THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
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October 10, 2017

United States Sentencing Commission
Tribal Issues Advisory Group
Attn: Public Affairs
One Columbus Circle N.E. Suite 2-500
Washington, D.C. 20002-8002

Re: Comments on Use of Tribal Convictions and Court Protection Orders

Dear Tribal Issues Advisory Group

On behalf of the Navajo Nation (the Nation) this letter provides comments on whether the Chapter Four, Part A of the United States Sentencing Guidelines (USSG) should be amended to include sentences from tribal court convictions under §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

We would like to thank the United States Sentencing Commission for establishing the Tribal Issues Advisory Group (TIAG). We are pleased to see the TIAG addressing this issue and consulting with the tribes on a government-to-government basis on this matter.

The Nation spans 27,000 square miles and is roughly the size of West Virginia. The Nation has a Judicial Branch with eleven district courts and a Navajo Nation Supreme Court. This branch interprets and applies laws from the Navajo Nation Code, as well as Diné Fundamental Law. The Office of the Prosecutor has six attorneys and seven prosecutors/tribal advocates. The Public Defender's Office has seven public defenders. Given our land size, population, and staff numbers, the Nation has not yet implemented expanded jurisdiction such as the Tribal Law and Order Act or the Violence Against Women Act's Special Domestic Violence Criminal Jurisdiction. However, we are working towards implementation.

The use of tribal convictions as the basis for an upward departure in sentencing will be an effective means to deter Navajo citizens from committing crimes, and any form of deterrence is greatly needed and appreciated given the high rates of crime on the Nation. I thus support the use of tribal convictions in upward departures in federal sentencing. For that same reason, I also support the use of tribal convictions in calculating criminal history in federal sentencing.

The Nation will be launching the Tribal Access Program (TAP) on November 13, 2017, which allows us to share certain tribal convictions through agreements. We understand that by using TAP, we implicitly agree to have tribal convictions shared through TAP to be used in upward departures in federal sentencing, and we do not object to that so long as the convictions shared through TAP are formally approved by the Nation. Similarly, for Navajo Nation convictions not shared through TAP, I strongly urge the Commission to respect Navajo

sovereignty by obtaining a formal expression of policy from the Navajo Nation authorizing upward departures for those specific convictions.

I imagine other tribal nations will have their own laws governing who their formal expression of consent should come from. Those laws should be respected in determining which body within each tribe has the authority to make that expression. Indeed, tribal law should provide the criteria used in determining when a tribal government has "formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual." The tribe's attorney general or general counsel can provide confirmation that the appropriate body has provided this expression and can also provide confirmation that the appropriate form of expression has been secured. The form of expression will likely be a council resolution or a formal letter.

Below are comments provided by the Nation's Attorney General and Chief Prosecutor. Our Attorney General and Chief Prosecutor are very familiar with the state of public safety on our Nation, and are well-equipped to provide comments regarding the use of factors.

Navajo Nation Attorney General & Chief Prosecutor Comments

The proposed amendment to the federal sentencing policy statement at §4A1.3 regarding departures based on inadequacy of criminal history is an equitable and prudent approach to include certain tribal court convictions in the computation of criminal history points. Under the current policy statement, tribal court convictions are not counted for purposes of calculating criminal history points and the amendment does not change that. The proposed amendment to §4A1.3 itself is minor, striking out one word. The greatest change to §4A1.3 is to the commentary section. The decision to leave §4A1.3 intact and to provide more guidance to federal courts via the commentary is a judicious approach considering the great variety of tribal court systems and procedures. The guidance provided in the commentary section provides a non-exhaustive list of factors the court can consider in determining whether an upward departure based on a tribal court conviction is appropriate, which gives the federal court a great deal of discretion.

With regard to those factors, a non-exhaustive list is provided in the commentary:

(i)	The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.	*This factor is largely focused upon due process concerns, of which the Tribal Issues Advisory Group was most concerned because of the variety of due process protections and procedures provided by the various tribes. What may keep Navajo Nation tribal convictions from being counted is that not all defendants are represented by counsel, though they have a right to counsel, a right to a jury trial, and other due process protections.* ***This is an appropriate factor.***
(ii)	The Tribe was exercising expanded jurisdiction under the	*This factor would not necessarily weigh against the Navajo Nation given the due process protections*

	Tribal Law and Order Act and the Violence Against Women Reauthorization Act.	*provided in our system. A tribe exercising expanded jurisdiction under TLOA and VAWA would automatically meet certain due process and procedural requirements.* ***This is an appropriate factor.***
(iii)	The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.	*This factor has both a fairness and double jeopardy element to it in that the court is advised not to penalize a defendant twice for the same conduct.* ***This is an appropriate factor.***
(iv)	The conviction is for an offense that otherwise would be counted under §4A1.2.	*Under §4A1.2 the crimes counted include felony and misdemeanors offenses, and crimes of violence. Certain juvenile and petty offenses are not included.* ***This is an appropriate factor.***
(v)	At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.	*This factor is dependent upon the Tribe making its own policy statement. However, regardless whether the Navajo Nation makes a formal statement, a court is not automatically precluded from using the tribal court conviction, as this is a non-exhaustive list of factors.* ***This is an appropriate factor.***

An issue for comment is whether the policy statement should build in a threshold inquiry for tribal court convictions. A threshold inquiry into the due process protections provided by the Tribe is a fair inquiry to make, but it may lead to the exclusion of many tribes. The Navajo Nation has due process protections in place and would have an argument that it meets any threshold requirement. However, not all defendants in the Navajo Nation system are represented by counsel. This is a concern considering the number of tribal defendants who plead guilty at arraignment without counsel.

Factor (v) is an appropriate factor, but seems to go further than is needed. We understand that the criminal history calculation serves as the basis for any departure, and at present tribal convictions are not included in that calculation. Thus it would be unlikely that a tribe would have a formal statement in support of this as it is not presently an option for tribes. It seems the more appropriate factor, or perhaps a factor to be added in addition to this one, is whether at the time the defendant was sentenced the tribe had formally expressed a desire that convictions from its courts should serve as the basis for upward departures in federal sentencing as that is a viable option given this proposed rule change.

An additional factor the court should consider is whether the victim, if there is one, has expressed a desire that the tribal court convictions be counted. This is a concern for which the Federal AUSAs and federal victim advocates could provide some insight.

Lastly, we do not object to the definition of a court protection order deriving from 18 U.S.C. §2266(a-b) or 18 U.S.C. §2265(b). Both definitions include protection orders from tribal courts. Thank you again for allowing us to comment on an important issue concerning public safety on the Navajo Nation.