampling and nonsampling errors. As a result, the estimates used to summarize statistics for one population group may not be statistically different from estimates for another population group. Further information on the accuracy of the data is located at <www.census.gov/prod/cen2000 /doc/sf4.pdf>. For further information on the computation and use of standard errors, contact the Decennial Statistical Studies Division at 301-763-4242.

FOR MORE INFORMATION

The Census 2000 Summary File 3 and Summary File 4 data are available from American FactFinder on the U.S. Census Bureau's Web site <factfinder.census.gov>. For information on confidentiality protection, nonsampling error, sampling error, and definitions, also see <www.census.gov/prod/cen2000 /doc/sf4.pdf> or contact the Customer Services Center at 301-763-INFO (4636).

Information on population and housing topics is presented in the Census 2000 Briefs and Census 2000 Special Reports series, located on the U.S. Census Bureau's Web site at <www.census.gov /population/www/cen2000 /briefs.html>. These series present information on race, Hispanic origin, age, sex, household type, housing tenure, and social, economic, and housing characteristics, such as ancestry, income, and housing costs.

For more information on race in the United States, visit the U.S. Census Bureau's Internet site at <www.census.gov/population /www/socdemo/race.html>.

To find information about the availability of data products, including reports, CD-ROMs, and DVDs, call the Customer Services Center at 301-763-INFO (4636).

Table 2.

Selected Characteristics of the American Indian and Alaska Native (AIAN) Population—Alone, In Combination With Non-AIAN Races, and Total: 2000

(Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)

Characteristic	Number			Percent		
	Alone	In combination	Total	Alone	In combination	Total
Total American Indian and Alaska Native	2,447,989	1,867,876	4,315,865	100.0	100.0	100.0
AGE						
Under 18 years	814,290	588,994	1,403,284	33.3	31.5	32.5
18 to 64 years	1,496,113	1,151,802	2,647,915	61.1	61.7	61.4
65 years and over	137,586	127,080	264,666	5.6	6.8	6.1
Median age (years)	28.5	30.7	29.4	(X)	(X)	(X)
HOUSEHOLD TYPE						
Households with an American Indian and Alaska Native householder	770,334	649,870	1,420,204	100.0	100.0	100.0
Family households	563,651	433,997	997,648	73.2	66.8	70.2
Married couple	346,536	286,224	632,760	45.0	44.0	44.6
Female householder, no spouse present	159,486	110,811	270,297	20.7	17.1	19.0
Male householder, no spouse present	57,629	36,962	94,591	7.5	5.7	6.7
Nonfamily households	206,683	215,873	422,556	26.8	33.2	29.8
LANGUAGE SPOKEN AT HOME AND ENGLISH-SPEAKING ABILITY						
Population 5 years and over	2,243,344	1,712,591	3,955,935	100.0	100.0	100.0
Only English at home	1,611,831	1,461,452	3,073,283	71.8	85.3	77.7
Non-English at home, English spoken "very well"	399,731	156,402	556,133	17.8	9.1	14.1
Non-English at home, English spoken less than "very well"	231,782	94,737	326,519	10.3	5.5	8.3
EDUCATIONAL ATTAINMENT						
Population 25 years and over	1,350,998	1,077,581	2,428,579	100.0	100.0	100.0
Less than high school graduate	392,920	222,203	615,123	29.1	20.6	25.3
High school graduate	395,041	283,901	678,942	29.2	26.3	28.0
Some college or associate's degree	407,968	379,365	787,333	30.2	35.2	32.4
Bachelor's degree or more	155,069	192,112	347,181	11.5	17.8	14.3
LABOR FORCE PARTICIPATION						
Men 16 years and over	846,909	644,242	1,491,151	100.0	100.0	100.0
In labor force	555,757	458,834	1,014,591	65.6	71.2	68.0
Women 16 years and over	878,412	699,980	1,578,392	100.0	100.0	100.0
In labor force	499,011	420,982	919,993	56.8	60.1	58.3
OCCUPATION						
Employed civilian population 16 years and over	914,484	795,221	1,709,705	100.0	100.0	100.0
Management, professional, and related occupations	222,142	221,341	443,483	24.3	27.8	25.9
Service occupations	188,678	148,171	336,849	20.6	18.6	19.7
Sales and office occupations	219,461	206,134	425,595	24.0	25.9	24.9
Farming, fishing, and forestry occupations	12,327	7,090	19,417	1.3	0.9	1.1
Construction, extraction, and maintenance occupations	118,273	88,981	207,254	12.9	11.2	12.1
Production, transportation, and material moving occupations	153,603	123,504	277,107	16.8	15.5	16.2
EARNINGS AND INCOME (in 1999)						
Median earnings (dollars) for males[1]	28,919	31,611	30,376	(X)	(X)	(X)
Median earnings (dollars) for females[1]	22,834	25,153	23,884	(X)	(X)	(X)
POVERTY (in 1999)						
Individuals for whom poverty status was determined[2]	2,367,505	1,820,250	4,187,755	100.0	100.0	100.0
Individuals below the poverty level	607,734	312,726	920,460	25.7	17.2	22.0
HOMEOWNERSHIP						
Occupied housing units	765,474	643,276	1,408,750	100.0	100.0	100.0
Owner-occupied	426,340	348,933	775,273	55.7	54.2	55.0

(X) Not applicable.

[1] Based on full-time, year-round workers.

[2] Poverty status was determined for everyone except individuals in institutions, military group quarters, college dormitories, and individuals under age 15 unrelated to the householder.

Source: U.S. Census Bureau, Census 2000 Summary File 4.

Table 3.

Selected Characteristics of the American Indian and Alaska Native Alone Population for the Ten Largest American Indian Reservations and Alaska Native Village Statistical Areas: 2000

(Data based on sample. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see *www.census.gov/prod/cen2000/doc/sf4.pdf*)

Characteristic	American Indian Reservations									
	Black-feet*, MT	Fort Apache, AZ	Gila River, AZ	Navajo*, AZ-NM-UT	Pine Ridge*, SD-NE	Rose-bud*, SD	San Carlos, AZ	Tohono O'odham*, AZ	Turtle Mountain*, MT-ND-SD	Zuni*, NM-AZ
Total	8,259	11,597	10,317	174,847	14,255	8,687	8,769	9,783	7,675	7,377
AGE										
Median age (years)	24.4	20.7	22.1	23.8	19.7	19.4	20.8	25.1	23.1	27.4
HOUSEHOLD TYPE AND SIZE										
Households with an American Indian and Alaska Native householder	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Family households	83.6	83.6	85.2	81.2	87.6	80.4	84.0	81.8	79.8	91.4
Married couple	49.9	42.5	27.7	47.8	34.1	27.3	34.6	29.1	40.9	50.9
Female householder, no spouse present	24.4	34.7	45.3	26.3	41.0	40.3	38.8	39.0	29.2	34.3
Male householder, no spouse present	9.3	6.5	12.1	7.0	12.5	12.8	10.6	13.6	9.8	6.3
Nonfamily households	16.4	16.4	14.8	18.8	12.4	19.6	16.0	18.2	20.2	8.6
Average household size	3.57	4.11	4.17	3.86	4.68	4.01	4.33	3.91	3.36	4.34
EDUCATIONAL ATTAINMENT										
Population 25 years and over	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Less than high school graduate	25.3	49.0	48.3	45.8	33.7	30.8	43.2	38.1	30.4	37.2
High school graduate	26.0	31.0	34.8	26.9	26.9	32.0	32.6	41.0	24.3	32.0
Some college or associate's degree	39.9	17.8	15.8	22.5	31.0	29.7	22.5	17.2	35.8	27.4
Bachelor's degree or more	8.8	2.3	1.2	4.8	8.4	7.5	1.7	3.7	9.5	3.3
HOMEOWNERSHIP										
Occupied housing units	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Owner-occupied	55.2	63.3	64.3	74.9	49.9	45.0	63.0	73.1	62.6	76.4

Characteristic	Alaska Native Village Statistical Areas									
	Barrow	Bethel	Chicka-loon	Dillingham	Emmonak	Hooper Bay	Kenaitze	Knik	Kotzebue	Selawik
Total	2,637	3,284	969	1,256	685	942	1,823	1,521	2,200	726
AGE										
Median age (years)	24.2	23.5	25.2	24.0	21.6	18.8	27.7	25.4	22.0	18.4
HOUSEHOLD TYPE AND SIZE										
Households with an American Indian and Alaska Native householder	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Family households	77.3	74.8	93.2	74.9	78.5	81.8	75.5	77.1	79.4	91.2
Married couple	38.6	35.1	56.8	42.7	48.7	32.1	40.1	54.2	37.8	37.8
Female householder, no spouse present	27.9	28.4	25.6	27.5	13.3	26.8	28.8	17.5	27.9	35.1
Male householder, no spouse present	10.8	11.4	10.8	4.8	16.5	23.0	6.5	5.4	13.7	18.2
Nonfamily households	22.7	25.2	6.8	25.1	21.5	18.2	24.5	22.9	20.6	8.8
Average household size	3.71	3.36	3.28	3.13	4.37	4.53	2.82	3.23	3.78	4.72
EDUCATIONAL ATTAINMENT										
Population 25 years and over	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Less than high school graduate	18.1	15.8	11.6	16.5	28.7	28.0	11.1	11.7	24.1	42.2
High school graduate	31.1	31.1	29.8	29.7	48.3	50.3	32.1	31.5	32.4	45.8
Some college or associate's degree	30.5	30.4	39.6	31.9	18.5	13.4	37.8	38.0	25.5	6.3
Bachelor's degree or more	20.4	22.7	19.0	21.9	4.5	8.2	19.1	18.8	17.9	5.6
HOMEOWNERSHIP										
Occupied housing units	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Owner-occupied	40.6	43.2	78.9	49.3	79.8	76.5	74.4	8.4	43.6	59.9

* Includes trust lands.

Source: U.S. Census Bureau, Census 2000 Summary File 4.