

Page 2 of 2

Scope, Duration and Membership

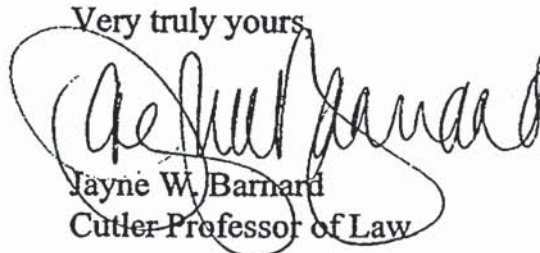
I would think that any advisory committee should be encouraged (subject to some agenda control) to provide comment on any aspect of the Organizational Sentencing Guidelines. The committee should function for a minimum of three years. Membership should be by invitation, with an opportunity to expand the group as expertise and interest manifest themselves. The advisory committee should be kept to a workable size (25 participants?), with the understanding that non-members with specific expertise should be invited to participate in the advisory committee's discussions. Certainly, the committee should include representatives of the Justice Department and the corporate defense bar, as well as those who make their living in the "compliance business."

Specific Agenda Items

I have my doubts about extending the protections of the existing Guidelines to include programs aimed generally at "ethical" behavior. A lot of these programs are self-congratulatory without having any real impact or substance.

I think a serious discussion of a "safe harbor" provision is in order – the practices of various divisions of the Justice Department on this issue appear to be all over the place.

Very truly yours,



Jayne W. Barnard  
Cutler Professor of Law

**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 AND 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 severe 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 versus 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 "IN 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 fore 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



KAW 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 (9<sup>th</sup> 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 #GMH 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 4<sup>th</sup> 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**

*Attorneys at Law*

1617 Sheridan Lake Road  
Rapid City, South Dakota 57702-3483

FAX: (605) 341-0716

*Linda Lea M. Viken  
Jeffrey L. Viken  
Terry L. Pechota  
James D. Leach  
Kenneth R. Dewell  
Lisa F. Cook*

*Legal Assistants*

*Sherril J. Holechek  
Nicki Schwall, CLA*

---

Tel: (605) 341-4400

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 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**

Joseph W. Gandert  
Supervisory Assistant  
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107 E. Lobman  
Las Cruces, NM 88001  
Tel (505) 527-6930  
Fax (505) 527-6933

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.*<sup>1</sup>

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. Kommann, U.S. District Judge, District of South Dakota, recognizes a sentiment among federal judges that the sentencing guidelines are unfair to Native Americans. Kommann, *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 Kommann sets forth several proposed departures that he believes would taken into account the realities of the reservation.

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<sup>1</sup>The 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.

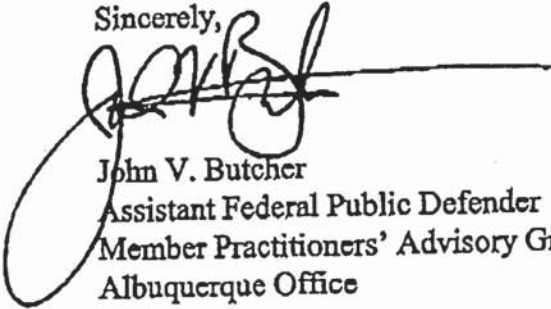
The Sentencing Commission should seek broad based input in forming its committee. The Federal Public and Community Defenders and C.J.A. Panel attorneys represent the majority of Native Americans who are charged with crimes in Indian Country. Thus, we believe the defense community can provide useful input 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  
Page 3

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,



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).





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

LAWRENCE L. PIERSOL  
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  
Page 2

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

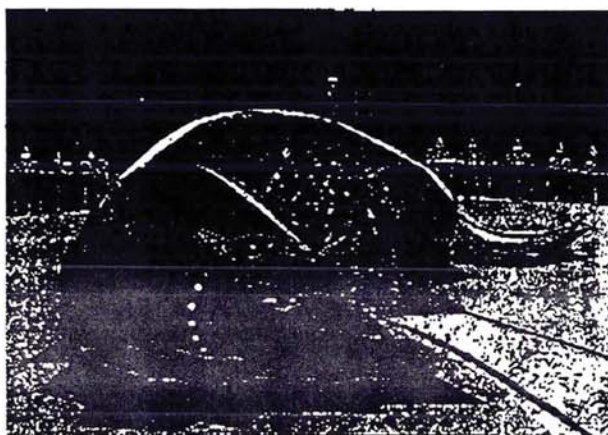
Newsletter  
of the  
Federal  
Courts



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 E. 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

*See Resolution on page 2*

### INSIDE

Judicial Conference Approves Second Ballot .....	pg. 3
Judiciary Works to Reach Indian Territories .....	pg. 4
Where Are the Needed Judgeships? .....	pg. 6



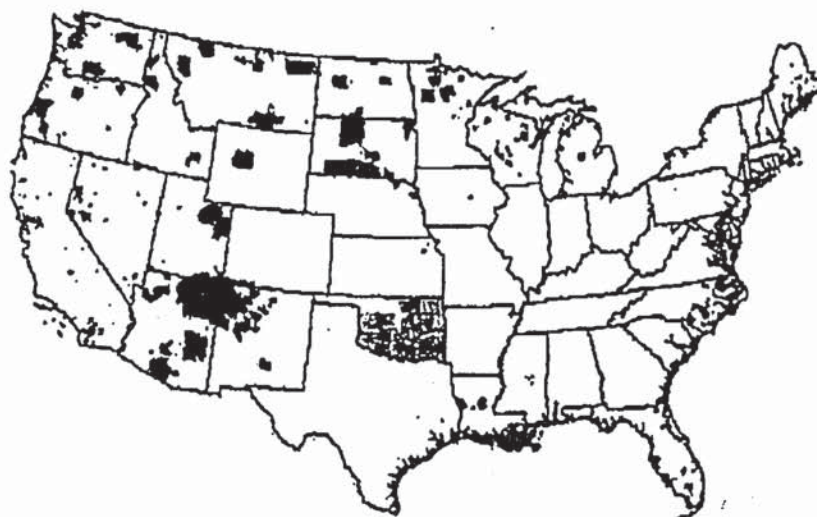
## Courts Try New And Tribal Ways In Indian Territory

Assault, sexual abuse, arson, burglary—these are typically of-fenses heard in state courts—ex-cept when the federal govern-ment has jurisdiction. That juris-diction, 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 adminis-tered as Indian reservations where an expanding workload is accom-panied by particularly unique challenges.

For more than 100 years the federal government has been vested with the responsibility to enforce major crimes on reser-vations, although this responsibility can be transferred to state gov-ernments. 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. resi-dents. This crime rate has, since 1996, increased the number of American Indians under supervi-sion 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 Ameri-can Indians under supervision. Judge Karen E. Schreier (D. S.D.), who sits in Rapid City, hears cases from the nearby Pine Ridge Reser-vation. "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 sig-nificantly increased over 6 or 7 years. We're seeing a more severe level of violence, most of which is alcohol-re-lated. We're also seeing a large num-ber 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 un-employment reaches nearly 80 per-cent. Said Schreier, "American Indi-ans 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 corre-sponding 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 Ameri-can Indians convicted of violence re-ported 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 dis-tricts. Indian juveniles represented 62 percent of all juveniles arrested in calendar year 1999. Nationwide, American Indians represent 30 per-cent of all offenders convicted for sex offenses.

"Most probation officers never see juveniles in their careers," said Magdeline E. Jensen, Chief U.S. Pro-bation Officer for the District of Ari-zona, "but we have more than 80 ju-veniles, mainly American Indians, under supervision here. We have 22 juveniles serving terms of official de-tention, of whom 16 had underlying offenses involving crimes of violence ranging from 1<sup>st</sup> and 2<sup>nd</sup> degree mur-der to aggravated assault and kid-napping."

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-



fenders, 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

See Indians on page 7





**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-

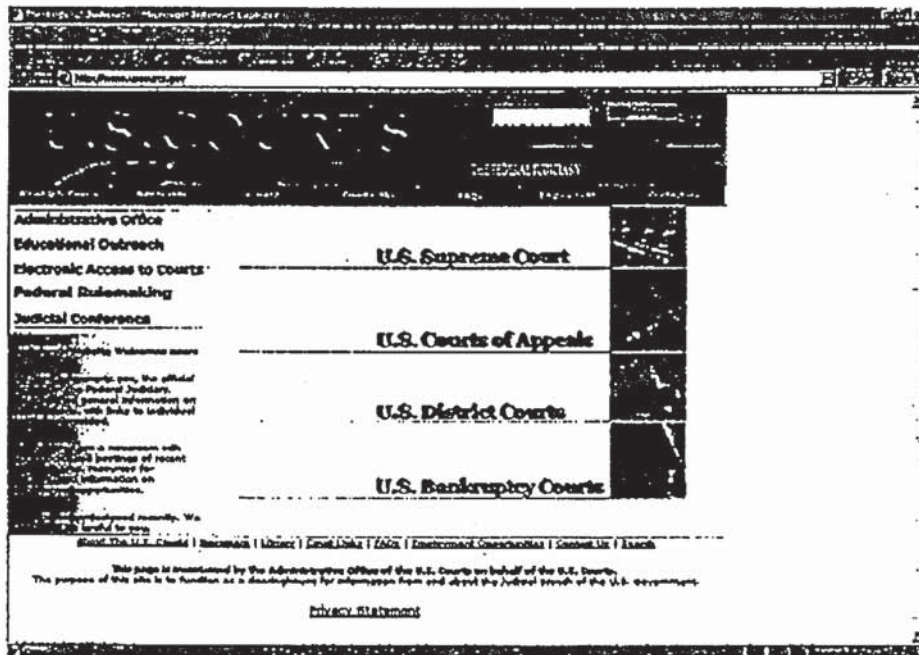
sition into the community. If there's a question of non-compliance with the terms of probation, officers try to work out matters on a local level before heading to court for a revocation hearing. Fleming says that with the support of Chief Judge Donald W. Molloy, he has worked with the Bureau of Prisons 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**

P.O. Box 1803, Browning, MT 59417

Phone/Fax (406) 338-7262



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 Exparte 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."

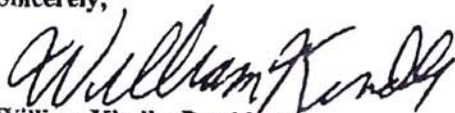
The Major Crimes Act of March 3, 1885 did override the Exparte Crow Dog case, and diminished extensively the culture part of the Native American Indian's capability to maintain control over crimes within their own circles according to Sioux customs.

We maintain our position on the merits of Exparte 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: [rslakota@agwte.net](mailto:rslakota@agwte.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 Kormann 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  
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Fax: 605-747-2905  
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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 20002-8002

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

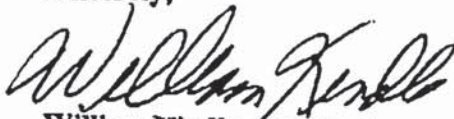
To improve the operations of the federal guidelines and to consider all viable methods in the areas that have a significant Native American population. My foremost concerns lie in the following:

**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







**INDEX TO THE ADDENDUM**  
**(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)**

<b>I.</b>	<b>Issues Related to the Organizational Guidelines</b> . . . . .	(Addendum Page 1)
	Cingular Wireless . . . . .	A1
	NYSE . . . . .	A3
	Health Care Compliance Association . . . . .	A4
	Center for Ethical Business Cultures . . . . .	A7
	Compaq . . . . .	A8
<b>II.</b>	<b>Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans in Indian Country</b> . . . . .	(Addendum Page 3)
	The Honorable Charles B. Kornman . . . . .	A9
	Elsie Meeks, United States Commission on Civil Rights . . . . .	A13
	Dakota Plains Legal Services . . . . .	A23
	Forest County Potawatomi Community . . . . .	A24
	Greenville Rancheria . . . . .	A25



# **Addendum to Summaries of Responses to Request for Public Comment**

**(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)**

## **I. Issues Related to the Organizational Guidelines**

### **Cingular Wireless**

Carol L. Tacker  
Atlanta, Georgia 30342

Cingular believes that the organizational guidelines have had an enormous influence on the development, shape, and scope of corporate compliance programs and it supports the creation of an advisory group to review their impact and make recommendations. Cingular suggests that the group include experts on ethics and compliance, including corporate officers, and members of the bar who represent corporations in criminal matters. The advisory group should review the other legal and regulatory initiatives that impact the development of corporate compliance programs, 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.

### **NYSE**

Frank Z. Ashen, Executive Vice President  
New York, New York 10005

Mr. Ashen, a member of the Board of Directors of the Ethics Officer Association, commends the Commission on its plan to form an ad hoc advisory group on the organizational guidelines. He suggests that the group include business ethics practitioners and that the group be given sufficient time to conduct a thorough review of the broadest scope.

### **Health Care Compliance Association**

Roy Snell, CEO  
Plymouth, Minnesota 55446

HCCA would be interested in discussing which of its constituent members would be best suited to participate in the advisory group.

**Center for Ethical Business Cultures**

Ron James, President and CEO

Minneapolis, Minnesota 55403-2005

Mr. James supports the formation of an advisory group to review the organizational guidelines. He thinks that the analysis should be made from several perspectives: (1) comparing the intent of the guidelines with their actual impact; (2) determining whether external factors in the business environment impact the effectiveness of the guidelines; and, (3) examine actual applications of the guidelines to aid practitioners in improving their ethics and compliance programs.

Membership should be balanced and should represent a cross-section of corporate practitioners, academic ethicists, business ethicists, and representatives of the Sentencing Commission.

**Compaq**

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

Houston, Texas 77070

Compaq supports the formation of the ad hoc advisory group on the organizational guidelines and recommends that the Ethics Officers Association be invited to participate. Compaq stresses the importance of the organizational guidelines and indicates that it has relied on them in the development of communication, training, marketing, and case management programs. It asks that the Commission take all proposal into careful consideration.



## II. Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans in Indian Country

### **The Honorable Charles B. Kornman**

United States District Judge  
Aberdeen, South Dakota 57402

Judge Kornman supports the formation of an ad hoc advisory group to address federal sentencing issues for Native Americans in Indian Country. He suggests that the group be comprised of individuals who are familiar with the sentencing guidelines and how they work. Judge Kornman refers the Commission to an article that he authored for the September/October 2000 issue of the Federal Sentencing Reporter entitled *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*. A copy of the article is attached.

### **United States Commission on Civil Rights**

Elsie Meeks, Commissioner  
Washington, DC 20425

Ms. Meeks supports the formation of an ad hoc advisory group to review the impact of the Sentencing Guidelines in Indian country. She believes that the federal sentencing structure as applied to Indians on Indian reservations neither deters crime nor rehabilitates offenders. Because Indian defendants are sentenced in federal court for offenses that would normally be heard in a local forum, Indian defendants receive longer sentences than non-Indian defendants convicted of similar offenses. Such inequities, real and perceived, breed resentment and distrust of the system.

Ms. Meeks recommends that the advisory group scope be determined after more is known about what data exists and what data is still needed. She recommends that an inter-jurisdictional study be conducted to determine the extent to which Indians are disparately impacted by federal sentencing. The group must analyze options available to address concerns about the that impact, such as:

- Deferring more criminal cases to tribal courts;
- Increased discretion for judges to take into account the extraordinary conditions that exist in Indian Country; and
- Tribal "opt-in" clauses in crime legislation.

The article *The Unique Circumstances of Native American Juveniles Under Federal Supervision* was included for the Commission's review.

Ms. Meeks recommends that the membership of the advisory group include recognized experts on the Guidelines, academicians, federal judges, prosecutors, and public defenders, private defense attorneys, and representatives from the Native American Community. Ms. Meeks would

be willing to serve on the advisory group. She also recommends a number of qualified individuals that she feels would be an asset to the advisory group including: the Honorable William Canby, Jr. (9<sup>th</sup> Circuit Court of Appeals), Kevin Gover (Former Assistant Secretary for Indian Affairs), Jon Sands (Arizona Federal Public Defender), Michael Tonry (law professor), the Honorable Charles Kornman (District for South Dakota), Bob Van Norman (Federal Public Defender, District of South Dakota), Terry Pechota (Former US Attorney), Frank Pommersheim (USD law professor), Patrick Duffy (attorney), and Bruce Ellingson (attorney).

**Dakota Plains Legal Services**

Brad Peterson

Fort Yates, North Dakota 58538

Mr. Peterson serves as the managing attorney on the Standing Rock Sioux Indian Reservation for one of the legal service programs in South Dakota. He took part in the training in Pierre, South Dakota and would like to be included in the advisory group.

**Forest County Potawatomi Community**

Harold Gus Frank, Chairman

Crandon, Wisconsin 54520

The Forest Country Potawatomi supports the formation of the ad hoc advisory group as an initial step and suggests the formation of a more permanent group that would review any implemented changes. The membership of the group should include tribal members with an expertise in the impact of the Guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from civil rights groups, DOJ, and federal prosecutors. The group should have clear and broad authority.

**Greenville Rancheria**

Robert Bare, Administrator

Greenville, California 95947

Greenville Rancheria supports the formation of the advisory group. They are interested in obtaining any letters available from the Commission and would like to be informed of developments in this area.



**INDEX TO THE ADDENDUM**  
**(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)**

**I. Issues Related to the Organizational Guidelines** ..... (Addendum Page 1)

Cingular Wireless ..... A1  
NYSE ..... A3  
Health Care Compliance Association ..... A4  
Center for Ethical Business Cultures ..... A5  
Compaq ..... A6

**II. Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans  
in Indian Country** ..... (Addendum Page 3)

The Honorable Charles B. Kornman ..... A9  
Elsie Meeks, United States Commission on Civil Rights ..... A13  
Dakota Plains Legal Services ..... A23  
Forest County Potawatomi Community ..... A24  
Greenville Rancheria ..... A25

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.

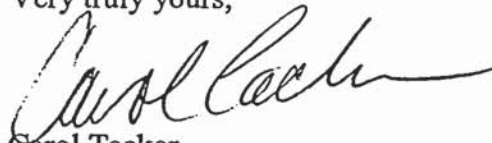
A



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 black ink, appearing to read "Carol Tacker", written in a cursive style.

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 cursive script that reads "Frank Z. Ashen".



## HEALTH CARE COMPLIANCE ASSOCIATION

18105 46<sup>th</sup> Avenue North • Plymouth, MN 55446 • Tel: 763/478-4490 • email: [rsnell@hcca-info.org](mailto: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  
18105 46<sup>th</sup> Ave. N.  
Plymouth, MN 55446  
763 478-4490  
[rsnell@hcca-info.org](mailto:rsnell@hcca-info.org)

At

## HCCA 2001 Leadership Directory

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**Debbie Troklus CHC**  
**Immediate Past President**  
 Manager  
 PricewaterhouseCoopers  
 Louisville, KY 40202  
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### HCCA COUNSEL

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 Philadelphia, Pennsylvania 19108  
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 Fax: 215-772-7620  
 Email: [tsuddath@mmwr.com](mailto:tsuddath@mmwr.com)

### CEO/EXECUTIVE DIRECTOR

**Roy Snell CHC**  
 HCCA  
 1211 Locust Street  
 Philadelphia, PA 19107  
 Phone: 215-545-3334  
 Fax: 215-545-8107



**HCCA GENERAL BOARD MEMBERS**

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 Washington, DC  
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 Philadelphia, Pennsylvania 19103  
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**Teresa Mullett Ressel**  
 Deputy Assistant Secretary  
 Department of the Treasury  
 Washington, DC 20005  
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 Compliance and Business Integrity Officer  
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 President & CEO  
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**Alan Yuspeh**  
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UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

Diana E. Murphy, Chair



December 28, 2001

**MEMORANDUM TO COMMISSIONERS**

Ruben Castillo  
Sterling Johnson, Jr.  
Joe Kendall  
Michael O'Neill  
William Sessions  
John R. Steer

John Elwood  
Edward Reilly

**FROM:** Diana Murphy

A handwritten signature in cursive script, appearing to read "Diana", written over the printed name "Diana Murphy".

**RE:** January 2 Telephone Conference on Formation of the Organizational Guidelines  
Ad Hoc Advisory Group

Enclosed are some background materials which may help to stimulate your thinking. The purpose of the call is generate ideas and discussion about how best to constitute the group. During the call we will be gathering ideas, with the goal to make decisions at the January Commission meeting.



## AGENDA

(See attached question sheet.)

1. Discussion of:
  - Mission
  - Duration
  - Makeup of group
2. Nominations for membership

### Background Materials

White notebook with public comment (already distributed)  
Addendum to public comment (distributed with January meeting materials)  
List of individuals mentioned as possible members  
Responses to Federal Register notice

## DISCUSSION QUESTIONS

1. What should the scope of the ad hoc advisory group's work be?

Based on Commission statement in the Federal Register soliciting comment?

Consider viable methods to improve the operation of the organizational guidelines by identifying problems and developing proposals on the guidelines for Commission consideration.

Recognize the beneficial effect that the generality and simplicity of the seven principles have had??

2. What should the duration of the ad hoc advisory group be?

18 months?

3. How many members should the ad hoc group have?

15?

4. Which constituencies need to be represented?

Prosecutors/DOJ  
Attorneys in private practice  
Corporate counsel (both large and small businesses)  
Industries—defense, health care, securities  
Compliance professionals, ethics officers, and scholars in the field

5. What kinds of experience or personal attributes should members have?

Experience applying the guidelines in a criminal setting  
Experience creating compliance programs  
Industriousness  
Good judgment  
Ability to listen to others/consider other points of view  
Not too many from any one constituency



## INDIVIDUALS MENTIONED AS POSSIBLE MEMBERS

### Corporate Counsel/Industry

**Richard J. Bednar, Esq.** <sup>□</sup>  
Senior Counsel, Crowell & Moring, LLP  
National Coordinator  
Defense Industry Initiative of  
Business Ethics and Conduct

**Keith T. Darcy** <sup>□</sup>  
Executive Vice President  
Director of Professional Services  
IBJ Whitehall Bank & Trust Company

**Paul Gardephe** <sup>†</sup>  
Deputy General Counsel, Time Inc.  
ex-AUSA and chief of appeals, SDNY

**Jane Adams Nangle** <sup>○■</sup> ✓  
Corporate Compliance Officer  
Former General Counsel  
St. Joseph's/Candler Health System  
Developed hospital compliance program prior  
to HHS model

**Steve Zipperstein** <sup>†</sup>  
Deputy General Counsel, Verizon  
ex-First Ass't USA, CDCA  
ex-aide to AG Barr

### Compliance Professionals

**Scott Charney** <sup>†</sup>  
PriceWaterhouse  
ex-chief, DOJ Computer Crime Section

**Ron James** <sup>○■</sup> ✓  
President & CEO  
Center for Ethical Business Cultures  
Former corporate executive

**Lisa Kuca** <sup>†■</sup>  
Director of Corporate Compliance  
Holland & Knight Consulting  
ex-probation officer, SDFla

**Neil Getnick** <sup>†</sup>  
Getnick & Getnick  
former ADA  
court-appointed monitor in many cases

**Joseph E. Murphy, Esq.** <sup>□</sup>  
Partner, Compliance Systems Legal Group  
Co-Coordinator  
Coalition for Ethics and Compliance Initiatives

**Dr. Edward S. Petry** <sup>□</sup>  
Executive Director  
Ethics Officer Association

**The Honorable Stephen D. Potts, Esq.** <sup>□</sup> ✓  
Interim President  
Ethics Resource Center Fellows Program

**Roy Snell, CHC** <sup>□</sup>  
Executive Director  
Health Care Compliance Association

**Winthrop M. Swenson, Esq.** <sup>□■</sup>  
Partner, Compliance Systems Legal Group  
Co-Coordinator  
Coalition for Ethics and Compliance Initiatives

## Federal Prosecutors

**Leslie Caldwell**<sup>†</sup>  
Criminal Chief  
US Attorney's Office  
Northern District of CA

**Michael Horowitz**<sup>†</sup>  
Criminal Division  
U.S. Department of Justice

**Rob Khuzami**<sup>†</sup>  
Chief of Securities Fraud Unit  
US Attorney's Office  
Southern District of NY

**Miriam Krinsky**<sup>†</sup>  
Chief of Appeals  
US Attorney's Office  
Central District of CA

**Sally Yates**<sup>†</sup>  
Chief of Fraud Section  
US Attorney's Office  
Northern District of GA

## Attorneys in Private Practice

**Zachary Carter**<sup>†</sup>  
Dorsey & Whitney  
ex-US Magistrate Judge and ex-United States  
Attorney, EDNY

**Kimberly Dunne**<sup>†</sup>  
Sidley & Austin  
ex-LA AUSA  
former chief of LA major fraud section and  
prosecuted corporate crime

**Gary Grindler**<sup>†</sup>  
King & Spalding  
ex-Principal Deputy to DAG Holder  
ex-AUSA MDGA and SDNY

**Eric Holder**<sup>†</sup>  
Covington & Burling  
ex-Deputy AG  
issued Principles of Corporate Prosecution  
while Deputy AG

**Thomas E. Holliday, Esq.**<sup>□</sup>  
Gibson, Dunn & Crutcher LLP

**Todd Jones**<sup>†</sup>  
Robins, Kaplan, Miller & Ciresi L.L.P.  
ex-Minn. United States Attorney, former chair  
of Attorney General's Advisory Cmte

**Joe Savage**<sup>†</sup>  
Testa, Hurwitz & Thibault  
ex-Boston AUSA and chief of corruption  
section

**Mary Spearing**<sup>†</sup>  
Baker Botts  
ex-AUSA EDPA  
ex-chief Criminal Division's Fraud Section)

**Gary Spratling, Esq.**<sup>□</sup>  
Partner, Gibson, Dunn & Crutcher LLP

**Larry Urgenson**<sup>†</sup>  
Kirkland & Ellis  
ex-AUSA EDNY  
ex-chief Criminal Division's Fraud Section

**Gregory J. Wallace, Esq.**<sup>□</sup>  
Member, Kaye Scholer, LLP

**Andrea Likwornik Weiss**<sup>†</sup>  
Levi, Lubarsky & Feigenbaum  
ex-SDNY AUSA  
ex chief of SDNY major fraud section  
prosecuted corporate crime, including Con  
Edison

*Charles Howard*



Academics Who Have Written on the Organizational Guidelines

**Cindy R. Alexander**<sup>†■</sup>

Economic Analysis Group, Antitrust Division  
U.S. Department of Justice

**Jennifer Arlen**<sup>†</sup>

Professor Law and Business  
University of Southern California

**Jayne Barnard**<sup>†■</sup>

Professor of Law  
William and Mary School of Law

**Pamela Bucy**<sup>†</sup>


Professor of Law  
University of Alabama School of Law

**Mark Cohen**<sup>†■</sup>

Professor of Management  
Vanderbilt University

**Thomas Donaldson**<sup>†</sup>

Professor of Legal Studies  
University of Pennsylvania


 **Paul Fiorelli, Esq.**<sup>□‡</sup>

Professor of Business Law and Ethics  
Xavier University

**Ron Goldstock**<sup>†</sup>

Lecturer, Columbia Law School  
former chair, ABA criminal justice section  
former head of NY Organized Crime Task  
Force


*Charles Howard*

 **Richard Gruner**<sup>†■</sup>

Professor of Law  
Whittier Law School

**William S. Laufer**<sup>†</sup>

Associate Professor of Legal Studies  
University of Pennsylvania

 **Julie O'Sullivan**<sup>†</sup>

Georgetown Law Professor  
ex-AUSA SDNY  
gave presentation at 1995 USSC symposium  
on corporate crime

**Lynn Sharpe Paine**<sup>†</sup>

Professor of Business Administration  
Harvard Graduate School of Business

**Joseph Petrick**<sup>†</sup>

Professor of Management  
Wright State University

**Linda Klebe Trevino**<sup>†■</sup>

Professor of Organizational Behavior and  
Chair of the Department of Management and  
Organization  
Pennsylvania State University

**Ian Weinstein**<sup>†</sup>

Fordham Law School  
ex-Ass't Public Defender, SDNY

**Patricia Werhane**<sup>†</sup>

Professor of Business Ethics  
University of Virginia

○ Suggested by Chair Murphy

□ Suggested by Vice Chair Steer/Paula Desio

† Suggested by Michael Horowitz

‡ From literature review by Mark Allenbaugh (at request of Murphy)

■ Submitted suggestions regarding scope of group's work in response to Federal Register notice

## RESPONSES TO REQUEST FOR PUBLIC COMMENT

### Specific Suggestions Regarding the Scope of the Group's Work

**Cindy R. Alexander, Ph.D.**  
U.S. Department of Justice  
Antitrust Division

Examine how the guidelines' treatment of compliance programs and the presence of these programs affect the incentives of individuals within corporations to comply.

**Jayne W. Barnard**  
William & Mary School of Law

Comment on any aspect of the organizational guidelines. Discuss a "safe harbor" provision. The group should not look at broadening the guidelines to include programs aimed generally at "ethical" behavior.

**Barry Boss & Jim Felman**  
Practitioners' Advisory Group

Mission should not be radical change to seven criteria. Review seven criteria for improvement &/or clarification (example = 8A1.2, n.3(k)(3)). Evaluate whether fine ranges & culpability score values need adjustment (example = 8C2.5(g)).

**Jay Cohen**  
Coalition for Ethics and  
Compliance Issues

Carefully review provisions detailing the credit defendants can receive for compliance programs, including related provisions regarding cooperation and voluntary disclosure of wrongdoing. Review should include relevant legal and regulatory developments outside of the sentencing context.

**Mark A. Cohen**  
Vanderbilt University,  
Owen Graduate School of  
Management

Consider crimes not covered and begin filling in those holes, if appropriate. Consider what data to collect on organizations sentenced under the guidelines (data not currently collected).

**E. Scott Gilbert**  
General Electric Company

The group should not be charged with making major changes in the definition of an effective compliance program.

**Richard Gruner**  
Whittier Law School

Study past sentencing to evaluate present guidelines. Study experience with innovative sentences, especially proper scope of organizational probation. Develop standards for effective compliance programs. Look at DOJ corporate amnesty standards with respect to sentence reductions for self-reporting and cooperation.

**Charles L. Howard**  
Shipman & Goodwin

Concentrate on business ethics & compliance issues.  
Articulate criteria for a presumptive “safe harbor.”

**Ron James**  
Center for Ethical Business  
Cultures

Compare the intent of the guidelines with actual impact.  
Analyze changing business environment for impact on  
the effectiveness of the guidelines.  
Examine themes from real occurrences to aid practitioners  
in improving compliance programs.

**Kenneth W. Johnson**  
Ethics and Policy Integration  
Center

Endorses issues raised by Ethics Resource Center, CECI  
& Mr. Charles Howard (provide a more robust  
framework for compliance programs).  
Address applicability to Tribal Governments.  
Address designing & implementing effective compliance  
programs for micro/small to medium businesses.

**Lisa A. Kuca**  
Holland & Knight LLP  
**David F. Axelrod**  
Vorys, Sater, Seymour,  
and Pease LLP

Consider whether and how to amend the criteria for an  
effective compliance program to provide more  
guidance regarding what constitutes such a  
program.

**Jane Adams Nangle**  
St. Joseph's/Candler  
Health Systems

Review extending the guidelines to cover ethical business  
practices.  
Consider the impact of sanctions on tax-exempt  
organizations.  
Consider establishing standards and/or defining what  
constitutes an effective compliance program.  
Evaluate whether early concerns about including  
environmental cases in general provisions of  
Chapter 8 are still merited.

**Robert Olson, PhD, MPH**  
Alliance for Health Care  
Integrity

Address industry wide issues, such as efficiency &  
effectiveness of existing compliance programs; best  
practices in implementing & evaluating such  
programs; background & training of staff; and  
policies related to investigation & enforcement of  
legal & ethical violations.

**Eric Pressler**  
PG&E Corporation

Discuss the operation & impact of the guidelines in the  
corporate environment.  
Explore how guidelines could promote a more consistent  
approach to compliance between and across  
industries & how they could improve compliance  
management in corporations with programs.



**Winthrop M. Swenson**  
Compliance Systems Legal Group  
Coalition for Ethics and  
Compliance Issues

Primary focus should be credit for compliance programs. Examine broader legal & enforcement environment in which these provisions operate (because it is inimical to goal of promoting effective compliance programs).  
Propose either dialogue with other agencies or legislation.

**Carol L. Tacker**  
Cingular Wireless

Address the legal & regulatory developments that may make it more difficult to establish & maintain the effective compliance program contemplated by the guidelines.

**Linda K. Trevino**  
Professor of Organizational  
Behavior, Pennsylvania State  
University

Focus on informal organizational characteristics such as executive & supervisory commitment to ethics, perceived fair treatment by employees, & management follow through when ethics problems are brought to its attention.

#### General Statements of Interest Only

**Jerome Adams**, Shell Oil Company; **Jennifer Arlen**, Yale Law School; **Frank Z. Ashen**, NYSE, Inc.; **Richard J. Bednar**, Defense Industry Initiative; **Keith T. Darcy**, IBJ Whitehall Financial Group; **Paul Fiorelli**, Xavier University, Professor of Legal Studies, Director of Xavier Center for Business Ethics and Social Responsibility; **Nancy McCready Higgins**, Lockheed Martin Corporation; **W. Michael Hoffman**, Bentley College, Center for Business Ethics; **Edward S. Petry, Ph.D.**, Ethics Officer Association; **Roy Snell**, Health Care Compliance Association; **Robert T. Spencer, Jr.**, Compaq Computer Corporation.

#### Statement Opposing

**David T. Buente**, Sidley Austin Brown & Wood, American Chemistry Council, General Electric Company



CENTER 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:

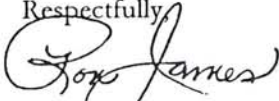
I am writing this letter in follow up to the United States Sentencing Commission's requested comment on formation of an ad hoc advisory group pertaining to Chapter Eight of the Sentencing of Organizations.

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

651 962 4120  
TELEPHONE

651 962 4042  
FACSIMILE

mail@cebglobal.org  
www.cebglobal.org



A7

**COMPAQ**

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](http://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



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 marijuana 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 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

- <sup>1</sup> See 18 U.S.C. § 13.
- <sup>2</sup> See 21 U.S.C. § 860.
- <sup>3</sup> 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. (9<sup>th</sup> 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.

#### REFERENCES

- Aguirre, A. & Turner, J. (1995). *American ethnicity*. New York: McGraw- Hill, Inc.
- Brown, J. E. (1993). *The spiritual legacy of the American Indian*. Wallingford, PA: Pendle Hill Publications.



Bureau of Justice. (1995). Statistical report. Washington, DC: Office of Justice Programs, U.S. Department of Justice.

Bureau of Justice Statistics. (1999). American Indians and crime. Washington, DC: Office of Justice Programs, U.S. Department of Justice.

Cohn, A. W. (1997, September). Juvenile focus. *Federal Probation*, 61, 71-73.

Dvorak, J. S. (1995, Summer). Excerpts from presentation on life chances of American Indians in South Dakota, Brookings, SD.

O'Hare, W. P. (1992). America's minorities--the demographics of diversity. *Population Bulletin*, 47, 9-38.

Sands, J. M. (1998, November/December). Indian crimes in federal courts. *Federal Sentencing Reporter*, II, 153-158.

Sandven, S. (1999, June 2). Excerpts from a speech on Native American culture and the correctional environment, Chamberlain, SD.

U.S. Department of Health, Education, and Welfare. (1976). A statistical portrait of the American Indian. Washington, DC: U.S. Government Printing Office.

U.S. Probation Office. (1999). Local statistics from the District of South Dakota.

END OF DOCUMENT



## 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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A23





*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*





# 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

# Addendum to Summaries of Responses to Request for Public Comment

(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)

## I. Issues Related to the Organizational Guidelines

### **Cingular Wireless**

Carol L. Tacker  
Atlanta, Georgia 30342

Cingular believes that the organizational guidelines have had an enormous influence on the development, shape, and scope of corporate compliance programs and it supports the creation of an advisory group to review their impact and make recommendations. Cingular suggests that the group include experts on ethics and compliance, including corporate officers, and members of the bar who represent corporations in criminal matters. The advisory group should review the other legal and regulatory initiatives that impact the development of corporate compliance programs, 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.

### **NYSE**

Frank Z. Ashen, Executive Vice President  
New York, New York 10005

Mr. Ashen, a member of the Board of Directors of the Ethics Officer Association, commends the Commission on its plan to form an ad hoc advisory group on the organizational guidelines. He suggests that the group include business ethics practitioners and that the group be given sufficient time to conduct a thorough review of the broadest scope.

### **Health Care Compliance Association**

Roy Snell, CEO  
Plymouth, Minnesota 55446

HCCA would be interested in discussing which of its constituent members would be best suited to participate in the advisory group.



**Center for Ethical Business Cultures**

Ron James, President and CEO  
Minneapolis, Minnesota 55403-2005

Mr. James supports the formation of an advisory group to review the organizational guidelines. He thinks that the analysis should be made from several perspectives: (1) comparing the intent of the guidelines with their actual impact; (2) determining whether external factors in the business environment impact the effectiveness of the guidelines; and, (3) examine actual applications of the guidelines to aid practitioners in improving their ethics and compliance programs.

Membership should be balanced and should represent a cross-section of corporate practitioners, academic ethicists, business ethicists, and representatives of the Sentencing Commission.

**Compaq**

Robert T. Spencer, Jr., Director of Office Business Practices and Chief Privacy Officer  
Houston, Texas 77070

Compaq supports the formation of the ad hoc advisory group on the organizational guidelines and recommends that the Ethics Officers Association be invited to participate. Compaq stresses the importance of the organizational guidelines and indicates that it has relied on them in the development of communication, training, marketing, and case management programs. It asks that the Commission take all proposal into careful consideration.

## II. Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans in Indian Country

### **The Honorable Charles B. Kornman**

United States District Judge  
Aberdeen, South Dakota 57402

Judge Kornman supports the formation of an ad hoc advisory group to address federal sentencing issues for Native Americans in Indian Country. He suggests that the group be comprised of individuals who are familiar with the sentencing guidelines and how they work. Judge Kornman refers the Commission to an article that he authored for the September/October 2000 issue of the Federal Sentencing Reporter entitled *Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country*. A copy of the article is attached.

### **United States Commission on Civil Rights**

Elsie Meeks, Commissioner  
Washington, DC 20425

Ms. Meeks supports the formation of an ad hoc advisory group to review the impact of the Sentencing Guidelines in Indian country. She believes that the federal sentencing structure as applied to Indians on Indian reservations neither deters crime nor rehabilitates offenders. Because Indian defendants are sentenced in federal court for offenses that would normally be heard in a local forum, Indian defendants receive longer sentences than non-Indian defendants convicted of similar offenses. Such inequities, real and perceived, breed resentment and distrust of the system.

Ms. Meeks recommends that the advisory group scope be determined after more is known about what data exists and what data is still needed. She recommends that an inter-jurisdictional study be conducted to determine the extent to which Indians are disparately impacted by federal sentencing. The group must analyze options available to address concerns about the that impact, such as:

- Deferring more criminal cases to tribal courts;
- Increased discretion for judges to take into account the extraordinary conditions that exist in Indian Country; and
- Tribal "opt-in" clauses in crime legislation.

The article *The Unique Circumstances of Native American Juveniles Under Federal Supervision* was included for the Commission's review.

Ms. Meeks recommends that the membership of the advisory group include recognized experts on the Guidelines, academicians, federal judges, prosecutors, and public defenders, private defense attorneys, and representatives from the Native American Community. Ms. Meeks would



be willing to serve on the advisory group. She also recommends a number of qualified individuals that she feels would be an asset to the advisory group including: the Honorable William Canby, Jr. (9<sup>th</sup> Circuit Court of Appeals), Kevin Gover (Former Assistant Secretary for Indian Affairs), Jon Sands (Arizona Federal Public Defender), Michael Tonry (law professor), the Honorable Charles Kornman (District for South Dakota), Bob Van Norman (Federal Public Defender, District of South Dakota), Terry Pechota (Former US Attorney), Frank Pommersheim (USD law professor), Patrick Duffy (attorney), and Bruce Ellingson (attorney).

**Dakota Plains Legal Services**

Brad Peterson  
Fort Yates, North Dakota 58538

Mr. Peterson serves as the managing attorney on the Standing Rock Sioux Indian Reservation for one of the legal service programs in South Dakota. He took part in the training in Pierre, South Dakota and would like to be included in the advisory group.

**Forest County Potawatomi Community**

Harold Gus Frank, Chairman  
Crandon, Wisconsin 54520

The Forest Country Potawatomi supports the formation of the ad hoc advisory group as an initial step and suggests the formation of a more permanent group that would review any implemented changes. The membership of the group should include tribal members with an expertise in the impact of the Guidelines on Tribal communities, scholars who have studied the rates of incarceration of Native Americans, and representatives from civil rights groups, DOJ, and federal prosecutors. The group should have clear and broad authority.

**Greenville Rancheria**

Robert Bare, Administrator  
Greenville, California 95947

Greenville Rancheria supports the formation of the advisory group. They are interested in obtaining any letters available from the Commission and would like to be informed of developments in this area.

**INDEX TO THE ADDENDUM**  
**(Federal Register, Vol. 66, No. 182, Sept. 19, 2001)**

<b>I.</b>	<b>Issues Related to the Organizational Guidelines</b> .....	(Addendum Page 1)
	Cingular Wireless .....	A1
	NYSE .....	A3
	Health Care Compliance Association .....	A4
	Center for Ethical Business Cultures .....	A5
	Compaq .....	A6
<b>II.</b>	<b>Issues Related to the Impact of Federal Sentencing Guidelines on Native Americans in Indian Country</b> .....	(Addendum Page 3)
	The Honorable Charles B. Kornman .....	A9
	Elsie Meeks, United States Commission on Civil Rights .....	A13
	Dakota Plains Legal Services .....	A23
	Forest County Potawatomi Community .....	A24
	Greenville Rancheria .....	A25



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.

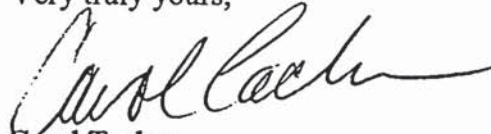
This group should include ethics and compliance officers and other experts on ethics and compliance, in addition to members of the bar who represent corporations in criminal matters. Ethics and compliance officers can: describe the impact the organizational guidelines and each of the seven elements has 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.

AH

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,



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 cursive script that reads "Frank Z. Ashen".

## HEALTH CARE COMPLIANCE ASSOCIATION

18105 46<sup>th</sup> Avenue North • Plymouth, MN 55446 • Tel: 763/478-4490 • email: [rsnell@hcca-info.org](mailto: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  
18105 46<sup>th</sup> Ave. N.  
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Ad



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AL





CENTER 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:

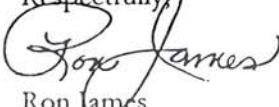
I am writing this letter in follow up to the United States Sentencing Commission's requested comment on formation of an ad hoc advisory group pertaining to Chapter Eight of the Sentencing of Organizations.

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

BUSINESS  
PARTNERING WITH  
THE UNIVERSITY OF  
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AND  
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A7



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](http://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 Spencer".

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 marijuana 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

A 10



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 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

- <sup>1</sup> See 18 U.S.C. § 13.
- <sup>2</sup> See 21 U.S.C. § 860.
- <sup>3</sup> 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. (9<sup>th</sup> 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



(Cite as: 63-DEC Fed. Probation 68, \*70)

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.

#### REFERENCES

Aguirre, A. & Turner, J. (1995). American ethnicity. New York: McGraw-Hill, Inc.

Brown, J. E. (1993). The spiritual legacy of the American Indian. Wallingford, PA: Pendle Hill Publications.

Bureau of Justice. (1995). Statistical report. Washington, DC: Office of Justice Programs, U.S. Department of Justice.

Bureau of Justice Statistics. (1999). American Indians and crime. Washington, DC: Office of Justice Programs, U.S. Department of Justice.

Cohn, A. W. (1997, September). Juvenile focus. *Federal Probation*, 61, 71-73.

Dvorak, J. S. (1995, Summer). Excerpts from presentation on life chances of American Indians in South Dakota, Brookings, SD.

O'Hare, W. P. (1992). America's minorities--the demographics of diversity. *Population Bulletin*, 47, 9-38.

Sands, J. M. (1998, November/December). Indian crimes in federal courts. *Federal Sentencing Reporter*, 11, 153-158.

Sandven, S. (1999, June 2). Excerpts from a speech on Native American culture and the correctional environment, Chamberlain, SD.

U.S. Department of Health, Education, and Welfare. (1976). A statistical portrait of the American Indian. Washington, DC: U.S. Government Printing Office.

U.S. Probation Office. (1999). Local statistics from the District of South Dakota.

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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  
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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*

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*October 22, 2001*

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

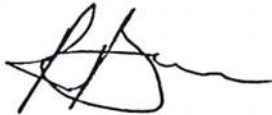
*In Re: Memorandum Dated October 18, 2001 Regarding Sentencing Information*

*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*

# FACSIMILE TRANSMISSION COVER SHEET

U.S. Department of Justice  
Office of the Assistant Attorney General  
950 Pennsylvania Avenue, NW Room 2708  
Washington, DC 20530-0001  
Tel. No: 202-514-9351  
Fax. No: 202-514-9412

Date:

11/8/01

PLEASE DELIVER TO:

Judge Murphy

Firm/Agency:

US Sentencing Commission

Recipient Tel:

Recipient Fax:

502-4699

FROM:

John Elwood  
Counselor to the Assistant Attorney General  
Criminal Division

Number of pages excluding cover sheet:

2

Remarks/Comments:

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 8, 2001

MEMORANDUM

TO: Judge Murphy  
Commissioners

FROM: John P. Elwood *JPE*  
Counselor to the Assistant Attorney General

SUBJECT: Formation of New Ad Hoc Advisory Groups

This memo serves to follow up on our discussion at the September Commission meeting concerning the formation of two new ad hoc advisory groups to review issues related to (1) the Federal Sentencing Guidelines and Native Americans in Indian Country, and (2) the Organizational Sentencing Guidelines. The points below represent some of our preliminary suggestions. We look forward to discussing them with the Commission in upcoming meetings.

- The membership of the advisory groups should represent the diverse stakeholders in the Commission's work. The Organizational Guidelines Advisory Group should include representatives from the corporate sector, the non-profit sector, law enforcement, victims' organizations, and other relevant interest groups (e.g. representatives from appropriate national environmental organizations). The Native American Advisory Group should include officials from various Native American tribes, federal and state law enforcement, DOJ's Office of Tribal Justice, the Interior Department, victims' organizations, and probation officers. We believe that the tribal representatives should be drawn from a broad cross-section of tribes in various regions. Finally, we believe several government/law enforcement representatives – with different and varied perspectives – should be represented on each group, and we will gladly provide you with specific suggestions for prospective members.
- While the groups should be sufficiently large to represent all important stakeholders, at the same time, the advisory groups should be not so large as to be unmanageable. We suggest the groups should probably consist of between 12 and 18 members. We also believe the duration of the groups' work should be clearly articulated by the Commission when formed, with the duration just long enough to allow the groups to complete their work in a deliberate and timely way. We note that if the groups begin their work in

January and are able to complete it in 18 months, the Commission could consider any recommendations provided by the groups in the regular amendment cycle that begins in the spring of 2003.

- The scope of the advisory groups' work should be clearly defined by the Commission itself, with specific deadlines for work product that clearly articulate issues and questions for the groups to address. With respect to the Organizational Guidelines Advisory Group, we note that there generally has been broad satisfaction with the operation of the organizational guidelines. We understand that specific issues have been raised in correspondence to the Commission, although I have not seen that correspondence and am unfamiliar with the precise issues raised. We urge the Commission to have the advisory groups examine the specific issues that have been the subject of concern, but not to conduct an open-ended review of the entire organizational sentencing system. Such a review is, we believe, not warranted at this time. For the Native Americans Advisory Group, the scope of work should certainly address the impact of the guidelines on Native Americans, the fairness of the federal sentencing system, and perceptions about its fairness. We also believe the Advisory Group's work should be tied closely to a review of the nature and scope of the crime problem in Indian Country, and how the federal sentencing system contributes (and could better contribute) to addressing the crime problem. We also believe that both advisory groups should provide specific recommendations for improvement.
- We believe the advisory groups should provide an interim report to the Commission at least once in the course of their work to allow the Commission to provide feedback on their work.

\* \* \*

We hope these suggestions are helpful, and we look forward to discussing them with you further.



UNITED STATES SENTENCING COMMISSION  
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WASHINGTON, D.C. 20002-8002  
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November 7, 2001

**MEMORANDUM**

**TO:** Tim McGrath  
Frances Cook  
Ken Cohen  
J. Deon Haynes  
Pam Montgomery  
Lou Reedt  
Judy Sheon  
Charlie Tetzlaff  
Susan Winarsky  
Theresa Cooney  
Paula Desio  
Janeen Gaffney

**FROM:** Mike Courlander

**SUBJECT:** Public Comment

Attached for your reference is some additional public comment that recently arrived at the Commission.

**PRACTITIONERS' ADVISORY GROUP**  
**CO-CHAIRS BARRY BOSS & JIM FELMAN**  
**c/o ASBILL, JUNKIN, MOFFITT & BOSS, CHARTERED**  
**1615 NEW HAMPSHIRE AVENUE, N.W.**  
**WASHINGTON, DC 20009**  
**(202) 234-9000 - BARRY BOSS**  
**(813) 229-1118 - JIM FELMAN**  
**(202) 332-6480 - FACSIMILE**

November 5, 2001

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

Re: Organizational Sentencing Guidelines Ad Hoc Advisory Group

Dear Judge Murphy:

The Practitioners' Advisory Group (the "PAG") to the United States Sentencing Commission submits this letter in response to the Commission's September 19 notice (66 Fed. Reg. 48306) for advice on the make-up and objectives of an ad hoc advisory group that the Commission is considering appointing to review the Organizational Sentencing Guidelines ("OSG"). As set forth below, the PAG supports the formation of such a group, which should have a well-defined mission and a broad-based membership.

At the outset, the PAG regards the OSG as a success for which the Commission deserves great credit. Viewed from the perspective of their tenth anniversary, the OSG began a nationwide, corporate compliance movement by combining an appeal to corporate self-interest - compliance programs - with the best good corporate citizenship instincts of American corporations.

The ten year mark in the life of the OSG is an appropriate time to ask what changes, if any, are needed, and an ad hoc advisory group could serve a useful purpose in suggesting improvements to the OSG. Such a group will best achieve its purpose if its membership includes as many perspectives as feasible. Among the possible members, therefore, are corporate compliance officers and/or in house legal counsel who are responsible for their company's compliance programs, prosecutors responsible for the Department of Justice's white collar corporate prosecution policy, defense attorneys who conduct internal investigations and/or represent companies in grand jury investigations, compliance and ethics specialists, both from academia and the private sector, and senior executives of both large and small companies.



Honorable Diana E. Murphy, Chair

November 5, 2001

Page 2

As to the small company representation, in certain respects the OSG - particularly the seven criteria for an effective compliance program - were written more for large companies than small ones. Small companies attempting to comply with the seven compliance criteria often complain that they lack resources and expertise to develop and implement effective compliance programs and therefore allowing their views to be expressed within the ad hoc advisory group's deliberations would be invaluable.

Overall, the private sector members should reflect or have experience with a variety of industries since the perspective on compliance of, for example, the health care industry may differ from that of the defense industry. The ad hoc advisory group should have a term of not more than two years, which is sufficient to analyze, discuss and formulate recommendations while setting a deadline for completion of the group's work.

The mission of the ad hoc advisory group should be neither too broad nor too narrow. As the well-known but generally apt saying goes, "if it ain't broke, don't fix it." After ten years, corporate America has generally become comfortable with the OSG and radical changes might create confusion. In particular, we are skeptical that the OSG needs major rewriting, for example, to accommodate a sentencing scheme based on so called integrity based compliance in which a company's ethical culture is evaluated, along with its compliance programs, in considering the appropriate corporate sentence. We fully agree with integrity based compliance advocates that the success of a company's corporate compliance program is directly proportional to the commitment of its leadership to promoting an ethical company culture in which ethics is regarded as important a business objective as the company's earnings per share or annual revenue growth. But we question whether it is possible to establish objective, uniformly applicable criminal sentencing bench marks for measuring a company's ethical culture that improve on the existing seven criteria for a compliance program that identify *objective* compliance activities - such as use of auditing and monitoring systems or hotlines - and generally do not depend on inherently subjective evaluations of a company's ethical culture. The ad hoc advisory group could usefully function as a think tank to examine ideas such as integrity based compliance, and conceivably the OSG commentary might refer to, and emphasize, the importance of an ethical culture to achieving the "due diligence" required of an effective compliance program, but the group should be cautious in advocating the replacement of the seven criteria with a substantially different scheme.

Rather, a principal focus of the ad hoc group advisory group should be to review the seven criteria for an effective compliance program for improvement and/or clarification and evaluate whether the fine ranges and culpability score values need adjustment in light of the past ten years experience with corporate sentences under the OSG. As one example, the ad hoc advisory group

Honorable Diana E. Murphy, Chair

November 5, 2001

Page 3

might consider whether the OSG should explicitly require companies to engage in ongoing efforts to audit and test compliance procedures to ensure that a compliance program is as effective in practice as it is on paper.

As another example, one of the criteria for an effective compliance program, that the company should not "delegate substantial discretionary authority to individuals with a propensity to engage in criminal activity," §8A1.2, Application Note 3 (k) (3), causes significant confusion. The ad hoc advisory group might consider just how a company can determine that a person has a "propensity" to engage in criminal activity and perhaps address whether this criteria should explicitly state whether or not due diligence obligates the company to institute background checks of all significant decision makers before they are hired.

Among the culpability score issues that might be considered by the ad hoc advisory group is clarification of what constitutes cooperation by a corporation that qualifies it for either a three point or two point reduction in culpability score pursuant to §8C2.5 (g) (1) or (2). These provisions require that the company, to qualify for the reduction, among other things, must have "fully cooperated in the investigation." In June 1999, the Department of Justice promulgated a guidance memorandum to federal prosecutors titled "Federal Prosecution of Corporations," which among matters, suggested that a company might not be considered by federal prosecutors to have fully cooperated unless its disclosure included, if necessary, "a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel." *Id.* at 7.

The guidance memorandum, which did not address cooperation pursuant §8C2.5 (g) (1) or (2), provoked significant comment and controversy. The ad hoc advisory group might consider whether §8C2.5 (g) can usefully be clarified to make clear whether or not a privilege waiver is a necessary prerequisite to a culpability score reduction based on cooperation.

In addition to our thoughts regarding the mission of the advisory group, we would nominate Gregory Wallance for participation in the group. Mr. Wallance who is a litigation partner at Kaye Scholer LLP in New York. Mr. Wallace is a former Assistant United States Attorney in the Eastern District of New York, where he prosecuted white collar criminal cases. His practice concentrates on internal investigations, corporate compliance and white collar criminal representation. He was instrumental in helping to start and co-chaired for the past several years, the Practising Law Institute's multi-city Seminar on Corporate Compliance. Mr. Wallance has written and lectured widely on the Organizational Sentencing Guidelines. Although Mr. Wallance is a member of the



Honorable Diana E. Murphy, Chair

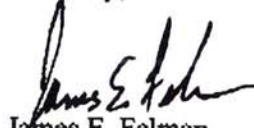
November 5, 2001

Page 4

Practitioners' Advisory Group, hopefully this would not disqualify him from consideration for the organizational group.

In sum, we support the creation of an ad hoc advisory group to review the OSG and their application in the past ten years to corporate offenses and, whether appropriate and feasible, recommend improvements to the commission.

Sincerely,



James F. Felman

Barry Boss

JEF/lh



October 19, 2001

Hon. Diana E. Murphy, Chair  
United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
Washington, DC 20002-8002

Re: Issues related to the Organizational Guidelines  
Federal Register Notice 9/19/01

Dear Judge Murphy:

Please accept these comments in response to the Notice published in the Federal Register on September 19, 2001, requesting comments on the scope, potential membership and possible formation of an ad hoc advisory group on the organizational sentencing guidelines to consider any viable methods to improve the operation of these guidelines.

***Possible formation of an ad hoc advisory group.***

Forming an ad hoc advisory group to review the organizational sentencing guidelines after ten years of application is an excellent idea. During the last ten years, the organizational sentencing guidelines have dramatically impacted the way that business is conducted in America. Speaking for the health care industry – one of the most highly regulated industries in the world – I can say that no law has had a greater impact on this industry since the creation of the Medicare program in the 1960s. I feel certain the same is true for other industries as well. Ad hoc advisory groups assisted the Commission in developing the guidelines and would provide valuable insight to the Commission in reviewing them for viable opportunities for improvement after ten years of experience.

An ad hoc advisory group will provide a forum for the Commission to openly discuss with representatives of industry and government the benefits and burdens as well as the workable and difficult provisions of the guidelines and to evaluate the effect of any potential changes to the guidelines. The views of industry representatives in an organized forum are likely to be more balanced than those of advocates for organizational defendants facing sentencing under the guidelines. Organizations all too



Affiliate  
Candler Hospital

5353 Reynolds St. Savannah, Georgia 31405 (912) 692-6000



often do not worry about the guidelines until they face sentencing. The comments submitted to the Commission under such circumstances are not likely to be as constructive as those made in a dispassionate ad hoc advisory group.

***Scope of review.***

The original organizational sentencing guidelines listed the seven components of an effective corporate compliance program in such general terms that each industry has been able to apply the seven components to its own unique industry practices. Based on the framework of the sentencing guidelines, the Office of Inspector General of the Department of Health and Human Services has issued ten final sets of guidelines for:

- hospitals
- clinical laboratories
- home health agencies
- voluntary disclosures of health care fraud
- third-party billing companies
- the durable medical equipment, prosthesis and orthotics supply industry
- hospices
- Medicare +Choice Organizations
- nursing facilities, and
- individual and small group practices.

Guidelines for the pharmaceutical industry are currently under development. More will surely follow.

With this many supplemental guidelines being released in only three years for just one industry, the Commission should exercise caution in responding to the many requests that the sentencing guidelines themselves be more specific. While everyone has a desire for certainty, this is not an area where one size fits all. The guidelines should remain a flexible and general framework for measuring corporate culture.

Nevertheless, there are questions or ideas about the guidelines that merit review and discussion. Certainly, extending the guidelines to cover ethical business practices is clearly the next step. Strict compliance with legal requirements is not sufficient to deter criminal behavior if an organization can find creative ways to circumvent the limitations imposed by the law. While such conduct may not be actionable under the law, it should be weighted in the sentencing guidelines. Many corporations have expanded their private compliance programs to include ethical business practices. However, this can place them at a disadvantage when their sole competitor is using every legal loophole.

Likewise, the Commission should consider the impact of sanctions on tax-exempt organizations. Since creation of the Medicare program, the federal government has become the nation's largest payor for health care services. Because hospitals were

paid under a "cost plus" reimbursement basis for nearly four decades, the Medicare program resulted in huge infusions of capital into the health care industry, creating the world's most advanced health care system. However, with the prosperity came the conversion of the hospital industry from a primarily non-profit, charitable industry to an increasingly publicly traded for-profit business. Tax-exempt and for-profit hospitals follow the same laws. Theoretically, the penalties for violating those laws should be the same. The guidelines currently make no distinction between the two.

The primary fiduciary duty of directors of a shareholder-owned corporation is to increase dividends and/or share value. The personal liability of directors for assuring corporate legal compliance established in *In re Caremark*<sup>1</sup> is one function of that primary duty. Conducting business lawfully reduces the risk of fines, penalties and negative publicity. By contrast, the primary fiduciary duty of directors of a tax-exempt organization is to provide designated services to the community. When large fines are assessed against a shareholder-owned entity, the dividends and/or stock values fall. When large fines are assessed against a non-profit entity, the funds available to provide services to the community decrease. Likewise, the personal reputations of shareholders are not damaged when a for-profit corporate entity is fined, but the personal reputations of non-profit trustees are often impacted when the reputation of the facility they govern is diminished by criminal sanctions. This is fact, not theory, and it is something the Commission should consider when evaluating the guidelines for areas of potential improvement.

There is a provision in the organizational sentencing guidelines that permits a downward departure if the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense. This provision cites, as an example, labor unions convicted of embezzling pension funds.<sup>2</sup> There should be a similar recognition that the members of the community are the beneficiaries of a tax-exempt health care provider and substantial fines against tax-exempt health care providers remove funds from the community that would otherwise be spent to benefit the general public.

Serious consideration should be given to the suggestion that the guidelines be more specific about establishing standards and/or defining what constitutes an "effective" compliance program. The annual statistical reports of the Commission show that very few compliance programs have been found to be effective in preventing criminal conduct. The reason for this should be evaluated to see if the cause is lack of specificity in the guidelines or lack of commitment from the organizational defendants.

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<sup>1</sup> *In re Caremark Int'l, Inc.*, 698 A.2d 959 (Del. Ct. Chan. 1996).

<sup>2</sup> § 8C4.8 Guidelines Manual (November 1, 2001)



Finally, the ad hoc advisory group should evaluate the wide spectrum of cases in which Chapter Eight has been applied to see if the early concerns about including environmental cases in the general provisions of Chapter Eight are still merited. It may be that the range of activities to which Chapter Eight has already been applied is greater than the range of potential environmental offenses that originally led to excluding them from Chapter Eight.

### ***Potential Membership of Ad Hoc Advisory Group***

The size of an ad hoc advisory group is always a difficult decision. The larger a group becomes, the more difficult it is to coordinate schedules and reach consensus. However, the organizational sentencing guidelines impact the entire spectrum of business in America. Thus, any group considering potential changes to the guidelines should be large enough to represent a cross-section of the business community.

Application of the False Claims Act to health care claims has resulted in a situation where institutions that have traditionally been public charities operate under constant fear of enormous fines and penalties for technical violations of complex regulations that are frequently given retroactive interpretations by their issuing agencies. It is perhaps the only industry where businesses feel the need to seek formal advisory opinions from governmental agencies to continue decades of charitable work.<sup>3</sup> Thus, the health care industry is very interested in being represented on any committee or advisory group considering new or revised regulations or guidelines.

Changes in the guidelines, however, will not be limited to the health care industry. Thus, the members of the ad hoc advisory group should represent several of the most highly regulated industries that have a history of being subject to criminal penalties covered by Chapter Eight. If one industry is represented too heavily on the ad hoc advisory group, any recommendations made by the group may not take into consideration the impact of those recommendations on other industries.

Individual organizations are able to maintain anonymity when the ad hoc advisory group is composed of representatives from industry organizations such as the American Hospital Association, American Medical Association, Health Care Compliance Association and the Alliance for Health Care Integrity. However, there is genuine benefit to having the firsthand experience that can be provided by representatives from

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<sup>3</sup> *OIG Advisory Opinion No. 99-6 (St. Jude's Hospital may continue to waive co-payments and deductibles for pediatric cancer patients.)*

Hon. Diana E. Murphy, Chair  
United States Sentencing Commission  
October 19, 2001  
Page 5

large and small providers who have either been sentenced under the guidelines or have settled to avoid being sentenced under the guidelines.

The ad hoc advisory group should include representatives from the various federal agencies that administer the guidelines. The key consideration here is experience. There should be people on the ad hoc advisory group who have prepared the sentencing recommendations for organizational defendants and can share their experience in identifying places where they believe the guidelines did not permit allowance for either mitigating or aggravating circumstances.

And of course, district court judges who review the recommendations and impose the sentences must be on the ad hoc advisory group to share their experiences with cases in which they felt the guidelines were to restrictive.

I hope these comments are useful to the Commission and would be delighted to help in any additional capacity.

Sincerely,

A handwritten signature in black ink that reads "Jane Adams Nangle". The signature is written in a cursive, flowing style.

Jane Adams Nangle  
Corporate Compliance Officer  
St. Joseph's/Candler Health System, Inc.  
912-692-5291





# Yale Law School

November 6, 2001

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
South Lobby  
Washington, CD 20002-8002  
FAX (202) 502-4699

Attn: Public Affairs

Re: Ad Hoc Advisory Group on Organizational Guidelines

To Whom It May Concern:

I strongly favor both amending the organizational sentencing guidelines as well as proposals for form an ad hoc advisory group. It is critical that a majority of this group be informed but disinterested parties, e.g., academics and scholars, although affected corporations, prosecutors and judges would also be valuable members of the group.

As for the nature of the group, ideally it would be composed of no more than 9-12 persons with staggered terms (so that the group always includes members who have served before). Three year staggered terms (with a third of the group rotating off in any given year) might be advisable (and would be consistent with the protocol of many corporate boards of directors).

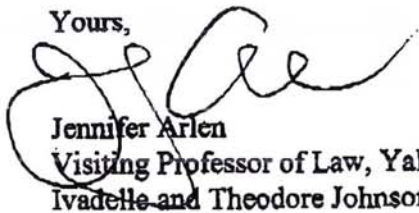
As to the identity of person, I would like to serve on this committee. Additional people who I recommend include:

Reinier Kraakman (Harvard Law School)  
Mark Cohen (Owen School of Management, Vanderbilt Law School)  
John Coffee (Columbia Law School)  
Kate Stith (Yale Law School).  
Susan Rosc-Ackerman (Yale Law School)

As to the merits of certain suggestions, I am attaching copies of my own work in this area. I am not FAXing the articles along with this letter because that would be too long. I will include them in the hard copy mailing that follows.

Thank you for contacting me about this proposal. I look forward to speaking to you about  
it.

Yours,



Jennifer Arlen  
Visiting Professor of Law, Yale Law School  
Ivadelle and Theodore Johnson Professor of Law and Business, USC Law School



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November 6, 2001

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

Re: Request for comment on forming an ad hoc advisory group on the Organizational Sentencing Guidelines, 66 Fed. Reg. 48306 (September 19, 2001)

Dear Judge Murphy:

On behalf of the American Chemistry Council ("Council") and the General Electric Company ("GE"), we appreciate the opportunity to respond to the United States Sentencing Commission's request for comments on the possible formation of an "ad hoc advisory group" on Chapter Eight ("Sentencing of Organizations") of the U.S. Sentencing Guidelines ("*Organizational Guidelines*").

The Council represents the leading companies (including GE) engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make our lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care<sup>®</sup>, common sense advocacy designed to address major public policy issues, and extensive health and environmental research and product testing. The business of chemistry is a \$460 billion-a-year enterprise and a key element of our nation's economy. It is the nation's #1 exporting sector, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other industry.

Honorable Diana E. Murphy  
November 6, 2001  
Page 2

I. The Organizational Sentencing Guidelines Have Been Effective in Fostering the Implementation of Programs to Prevent and Detect Violations of Law and Do Not Need to be Revised

As the Commission noted in the Federal Register notice, the “organizational guidelines have had a tremendous impact on the implementation of compliance and business ethics programs over the past ten years.” 66 Fed. Reg. at 48307. In fact, we are unaware of evidence in the docket created for this matter, Congressional testimony, or judicial opinions, that indicates that there are any deficiencies in the *Organizational Guidelines* that need to be corrected. There is also nothing in the docket from Congress, the Judiciary or the Executive Branch criticizing the *Organizational Guidelines*. The letters that the Commission refers to in the Federal Register notice do not identify any deficiencies in the *Organizational Guidelines*, or any difficulties that courts or organizations have had in implementing them. Absent any such evidence that there is a problem to be solved, we do not see a reason for convening an ad hoc committee to consider proposals to revise the *Organizational Guidelines*. Material changes to the *Organizational Guidelines* should only be considered after a showing that the *Organizational Guidelines* are flawed or defective. To the extent that the docket materials do raise issues for consideration, they appear to be outside of the Commission’s charter and beyond the sentencing power of the Federal courts.

Not only is there no evidence that the *Organizational Guidelines* are flawed, the evidence is to the contrary. It is a testament to the importance of the *Organizational Guidelines* that, beyond their direct role as guidance for sentencing, they have also encouraged organizations to implement compliance programs. Since the *Organizational Guidelines* were published, numerous organizations have upgraded their compliance programs to be consistent with the *Organizational Guidelines*’ criteria. The letters in the docket illustrate the extent to which some of those compliance programs have now independently advanced to encompass broader issues of ethics. This does not mean, however, that those efforts should now be mapped back onto the *Organizational Guidelines* themselves, in the hope that the *Organizational Guidelines* will have the effect of spreading those ethical programs more widely. This is particularly because the most direct consequence of amending the *Organizational Guidelines* as the letters recommend would be to punish more severely organizations with effective compliance systems but that do not include broader ethics or integrity programs.

II. The Organizational Guidelines Should Continue To Focus On Criminal Conduct

The principal purpose of the Commission is to promulgate “detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.” U.S. Sentencing Commission, Guidelines Manual, Ch. 1 Pt. A p. 1 (November 2000). The purpose of the *Organizational Guidelines* is to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” *Id.* In particular, the *Organizational Guidelines* are “designed so that the sanctions imposed upon organizations and their agents, taken together, will



Honorable Diana E. Murphy  
November 6, 2001  
Page 3

provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” USSG Ch.8 intro. comment. Therefore, the function of the *Organizational Guidelines* is to address the specific issue of criminal noncompliance with legal requirements and not to expand into general issues of corporate social responsibility or ethics that are not directly regulated by criminal law.

Some of the suggestions raised in the letters submitted to the Commission and referred to in the Federal Register notice would have the Commission expand its charter beyond its authority to address violations of criminal law. For example, requiring an “integrity and ethics based system,” however admirable, is not specifically related to preventing, detecting or reporting criminal conduct. Some commenters are beginning to refer to “ethics and compliance programs” as if the two concepts are interchangeable or identical. However, they are not. Criminal conduct is defined in countless federal statutes. Individuals and organizations are convicted and sentenced because of specific violations of specific statutory provisions, not because they may in some manner be unethical or lack integrity. The focus of the Commission should remain on systems that assure compliance with legal requirements, not ethics programs which focus on important questions in a wider domain. This is particularly true when, unlike the defined realm of criminal offenses, there is no agreed-upon set of ethical criteria against which organizations can be measured.

The letter to the Commission with the most specific suggestions urges that the *Organizational Guidelines* be revised to “move this world from ‘obeying the law because I have to’ to ‘doing what is right because I want to.’”<sup>1</sup> This letter also asks that the Commission “require that violations of ethical standards carry penalties similar to the violation of regulatory standards.” The suggestion that the Commission impose punishments for “violations of ethical standards” appears to imply that the Commission has the authority to punish for acts which have not violated the law. If that is what is meant, the author is asking the Commission to go beyond its mandate and do what only Congress can do. Issues raised by other commenters also go beyond the legal authority of the Commission, such as evaluating the impact of “qui tam” legislation on compliance assurance systems.

The *Organizational Guidelines* are used by courts to sentence those convicted of crimes. Therefore, proposed changes to the *Organizational Guidelines* should always be assessed in terms of how they would be used in the sentencing context. However, almost all of the comments submitted to the Commission thus far treat the *Organizational Guidelines* as a guidance manual or educational tool on how to implement effective compliance systems and do not discuss how these changes would be implemented in the sentencing context. For example, drawing upon some of the suggestions in the letters referred to by the Commission, should an organization’s criminal sentence be adjusted if it:

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<sup>1</sup> February 21, 2001 letter from Alliance for Health Care Integrity to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission.

Honorable Diana E. Murphy  
November 6, 2001  
Page 4

- has a compliance assurance system that focuses on preventing, detecting and correcting criminal conduct, but does not address “ethics” generally;
- has a compliance officer, but does not have an “ethics officer” who does not have “at least three university level, full – term courses in ethics;” or
- has a system for confidential internal reporting of potential or actual misconduct (e.g., a 1-800 “hotline”), but does not have a “neutral ombudsman?”

In each case, we believe the answer is “no.” The current *Organizational Guidelines* properly focus on effective systems directed at preventing criminal behavior. Encouraging organizations to create an “ethics infrastructure” that goes beyond compliance with criminal law may be a laudable goal. However, the presence or absence of such an ethical infrastructure should not have consequences in the very serious context of sentencing those convicted of crimes.

There is no evidence that organizations need more government incentives through directions on criminal sentencing in order to implement compliance assurance programs. The threat of increased criminal penalties should not be used to “encourage” organizations to upgrade their compliance assurance systems into “ethics programs.” The *Organizational Guidelines* have considerable consequences in criminal sentencing. Therefore, it is appropriate that they set out general principles and be free of unnecessary detail so that they are adaptable to a wide range of organizations. They should also avoid vague aspirational directions that are not directly related to detecting and preventing crime.

### III. There Is Already Sufficient Guidance On How To Implement Effective Compliance Assurance Systems

There is no apparent need to expand on the existing provisions on compliance assurance systems contained in the *Organizational Guidelines*. Chapter 8, comment 3(k) properly sets forth the minimum steps that any organization must take to have an “effective program to prevent and detect violations of law.” Such criteria should be applicable to all organizations, public or private, large or small, in all industrial and service sectors. Given the diversity of organizations and subject matter covered by compliance programs, the Commission should not attempt to prescribe additional criteria for compliance programs which are not at the same level of general applicability as the current *Organizational Guidelines*.

Many federal agencies have been developing guidance on compliance assurance systems tailored to specific legislative programs. For example, the Department of Health and Human Services (“HHS”) has launched a number of compliance assurance program initiatives, including:

- *Model Compliance Plan for Clinical Laboratories*, 62 Fed. Reg. 9435 (March 3, 1997).



Honorable Diana E. Murphy  
November 6, 2001  
Page 5

- *Compliance Program Guidance For Medicare+Choice Organizations*, 64 Fed. Reg. 61893 (November 15, 1999).
- *Draft Compliance Program for Individual and Small Group Physician Practices*, 65 Fed. Reg. 36818 (June 12, 2000).

In all, HHS has issued compliance program guidance for nine healthcare industry sectors. 66 Fed. Reg. 31246, 31247, n.3 (June 11, 2001). HHS bases these programs on the Sentencing Guidelines, but tailors them to specific sectors because it “recognizes that there is no ‘one size fits all’ compliance program.” 65 Fed. Reg. at 36819. HHS continues to develop tailored compliance program guidance, recently soliciting comments on compliance programs for the ambulance (65 Fed. Reg. 50204, August 17, 2000) and pharmaceutical industries (66 Fed. Reg. 31246, June 11, 2001).

HHS is not alone in developing detailed guidance. For example:

- The Securities and Exchange Commission recently announced a list of factors, including the existence of internal compliance programs and procedures, that it will take into account in deciding whether to prosecute a matter. *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, (SEC, October 23, 2001).
- The U.S. Department of Justice has developed general prosecutorial policies that take into account an organization’s compliance assurance systems and has also developed such policies for particular types of crimes. *Federal Prosecution of Corporations* (U.S. DoJ, June 16, 1999); *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance* (U.S. DoJ, July, 1991).
- The U.S. Customs Service has established compliance programs, such as one encouraging those engaged in international trade to implement programs to comply with the so-called “drawback” customs requirements, 19 C.F.R. § 191.191 *et. seq.*, and an “importer compliance monitoring program,” 66 Fed. Reg. 38344 (July 23, 2001).
- The Occupational Safety and Health Administration (“OSHA”) has devoted considerable resources to compliance programs, issuing sector-specific guidance such as the *Framework for a Comprehensive Health and Safety Program in Nursing Homes* (U.S. Dept. of Labor/OSHA, January 3, 2001).
- Though the *Organizational Guidelines* do not cover environmental crimes, the U.S. Environmental Protection Agency has provided guidance on what constitutes an effective environmental management system aimed at complying with the law. *See, e.g., Compliance – Focused Environmental Management Systems – Enforcement Agreement Guidance* (U.S. EPA, January 2000); *Incentives for Self – Policing, Discovery, Correction and Prevention of Violations*, 65 Fed. Reg. 19618 (April 11, 2000); *Code of Environmental Management Principles for Federal Agencies*, 61 Fed. Reg. 54062 (October 16, 1996).

Honorable Diana E. Murphy  
November 6, 2001  
Page 6

In some situations, guidance established by federal agencies has extended to enforceable regulations on compliance assurance systems, such as the detailed, systems-oriented, process safety management regulations promulgated by OSHA. 29 C.F.R. § 1910.119.

The private sector has also produced prodigious guidance on designing, evaluating and implementing compliance assurance systems. The past decade has seen an explosion of literature, trade press, conferences, guidance and educational material on not only compliance assurance systems, but also on the more general topic of ethics and integrity programs. This is reflected in the letters that the Commission recently received from organizations such as the Coalition for Ethics and Compliance Initiatives, the Ethics Resource Center and the Alliance for Health Care Integrity.

The growth of interest in compliance assurance systems and ethics programs has not been limited to the United States. For example:

- In 2000, the Organization of Economic Cooperation and Development (“OECD”), to which the U.S. belongs, published its revised *OECD Guidelines for Multinational Organizations*, which establish a “code of conduct” on a range of issues, including labor, bribery, occupational safety and environmental.
- A coalition of private sector and non-governmental organizations has created *Social Accountability 8000*, which applies management systems principles to labor and social issues and is typically implemented in conjunction with accredited third-party auditors to verify conformance.
- The International Labor Organization (“ILO”) this year published its *Guidelines on Occupational Health and Safety Management Systems*.
- A number of guidance documents have been developed on implementing systems to identify and meet environmental obligations. These include the International Organization for Standardization’s ISO 14001 environmental management systems standard (which has been implemented by over a 1,000 facilities in the U.S. and 30,000 world-wide) and a number of sector-specific guidance documents such as the American Chemistry Council’s Responsible Care<sup>®</sup> program and the American Forest & Paper Association’s Sustainable Forestry Initiative.

Multi-national organizations that wish to achieve consistent and acceptable levels of conduct world-wide are looking to these and other documents to assist them implement systems that will be effective in the U.S. and abroad.

This brief review of the landscape on compliance assurance systems reveals that the “user community” does not suffer from an absence of guidance on implementing effective compliance assurance programs. Therefore, there is no “market need” for the Commission to provide even more. Indeed, increasing the level of detail contained in the *Organizational Guidelines* could be counter-productive. More specific guidance on compliance programs has already been devel-



Honorable Diana E. Murphy  
November 6, 2001  
Page 7

oped and continues to be refined in public and private fora more tailored to the needs and interests of specific areas of regulation. Adding detail to the *Organizational Guidelines* could create conflicts with these other efforts, particularly for multi-national organizations that are developing comprehensive world-wide compliance assurance systems.

Increasing the requirements of the *Organizational Guidelines* might also disadvantage the small and medium-sized organizations that constitute the vast majority of U.S. businesses. The current *Organizational Guidelines* offer the flexibility needed to allow organizations of all sizes and types to implement effective compliance programs. This is not a theoretical concern. The Commission's own statistics reveal that in fiscal year 2000, approximately 87% of organizations sentenced under Chapter 8 employed fewer than 200 persons, a figure that was 94% in fiscal year 1999. *Sourcebook of Federal Sentencing Statistics*, Table 54 (U.S. Sentencing Commission 1999 and 2000). In fiscal year 2000, approximately 65% of the sentenced organizations employed fewer than 50 individuals, a value that was almost 80% in fiscal year 1999. *Id.* Narrowing the description of what is acceptable and increasing the number of requirements may create a model that simply cannot be practically implemented by most small and medium-sized organizations. For example, most organizations are not likely to have the resources to have an "ethics officer," a "compliance officer," and a "neutral ombudsman." The "best practices" of the most sophisticated companies should not become the model for what all organizations, no matter how small or limited in resources, must do to avoid serious consequences in the criminal justice system.

#### IV. The Scope, Membership and Goals Of Any Ad Hoc Group Should Be Carefully Defined

If the Commission decides to create an ad hoc advisory group, the American Chemistry Council is interested in participating. It will be important that the membership of such a group be carefully developed to cover a wide range of users. It will be particularly important to include those with practical experience implementing systems in a wide range of organizations, particularly small and medium-sized organizations and other organizations that may have limited resources. It will be very important that the advisory group not become a "best practices" effort or one oriented toward furthering professional interests. The "leading edge" organizations that have already implemented "best practices" do not need changes to the *Organizational Guidelines* to continue down that path. On the other hand, organizations with fewer resources should be implementing effective compliance assurance systems based on the principles in the existing *Organizational Guidelines*, but should not be potentially subject to increased criminal penalties if they cannot attain a "best practices" level. Indeed, "raising the bar" might have the undesirable effect of discouraging many organizations from implementing effective compliance assurance systems.

Honorable Diana E. Murphy  
November 6, 2001  
Page 8

Thank you again for this opportunity to comment on the *Organizational Guidelines*. We look forward to continuing to work with the Commission on these issues. If you have any questions about these comments, you may contact me at 202-736-8111.

Sincerely

A handwritten signature in black ink, appearing to read 'David T. Biente', written over the printed name below it.

David T. Biente

cc: James W. Conrad, Jr. (American Chemistry Council)  
Larry Boggs (General Electric Company)



*Kenneth W. Johnson*  
Ethics and Policy Integration  
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DELIVERED BY FACSIMILE

November 6, 2001

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington DC 20002-8002  
Attn: Public Affairs

Subj: Response to USSC Federal Register Notice 9/19/01

Dear Sir or Madam:

I would like to take this opportunity to offer my encouragement and support for the United States Sentencing Commission to undertake a review of the Federal Sentencing Guidelines for Organizations (FSGO) as set forth in its Federal Register Notice 9/19/01. Rather than set forth another list of specific issues that the Commission might consider in its review, suffice to say that I endorse the specific issues raised in the letters before the Commission, specifically those of the Ethics Resource Center, the Coalition for Ethics and Compliance Initiatives, and Mr. Charles Howard.

The commission is well aware that it has created the *de facto* framework for what defines the minimum requirements for an effective compliance program in the ethics and compliance "industry." As such, the USSC's "Effective Program" elements [USSG §8A1.2, comment, (n 2(k))] provide a structure for discussing both organizational ethics and compliance issues. This structure is widely followed by governmental agencies, organizations and consultants in designing, implementing, enforcing, and assessing ethics and compliance programs.

While they provide the essential core of a developing framework for organizational ethics that addresses organizational behavior beyond compliance, the Commission Chair, Judge Diana Murphy, and others have recognized that more than the minimum framework is required for a compliance program to be truly effective. In our industry, truly effective programs are coming to be referred to as "ethics and compliance programs." But beyond the more robust framework that the letters referred to above suggest that the Commission consider, there are two aspects that an ad hoc advisory group might assist the Commission in understanding and addressing: the applicability of the provisions to Native American Tribal Government and the practical aspects of designing and implementing effective ethics and compliance programs for the micro/small to medium enterprise and the Native American Tribal Governments as well.