

From: K&G <TestingGK@netscape.net>
To: <pubaffairs@ussc.gov>
Date: Mon, Nov 5, 2001 4:39 AM
Subject: comments due by nov. 6 on ad hoc adv. group for sent. guidelines (sept. 19 fed. register)

KINDLY PASS ON THESE COMMENTS TO THE COMMISSION AS GENERAL INPUT BUT ALSO AS COMMENTS FOR THE PROPOSED AD HOC ADVISORY COMMITTEE

MESSAGE: GO FOR HIGH IMPACT CHANGES, NOT MINOR TWEAKS. HERE ARE THREE:

1. REQUIRE COMPANIES TO HAVE A S E P A R A T E A N D I N D E P E N D E N T SENIOR LEVEL COMPLIANCE FUNCTION. MANY COMPANIES HAVE RESPONDED TO THE COMPLIANCE IMPERATIVE BY JUST RE-NAMING THE POSITION OF AN EXISTING LAWYER IN THE LEGAL DEPARTMENT. THIS IS COSMETIC. IT'S NOT MORE "LAWYERING" THAT BRINGS COMPLIANCE RESULTS, IT IS A RECOGNIZED LEADERSHIP AND OPERATIONAL FUNCTION THAT CAN THINK AND ACT INDEPENDENTLY, IMPACT MANAGEMENT, AND USE MANY TYPES OF TOOLS (NOT JUST LEGAL TOOLS) TO IMPLEMENT AND MEASURE.

2. RECOMMEND THAT COMPANIES CHANGE THEIR BOARD COMMITTEES FROM "AUDIT COMMITTEES" TO "AUDIT AND COMPLIANCE COMMITTEE". OR EVEN BETTER PRACTICE, TO HAVE A SEPARATE "COMPLIANCE COMMITTEE". THIS ALLOWS FOCUS ON FUTURE AND PREVENTION, NOT JUST LOOKING AT THE PAST, WHICH IS WHAT AUDITORS/AUDIT COMMITTEES BEST DO.

3. RECOMMEND THAT COMPLIANCE FUNCTIONS GO BEYOND JUST SIMPLY AIMING FOR TECHNICAL REGULATORY COMPLIANCE. IT SHOULD INCLUDE PROMOTING GOOD CONDUCT BEYOND THE LAW. HOWEVER, DO NOT RECOMMEND THAT IT BE CALLED "ETHICS" AS THIS TURNS OFF MANAGEMENT.

THANK YOU VERY MUCH.

GK Testng

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**United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002**

**Sentencing Guidelines for United States Courts
66 FR 128 (July 3, 2001)**

Included are comments and suggestions concerning the request for response; I am pleased to be able to provide these comments, but concerned that the possible lack of regard for the Indian Community and those who face Federal Sentencing, regulations will go unchanged and more of our people will be lost to this system.

For centuries Native Americans have been treated as second-class citizens, considered illegal aliens in their own country. This is especially so in the legal arena, more impacting to those who reside on Indian Reservations facing the most sever sentencing guidelines in the nation.

In New Mexico as in most Southwestern States, the location of the offence could mean probation to a lengthy prison sentence, for the same offence. This depends on "Which Side of the Fence" the offence occurs, State verses Federal, Tribal or Federal. Severe sentences are levied to those who are on Federally Impacted Lands, more so for those who reside on Indian Reservations, no variances are given to those who lack a criminal background. They are treated the same as those who have no regard for the law and are habitual offenders.

Native Americans in Indian Country do not appear to have the same rights as those in other parts of the country or those who are from other ethnic origin. This creates a rebellious atmosphere against authority. Included into this equation is the fact that when an incident occurs, no matter the severity of the situation, the individual will more than likely be tried in the Local Tribal System, if a sentence is levied, the term is served out in Tribal Jail, once the sentence is served, the Federal System has the option to charge the individual for the same charges that they had served in the Tribal System. This in the legal community is called "Double Jeopardy", and should not happen in any case, Federal, State or Tribal.

Individuals sentenced in the State's legal system are almost assured parole for their **FIRST OFFENCE**, in the Federal System they are **GAURANTEED THE MAXIMUM PENALTY BY LAW**. This system almost assure those who enter the "SYSTEM" will be released to further their criminal life, as been taught to them "TN THE SYSTEM". This does not provide those "FIRST TIME OFFENDERS" the chance to rehabilitate through probation and a **SECOND CHANCE**, as most States allow.

Economically, the Federal System places a lot of burden on the taxpayers of the Nation. In Indian Country unemployment on most reservations exceeds 70% of the local

population, many do not pay taxes, and receive some sort of assistance income. The question would be; Wouldn't we rather have them incarcerated or rehabilitated and placed into a productive environment? Many who return from Federal Prison return to the reservation, cannot find employment and in the end become a burden to the taxpayer.

On Indian Reservations there appears to be a lack of respect for local Law Enforcement this in most cases is brought on by the lack of the local Law Enforcements effective approach with the local drug trade. Here on the Zuni Reservation drug dealers go on untouched, but those who retaliate against them are punished in the Federal System, these drug dealers have in recent cases provoked altercations with individuals, and when confronted in retaliation the their aggression the drug dealers run to the Local Law to seek and gain support. Those who are defending themselves are sentenced in the Federal System, while those who cause the most harm to the people (The Drug Dealers) are left to continue their trade.

Granted, habitual and first offenders who commit murder should be sentenced to hard time, included in that company should be the drug dealers. Leniency to those who have committed their first offence protecting themselves. The current system does not allow for rehabilitation for First Offenders, only the knowledge of a lengthy prison term.

Have you heard of Young Indian Youth awaiting sentencing for a crime committed on an Indian Reservation, hanging themselves so they wouldn't have to go through the seemingly harsh process? This is all too common in Indian Country; the Federal System is just another example of the System, "STACKING THE DECK" for those who would find survival easier if the system was structured differently.

The Federal System needs to be overhauled and comparable to the States Sentencing Procedures, this will correct a disparity that singles out a race of people.

When the ad hoc advisory group is assembled, please include or promote certain involvement of those who have challenged the system trying to gain a lesser penalty for those who have had no previous criminal activity. Formulate sentencing following the States Guidelines where the crime is committed.

Thank You,
Ernest Mackel
(505) 782-4569
PO Box 338
Ramah, New Mexico
87321

Washburn, Kevin

From: Washburn, Kevin
Sent: Wednesday, October 24, 2001 2:03 PM
To: John P. Elwood (E-mail)
Subject: Ad Hoc Advisory Group on Native American Issues under the USSG

John, as a member of the Chickasaw Nation of Oklahoma, I have a strong interest in issues related to justice and public safety in Indian communities. As a former federal prosecutor handling Indian country prosecutions in New Mexico, I have more than a passing familiarity with the sections of the sentencing guidelines that most often are involved in sentencing Native Americans. I would be delighted to have an opportunity to offer my own thoughts and suggestions to any committee considering proposed changes related to the sentencing of Native Americans under the guidelines.

I am attaching my resume for consideration. If there is anything else that I should be doing or if you prefer a hard copy of this resume, please let me know. Best wishes. Kevin Washburn, (202) 632-0040



KXW resume.doc

KEVIN K. WASHBURN

*1276 North Wayne Street, Apt. 1200, Arlington, Virginia 22201 email: kevinwashburn@hotmail.com
703.465.4731 (home) 202.632.0040 (office)*

EXPERIENCE**GENERAL COUNSEL, NATIONAL INDIAN GAMING COMMISSION, Jan. 2000 to present.**

Provide legal advice to Chairman and Associate Commissioners of the independent federal regulatory agency responsible for regulating Indian gaming, a \$10 billion industry existing in 28 states. Supervise seven lawyers and several support personnel. Develop enforcement policy, strategy and regulatory initiatives. Advise the Commission on enforcement actions, administrative and judicial litigation, Congressional testimony and administrative rulemaking. Coordinate with Department of Justice on civil litigation and with various law enforcement agencies on criminal investigations involving gaming.

ASSISTANT UNITED STATES ATTORNEY, Albuquerque, N.M., Nov. 1997 - Jan. 2000.

Prosecuted violent criminals, primarily for crimes arising under the Indian country jurisdictional statutes. Handled all aspects of prosecutions, including supervising investigations by the FBI, BIA, ATF and other law enforcement agencies, seeking indictments before federal grand juries, arraignments, preliminary hearings and detention hearings, and jury trials and appeals before the federal courts.

TRIAL ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. 1994-1997.

Appointed through the Attorney General's Honors Program to the Environment and Natural Resources Division - Indian Resources Section. Litigated affirmative cases on behalf of the United States in its role as trustee for Indian tribes. Defended programs of the Department of the Interior and the Environmental Protection Agency in actions by states and other non-Indian parties.

LAW CLERK, JUDGE WILLIAM C. CANBY, JR., U.S. Court of Appeals for the Ninth Circuit, 1993-94.**EDUCATION****YALE LAW SCHOOL, J.D. 1993.**

Editor-in-Chief, *Yale Journal on Regulation*; Arnold & Porter Scholar.

WASHINGTON UNIVERSITY (ST. LOUIS) SCHOOL OF LAW, 1990-1991.

Gustavus A. Buder Scholar; American Jurisprudence Awards: Torts, Civil Procedure.

UNIVERSITY OF NEW MEXICO, Summer 1990.

Pre-Law Summer Institute for Indians, American Indian Law Center: Outstanding Student, Indian law.

UNIVERSITY OF OKLAHOMA, B.A. (Economics) with Honors 1989.**AWARDS AND PERSONAL INFORMATION****Special Commendations for Outstanding Service:**

United States Department of Justice, April 8, 1997.

United States Department of Justice, May 7, 1998, for successfully litigating *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996) and 137 F.3d 1135 (9th Cir. 1998).

Award for Sustained Superior Performance, United States Attorneys Office, September 13, 1999.

Member, **CHICKASAW NATION OF OKLAHOMA**, a Federally Recognized Indian Tribe.



SCHOOL OF LAW FACULTY

Mail #TMH 444 Telephone: 651-962-4920
1000 LaSalle Avenue Facsimile: 651-962-4915
Minneapolis, MN 55403-2005

November 5, 2001

Honorable Judge Diana E. Murphy
United States Court of Appeals
for the Eighth Circuit
300 South 4th Street
11E
Minneapolis, MN 55415-2219

Via Facsimile: 202-502-4699
Attention: Frances Cook

Dear Judge Murphy:

I am an Assistant Professor of Law at the University of St. Thomas School of Law. I teach in the lawyering skills program. Before coming to UST, I worked as a Federal Public Defender for 10 years. I understand that the sentencing commission may be establishing an ad hoc committee to study the impact of the federal sentencing guidelines on Indian country. Having practiced federal criminal defense for the last seven years in Arizona, I am very interested in this topic. I am writing to volunteer any assistance I can provide to such a committee. If there is anything I can do to assist with this study, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Rumann".

Celia Rumann

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP

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October 23, 2001

Diana Murphy
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

I received your letter of October 16, 2001. I think that an ad hoc advisory group is an excellent idea. I hope that if such a group is formed, it will include Indian people who are familiar with not only traditional forms of justice but also with existing formal tribal court systems already in place. Tribal justice systems need to be a part of the federal law enforcement effort in Indian Country, not separate and largely to be ignored by the federal courts and federal prosecutors.

Sincerely,

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP



Terry L. Pechota

TLP/mc



Forest County Potawatomi Community
P.O. Box 340, Crandon, Wisconsin 54520

05 November 2001

United States Sentencing Commission
ATTN: PUBLIC AFFAIRS
One Columbus Circle, NE Suite 2-500
South Lobby
Washington, DC 20002-8002

VIA United States Mail and
FACSIMILE 202/502-4699

RE: Native Americans in Indian Country

Dear Sir or Madam:

The Forest County Potawatomi Community has reviewed the Federal Register for Wednesday, September 19, 2001 regarding the Notice of the United States Sentencing Commission. The Forest County Potawatomi Community supports the formation of an ad hoc advisory group on issues related to the impact of the sentencing guidelines on Native Americans in Indian Country. While Wisconsin is a P.L. 280 state, the Forest County Potawatomi Community is well aware of the issues faced by Native Americans in sentencing before Federal authorities.

Our Native American brothers and sisters are incarcerated in Federal facilities at disproportionate rates to the Anglo population; this includes death row. Native Americans tend to face more harsh penalties when being sentenced in Indian Country. State courts have greater flexibility in fashioning appropriate sentences. In the Federal system, Native Americans serve longer sentences than non-minorities.

While the Tribe supports the formation of an ad hoc committee as an initial step, it is suggested that the Sentencing Commission take steps to establish a more permanent, formal group that has some authority and continuing review responsibility over any implemented changes. It is suggested that membership terms be at least three to four years. The membership could be comprised of tribal members that have an expertise in matters of sentencing and the impact of Federal sentencing guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from appropriate civil rights organizations as well as Department of Justice prosecutors and Federal Judges. The group must have a clear charge of their scope of authority—which should be broad. It must also be clear that the advisory group will actually play a valid role in tempering the Federal justice system. There must be a commitment to change by the Sentencing Commission.

Sincerely,

Harold Gus Frank
Chairman

COPY: Executive Council
File

**FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW MEXICO**

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November 6, 2001

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, D.C. 20002-8002

Re: Ad Hoc Advisory Group Concerning Native Americans in Indian Country

Dear Judge Murphy:

The United States Sentencing Commission has proposed forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. The Federal Public and Community Defenders, joined by the Practitioners' Advisory Group, would support forming a broad based Ad Hoc Advisory Group that could give voice to the concerns of Native Americans and constructive guidance to the Sentencing Commission. Those of us who have worked with many Native American tribes have heard the universal concerns and frustrations that are reflected in the March 2000 report of the South Dakota Advisory Committee to the United States Commission on civil rights: *Native Americans in South Dakota: An Erosion of Competence in the Justice System*.¹

Concerns over the appropriateness of the sentencing guidelines for Native American defendants in Indian Country cases are being raised by members of the federal judiciary. In a recent article, Judge Charles B. Kornmann, U.S. District Judge, District of South Dakota, recognizes a sentiment among federal judges that the sentencing guidelines are unfair to Native Americans. Kornmann, *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*, 13 Fed.Sent.R 71 (2001). "Too often [sentencing judges are] required to impose sentences based on injustice rather than justice, and this bothers us greatly." *Id.* We have heard similar concerns, although less bluntly spoken, from judges in the Southwest and Northwest, who have significant Native American case loads. In his article, Judge Kornmann sets forth several proposed departures that he believes would taken into account the realities of the reservation.

¹The Federal Public and Community Defenders and the Practitioner' Advisory Group strongly recommended to the Sentencing Commission to seek Native American input before passing amendments to the sex abuse guidelines, where historically Native Americans have represented approximately 70% of defendants sentenced under U.S.S.G. § 2A3.1, § 2A3.2 and § 2A3.4.

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
November 6, 2001
Page 2

It is clear that the reservations are home to the highest crime rate of any community. While the last of 1990's saw an economic boom and the concomitant reduction of violent and other crimes throughout the country, the reservations were left out of both. According to 1999 statistics from the Census Bureau and the Bureau of Indian Affairs, out of the 1.4 million of Native Americans that live on or near reservations, 19% are homeless and 59% live in sub-standard housing. 20% of Native American households on the reservations do not have full access to plumbing. 38% of Native American children age 6-11 live in poverty, in comparison with 18% for U.S. children nationwide. Only 63% of Native Americans are high school graduates. The unfortunate permanency of poverty on the reservation has also led to consistency in the crime rate. In 1998, 110 Native Americans out of 1,000 were victims of a crime of violence in comparison with 43 per 1,000 blacks, 38 per 1,000 whites and 22 per 1,000 Asians.

Long periods of incarceration have little effect on Native American crime. The roots of Native American crime can be found in the destruction of their culture, extreme poverty and the lack of economic opportunity, and a very understandable high rate of depression. This has led to significant substance abuse problems, teenage pregnancies and an alarmingly high suicide rate among Native American populations. These factors make Native American cases unique in the federal justice system.

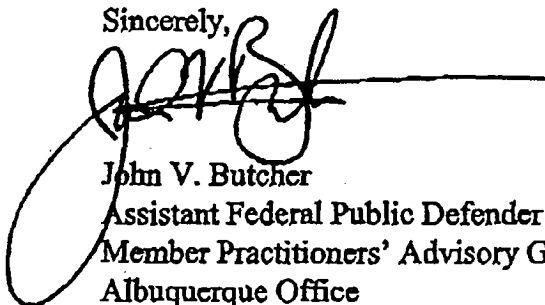
The Sentencing Commission should seek broad based input in forming its committee. The Federal Public and Community Defenders and C.J.A. Panel attorneys represent the majority of Native Americans who are charged with crimes in Indian Country. Thus, we believe the defense community can provide useful input to the committee and the Commission. We also respectfully suggest that the Commission should seek the involvement of the National Congress of American Indians, which is based in Washington, D.C. The National Congress of American Indians is the largest association of tribes and has members throughout the country. In addition, we believe the Commission should also extend invitations to the Honorable Robert Yazzie, Chief Judge of the Navajo Supreme Court, and Dr. Dewey J. Ertz, of South Dakota. Dr. Ertz, a Native American, has vast experience concerning reservation crime and effective treatment of offenders. These individuals can add unique perspectives on the causes of crime on the reservation.

The scope of the Ad Hoc Committee should include possible amendments or downward departures concerning Indian Reservation cases. This would be consistent with concerns raised to the Commission prior to the promulgation of the sentencing guidelines. See, Tova Indritz, Testimony before U.S. Sentencing Commission, Denver, CO (Nov. 5, 1986); Letter from Fredric F. Kay, Federal Public Defender, Dist. of Arizona, to the Hon. William W. Wilkins, Chair, U.S.S.C. (Aug. 9, 1989); Jon M. Sands, Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With "Reservations", 9 FED. SENT. R. 144, 145 (1996).

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
November 6, 2001
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The Federal Public and Community Defenders and the Practitioners' Advisory Group are willing to work with the Commission in forming an Ad Hoc Advisory Group on issues related to the impact of the Federal Sentencing Guidelines on Native Americans in Indian Country. Please let us know if we can provide further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Butcher", is written over a horizontal line. The signature is stylized with a large loop at the end.

John V. Butcher
Assistant Federal Public Defender
Member Practitioners' Advisory Group
Albuquerque Office

JVB:srf

cc: Vice Chair John Steer
Tim McGrath
Jon Sands
Barry Boss
James Felman

**U.S. Department of Justice****United States Attorney
District of New Mexico****Post Office Box 607
Albuquerque, New Mexico 87103****505/346-7274
505/346-7224
FAX 505/346-7296****November 6, 2001**

**Ms. Theresa H. Cooney
Assistant General Counsel
Office of General Counsel
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, DC 20002-8002**

**Via facsimile (202-502-4788)
To be followed by United States mail**

RE: Impact of the Sentencing Guidelines on Native Americans in Indian Country

Dear Ms. Cooney:

In response to your inquiry for comment regarding an *ad hoc* committee to consider the above-referenced subject, please forward the enclosed suggestions to the appropriate person for review.

We recommend that the scope of an *ad hoc* committee include a statistical review of sentences served by Native Americans in federal prison, in comparison to sentencing in state courts for similar offenses. The scope of any such committee should go beyond the alleged discrepancy in state and federal sentencing, as many factors will need to be considered. For example, there should be some consideration of a defendant's criminal history (tribal and state offenses), as that factor will cause a sentence for the same type of offense to vary among defendants. Additionally, an *ad hoc* committee should consider recidivism rates, as differences in those statistics are important policy considerations regarding appropriate lengths of state and federal sentences. Funding resources and limitations within the respective prison systems should also be considered.

Further, recent statistics from the U.S. Department of Justice, Bureau of Justice Statistics show that violent crime is increasing in Indian Country and decreasing elsewhere; therefore, the 1993-1998 Violent Victimization and Race data released in March 2001 should be part of any study regarding the impact of the Sentencing Guidelines on Native Americans, as overall crime rates will, in all likelihood, have some relation to appropriate lengths of sentences.

A comparison of felony and misdemeanor conduct should also be considered, in light of the jurisdictional limits that exist for crimes in Indian Country. It would also be worthwhile to consider areas of criminal law where state sentences are known to be higher than federal sentences resulting from similar conduct in Indian Country (*i.e.*, drunk driving offenses). An *ad hoc* committee would also need to examine federal sentences that result from factors that are wholly unrelated to Indian Country (*i.e.*, firearm and narcotic offenses result in longer federal sentencing than a similar state offense would yield, but those sentences have no relationship to whether the crime occurred in Indian Country).

November 6, 2001

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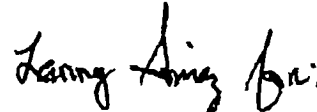
As to duration, it is likely that at least six months would be required to gather necessary statistics and reach conclusions about how the statistics relate to the impact of the Sentencing Guidelines in Indian Country.

Finally, we recommend that any *ad hoc* group membership include federal prosecutors from non-PL-280 states, *i.e.*, federal districts that prosecute a majority of violent crimes arising in Indian Country. We would specifically request that the committee include a representative from the District of New Mexico. Prosecutors from federal districts that are part of states with authority under PL-280 should also be included, as comparisons between those types of districts will be valuable. Members of the Attorney General's Native American Issues Subcommittee ("NAIS") should also be included.

The composition of the group should also include representation from victim/witness advocates, as victims' perspective on federal sentencing for Indian Country crime is essential. A probation officer would also be helpful on the committee. It would be imperative to include law enforcement from tribal, state and federal agencies, as well as a member from a tribal judiciary.

We would be happy to provide particular names for recommendation on the group membership at an appropriate time. If you have any questions, please feel free to call me.

Sincerely,



DAVID C. IGLESIAS
United States Attorney

W:\Agenda\2001\11\06\11060101.doc

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
400 South Phillips Avenue
Sioux Falls, South Dakota 57104-6851
605-330-4505

LAWRENCE L. PIERSON
Chief Judge

November 5, 2001

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: United States Sentencing Commission

Dear Judge Murphy:

This letter is in response to the notice published in the Federal Register on September 19, 2001.

I believe a Native American Advisory Group would be most desirable. The June, 2001 hearing held in Rapid City, South Dakota, showed the need for such an Advisory Group. The Advisory Group is needed not only for the Native Americans on South Dakota's nine reservations, but also for other Districts that have a significant Native American population. As you know, because of federal law, Native Americans are subject to federal prosecution and the sentencing guidelines to a far greater extent than any other portion of our population. Many Native Americans are prosecuted in Federal Court for offenses which would be the subject of State Court prosecution if they were not Native Americans.

The Advisory Group, if it is created, should be broad based, with representation from interested persons in a number of affected federal jurisdictions. The members should have the time and the interest to identify problems and suggest solutions within the framework of the Guidelines.

Some members might have government or private employers who could pay the expense of their employee attending advisory board meetings. Other members, based upon need, would need to have a mechanism to cover their expenses.

I do hope that an advisory board is created. In those few jurisdictions where there is a significant Native American population of juveniles and adults, trial courts have neither the jurisdiction, resources, nor training to handle any significant offense conduct. The application of federal criminal law on those reservations is intense with sentencing problems that do not generally or, in some instances, ever, arise in other federal

The Honorable Diana E. Murphy
November 5, 2001
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jurisdictions. An example of the degree of impact of federal criminal law on the South Dakota reservations is set forth on pages 4, 5 and 7 of *The Third Branch*, October 2001.

An advisory group to identify problems and suggest solutions for sentencing problems peculiar to Native Americans is most desirable. The trust relationship the United States has recognized it has with Native American people likewise suggests that an advisory group is desirable.

Sincerely yours,



LAWRENCE L. PIERSOL

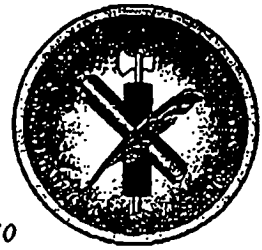
Chief Judge

LLP:jh

cc: The Honorable Roger L. Wollman
Chief Judge
United States Court of Appeals for the Eighth Circuit
400 South Phillips Avenue, Suite 315
Sioux Falls, SD 57104

THE THIRD BRANCH

Newsletter
of the
Federal
Courts

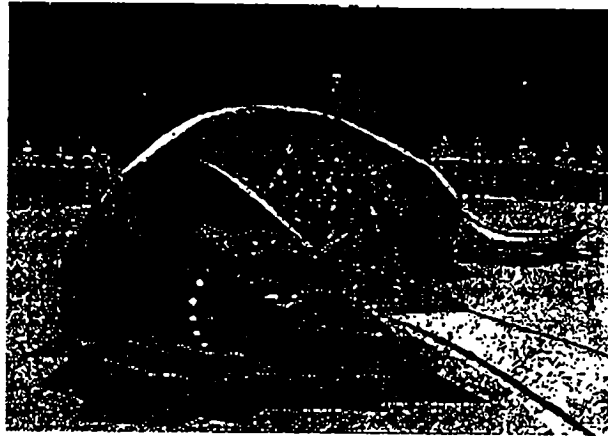


Vol. 33
Number 10
October 2001

Judiciary Looks To Security Following Attacks

A week after the September 11 terrorist bombings in New York City and Washington, Administrative Office Director Leonidas Ralph Mecham presented the security needs of the federal Judiciary to House members. Sally Rider, Administrative Assistant to the Chief Justice, appeared for the Supreme Court. The special briefing was convened by Congressman Frank Wolf (R-VA), chair of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies, with José B. Serrano (D-NY), the subcommittee's ranking minority member.

Following the attacks, the U.S. Marshals Service (USMS), which provides protective services to judges and the courts, went on heightened alert. Court facilities throughout Manhattan were closed, but reopened for business by the end of the following week, although phone service and public access to the area continue to be disrupted. It was expected that the heightened security alert would continue throughout the Judiciary for the



long-term, especially as the war on terrorism evolves into trials and other court proceedings.

With this in mind, Mecham told the subcommittee, "We believe very strongly that the Department of Justice needs additional deputy U.S. Marshals for protection of the judicial process and to provide overall security coordination for the courts." The Judiciary fears that U.S. Marshals may be diverted to bolster security at airports, to work on investigations, and to fly on civilian aircraft, which would stretch their already limited numbers to cover the needs of the federal courts.

Even before the terrorist attacks, the Judiciary had been in the process

See Security on page 2

Continuing Resolutions Keep Government Running

They nearly have become a sign of fall. As the leaves turn, the continuing resolutions emerge. Congress passed and the President signed the first continuing resolution at the end of September to keep government running as the fiscal year began October 1 without Presidential signatures on any of the 13 appropriations bills. The House and Senate passed H.J. Res. 65, and the President signed on September 28 the first CR making federal funds available through October 15, 2001. A second CR extended that deadline. Meanwhile, 35 percent of the projected fiscal year 2002 funding was dispersed to the courts to continue operations in the new fiscal year.

The House and Senate passed separate bills making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2002. The Judiciary requested a \$4.8 billion appropriation for fiscal year 2002. However, the House approved \$4.6 billion for the Judiciary, and the Senate approved just \$4.4 billion. In response to the September 11 terrorist attack, the Senate version now contains funds "to

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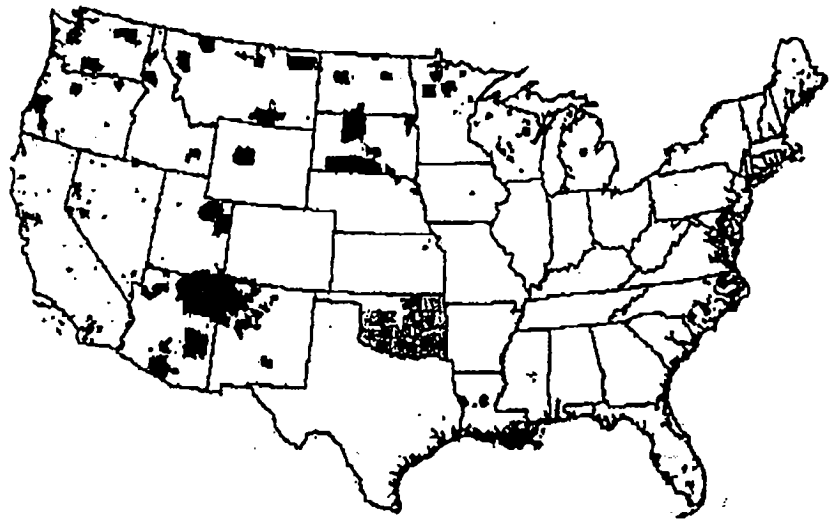
Courts Try New And Tribal Ways In Indian Territory

Assault, sexual abuse, arson, burglary—these are typically offenses heard in state courts—except when the federal government has jurisdiction. That jurisdiction, and the authority of the federal courts, extends to national parks and other federal property, but it is in the 275 locations in the U.S. that are federally administered as Indian reservations where an expanding workload is accompanied by particularly unique challenges.

For more than 100 years the federal government has been vested with the responsibility to enforce major crimes on reservations, although this responsibility can be transferred to state governments. Today, 1.2 million American Indians live on or near these reservations, and according to the Department of Justice, American Indians are the victims of violent crimes at more than twice the rate of all U.S. residents. This crime rate has, since 1996, increased the number of American Indians under supervision in the federal probation system by 57 percent. The unique nature of the cases, the large number of juveniles involved, the low standard of living, and the geographic remoteness of much of these areas have prompted judges and probation officers who handle American Indian cases to take a different approach to their work.

Last year, the District of South Dakota had a total of 412 American Indians under supervision. Judge Karen E. Schreier (D. S.D.), who sits in Rapid City, hears cases from the nearby Pine Ridge Reservation. "The caseload from the

Map courtesy of Geographic Data Service Center



American Indian Reservations and Tribal Entities in The United States

reservation," said Schreier, "has significantly increased over 6 or 7 years. We're seeing a more severe level of violence; most of which is alcohol-related. We're also seeing a large number of juveniles. They're usually 16 or 17 years old, but the youngest was 13." Schreier adds that nearly 200 gangs have been identified on the Pine Ridge Reservation, where unemployment reaches nearly 80 percent. Said Schreier, "American Indians are entitled to live in a safe, crime-free environment. So I place a high priority on handling these cases."

Chief Judge Lawrence L. Piersol (D. S. D.) knows the defendants he sees in court are the product of high rates of unemployment and corresponding rates of alcoholism on the reservations. According to statistics compiled by the Bureau of Justice Statistics, American Indian victims reported a drinking offender in 46 percent of all violent victimizations, and about 70 percent of jailed American Indians convicted of violence reported that they had been drinking at the time of the offense. Piersol is especially concerned about the num-

ber of cases involving juveniles, which due to their nature take up a disproportionate amount of the court's time.

The number of sex offenses and juvenile crimes on reservations is a cause for concern throughout the districts. Indian juveniles represented 62 percent of all juveniles arrested in calendar year 1999. Nationwide, American Indians represent 30 percent of all offenders convicted for sex offenses.

"Most probation officers never see juveniles in their careers," said Magdeline E. Jensen, Chief U.S. Probation Officer for the District of Arizona, "but we have more than 80 juveniles, mainly American Indians, under supervision here. We have 22 juveniles serving terms of official detention, of whom 16 had underlying offenses involving crimes of violence ranging from 1st and 2nd degree murder to aggravated assault and kidnapping."

As crime involving violence or child physical or sexual abuse has grown, probation officers and the federal judiciary are looking for ways in which to reach not only of-

senders, but also the communities in which they live.

The Administrative Office Federal Corrections and Supervision Division (FCSD) began developing Indian country initiatives in districts with significant Indian caseloads in 1993. In 1999, FCSD created a special Indian Country Project to improve supervision and treatment services in reservation communities. The FCSD has helped form partnership projects with the Department of Justice and the Bureau of Indian Affairs, and FCSD's Rene Green works closely with probation officers who are looking for solutions to problems. At an FCSD-hosted meeting of federal officials and tribal community members, all agreed that any successful effort to address law-enforcement and correctional treatment issues on Indian reservations must include an understanding of the Indian culture, the economy, and the geography, and that each court must work with the local tribes to establish partnerships.

One such effort is underway in the District of New Mexico, where Anita Chavez, as Supervising U.S. Probation Officer, supervises an office that covers most of the district's Indian country cases. Her district is third in the country for sex offender cases. "We're emphasizing supervision," said Chavez, "including polygraphs and treatment." She acknowledges that the geography makes supervision particularly challenging. On the 16 million acre Navajo reservation, a "surprise" visit to an offender in her territory may mean a four-hour trip from the base office. In response, the district has opened a part-time satellite office, with cooperation with the FBI, in a city closer to the more remote reservation areas. This office will be manned four days a month to give defendants access to probation officers on a regular basis. "We also are working on a half-way house where sex offenders will come as a condi-

tion of release to get the help they need," said Chavez.

Other districts have developed equally innovative solutions. In the District of Arizona, the probation office helped form a Tribal/Federal Sex Offender Management Task Force composed of tribal and federal representatives of probation, victim advocates, law-enforcement and prosecutors, therapists, judges, legislative representatives and a tribal counsel member. The Task Force has helped change tribal law to permit registration and notification of sex offenders, and it has helped increase awareness on the reservation of the incidence of sexual violence.

The District of South Dakota has developed its own sex offender program where therapy is mandatory for offenders. Community service also is mandatory if an offender is not employed or a student. A juvenile facility has been opened on the Pine Ridge Reservation, and now juveniles who were once sent away for placement are supervised on the reservation. The goal is to find continued funding for teachers and therapists, and continue access from tribal elders who can teach offenders about their culture.

Forty to 50 percent of the offenders under supervision in the District of North Dakota are American Indians. As a result, Chief Probation Officer Richard Crawford has aggressively recruited American Indians for his staff who have criminal justice degrees and law enforcement experience, and who are enrolled members of reservation tribes. Four new American Indian staff members came on board within the last year and have proved invaluable in working within their communities. The probation office has made its presence felt on the reservations in other ways. With the support of Chief Judge Rodney Webb, the district is now finalizing the opening

Indians continued from page 5

of offices on three of the reservations in its jurisdiction that once entailed a 70- to 100-mile drive to conduct any business. The fourth reservation is within 12 miles of the central office.

Frank Fleming, Chief U.S. Probation Officer for the District of Montana, says 40 percent of his office's supervision caseload is on Montana's reservations. His probation officers place a high priority on working with the community, and when working with juveniles, interacting with their schools and teachers. Officers specializing in juveniles carry a smaller caseload to make that possible.

Officers also are encouraged to be proactive in helping offenders on probation make a successful tran-

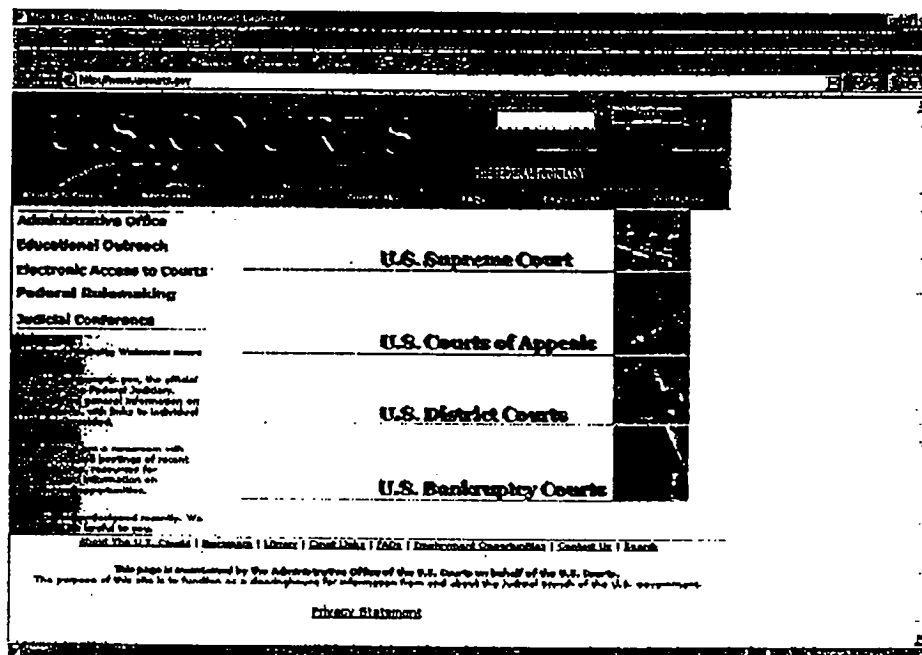
sition into the community. If there's a question of non-compliance with the terms of probation, officers try to work out matters on a local level before heading to court for a revocation hearing. Fleming says that with the support of Chief Judge Donald W. Molloy, he has worked with the Bureau of Prisons to acquire facilities for juvenile offenders from the reservation. "These offenders previously were sent out of state," said Fleming, "and that's not acceptable for a good support system. Now we have a non-secured facility in western Montana, and we're breaking ground for a 30-bed secured juvenile facility near Butte."

For the future, the Judicial Conference Criminal Law Committee may be considering asking Congress to

change the sentencing for juvenile offenders to allow for such options as a combination of incarceration and supervised release, which is not possible now.

Most judges and probation officers agree that the crime problems seen on Indian reservations have their roots in poverty. Fleming may speak for many when he observes that unemployment and alcoholism on reservations combine to present a future with little or no hope for the children. "That's why we emphasize working with the kids," says Fleming, "to show them other ways they can go. If we can't give people hope, especially the kids, if we lose them, we'll never get them back. We're invested in the communities, and it is well worth it." 

Redesign Makes Navigating Judiciary's Website Easier



The official website of the federal Judiciary (<http://www.uscourts.gov/>) has a new look this month. And the redesign is more than just a facelift. Content has been reorganized with users' needs in mind. It's easier to find the most frequently accessed information; current news is posted up front; and, in many cases, pages that were two or more clicks of a mouse away are now accessible directly from the home page. All of which makes the site significantly easier to navigate.

JOE J. MCKAY • ATTORNEY AT LAW

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November 1, 2001

U.S. SENTENCING COMMISSION
One Columbus Circle, NE
Suite 20500, South Lobby
Washington, D.C. 20002-8002

RE: Comments on Proposed Ad Hoc
Advisory Group on the Impact of
Federal Sentencing Guidelines on
Native Americans in Indian Country

TO THE UNITED STATES SENTENCING COMMISSION:

Pursuant to the notice published in the Federal Register on Wednesday, September 19, 2001, please consider the following comments on the question of the formation of an Ad Hoc Advisory Group to study the impacts of the Federal Sentencing Guidelines on Native Americans in Indian Country.

The Sentencing Commission has asked for comment on the merits of forming an ad hoc advisory group and for comments on the scope, duration and membership of such a group.

Before turning to my specific comments, by way of background; I am an enrolled member of the Blackfeet Indian Tribe of Montana, and except for time in the military service and to attend university, I am a life-long reservation resident.

I am also a licensed attorney and member of the Montana State Bar Association. I have practiced law since 1983 in the Tribal courts of Montana, the Montana State courts and the Federal District Court of Montana. As a part of my practice, I have handled criminal cases in all three court systems. And, unfortunately, I have a son who made some wrong decisions and as a consequence of those decisions, had proceedings in both the State District Courts of Montana and the Federal District Court of Montana.

I have served as a member of the Blackfeet Tribal Business Council (the governing body of the Blackfeet Nation) and I am currently a contract attorney for the Blackfeet Tribe.

My comments are as follows:

First, as to the merits of forming an ad hoc advisory group on the effects of the Federal Sentencing Guidelines on Native Americans in Indian Country, my response is that the recommendation has great merit and should be undertaken at once.

As the Commission fully understands, the effect of the Federal Sentencing Guidelines on the Court itself is to greatly restrict, indeed almost eliminate, the discretion of the sentencing judge in the Federal system.

At the same time, the sentencing discretion of the judges of most state courts remains relatively intact. The end result in the context of Indian people is that an Indian can commit a crime on the Reservation for which the sentencing guidelines mandates incarceration, while another Indian committing that same crime off the reservation may serve no jail time whatsoever.

Areas where this is particularly true is in drug related crimes. In most instances state court judges have unfettered discretion to fashion a sentence for the particular defendant and crime. In many instances, in drug cases, the state sentence may be centered more around treatment and rehabilitation rather than incarceration. As the Commission considers this decision, many Montana Indians are serving time in the Federal penal system for drug related crimes, while those committing the same crimes in the State generally, are going to treatment and serving probation.

It has been my experience, that many reservation crimes are rooted in poverty and despair. The effect of the Federal Sentencing Guidelines is to further victimize Indian people by mandating jail time, where a state court judge may well take the entire circumstances into consideration and opt for a more rehabilitative sentence.

In a recent particular case, a client of mine is now serving 11 months in Federal prison for being a felon in possession of a firearm. His prior felony was 20 years ago, and in that time he had no violations of his supervised release. I have no doubt that he would not have gone to prison under a state court judge's sentence.

This disparity in sentencing derives solely from the fact that the Indian person is on a federal Indian Reservation. There is no legal basis otherwise for treating Indian people different in sentencing than their white or non-Indian neighbors receive outside the Reservation for similar, and what in some cases, are more serious crimes.

Therefore I believe that the scope of an ad hoc advisory groups' review should be limited only by the nature of the problem. Thus not only should the advisory group look at the impact of the Federal Sentencing guidelines on Indians in Indian Country, it should also look at the consistency of sentencing within the Federal system as between Indians and non-Indians who commit similar crimes. Examining this latter issues will give some insight not only on whether Indians are being treated consistently within the federal system as compared to other ethnicities, it will also give some guidance on whether Indians are being impacted more or less disparately than white people or others in the context of state

court versus federal court sentences.

The Commission should be commended for even considering the formation of an ad hoc advisory group on this issue. Having taken the first step, the Commission should realize that the problem is complex, widespread and has as many mutations as there are states with Indian Country lands and Indian tribes.

With this in mind, I would suggest that the ad hoc advisory group be formed and that it be given 12 to 18 months within which to study the problem, assess the variables and make recommendations to the Sentencing Commission by way of a formal "white paper" report.

With respect to membership on such an ad hoc advisory group, I would recommend that membership be solicited from the following groups:

1. Tribal governments;
2. Indian Attorneys with criminal practice experience in State and Federal Court;
3. Non-Indian Attorneys with criminal practice experience in State and Federal Court;
4. State Court prosecutors in counties or districts which encompass or are adjacent to Indian Country lands;
5. State Court judges with districts which encompass or border Indian Country lands;
6. Federal Court judges with districts encompassing Indian Country lands;
7. State court probation officers who handle counties or districts which encompass or are adjacent to Indian country lands; and,
8. Federal probation officers whose case loads involve significant numbers of Reservation Indians who were convicted of crimes arising out of Reservation based conduct.

In closing, I welcome the opportunity to comment on this very important issue. While it is probably not possible to effect an overhaul of the Federal Sentencing Guidelines, the Commission now has the opportunity to at least study and perhaps correct what I believe to be an injustice to Indian people which is founded in the harsh treatment in the Federal Sentencing Guidelines.

While I do not personally support the Federal Sentencing Guidelines, it is my impression that the discretion was taken from Federal judges to ensure that career

criminals and those with demonstrated, consistent criminal intent could be appropriately punished. Most crimes committed by Reservation Indians and most Indian perpetrators do not fall in those categories. As I indicated, my own experience is that most Reservation crime arises out of the feelings of despair and depression that are born in abject poverty.

There must be a more appropriate way of dealing with this class of perpetrators than is currently allowed by the Federal Sentencing Guidelines. While putting all reservation Indians in federal prisons may be a short term solution to Reservation crime (and indeed, may be preferable to many non-Indians), it has no long term benefits for anyone. Additionally, the costs to the American Society as a whole (including tax payer dollars for incarceration) could be, in my opinion, greatly reduced if a different, more discretionary approach were followed.

Finally, if such an ad hoc advisory group is formed, please consider this as my expression of interest in serving on such a group.

Thank you for taking the time to review my comments and to even consider the issue discussed herein.

Respectfully,

Joe J. McKay

cc: file

Blackfeet Tribal Business Council

ROSEBUD SIOUX TRIBE**October 31, 2001**

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the Federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

CULTURE ISSUE

On cultural issue regarding federal court and sentencing, we cite the *Ex parte Crow Dog* U.S. Supreme Court Case (109 U.S. 566, 1883) and we maintain that position therein today. We cite an excerpt from that case to make a point. "To impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its extractions, and make no allowance for their inability to understand it. It tries them, not by their peers, nor the law of their land, by superiors of a different race according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; on which measures the red man's revenge by the maxims of the white man's morality."

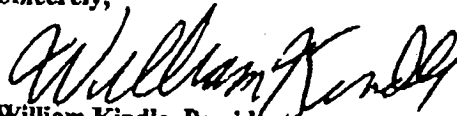
The Major Crimes Act of March 3, 1885 did override the *Ex parte Crow Dog* case, and diminished extensively the culture part of the Native American Indian's capability to maintain control over crimes within their own circles according to Sioux customs.

We maintain our position on the merits of *Ex parte Crow Dog*'s decision especially in the light of the current federal sentencing guidelines imposed on the Native American Indians, and more recently the new laws imposed on them to address federal court impositions and dilemma regarding Indian Reservations.

We believe the culture part of any group of people maintain's control over their own circle in any given circumstances especially where civil conduct may be the issue.

It is difficult to maintain control over a group of people when others impose their standards of rule and laws on such as the Native American Indian reservations here in the state of South Dakota.

Sincerely,


William Kindle, President
Rosebud Sioux Tribe

11 Legion Avenue
Phone: 605-747-2381

P.O. Box 430
Fax: 605-747-2905

Rosebud, SD 57570-0430
E-mail: rsiakota@gwte.net

ROSEBUD SIOUX TRIBE

October 31, 2001

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the Federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

COURT APPOINTED ATTORNEYS

It is our opinion that the court appointed attorneys do not always serve in the best of their clients. Most of the Native American defendants always end up serving time through plea-bargaining, guilty pleas by their court-appointed attorneys. The inexperienced attorneys or the lackadaisical attitude on the part of the attorneys, often mean a long-term incarceration for the clients, usually the Native American Indians in this instance. We feel reservations are targeted for more laws unnecessarily as a federal judge observed, and said (quote) "And if your drinking and driving on the reservation and someone is injured, you get a year on top of what anybody else in the state would receive for a similar crime," (unquote) Rapid City Journal, April 22, 1999, and again said (quote) "For every Saturday night brawl, they prosecute somebody in Federal Court" (unquote) Rapid City Journal, April 22, 1999, (meaning on the reservation). The Federal Judge Kornmann comments came from the fact most of his federal cases came from the Indian Reservation here in South Dakota.

For these reasons above the current Court Appointed Attorneys through the federal courts must be willing to strive forward at their best in the interest of their clients who are already facing harsh prison sentence(s) by and through the current sentencing guidelines in place in federal courts.

Sincerely,



William Kindle, President
Rosebud Sioux Tribe

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E-mail: rsiakota@gwtc.net

ROSEBUD SIOUX TRIBE

October 31, 2001

United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8002

Attention: Public Affairs Commission

To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American Indian population. My foremost immediate concerns lie in the following:

INTERPRETERS

The federal courts must allow an interpreter to be available at all times. The majority of the court appearances in federal court here in the state of South Dakota are Native American Indians by a population ratio figure. The majority of our Native Americans do not have education and sometimes do not understand federal charges that are being read to them let alone know the procedures available for them.

A non-Indian in federal court has a difficult time when such charges are read to him and he speaks that same language every day in life, from the time of his birth yet, he has a hard time understanding.

Our Native American people always speak their Sioux language at home, social gatherings and elsewhere, so to try to comprehend thoroughly the federal charges initiated against him is usually a devastating experience for that person charged.

An interpreter may help the defendant understand the charges clearly so a proper defense can be initiated for the trial should there be one. An interpreter's presence will show the federal court's initiation of fair play extended even to those who may seem semi-illiterate. The availability of an interpreter would be essential and a vital part of the federal court operations.

Sincerely,



William Kindle, President
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ROSEBUD SIOUX TRIBE

October 31, 2001

**United States Sentencing Commission
One Columbus Circle NE Suite 2-500
South Lobby
Washington, DC 20002-8022**

Attention: Public Affairs Commission

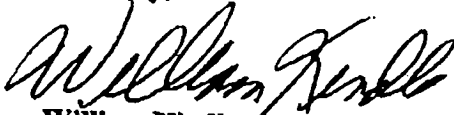
To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American population. My foremost concerns lie in the following:

FEDERAL JUDGE/DISCRETIONARY SENTENCING

The strict sentencing guidelines calls for a federal judge to remain within these guidelines, thus, the discretionary source of a federal judge is no longer viable in sentencing when mitigating circumstances do surface when sentencing a defendant.

We assumed the strict sentencing guidelines arose because of the organized crime activities and other related troublesome groups here in the United States and not so much for individual offense(s), such as that of the Native American Indians here in U.S. we may be wrong.

Sincerely,



**William Kindle, President
Rosebud Sioux Tribe**

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Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

October 29, 2001

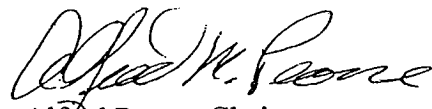
United States Sentencing Commission
Attn: Public Affairs
One Columbus Circle, NE.,
Suite 2-500 South Lobby
Washington, DC 30003-8002

Dear Ms. Murphy:

The Spokane Tribe of Indians agrees that the Sentencing Commission should form an *ad hoc* advisory group to study the impact of the federal sentencing guidelines on Native Americans. Because of our unique status and the general trust obligation of all agencies of the United States in relation to Native American people, the sentencing guidelines should be given careful scrutiny under the highest of standards.

The composition of this group should be comprised of the people directly affected: Indian people. Efforts should be made to solicit applications for members from organizations such as the National Council of American Indians (NCAI) along with its regional sub-organizations, and the Native American Rights Fund (NARF).

Sincerely,



Alfred Peone, Chairman

November 5, 2001

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002
ATT: Public Affairs

RE: Formation of Advisory Group on Organizational Guidelines

In response to your request for comment on the possible formation of an ad hoc advisory group on the organizational guidelines, Cingular Wireless hereby files these comments for your consideration.

Cingular believes the organizational sentencing guidelines have had an enormous influence on the development, shape and scope of compliance programs in many companies. This impact goes beyond the relatively limited number of organizational sentencing cases that come before the courts each year. But instead, is revealed in the increasing numbers of companies that have joined organizations such as the Ethics Officer's Association, desiring to benchmark their compliance programs. Now is an appropriate time, ten years after the organizational guidelines were implemented in 1991, to review their application and make recommendations for improvement.

An advisory group is an excellent vehicle for undertaking this review and providing the Commission with the most comprehensive information and recommendations. As the Commission realizes, this effort will take some time, if done properly and thus the advisory group should be given sufficient time to conduct a careful, thoughtful and extensive review of the broad impact the organization guidelines have had on companies, including the possible reforms to improve them.

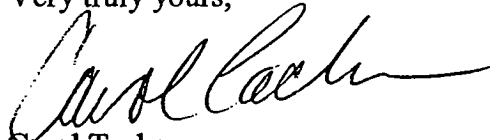
This group should include ethics and compliance officers and other experts on ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can: describe the impact the organizational guidelines and each of the seven elements has had on their organization, address the strengths and weaknesses of the guidelines as written and also detail other legal and regulatory developments which may make it more difficult to establish and maintain the "effective" compliance program contemplated by the guidelines.

A

The advisory group should, consistent with the Commission's legal authority, have the ability and time to review these other legal and regulatory initiatives, such as regulatory compliance guidance, voluntary disclosure programs, self-audit and source privilege issues, False Claims Act proceedings, corporate integrity agreements and other enforcement activity. These initiatives may also offer helpful suggestions for improvement in the guidelines themselves.

If you have any questions regarding our comments, please call Carol Tacker, Compliance Officer on 404-236-6030 or Kathy Rehmer, Executive Director – Ethics and Compliance on 314-835-2519.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Carol Tacker", written in black ink.

Carol Tacker

Compliance Officer – Cingular Wireless



November 5, 2001

United States Sentencing Commission
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Affairs

Dear Sir or Madam:

As a member of the Board of Directors of the Ethics Officer Association (EOA), I write to commend the Commission on its plan to establish an advisory group to review the organization sentencing guidelines. The guidelines have provided an effective roadmap for ethics and compliance officers to develop meaningful programs.

I urge the Commission to include business ethics practitioners, including representatives from the EOA, in the advisory group and that the group be provided with sufficient time to conduct a thorough review, of the broadest scope, prior to making its recommendations to the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Z. Ashen'.

HEALTH CARE COMPLIANCE ASSOCIATION

18105 46th Avenue North • Plymouth, MN 55446 • Tel: 763/478-4490 • email: rsnell@hcca-info.org

November 16, 2001

Mr. Michael Courlander
Public Affairs Officer
United States Sentencing Commission
Columbus Circle, NE., Suite 2-500, South Lobby
Washington, DC 20002-8002
Fax: 202/502-4699

Dear: Mr. Courlander:

I am responding to your call for members to participate in the ad hoc group reviewing the US Sentencing Commissions Guidelines, Chapter 8 – Sentencing of Organizations. I am the Chief Executive Officer of the Health Care Compliance Association (HCCA), which has 3000 individual members. All of our members are compliance professionals. HCCA's mission is to assist the health care industry in implementing compliance programs. Our board members are from prominent health care organizations such as University of Pennsylvania, Mayo Foundation, HCA Healthcare, and TAP Pharmaceuticals (see attached). Our Board representation also comes from outside groups such as the Office of Inspector General (OIG) and the U.S. Treasury.

We have conducted several joint roundtable meetings between the health care industry and the OIG on subjects such as the Physician Compliance Guidance and Corporate Integrity Agreements. We have conducted dozens of conferences and audio conferences on the Seven Elements of corporate compliance as listed in the USSC Sentencing Guidelines. We have published books, CDs, audio-tapes, videotapes and a newsletter on compliance related matters. We have also developed a certification programs for compliance professionals.

We have recently started to examine the topic of compliance program effectiveness. Paula Desio has participated in these discussions and several of our Officers met with Judge Murphy and John Steer in Minneapolis. Mary Didier has attended several of our meetings.

We would be interested in discussing with you, which of our constituents would be best suited to participate in your ad hoc group. Should you need a Chair of the group I would suggest Greg Warner who, as of January 1, 2002, will be our Immediate Past President and is the Compliance Officer for the Mayo Foundation. Mayo is a committee-run organization and Greg has 20 years of experience working with committees. Chairing a group of diverse participants can be challenging and he would be an asset to you. If you are looking for a general member we have many individuals who could be considered and would represent our constituency well.

Roy Snell
CEO HCCA
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rsnell@hcca-info.org

At

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ENTER FOR ETHICAL
BUSINESS CULTURES

November 6, 2001

Judge Diana E. Murphy
United State Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

BUSINESS
PARTNERING WITH
THE UNIVERSITY OF
ST. THOMAS
GRADUATE SCHOOL
OF BUSINESS
AND
THE UNIVERSITY OF
MINNESOTA
CARLSON SCHOOL
OF MANAGEMENT

I am writing this letter in follow up to the United States Sentencing Commission's requested comment on formation of an ad hoc advisory group pertaining to Chapter Eight of the Sentencing of Organizations.

Upon reviewing Chapter Eight and the supporting Chapters of the Federal Sentencing Guidelines, I support the concept of forming an advisory group to explore possible revision of the guidelines.

It has been ten years since the guidelines were first promulgated. During this ten-year period, a sufficient number of real experiences have occurred that provide a means for exploring the impact of the guidelines from several perspectives. First, a comparison of the intent of the guidelines with the actual impact could be made. It is important to continually assess whether the intent of the guidelines is having the desired outcomes. Secondly, an analysis of the changing business environment could be made to determine whether any changing external factors impact the guidelines effectiveness. Finally, it is useful to examine themes from real occurrences that provide greater clarity and aid practitioners in improving their ethics and compliance programs.

Questions pertaining to membership of the advisory group need to be pondered with considerable care. It is important to achieve balanced feedback and input. Membership of the ad hoc group should favor enlistment of a diverse cross section of corporate practitioners, academic ethicists, business ethicists and representatives from the United States Sentencing Commission. While membership should be balanced, considerable care should be given to hearing the voices of corporate practitioners and the United States Sentencing Commission, the two groups most knowledgeable of and interactive with the organizational guidelines.

I wish to thank you and the United States Sentencing Commission for providing an opportunity for input into this matter of great importance. If I can be of further assistance in the future please do not hesitate to contact me at the CEBC at 651-962-4123.

Respectfully

Ron James
President and CEO

1000 LaSalle Avenue
M 12
Minneapolis, Minnesota
55403-2005

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November 1, 2001

Judge Diana E. Murphy
Chair, U.S. Sentencing Commission
% United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
South Lobby
Washington, DC 20002-8002

Judge Murphy:

This letter is being written in response to your recent announcement that the commission is considering forming an ad hoc advisory group to consider development of proposals on the organizational guidelines for the Commission's consideration.

We recommend that you consider contacting the Ethics Officers Association (EOA) to seek their official participation on this ad hoc group. You may contact them at www.eoa.org.

The Sentencing Guidelines are very important to us as a business unit within our company. We have relied heavily on them for strategic guidance in developing our communication, training, marketing, and case management programs. We would kindly ask that you take the proposals offered, including ours, under careful consideration and give this matter as much time and diligence as necessary.

We offer our support in any phase of this endeavor going forward.

Thank you for your consideration.

Sincerely,

Compaq Computer Corporation

A handwritten signature in cursive script that reads "Robert T. Spencer, Jr.".

Robert T. Spencer, Jr.
Director, Office of Business Practices
Chief Privacy Officer

MEMORANDUM

UNITED STATES DISTRICT COURT

Date: November 1, 2001
To: United States Sentencing Commission
Re: Comments on possible ad hoc advisory group
From: Judge Kornmann

I endorse and support the formation of an ad hoc advisory group to address federal sentencing guidelines issues for Native Americans in Indian Country. I refer you to the article I authored for the Federal Sentencing Reporter for September/October 2000 and I enclose a copy.

The group should include only individuals who are knowledgeable about the sentencing guidelines and how they work. General philosophical statements and accusations are of little value, very frankly. I am constantly amazed at how little tribal leaders know about the Sentencing Guidelines. They often write to me, urging that an Indian defendant who is a tribal member be sentenced to a term of probation, this despite the fact that the Guidelines and the case law would absolutely not permit that. I receive the same letters from family members and friends of the defendant, again with no information about the Guidelines. They write often about factors that are prohibited or at least discouraged.

Thank you for your continuing interest in doing something about how unfairly Native Americans in federal court are impacted by the Sentencing Guidelines.



CHARLES B. KORNMANN
UNITED STATES DISTRICT JUDGE
United States Courthouse
102 Fourth Avenue SE, Suite 408
Aberdeen, SD 57402

Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country

Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would largely be the same: No. Too often are we required to impose sentences based on injustice rather than justice, and this bothers us greatly.

Our ancestors forced these original residents of North America into federal enclaves known as reservations, leaving them land that was largely undesirable to homesteaders and others. Surely, I need not recount the list of broken treaties and failures of the federal government to keep our promises and meet our obligations to Native Americans—these failures continue today.

It is a misnomer to call handcuffs "guidelines." If sentencing handcuffs must be placed on federal judges, at least the guidelines with regard to Indian Country should be structured differently. First, they should recognize the tremendous differences that exist between Indian Country and the rest of America. For many reasons Indian Country is a different world than any other part of this fantastically prosperous nation of ours. Second, one must keep in mind that Congress enacts statutes, very likely with little, if any, thought as to how severely they impact Native Americans.

I. The Impact of Congressional Legislation

Congress in recent years has moved far from the principles of federalism under which our country was founded by federalizing a large number of offenses. We even have a federal drunk driving law whose title—"Laws of States adopted for areas within Federal jurisdiction"—is a misnomer. Instead of simply adopting by reference the statutory scheme and the maximum penalties from the state in which the federal enclave lies, so as to treat members of the military and Native Americans the same as others living in that state, Congress added very serious penalties. If a Native American drives impaired in South Dakota's Indian Country, for example, he or she not only receives what a similar drunk driver would receive in Sioux Falls but the punishment "shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine . . . or both, if a minor (other than the offender) was present in the motor vehicle when the offense was committed . . ." Thus, if an impaired Native American driver in Indian Country

who otherwise obeys the law is hit by another driver who drives through a stop sign and a child in the Native American's vehicle is injured or killed, the Native American pays the enhanced penalty. Although many would seriously question whether Congress should address drunk driving in such a manner or perhaps in any manner, I do not argue that the penalties as such are necessarily out of line. That is a matter for our elected representatives to determine. However, I do argue strenuously that it is terribly wrong to treat Native American impaired drivers more severely than similarly impaired drivers in the rest of the United States.

Let me provide another example. Congress has seen fit to severely punish those who sell drugs from "protected locations," such as a "housing facility owned by a public housing authority." The statute calls for twice the maximum punishment authorized by 21 U.S.C. § 841(b) and "at least twice any term of supervised release" authorized by 21 U.S.C. § 841(b). In addition, a fine up to twice the amount authorized by 21 U.S.C. § 841(b) may be imposed. Except to the extent a greater minimum sentence is called for by 21 U.S.C. § 841(b), a person violating this statute "shall be" imprisoned for not less than one year. Only if the sale involved five grams or less of marihuana is the minimum sentence not required.

Guideline § 2D1.2 (a)(1) provides for a two-level enhancement for selling drugs from a "protected location." This section results from a directive to the Sentencing Commission in Section 6454 of the Anti-Drug Abuse Act of 1988. At least two circuits, including the Eighth Circuit in *United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993), hold that regardless of the application or lack of application of a statutory mandatory minimum, the guidelines provision must still be applied. In the Eighth Circuit, we are told to start with § 2D1.1 if the sale occurred in a protected location and then apply the enhancement under § 2D1.2.

The rationale for enhancing the sentences of drug dealers who deal from large public housing projects run by "public housing authorities" in major cities where law abiding residents are challenged daily by drug dealers and other criminals is certainly understandable and remains a matter of legislative decision making. However, Congress failed to take into account that, for the most part, public housing in Indian country which is run by Indian Housing Authorities consists of single family dwellings. Why should a wealthy or even a mid-level income person who rents or owns his or her



CHARLES B. KORNMANN
U.S. District Judge,
District of
South Dakota

own home and sells drugs be subject to significantly lesser penalties than a Native American of limited means who lives in a single family "public housing" home on the reservation and sells drugs from that home? I have interpreted 21 U.S.C. § 860 and the two-level guideline enhancement as not applicable to people who live in homes owned by Indian Housing Authorities. A "public housing authority" is a different entity than an "Indian Housing Authority." This is supported by my analysis of 25 U.S.C. §§ 4101 *et seq.*, and the rather extensive statutory scheme in Chapter 42 dealing with "Native American Housing Assistance and Self-Determination." I looked also at 42 U.S.C. § 1437a(b)(6) and the legislative history of removing any reference to Indian Housing Authorities in the definition of "public housing authority", this having been accomplished in 25 U.S.C. § 4101 by an Act of October 26, 1996, effective October 1, 1997. I considered also the rule of lenity and other statutes. Thus far, my interpretations have not been appealed.

II. The Impact of Substance Abuse on Sentencing
Substance abuse problems are rampant in Indian Country. Extreme poverty, lack of almost any job opportunities, feelings of oppression and discrimination, histories of domestic and other abuse, undesirable peer pressures, and loss of feelings of self worth all contribute to addictions. Convictions for driving under the influence (and similar convictions by whatever name they are known) often increase the criminal history categories of Native Americans pursuant to application note five to § 4A1.2. By contrast, those sentenced in state court (at least in South Dakota) for assaults, thefts and other offenses are not generally penalized for past convictions of drunk driving because the state judges simply pay little, if any, attention to such offenses. I believe that is true as well in other states, at least in those without sentencing guidelines. In any event, we are permitted no such luxury in Indian Country cases.

The sentencing guidelines are also especially harsh to Native Americans who have resisted arrest, often while under the influence of some substance. A citizen in state court for a similar offense would usually be sentenced to time served while he or she "sobered up." In federal court, however, Native Americans are often charged with impeding, obstructing or resisting a federal officer and, upon conviction, routinely go to a federal penitentiary as "obstructing or impeding an officer" calls for a base offense level of six pursuant to § 2A2.4(a). The definition of federal officer includes any tribal police officer when the tribe has entered into a contract with the federal government which virtually every tribe has done. If the defendant had "physical contact" with the officer, a three level enhancement is applied. Obviously, all arrests involve physical contact between the officer and the person being arrested and a defendant who is intoxicated will often touch the

officer in an improper manner. Thus, for a defendant with a criminal history I category who goes to trial and is convicted, the sentence range is four to ten months. This is an excessive sentence when the officer has not been injured in any way. Putting up with drunks is to some extent "part of the territory" for police officers. Therefore, people who resist arrest while intoxicated anywhere else in this country tend not to go to prison for resisting arrest, regardless of what their past criminal history might be. I hasten to add that a Native American who actually injures an officer is often charged with a different offense, namely assault with a dangerous weapon or assault resulting in serious bodily injury. The definition of a dangerous weapon includes "shod feet", e.g. kicking someone with tennis shoes.

III. The Need for More Departure Opportunities

Sentencing judges are largely prohibited from taking into account the realities in Indian Country. Under § 5H1.10 we can neither consider race or national origin nor the fact that we took away the culture, the language, the religion, the land, the buffalo, the pride, and the very freedom of Native Americans years ago. It is not only Blacks who have suffered greatly in America but also Native Americans.

Also, under § 5H1.12 we are prevented from considering lack of guidance as a youth and similar circumstances. If you could only see the terrible parenting that Article III judges see on so many occasions in Indian Country, this prohibition would not apply here. Why is it not a sentencing consideration to look at how the young person was raised and what the person was taught or not taught? How and why should the young person be sentenced without considering that the child's or young adult's parents were largely absent and, when present, often intoxicated and engaged in domestic violence? How could we not know that being raised in such an environment would cause the child as a young adult to reap what was sowed by the parents? The age of a young defendant who has just emerged or escaped from such a home of violence is not ordinarily relevant under U.S.S.G. § 5H1.1. It should be.

One might say that such departures should also be available to other disadvantaged youth. Perhaps so. However, the levels of hopelessness, lack of employment opportunities, alcoholism, drug abuse, domestic violence, sexual abuse of women and children, and complete lack of parental discipline or even presence are far worse in Indian Country than in any major city ghetto. Listen to what I hear virtually every week in trials and hearings and what I read in the presentence investigation reports. The conditions described are simply not on the "national radar"; they are not even on the "radar" of people living in the states where Indian Country is found. Few people off the reservations know what is happening and what has happened there.

All

Many young Native Americans appear at an early age in federal court. Sixty percent of all the juveniles (under age 18) prosecuted in federal court in the United States come from the District of South Dakota. This is an astounding and frightening statistic. It is particularly astounding since the federal Bureau of Prisons (BOP) neither operates nor owns any facility in this country to house or treat juvenile delinquents but rather relies on state or private facilities. The BOP does not even pretend to know what to do with juveniles. Because of these factors, federal judges dealing with juveniles, almost regardless of the crime committed, place the juvenile on probation to enable the United States Probation Officers to place and then supervise these young people. While the sentencing guidelines do not apply to juveniles, they pay the price later when they return to federal court as adults with a juvenile record. See U.S.S.G. § 4A1.2 (d)(2).

IV. A Proposal

A recent study by the United States Department of Justice as reported by the news media in March of 2001 tells us that what we have been doing in Indian Country is not working. The study period covered 1983 through 1998. Violent crime against blacks has fallen by 38%, against whites by 29%, and against Hispanics by 45%. Only Native Americans are "left out." The rate for blacks was 43 per 1,000; for whites 38 per 1,000; and for Asians 22 per 1,000. By contrast, in 1998, 110 Indians out of 1,000 were victims of violence. Indian women were victimized by their partners more than twice as often as black women but the incidents were reported less often than among blacks. In the words of James Alan Fox, criminal justice professor at Northeastern University, "the staggeringly high rates of violence, especially domestic violence, reflect the impact of severe poverty, alcoholism and lack of access to social and legal support systems and education."

But what to do? A partial solution would be for Congress to adequately fund tribal court systems to establish for the first time an independent judiciary with lawyers as judges, adequate staff support, and all the other safeguards commonly found in non-tribal courts in this country. Many cases now prosecuted in federal court could then be processed in tribal courts. Adequate and independent police departments and pretrial and

probation officers would also be required as would be a few other changes. The Indian Civil Rights Act, 25 U.S.C. § 1302, creates a body of substantive rights for Indians which are patterned, in part, on the Bill of Rights. The statute, however, does not grant a right to counsel in tribal court. This should be changed if more cases are to proceed in tribal court. Such a fundamental change would also create at least some good jobs in Indian Country. In the end its implementation depends on sufficient funding.

Alternatively, is there any chance of simply recognizing that Indian Country is different and that sentencing judges should be given true "guidelines" in dealing with these cases? A sentencing factor could be added to take into account the realities of these young Native Americans in coming of age. In short, a measure of mercy and understanding should be added. Another sentencing factor could allow the judge to take into account, in sentencing Native Americans or others in federal enclaves, similar sentences imposed in state courts in the state in which the judge presides. I realize this would not succeed with regard to all offenses, such as drug crimes, given the apparent mood of the country with regard to the so-called war on drugs, firearms offenses and other similar federal crimes that apply evenly throughout the country. Regardless of where a felon possesses a firearm and is federally prosecuted, the penalties should be largely the same. But the situation is different in the cases of assault, resisting arrest, drunk driving, theft, and similar offenses which are not usually prosecuted in federal court other than whenever they originate in Indian Country and other federal enclaves.

I hope the Sentencing Commission will carefully study these issues and, with the help of Congress, address the great unfairness that now exists as to Native Americans in federal court. I wish them well.

Notes

¹ See 18 U.S.C. § 13.

² See 21 U.S.C. § 860.

³ Primarily Native Americans are sentenced under this provision. However, it also applies in federal enclaves, such as national parks and monuments.

A12



November 6, 2001

Commissioner Elsie Meeks' Public Comment To The United States Sentencing Commission On The Merits Of Forming An Advisory Group On Issues Related To The Impact Of The Sentencing Guidelines On Native Americans In Indian Country

Merits of Forming an Advisory Committee

An advisory group to the United States Sentencing Commission needs to be formed to do a comprehensive review of the impact of the Federal Sentencing Guidelines in Indian country. The federal sentencing structure as applied to crimes committed by Indians on Indian reservations neither deters crime nor rehabilitates offenders, two key purposes of criminal punishment identified by the U. S. Sentencing Commission in its report *Manslaughter Working Group Report to the Commission*. Federal sentencing of Indians convicted of Indian country crimes is, however, breeding resentment because of inequities, real and perceived. A comprehensive review will provide the facts needed to move the discussion about federal sentencing of Indian country criminal defendants from anecdote and rhetoric to an informed dialogue that will aid future decision-making.

The impact of the Federal Sentencing Guidelines on Native Americans first came to my attention in 1999. Tribal members and leaders, defense attorneys, and federal judges were voicing their concerns that federal sentences were longer than state sentences for similar typical local-law violations. Because of federal jurisdiction on Indian reservations, these offenses that would normally have been heard in a local forum were prosecuted in federal court. Native Americans, therefore, were receiving longer federal sentences than non-Indians who were getting more lenient state sentences for similar violations. This fueled perceptions that sentences were unfair to Indians and created distrust in the justice system.

What I have found is that there is little data concerning the sentencing of Native Americans publicly available. The Sentencing Commission has issued three reports that show because of federal jurisdiction on Indian reservations the majority of those sentenced in federal court for manslaughter and sex-related crimes are Indians. While these reports -- *Manslaughter Working Group Report to the Commission* (December 1997), *Report to the Congress: Sex Crimes Against Children* (June 1996), and *Report to the Congress: Analysis of Penalties for Federal Rape Cases* (March 1995) -- are very informative, their focus is on those specific crimes and attendant sentences, not the Guidelines effect on American Indians.

There have been a number of sentencing studies by race, but they have looked at only four races: white, black, Hispanic, and "other," with Native Americans falling into

the other category. The lack of an in-depth analysis of the Guidelines effect on American Indians prevents a true understanding of the Sentencing Guidelines impact on Native Americans. Given that Indians are the only group that is subject to federal criminal jurisdiction based on race and where they effect a crime, a comprehensive review of the effect of the Federal Sentencing Guidelines in Indian country is long overdue.

Scope of Review by Advisory Committee

The exact scope of a review should be decided upon by an advisory committee after it has been formed and more is known about what data are already available, what data are needed, and what resources will be needed for the committee to complete its task. Necessary, though, are timetables to keep the project moving forward to prevent it from withering on the vine, an all too often occurrence with initiatives to address conditions in Indian country. The final work product must include findings and specific recommendations that the Sentencing Commission and Congress can take under consideration.

One thing a committee must do is an analysis of the options available to address the concerns of the impact of the Guidelines in Indian country. At the Sentencing Commission hearing in Rapid City, South Dakota, we heard requests for and against more reservation crimes being prosecuted in tribal court, more sentencing discretion for judges to take into consideration the unique circumstances that exist on most Indian reservations, and tribes consenting to the application of the Guidelines ("opt-in provision"). Each of these potential options, and others, needs to be flushed out more with the pros and cons of each identified.

Deferring to Tribal Court

The possibility of the U.S. Attorney deferring more criminal cases to tribal courts needs to be looked at. In the Sentencing Commission's 1997 report on federal sentencing and cocaine, the Commission advocated for more local control to better address drug crimes. The Sentencing Commission reported that federal policy inappropriately used limited federal resources by focusing law enforcement efforts at the lowest level. The Commission believed that local governments may be able to address some criminal issues more economically and with more locally-focused penal and social goals than could be achieved by the federal government. The same could be said about the federal government's policies in Indian country.

More Sentencing Discretion for Judges

Many want judges to have more sentencing discretion in Indian country cases to take into account the extraordinary conditions that exist in Indian country. Attached is an article, *The Unique Circumstances of Native American Juveniles Under Federal Supervision*, written by a federal probation officer that gives an excellent summary of

those conditions. A different culture perseveres on reservations, despite attempts of forced assimilation to accept the dominant society's ways. Also, living on a reservation subjects a person to the burden of federal criminal jurisdiction over what are ordinarily local law offenses. And the abuse of alcohol, caused by the dire socioeconomic conditions that exist on reservations, is involved with the vast majority of crimes committed in Indian country. The Federal Sentencing Guidelines do not adequately consider these circumstances.

Opt-in Provision for Sentencing Guidelines

Congress and the executive branch have recognized the burden of living under federal criminal jurisdiction and have included "opt-in" clauses in crime legislation. Opt-in provisions in federal law require tribal consent for the law to be applicable to the tribe. Tribal opt-in clauses are in the Violent Crime Control and Law Enforcement Act of 1994, the Federal Death Penalty Act of 1994, and the Federal Juvenile Delinquency Act of 1994.

In addition to these possible options, policies focused on preventing crime rather than after-the-fact penalties and culturally relevant practices need to be considered.

Inter-Jurisdictional Comparison

Most agree that federal sentences are generally more severe than state sentences for similar offenses and that individuals convicted of Indian country crimes are disparately impacted by this. What is unknown is to what degree Indians are effected. To determine this, a committee could do an inter-jurisdictional comparison between state and federal sentences for similar offenses committed on and off a reservation. While looking at state and federal sentences may not be the best comparison, for it assumes that state sentences are more appropriate than say tribal customary practice, it may be the most practical. Since most if not all felonies that occur in Indian country are prosecuted in federal court and not a tribal forum, data about tribal sentences may not be readily available.

An inter-jurisdictional comparison will provide a benchmark to help determine if the Guidelines do disparately impact American Indians and if so, to what degree. The Sentencing Commission has done these type of comparisons in its reports *Manslaughter Working Group Report to the Commission* and *Report to the Congress: Analysis of Penalties for Federal Rape Cases*. The comparisons showed where the federal guidelines were longer than state sentences and vice versa. These reports could serve as models.

An inter-jurisdictional comparison between federal and state sentences for similar offenses should include as many offenses and jurisdictions as practically possible or needed to provide meaningful information. One possibility is a comparison of federal and state sentences of all similar offenses in one jurisdiction. For example, a committee could compare all federal Indian country sentences with the state sentences for similar

offenses in South Dakota. Another possibility is to compare federal and state sentences for selected similar offenses in multiple jurisdictions with large federal Indian country crime dockets.

Advisory Committee Membership

Because I live in South Dakota, the people I know who are interested in reviewing the impact of the Federal Sentencing Guidelines in Indian country are from South Dakota. No doubt there are others from other states whose membership would benefit the committee. Some I can think of, based on my readings, are the Honorable William Canby, Jr. (9th Circuit Court of Appeals), Kevin Gover (Former Assistant Secretary for Indian Affairs), Jon Sands (Arizona Federal Public Defender), and Michael Tonry (law professor). There are many others, I'm sure, and hopefully the public comment submitted to the Sentencing Commission has identified some of those individuals.

I will assist the Sentencing Commission in any way I can to form an advisory committee to review the effect of the Federal Sentencing Guidelines on Native Americans. I am willing to serve on a committee but will understand if that cannot be accommodated. It is important that those who do serve will be able to give the time and attention needed to analyze the impact of the Federal Sentencing Guidelines in Indian country. Membership on a committee should include stakeholders representing a variety of interests:

- Recognized experts of the Federal Sentencing Guidelines
- Academicians
- Federal judges, prosecutors, and public defenders whose workloads consist of a large number of Indian country criminal cases
- Private defense attorneys who are very experienced with Indian country cases
- Representatives from the Native American community (organizations to contact for candidates: National Congress of American Indians, Native American Rights Fund, Indian Law Section of the Federal Bar Association, Department of Justice Office of Tribal Justice, National American Indian Court Judges Association)

There are many that could serve ably on an advisory group. Because of their demonstrated commitment to seeking fairness in sentencing, the following individuals would be an asset to a committee:

- The Honorable Charles Kornmann, District of South Dakota
- Federal Public Defender Bob Van Norman, District of South Dakota
- Former U.S. Attorney Terry Pechota, Rapid City, South Dakota
- USD law professor and Indian law scholar Frank Pommersheim, Vermillion, South Dakota
- Attorney Patrick Duffy, Rapid City, South Dakota
- Attorney Bruce Ellingson, Rapid City, South Dakota

I have not confirmed whether or not these individuals would serve, but I am inclined to believe they would. They all have a wealth of experience related to Indian country criminal cases and Indian law. Their service would be invaluable.

Ending Remarks

The U.S. Sentencing Commission has a body of work that could assist a committee in its task. The manslaughter and sex-related crimes reports mentioned before show that Native Americans are sentenced far more often in federal court than any other race for those crimes. Those reports show why a perception of disparate and unfair treatment of Native Americans in the federal criminal justice system exists. The Sentencing Commission has twice recommended that a penalty structure that results in a perception of unfairness because the sentences appear to be more severe for racial minorities be changed (1995 and 1997 Sentencing Commission reports to Congress on cocaine sentencing policy).

Punishing Native Americans more harshly based on their status of being Indian and living on a reservation may be lawful, but it is not just. Nor is it effective. The impact of the Federal Sentencing Guidelines on Native Americans has long been overlooked. Quoting from the latest Federal Sentencing Reporter (Vol. 13, No. 2):

Congress and the Sentencing Commission need to consider what goals the federal sentencing of Native Americans serves. Equal treatment for all may easily turn into inequality when the basic conditions differ so dramatically between reservations and the rest of the country. Therefore, the Commission should view the sentencing of Native Americans against the backdrop of the long and tortured history of Native Americans in this country...Native Americans remain the forgotten minority which continues to suffer from centuries of long abuse. In light of the high crime rate in Indian Country, in the long run it might be useful to focus less on punishing crimes committed on reservations but instead on putting together a comprehensive program to *prevent* such crime, which would have to include substantial efforts against alcohol abuse (emphasis in original).

Federal Probation
December, 1999

***68 THE UNIQUE CIRCUMSTANCES OF NATIVE AMERICAN JUVENILES UNDER FEDERAL SUPERVISION**

Brenda Donelan
United States Probation Officer, District of South Dakota

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The Myth and the Reality

THE ROMANTICIZED view of Indian reservations is that of a closely-knit family dealing with day-to-day problems in a rural setting. While this notion may be true to a degree, reservation life has been greatly idealized by Hollywood. The typical individual living on an Indian reservation in the United States faces poverty, alcoholism, unemployment, and violence on a near daily basis. Broken homes, as well as lack of access to education and health care, are also major impediments in reservation areas. Contrary to popular belief, the majority of Native Americans do not reside on or near a reservation. As of 1990, 22 percent of Native Americans lived on an Indian reservation, while 15 percent resided near a reservation (Aguirre and Turner, 1995). Thus, the remaining 60 percent made their homes in non-reservation areas.

Most felony and some misdemeanor offenses committed by Native Americans on reservation land fall under the jurisdiction of the federal court. Native Americans constitute less than one percent of the total population in the United States; however, Indian offenses amount to nearly ten percent of the overall federal cases (Sands, 1998). In some states, such as South Dakota, Indian offenses constitute a major part of the court docket. The Native American population in South Dakota in 1995 was approximately 7 percent (Dvorak, 1995); however, as of October 1999, the percentage of Native Americans on federal supervision in the state was 67 percent (U.S. Probation Office, 1999). Nationally, Indian offenses constitute over 20 percent of murders and assaults in federal court and nearly 75 percent of all manslaughter and sexual abuse cases (Sands, 1998). The number of Native Americans per capita confined in state and federal prisons is approximately 38 percent above the national average. The rate of confinement in local jails is estimated to be nearly four times the national average (Bureau of Justice, 1999).

According to Bureau of Justice statistics for 1995, United States attorneys filed cases against 240 individuals for alleged acts of juvenile delinquency. Out of the 240 cases, 122 were adjudicated in the federal court system, accounting for 0.2 percent of the total amount of cases federally adjudicated during 1995 (Cohn, 1997). Over half (61 percent) of the juveniles adjudicated in federal court are Native Americans. Bureau of Justice statistics for 1995 also revealed that 37 percent of the juveniles adjudicated delinquent were committed to a correctional facility, with the average length of commitment being 34 months (Cohn, 1997). As of October 1999, the U.S. Probation Office for the District of South Dakota was supervising 107 Native American juvenile offenders (U.S. Probation Office, 1999). The statistics illustrate that Native American youths are disproportionately represented in the federal court system. The purpose of this article is to illustrate the uniqueness of Native American juveniles: specifically, the Sioux Indians of South Dakota, who fall under the jurisdiction of the federal court system.

Indian and non-Indian Views on Crime and Delinquency

There is a vast difference between Indian and non-Indian perceptions of wrongdoing and the most effective means of dealing with crime. In the non-Indian community, a person who commits a crime is deemed a bad person who must be punished. Indian communities, however, view offenses as misbehavior which calls for teaching or illness which requires healing (Sandven, 1999). Non-Indian communities tend to favor a punishment modality, whereas Indian communities traditionally put their faith in education, treatment, and medicine. Obviously, these differing views lead to clashes between the cultures. When dealing with delinquent Native American youth, non-Indians may feel the best course of action is

juvenile detention, whereas Indian communities may favor probation, participation in traditional cultural ceremonies, or mentoring by a tribal elder.

Alcohol Abuse

Alcoholism is a major problem on Indian reservations in the United States. According to Bureau of Justice statistics (1999), 70 percent of jailed Native Americans convicted of violence reported that they had been drinking at the time of the offense. With regard to American Indians, the arrest rate for alcohol-related offenses such as drunken driving, public drunkenness, and liquor law violations was more than double that for the total population during 1996. Finally, the Bureau of Justice reported that almost 4 in 10 Native Americans held in local jails had been charged with a public order offense, most notably driving while intoxicated.

There is no doubt that alcohol abuse and alcoholism play a volatile role in the lives of people of all cultures. Native American populations, however, seem to be more susceptible *69 to the disease of alcoholism. Some studies have suggested that there is a physiological component to Native Americans' increased propensity toward alcoholism, while others have found that a variety of socio-economic factors such as poverty and lack of opportunities play the largest role in this issue.

When a juvenile or adult offender is a substance abuser, probation officers typically deal with this issue through inpatient or outpatient treatment, aftercare services, and Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. While these services may be of benefit to both Indian and non-Indian populations, Native Americans tend to rely on cultural methods to deal with their sobriety. Specifically, a sweat lodge ceremony, or a "sweat" as it is sometimes called, is used as a means of obtaining spiritual purification through prayer. Individuals enter the sweat lodge and engage in traditional prayers as a ceremonial process of cleansing their souls. In addition to getting in touch with their spirituality, participants in the sweat lodge ceremonies seek clarification and guidance concerning problems dealing with family, substance abuse, violence, and other pertinent issues.

The Sun Dance is a ceremony in which participation requires total abstinence from alcohol and drugs. In this sacred ceremony, Sun Dancers (who must be male) pierce their chests with sharp skewers which are attached to ropes connected to a center pole. The Dancers move around the center pole in a circle while pulling against the skewers piercing their muscles. During the Sun Dance, participants gaze at the sun and pray. The Sun Dance may last several days, during which the Dancers traditionally are not allowed food, water, or rest. Interestingly, the Sun Dance was prohibited by federal law from 1904 to 1935 (Brown, 1993). Although this sacred ceremony was proclaimed illegal, it continued in secrecy. By 1959, the right to hold and participate in Sun Dance ceremonies was reinstated.

Instead of insisting on only AA or NA attendance for Native American juvenile offenders, probation officers should consider balancing the traditional sobriety requirements with those of the Native American culture. Specifically, voluntarily attending a sweat or Sun Dance could take the place of mandatory attendance at a weekly AA meeting. Participation in sweats could be alternated with weekly AA meetings or used to supplement AA attendance. Another viable option is inpatient/outpatient treatment facilities operated by the Indian tribes. These types of facilities are typically located on Indian reservations. They offer a traditional chemical dependency treatment program which incorporates aspects of the Indian culture.

By including Native American culture and ceremonies in the traditional treatment regime, the probation officer approaches sobriety from a dual standpoint. It is now widely accepted that in order to be effective, treatment must be matched to client characteristics. It logically follows that Native American juveniles interested in their culture should be allowed to tap into it for help and support in achieving sobriety.

The Concept of Family

Another difference between the Indian and non-Indian communities is the concept of family, or "tiwahe," as it is called by

	indians	whites	blacks	asians
sexual Assaults	7	2	3	1
robberies	12	5	13	7
agg. Assaults	35	10	16	6
simple Assaults	70	32	30	15

Life Chances

Compared with other ethnic populations in the United States, Native Americans have been severely constrained in their interaction with mainstream society (Aguirre and Turner, 1995). This isolation is largely the result of the numerous treaties between the U.S. government and the Native American tribes, which placed tribal members in subordinate positions. The subordination, in turn, had the effect of limiting their opportunities to secure life chances. Typically, life chances are defined as the access to satisfactory education, housing, employment, income, and medical care. In essence, life chances are valued resources.

President John F. Kennedy was quoted as saying, "For a subject worked and reworked so often in novels, motion pictures, and television, American Indians remain probably the least understood and most misunderstood Americans of us all" (Brown, 1993). In the 1970s, the United States government officially acknowledged that Native Americans were the most impoverished group in the United States and that this population lived in conditions rivaling those found in Third World countries (U.S. Department of Health, Education, and Welfare, 1976). As little as 20 years ago, 14 percent of Native Americans lived in overcrowded housing, 67 percent lived in houses without running water, 48 percent lived in houses without toilets, and 32 percent had no means of transportation (Aguirre and Turner, 1995). These factors paint a dismal picture for Native Americans, especially those living in isolated reservation communities. Although living conditions have generally improved for most Indian communities, a large proportion of the Native American population still lives below the poverty line. See Table 2.

TABLE 2. PERCENTAGE OF FAMILIES LIVING BELOW THE POVERTY LINE, 1970-1990

year	white Americans	native Americans
1970	8.6	33.2
1980	7.0	23.7
1990	9.8	36.1

Educational attainment is another life chance in which Native Americans fall below the average level. With the exception of Hispanics, American Indians are the least likely of all minority groups to graduate from high school or college. According to Aguirre and Turner (1995), in 1992, 78 percent of Indians had earned a high school diploma, compared with 91 percent of non-Hispanic whites. When comparing college graduates, however, only 11 percent of Native Americans

had earned a college degree, compared with 28 percent of non-Hispanic whites. At the high school level, there was a 13 percentage point difference between the two groups. When comparing the two groups for college graduates, non-Hispanic whites were nearly three times as likely as Indians to have achieved a college degree. These figures can be explained, in part, by a lack of access to satisfactory elementary education. The parents of all minority youths, as a whole, tend to have less formal education than their white counterparts. Because parental educational attainment is often linked to a student's academic performance, minority students may start school at a disadvantage (O'Hare, 1992). Finally, much of the focus of education utilizes the white culture as a basis from which to compare all other cultures. Using the white culture as a point of reference is not necessarily pertinent or interesting to students of other cultures, races, and ethnicities.

Two final life chances to be addressed are occupational attainment and income levels. In 1995, the unemployment rate for whites in South Dakota was 3.2 percent. Native Americans had a 32 percent unemployment rate during the same time period (Dvorak, 1995). Astonishingly, the unemployment rate for Indians was ten times higher than that for whites. As has already been discussed, Native Americans have lower levels of educational attainment. Low levels of education have an inverse relationship with high unemployment rates. The isolation of reservation communities also prevents access to well-paying jobs. Finally, reservations *71 have difficulty in attracting businesses and industry to their already economically-depressed areas.

In South Dakota, as well as the rest of the United States, there exists a major economic difference in the median household income of Indians and whites living in the same area. In 1995, the median income for whites living in South Dakota was \$27,000 per year, compared to less than \$10,000 annually earned by Native Americans (Dvorak, 1995). It is important to remember that these figures are based on household income. As was previously mentioned, several extended family members and non-relatives may all live under one roof in Indian homes. At non-Indian residences, however, there are typically just parents and children. Therefore, Native Americans are supporting larger households on less income.

Probation officers dealing with Native American juvenile offenders need to consider the harsh reality that these individuals may not have transportation to get to school, running water in which to bathe, or the immunizations and nutrition necessary to keep them healthy. Expecting these individuals to attend school on a daily basis may largely be out of their control if transportation is not available. Once at school, Native American youths may find little value in an education which does not address issues from an Indian perspective. Further, payments of restitution may be few and far between due to the high unemployment rates and lack of industry in reservation areas. While the typical teenager's most important dilemma may be deciding the most fashionable outfit to wear to school, a Native American youth may be shivering because the family does not have the money for a winter coat.

Conclusion

"Man did not weave the web of life. He is merely a strand in it. Whatever he does to the web, he does to himself" (Dvorak, 1995). This quote by Chief Seattle warns of the negative consequences that the human race will inevitably face if we continue to mistreat our own people. When comparing the life chances of Indians to non-Indians in South Dakota, it is obvious that Native Americans do not have the same access to satisfactory housing, education, employment, and income as do whites. Further, there are cultural differences between the perception of crime, the treatment of alcohol abuse, the concept of family, and victimization. The purpose of this article was not necessarily to elicit sympathy for the plight of the American Indians. The primary objective was to enlighten probation officers as to the cultural and socio-economic differences that may exist between the Indian and non-Indian populations. When one begins to understand the experiences and culture of others, it tends to lessen conflict and miscommunication. Since a primary aim of probation officers is to reduce recidivism, it only makes sense that increased awareness and sensitivity would aid in the battle against juvenile re-offending.

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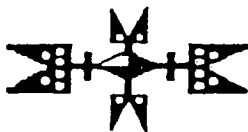
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DAKOTA PLAINS LEGAL SERVICES

November 9, 2001

Commissioner John R. Steer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: training seminar for CJA defense attorney's in South Dakota

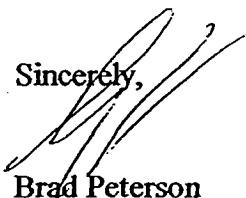
Dear Commissioner Steer:

Thank you for taking time out of your busy schedule to come to South Dakota and do a presentation to the CJA panel attorney's. I had the opportunity to take part in the training in Pierre, South Dakota. I found it to be quite informative and useful.

I presently serve as the managing attorney on the Standing Rock Sioux Indian Reservation for one of the legal service programs in South Dakota. If it is possible, I would like to be included in the Native American Issues Advisory Group that the U.S. Sentencing Commission is planning in 2002.

Thank you again for coming to South Dakota, I hope you enjoyed your stay.

Sincerely,



Brad Peterson

Please address reply to:

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Mission, SD 57555-0727
605-856-4444 • 1-800-658-2297
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Fort Thompson, SD 57339-0020
605-245-2341
FAX 605-245-2393

A23



POTAWATOMI
(Keeper of the Fire)

Forest County Potawatomi Community
P.O. Box 340, Crandon, Wisconsin 54520

05 November 2001

United States Sentencing Commission
ATTN: PUBLIC AFFAIRS
One Columbus Circle, NE Suite 2-500
South Lobby
Washington, DC 20002-8002

VIA United States Mail and
FACSIMILE 202/502-4699

RE: Native Americans in Indian Country

Dear Sir or Madam:

The Forest County Potawatomi Community has reviewed the Federal Register for Wednesday, September 19, 2001 regarding the Notice of the United States Sentencing Commission. The Forest County Potawatomi Community supports the formation of an ad hoc advisory group on issues related to the impact of the sentencing guidelines on Native Americans in Indian Country. While Wisconsin is a P.L. 280 state, the Forest County Potawatomi Community is well aware of the issues faced by Native Americans in sentencing before Federal authorities.

Our Native American brothers and sisters are incarcerated in Federal facilities at disproportionate rates to the Anglo population; this includes death row. Native Americans tend to face more harsh penalties when being sentenced in Indian Country. State courts have greater flexibility in fashioning appropriate sentences. In the Federal system, Native Americans serve longer sentences than non-minorities.

While the Tribe supports the formation of an ad hoc committee as an initial step, it is suggested that the Sentencing Commission take steps to establish a more permanent, formal group that has some authority and continuing review responsibility over any implemented changes. It is suggested that membership terms be at least three to four years. The membership could be comprised of tribal members that have an expertise in matters of sentencing and the impact of Federal sentencing guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from appropriate civil rights organizations as well as Department of Justice prosecutors and Federal Judges. The group must have a clear charge of their scope of authority—which should be broad. It must also be clear that the advisory group will actually play valid role in tempering the Federal justice system. There must be a commitment to change by the Sentencing Commission.

Sincerely,

Harold Gus Frank
Chairman

COPY: Executive Council
File

A24

Greenville Rancheria

P.O. Box 279 • 410 Main Street
Greenville, CA 95947
Phone (530) 284-7990
Fax (530) 284-6612

October 22, 2001

*United States Sentencing Commission
One Columbus Circle
Suite 2-500, South Lobby
Washington, DC 20002-8002*

In Re: Memorandum Dated October 18, 2001 Regarding Sentencing Information

After reviewing your correspondence, it is apparent that your comments regarding the creation of an "ad hoc advisory group" warrants consideration and support.

Viable methods need to be developed to bring these issues to the forefront to improve federal sentencing guidelines in all areas that have a significant impact on Native Americans.

We are interested in obtaining any letters available from your commission regarding the organizational guidelines and any suggested changes.

Please forward copies of these letters to us and keep us informed about any progress that occurs.



*Robert Bare
Administrator*

cc: Tribal Council

A25

UNITED STATES PROBATION & PRETRIAL SERVICES OFFICE
DISTRICT OF NORTH DAKOTA

Richard W. Crawford

Chief U.S. Probation Officer
Suite 154

220
East Rosser Avenue

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Bismarck, ND 58502
Tel. 701-530-2400
Fax 701-530-2412

January 2, 2002

Attn: Public Affairs
Diana E. Murphy, Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Advisory Group on Issues Related to the Impact of Federal Sentencing
Guidelines on Native Americans in Indian Country.

Dear Chairwomen Murphy:

I'm sorry about the lateness of this letter, but I did not receive notice of your intent to look at Indian country issues until after the deadline noted in the *Federal Register*. I hope that you will still take my comments into consideration even though they are late.

In the District of North Dakota approximately 40% or more of our defendants and offenders on supervision are Native Americans sentenced for crimes that occurred in Indian country. It is my belief that there is disparity in the sentences imposed in the federal system compared to those imposed by the State courts. To support this claim, I asked the state penitentiary for some data regarding Native Americans and the crime they were sentenced for and the length of their sentence. Defendants convicted of aggravated assault with a dangerous weapon were sentenced to an average term of imprisonment of one year. A similar offense under the guidelines would have resulted in an offense level of 19 -2 points for acceptance with a sentencing range of 24-30 months. This is just one example of the disparity.

I am also concerned about other forms of disparity in sentencing. For example, there are insufficient resources on many of the Indian Reservations therefore; sentences that are normally available to other federal offenders are not always available to Native Americans. Sentencing options to keep an offender in the community are rarely available for the court to impose. In North Dakota, there are no halfway house (community treatment centers) on any of the five Indian Reservations. Most Native American defendants live with extended family and the homes do not have a telephone nor do they have the financial wherewithal to afford a telephone for electronic monitoring. Our issues are the same with treatment. The majority of the reservations do not have treatment programs for offenders and their variety of needs. Native Americans with court ordered treatment conditions often fail to complete treatment programs because they lack funding to obtain transportation to and from the major communities that have the programs they require.

Indian country issues are different than inner city issues and therefore they require special consideration by the court and the U.S. Sentencing Commission. If the Commission decides to put together a committee to look at Indian Country issues, I will gladly volunteer to participate on behalf of the U.S. Probation and Pretrial Services Office for the District of North Dakota. Should you have any questions or concerns regarding this letter, please contact me at 701-530-2404, or by one of the following methods: mail - P.O. Box 793, Bismarck, ND 58502-0793; E-mail at marcus_roehrich@ndp.uscourts.gov <mailto:marcus_roehrich@ndp.uscourts.gov>. Thank you.

Sincerely,

Marcus Roehrich
QCS/Deputy Chief
U.S. Probation & Pretrial Services Office

THE FEDERAL DEFENDERS OF MONTANA

ANTHONY R. GALLAGHER
FEDERAL DEFENDER

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TIMOTHY CAVAN - Billings
MICHAEL DONAHOE - Helena
DAVID NESS - Great Falls
JOHN RHODES - Missoula

December 7, 2001

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington D.C. 20002-80002

Attn: Public Affairs

I write regarding the possible formation of an ad hoc advisory group to consider the impact of the Guidelines on Native Americans in Indian Country.

First, I apologize for providing this comment after the November 6 deadline. I have been informed by Maria Jankowski, however, that Theresa Cooney welcomes my input.

Second, per the attached letter, I will be joining the Commission in May or June 2002 as the Federal Defender intern with the Commission. I look forward to working with you.

As an Assistant Defender in Montana, I have worked on many reservation cases. I applaud the Commission for recognizing that an advisory group could assist the Commission in improving the application of the Guidelines to reservation defendants. At the same time, I recognize that many of the persistent problems endemic in the interplay of Indian Country and the Federal criminal justice system cannot be addressed by the authority of the Commission. Nonetheless, those underlying problems influence the impact of the Guidelines on reservation defendants. For instance, alcohol abuse is nearly always a driving force in the reservation cases that I have defended (I can think of one exception). On the positive side, the more exposure I have to the Plains Indian culture, the more impressed I am by the tribal sense of family and community and the resulting restorative justice: repeatedly, I have witnessed victims who have strongly voiced their belief that the punishment required by the Guidelines is too severe and fails to incorporate adequate rehabilitation programs. These and many other issues may be beyond the authority of the Commission to address but are relevant considerations in improving the Guidelines.

I strongly encourage the formation of the proposed advisory group and am personally willing to serve in any capacity requested by the Commission. I suggest that the group examine the specific (e.g. Offenses Against The Person) Guidelines that regularly govern reservation cases. For instance, the assault base offense level is, in my opinion, too high and that section should include a victim's conduct reduction; should the Guideline base offense level be lowered, perhaps an aggravating enhancement can be devised for application in cases warranting more severe punishment. I also suggest that the group examine departure issues that are particularly relevant to reservation cases. For instance, perhaps Section 5K can include a discussion of a departure based upon comparing the Guidelines range with state sentences for the same offense. Another idea is to for the group to

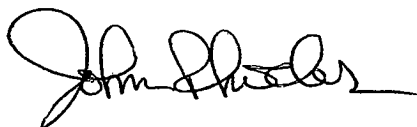
examine whether life on the reservation is a socio-economic or a political or otherwise permitted departure factor. See, e.g., United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). These are merely a few specific ideas for consideration by an advisory group. More generally, I believe that consideration of the Guidelines regularly applied in reservation cases and departures relevant to such cases should be included in the scope of an advisory group because those are the factors that determine sentences, and in reality, to the Indian families and communities, that's what counts.

The membership of an advisory group should include people who go to the reservations. Thus, I strongly believe that United States probation officers and federal defenders from reservation districts should be part of the group. I also recommend including federal prosecutors and district court judges from Indian Country districts; victim advocates would also contribute to the group. In my personal experience, it is important to work with the reservation communities rather than trying to assist by external fiat. Accordingly, I suggest including tribal members, perhaps judges or law enforcement officers, family of Native American offenders and victims, and most importantly, elders.

As for the duration of such a group, I confess that I am unfamiliar with the time necessary for an advisory group to effectively assist Commission, so I leave input on that issue to more learned individuals.

I again commend the Commission for its sensitivity to this issue and to the more general issue of the relationship between the United States and Native Americans, a relationship that is at the core of the American Experience. I look forward to working with you and am willing to assist in the proposed advisory group in any manner requested. Thank you for considering my opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rhodes", with a stylized, flowing script.

JOHN RHODES
Assistant Federal Defender
Federal Defenders of Montana

Enclosure