



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

**OCT 20 2014**

The Honorable Patti B. Saris  
Chair, United States Sentencing Commission  
Suite 2-500, South Lobby  
One Columbus Circle, NE  
Washington, DC 20002

Dear Chief Judge Saris:

The Department of the Interior (Department) supports the United States Sentencing Commission's (Commission) formation of a Tribal Issues Advisory Group (Advisory Group). The Commission proposes the Advisory Group to investigate issues that have been raised in recent years related to the operation of Federal sentencing guidelines in Indian Country and areas that have significant American Indian populations. In response to the Commission's request for comment, the Department offers its suggestions as to the scope, duration, and potential membership of the proposed Advisory Group.

## Scope

In order to foster confidence in the exercise of Federal criminal jurisdiction in Indian Country, our criminal justice system must earn the trust of the American Indian/Alaska Native (AI/AN) population. A Tribal Issues Advisory Group dedicated to the study of the treatment of AI/AN defendants and victims in the Federal sentencing system is essential to accomplish this goal.

We recommend the Advisory Group address perceptions of sentencing disparities through empirical analysis and qualitative studies. Differences in state and Federal sentences may appear to be unfair to Native Americans, at least to the extent that state sentences for Indians and non-Indians are shorter than Federal sentences for Indians. That said, evaluating Federal sentences in Indian country cases against state sentences requires careful thought because it could be used to undermine Federal Indian affairs policy. An Indian reservation exists in large measure to provide American Indians a sanctuary from state policymaking. In other words, the Indian country system is designed primarily to keep Indians on reservations immune from state policy preferences. Thus, any implication that Federal sentences should be evaluated – or changed – based on what is happening in state proceedings could have the unfortunate effect of applying policy preferences of state actors into Federal Indian country. That would undermine tribal sovereignty and Federal pre-emption of state laws in Indian country.

Using state sentences in this way also risks producing disparities within tribes. Should a Navajo prosecuted for a Federal offense in Arizona be sentenced differently than a Navajo prosecuted for the same Federal offense in New Mexico simply because state sentences differ dramatically

in those jurisdictions? What about members of Standing Rock Sioux prosecuted in North and South Dakota?

It is very important to remember that the Indian country regime was not constituted to protect Indians simply because they are members of a racial minority. This important work is related to their unique status as members of sovereign Indian nations. Pursuant to the Federal trust responsibility to Indian tribes, Federal sentences for Indian country offenses should be developed solely with regard to what is best for Indian tribes and appropriate for Indian defendants, without regard to the sentencing choices made by state policy-makers.

To the extent that state/Federal sentencing disparities exist, that is not to say that they are irrelevant. Wide disparities may say something broadly about Federal sentences, such as that they are unduly lengthy. And perhaps they have been developed without adequate tribal input. These questions deserve consideration.

As part of the analysis, we also ask the Advisory Group to consider the position of the Commission on discounting tribal convictions and violations of tribal court orders of protection in the criminal history of defendants. Currently, state and Federal court convictions are used to calculate the criminal history category, but tribal convictions cannot be used. Tribal court convictions may be considered only for an upward departure. This has the effect of rendering tribal courts inferior to state courts. It also has the effect of undermining accuracy in sentencing. For example, a defendant with a lengthy tribal criminal history may be sentenced like a first-time offender, potentially undermining sentencing goals related to retribution: i.e., the notion that a person with a lengthy criminal history deserves greater punishment and deterrence; the notion that it takes a "greater sentence" to deter a more experienced offender. We ask that the Advisory Group review the concept that tribal convictions, as well as tribal court orders of protection, receive the same consideration as state convictions within the sentencing structure. The Department, however, believes any such recommendation should be informed by input from tribal leaders and tribal courts through consultation.

The Department recommends the study also consider and review alternative sentencing options, including alternatives to incarceration for this population. Our suggestions are proposed within the context of the unique challenges facing AI/AN defendants, victims, and communities. As a whole, this population faces higher crime rates, staggering poverty and unemployment, and widespread substance abuse. These factors significantly impact crime rates and recidivism. Based on data from the U.S. Census 2011 American Community Survey, violent crime rates in Indian Country are more than 2.5 times the national rate and some reservations face more than 20 times the national rate of violence. The 5.2 million AI/AN population in the United States is more likely than the average population to have less than a high school education (21.1 percent vs. 14.1 percent), less than a bachelor's degree (87 percent vs. 71 percent), to be unemployed (10.0 percent vs. 6.5 percent), and to be living in households below the poverty line (24.4 percent vs. 11.6 percent). Further, one of the most prevalent issues facing AI/AN families in Indian Country is the high incidence of untreated substance use disorders.

Because of these challenges, addressing recidivism is a top priority for the AI/AN community. We thus request that the Advisory Group study various alternatives, including but not limited to the following: the Bureau of Indian Affairs Tiwahe Initiative, re-entry support services, expanded drug diversion programs, blended sentences, community accountability programs, and collaborative treatment through the Indian Health Services.

Due to the significant tribal interests involved, we suggest the Advisory Group be allowed to conduct tribal consultation in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Although the Commission may not be strictly within the Executive Branch, the mission of the Advisory Group will benefit from the voice of Indian tribes during the process.

The Department recommends that the Advisory Group develop strategies to recommend to the Commission based upon its analysis and findings. If supported by the findings, we recommend the Advisory Group propose strategies to the Commission to incorporate alternatives in incarceration into the Federal sentencing structure for AI/AN defendants. The Department recommends that the Advisory group develop strategies to suggest to the Commission based upon its analysis and findings.

#### Duration


We hope the proposed Advisory Group will have access to extensive data and adequate time to perform a thorough analysis. The Advisory Group will require additional time to issue substantive findings after collecting, analyzing, and publishing the data. Due to the time required to collect the data, analyze it, and then publish findings, the Department stops short of setting an exact timeframe. We recommend the Advisory Group's term of service extend long enough to allow it enough time to take the crucial step of developing strategies to recommend to the Commission.

#### Membership

The Department suggests the membership of the Advisory Group include members and staff with the education, training, and experience to analyze the sentencing data necessary to produce meaningful recommendations for the Commission's consideration. We recommend diverse representation, including professionals from the AI/AN community and tribal leaders. The Department requests members include the following offices: (1) Bureau of Indian Affairs, Office of Justice Services; (2) Office of the Assistant Secretary – Indian Affairs; (3) Special Assistant U.S. Attorney(s) from Indian Country; (4) Assistant U.S. Attorney(s) from Indian Country; (5) Probation Officer(s) from Indian Country; and (6) Behavioral Health, Office of Clinical and Preventive Services, Indian Health Service. We also support the Department of Justice recommendations for membership on the Advisory Group.

The Department thanks the Commission for its consideration of this important issue and looks forward to working on these issues with the Advisory Group.

Sincerely,



Kevin K. Washburn  
Assistant Secretary – Indian Affairs

cc: Chief Judge Patti B. Saris, Chair  
Chief Judge Ricardo H. Hinojosa, Vice Chair  
Judge Ketanji Brown Jackson, Vice Chair  
Judge Charles R. Breyer, Vice Chair  
Ms. Dabney Friedrich, Commissioner  
Ms. Rachel Barkow, Commissioner  
Judge William H. Pryor, Jr., Commissioner  
Mr. Isaac Fulwood, Jr., Designated Ex-Officio Member  
Mr. Jonathan J. Wroblewski, Designated Ex-Officio Member