

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON THE TRIBAL ISSUES ADVISORY  
GROUP REPORT AND RECOMMENDATIONS

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THURSDAY,  
JULY 21, 2016

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The Commission met in the Thurgood Marshall Judiciary Building, One Columbus Circle, NE, Washington, DC, at 11:00 a.m., Patti B. Saris, Chair, presiding.

PRESENT:

- PATTI B. SARIS, Chair
- CHARLES R. BREYER, Vice Chair (by telephone)
- RACHEL E. BARKOW, Commissioner
- DABNEY L. FRIEDRICH, Commissioner
- WILLIAM H. PRYOR, JR., Commissioner
- MICHELLE MORALES, Ex-Officio Commissioner

WITNESSES:

- HONORABLE RALPH R. ERICKSON, Chair, Tribal Issues Advisory Group, Chief U.S. District Judge, District of North Dakota
- HONORABLE ROBERTO A. LANGE, Chair, Drafting Subcommittee, U.S. District Judge, District of South Dakota

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BRENT LEONHARD, Co-chair, Tribal Court  
Convictions/Criminal History/Court  
Protection Orders Subcommittee, Tribal  
Attorney,  
Confederated Tribes of the Umatilla Indian  
Reservation  
BARBARA CREEL, Co-chair, Tribal Court  
Convictions/Criminal History/Court  
Protection Orders Subcommittee, Professor  
of Law, University of New Mexico School of  
Law  
HONORABLE JEFFREY VIKEN, Chair, Sentencing  
Disparities Subcommittee, Chief U.S.  
District Judge, District of South Dakota  
KATHLEEN BLISS QUASULA, Chair, Juvenile  
Justice/Youthful Offenders/Crimes Against  
Children Subcommittee, Kathleen Bliss Law  
Group PLLC

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1 P-R-O-C-E-E-D-I-N-G-S

2 11:01 a.m.

3 CHAIR SARIS: Good morning to  
4 everybody and welcome to the United States  
5 Sentencing Commission's public hearing on the  
6 report and recommendations of the Tribal Issues  
7 Advisory Group, whom we call TIAG.

8 I would like to extend a warm welcome  
9 to all our witnesses, some of whom I know, who  
10 have traveled far to be here today, and to the  
11 public audience that joins us both here in  
12 Washington, D.C.; we're pleased to have so many  
13 people from the public, and also by live stream  
14 via the Internet. We look forward to a  
15 thoughtful and engaging discussion about this  
16 important subject.

17 Today we will hear testimony that  
18 summarizes the important work of the TIAG over  
19 the past year-and-a-half which culminated in the  
20 publication of the TIAG report last month. The  
21 report is available to everyone on the Commission

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1 web site.

2 I look forward to hearing from our  
3 distinguished witnesses which include federal  
4 judges, tribal law experts and tribal members who  
5 bring together their perspectives from Indian  
6 country. The Commission is incredibly grateful  
7 to the witnesses who are here today and for all  
8 the TIAG members for their dedication to their  
9 topics and for their hard work on behalf of the  
10 Commission over the past several months. I'm  
11 sure we'll hear about it, but they've met not  
12 just in Washington, D.C., but more importantly I  
13 think they've been in Bismarck, the Standing Rock  
14 Reservation in North Dakota; the Pascua Yaqui  
15 Reservation in Arizona. And that was important  
16 to the work of TIAG.

17 The Commission formed the TIAG in  
18 February 2015 to study the impact of the  
19 sentencing guidelines on Native American  
20 defendants, victims and tribal communities and to  
21 make recommendations on sentencing and policy  
22 reforms based on the TIAG's analysis. The

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1 Commission charged the TIAG with studying certain  
2 topics such as sentencing disparities and the use  
3 of tribal court convictions in the calculation of  
4 criminal history.

5 The Commission also left open the  
6 possibility of the TIAG to study any other issues  
7 relating to criminal justice in Indian country,  
8 and it's done so. The result is that the TIAG  
9 report includes recommendations for concrete  
10 amendments to the sentencing guidelines as well  
11 as requests for further study by the Commission  
12 and for legislative and policy reform by law  
13 makers and the criminal justice community. It  
14 also highlights the need for more data in certain  
15 areas. We will hear about the specifics of those  
16 recommendations in just a few moments.

17 Let me remind the public audience on  
18 a different subject about where we are in the  
19 amendment cycle. Just last month on June 9th the  
20 Commission published its proposed priorities for  
21 the upcoming year. You can find a full listing  
22 of those priorities on our web site and in the

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1       *Federal Register*.       Publication of those  
2       priorities triggered a public comment period  
3       which will close on July 25th. Let me repeat  
4       that: July 25th, next Monday.

5               We hope to hear not only from today's  
6       witnesses, but also from members of the general  
7       public about the Commission's response to the  
8       TIAG report. We also welcome comment on any of  
9       our proposed priorities and about any other  
10      topics you would like us to address during this  
11      amendment cycle.

12             So let's get going. First, I'd like  
13      to introduce our Vice Chair, Judge Charles R.  
14      Breyer. You don't see him, but he's here with  
15      us. He's on the telephone.

16             Can you hear us?

17             VICE CHAIR BREYER: Yes, I can --

18             CHAIR SARIS: Okay.

19             VICE CHAIR BREYER: -- and I'm with  
20      you audio and in spirit.

21             CHAIR SARIS: Okay. He's a senior  
22      district judge for the Northern District of

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1 California and has served as a United States  
2 district judge since 1998. He joined the  
3 Commission in 2013.

4 Right next to me is Rachel Barkow who  
5 joined the Commission in 2013. She's the Segal  
6 Family Professor of Regulatory Law and Policy at  
7 the New York University School of Law where she  
8 focuses her attention on teaching and research in  
9 criminal and administrative law. She also serves  
10 as the faculty director of the center on the  
11 administration of criminal law at the law school.

12 Next to Commissioner Barkow is Dabney  
13 Friedrich who is also now from California, who's  
14 served on the Commission since 2006. Immediately  
15 prior to her appointment to the Commission she  
16 served as an Associate Counsel at the White  
17 House. She's served as counsel to Chairman Orrin  
18 Hatch of the United States Senate Judiciary  
19 Committee and as an Assistant United States  
20 Attorney first for the Southern District of  
21 California and then for the Eastern District of  
22 Virginia.

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1           And far to the end of the table here  
2           is Judge William H. Pryor, a United States  
3           Circuit Judge for the 11th Circuit Court of  
4           Appeals appointed in 2004. Before his  
5           appointment to the federal bench Judge Pryor  
6           served as attorney general for the State of  
7           Alabama. He joined the Commission in 2013.

8           Finally, to my left is Michelle  
9           Morales who serves as the designated ex-officio  
10          member of the Commission representing the  
11          Department of Justice. She is the acting  
12          director of the Office of Policy and Legislation  
13          in the Criminal Division of the Department. She  
14          first joined that office in 2002 and has served  
15          as its deputy director since 2009. She  
16          previously served as an Assistant United States  
17          Attorney in the District of Puerto Rico.

18          So now let me discuss for a minute the  
19          format of today. This is not our usual time for  
20          the Commission to start a public hearing. We're  
21          usually here bright and early at 8:30 or 9:00,  
22          but we realized that so many people here who are

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1 interested in this come from the West Coast and  
2 a large portion of the Indian country population  
3 might want to chime in, so what we decided to do  
4 is start this later in the day, which I think is  
5 pleasing to everyone in this room.

6 So our hearing will begin with a  
7 presentation of the TIAG report and a summary of  
8 the drafting process. And after that we'll hear  
9 from each of the -- I think there were four TIAG  
10 Subcommittees -- about their recommendations,  
11 followed by closing remarks.

12 So we have asked each witness to limit  
13 their remarks to roughly 10 minutes. Usually we  
14 have these lights that go off. We don't have the  
15 lights today. Nonetheless, you still have my  
16 hook if things go on a little too long. But the  
17 topic is so interesting we've decided to start  
18 with the judges here who know the most about it.  
19 We will take a short break in the middle and  
20 throughout the hearing the Commission will ask  
21 questions and we'll jump in on topics. We're not  
22 a shy group.

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1           So let's get started. And I start off  
2 with our first panel which will provide an  
3 overview of the TIAG and the drafting process,  
4 and it's comprised of two federal judges from  
5 Indian country who are well known to us. Judge  
6 Ralph Erickson is the chair of the TIAG and Chief  
7 United States District Judge of the District of  
8 North Dakota. We've heard from Judge Erickson  
9 before on other topics. He just came to our  
10 training session.

11           And we welcome you back.

12           And Judge Roberto A. Lange, whom we  
13 call Bob, chaired the Drafting Subcommittee for  
14 the TIAG, which means we can thank him for the  
15 monumental task of putting the report together.  
16 I don't know why Judge Lange came back here. The  
17 last time he came and testified in front of us he  
18 got stuck in a snowstorm over Valentine's Day and  
19 wasn't home with his family. So I don't know --

20           JUDGE LANGE: It made me feel at home  
21 coming from South Dakota.

22           CHAIR SARIS: Yes.

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1 (Laughter.)

2 CHAIR SARIS: So I thank you for  
3 risking it coming back. We tried for the summer  
4 so this wouldn't happen to you again. And  
5 welcome back.

6 The floor is yours, Judge Erickson.

7 JUDGE ERICKSON: Thank you, Chairman.

8 I want to start off by just thanking  
9 the Commission for the opportunity to serve in  
10 this capacity. I will start by telling you what  
11 I told the members of the TIAG when we first met  
12 at the very first meeting, and that is that I  
13 fundamentally and from the deepest part of my  
14 heart believe this is the most important  
15 professional work I have ever done and am likely  
16 ever to do in my career as a federal judge. And  
17 I say that with full knowledge that every day I  
18 make decisions that deeply impact people's lives.

19 But the reality of the relationship  
20 between the tribal nation and the United States  
21 and the relationship between the United States  
22 Sentencing Commission and sentencing in Indian

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1 country is such that this is a once in a lifetime  
2 opportunity to work together to improve the  
3 quality of life for tribal people in a way that  
4 can make a substantial difference. And I thank  
5 you from the bottom of my heart for the  
6 opportunity for our Commission, our Committee to  
7 go about this very important work.

8 I also want to thank you for the time  
9 and the effort that you put into selecting a  
10 diverse group of people who brought to the TIAG  
11 a broad background. If you think about the group  
12 of people that you selected for us to work with,  
13 you gave us five United States judges, a  
14 representative from the Department of the  
15 Interior, two representatives from the Department  
16 of Justice, a representative from the Office of  
17 the Federal Public Defenders, a tribal chairman,  
18 two tribal judges, a member of the Nevada Indian  
19 Commission, a victim specialist with the Bureau  
20 of Indian Affairs, three academics, tribal  
21 counsel, a private practitioner, a retired tribal  
22 police chief and director of public safety and

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1 liaisons from the Practitioners Advisory Group,  
2 the Probation Officers Advisory Group and the  
3 Victims Advisory Group.

4 All of these people have been very  
5 active in Indian country issues over a period of  
6 years. All of them were known to me by at least  
7 reputation. And when I read their writings, they  
8 staked out a broad diversity of opinions and  
9 background. And when Chair Saris asked me to  
10 take this position, I agreed because I could  
11 think of no reason that it was possible to say  
12 no, but I did so with great trepidation because  
13 these were committed people who had a long-  
14 standing history in Indian country and who were  
15 extremely committed to moving forward. And with  
16 that broad diversity of strong opinions I was  
17 quite fearful that it might be hard to build a  
18 consensus.

19 What I found instead was that you had  
20 selected a group of people that shared two  
21 fundamental traits that I think are important as  
22 we think about sentencing in Indian country: No.

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1       1, each of them was committed to recognizing,  
2       understanding and fostering the pre-  
3       constitutional nature of these sovereign  
4       governments and these sovereign people and they  
5       were committed in doing what was best for the  
6       people who lived in Indian country.

7               I probably should explain that  
8       "Indians" and "Indian country," while not  
9       politically correct terms, are terms of art and  
10      they are in the statute and that's why we refer  
11      to those titles.

12             The group of people you gave me to  
13      work with were absolutely phenomenal. I have  
14      never worked with a group of people that were  
15      better in my entire life. I say the same thing  
16      about the staff. There was no task that we asked  
17      them to undertake that they didn't undertake with  
18      great alacrity and with tremendous skill and  
19      perseverance. We kept asking, we kept pushing,  
20      we kept asking for things that maybe were not  
21      very fair, and yet they responded cheerfully, and  
22      to the best of their efforts they got all the

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1 information that was necessary. You should be  
2 justly proud of the people that you employ. They  
3 are fantastic to a person.

4 Now, our group met monthly and we met  
5 three times in person. We met once here in  
6 Washington, D.C., once in North Dakota spending  
7 time at the Standing Rock Reservation and in  
8 Bismarck, and we met once in Arizona at the Pascua  
9 Yaqui Reservation. We had an opportunity to see  
10 tribal governments function and to get  
11 information from our experiences in holding those  
12 hearings. We also held a consultation where we  
13 invited Indian people from around the country to  
14 contribute to our work.

15 The people who report from the  
16 substantive committees are going to talk in more  
17 detail about both those things, so I won't go  
18 into great detail about it, but I think it's  
19 important for us to understand that Indian  
20 Nations are in a trust relationship with the  
21 United States. They are pre-constitutional  
22 sovereigns. They have an interest that is unlike

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1 anything else that exists in our legal system.  
2 And consultation and respect for their customs  
3 and traditions is inherent in any type of  
4 sentencing process that we want to consider and  
5 we think it's extremely important that those  
6 efforts continue to be of paramount importance to  
7 the Commission.

8 The way that the Committee was  
9 organized, we formed four substantive working  
10 groups. We had a working group that was the  
11 Tribal/Federal Working Group, we had the Tribal  
12 Court Convictions, Criminal History, Court  
13 Protection Orders Working Group. We had the  
14 Sentencing Disparities Working Group. We had a  
15 Juvenile Justice, Youthful Offenders, Crimes  
16 Against Children Working Group. Each of the  
17 substantive committees met at least monthly in  
18 addition to the monthly meetings that were held  
19 telephonically or in person.

20 And so, over this 18-month period we  
21 have gotten to know each other exceptionally well  
22 and a lot of hard work was done. I'm proud of

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1 the report. I think that it pulls together a  
2 broad diversity of opinion and I'm exceptionally  
3 proud of the fact that we were able to produce a  
4 report that has not resulted in any minority  
5 reports or minority positions, which is difficult  
6 when you look at the interests that this party  
7 represents.

8 And I want to thank from the bottom of  
9 my heart the members of the TIAG for being willing  
10 to sacrifice their own personal stakeholder  
11 interests to look towards doing what was best for  
12 the people of Indian country.

13 I think that that's really a summary  
14 of what we did. My time is nearly up, but I do  
15 want to add one last thing. I'm sure most of you  
16 are familiar with Judge Myron Bright of the  
17 Eighth Circuit. He's a 98-year-old senior judge.  
18 He called me to his chambers at the beginning of  
19 this week and he wanted to tell me that there's  
20 something that I should bring to you, and I told  
21 him I would do so. And I do so because I think  
22 it's important as a piece of information.

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1           What he wanted me to point out was  
2           that the lack of statistical data should not be  
3           confused with a lack of evidence and that the  
4           fact that there is anecdotal evidence and  
5           evidence from opinions and evidence from people  
6           who reside in Indian country that they believe  
7           that there is significant sentencing disparity,  
8           that that's important, because it's nearly  
9           universally held as a belief. And as we traveled  
10          around Indian Country, it seems that everyone  
11          believes that there is some sentencing disparity.

12                 When we first started this process one  
13          of the things that I hoped to discover was each  
14          of us works in Indian country, but we each work  
15          with two or three tribal nations. And as a  
16          result, we have sort of a deep experience in  
17          Indian country, but a narrow experience. And the  
18          question that we are confronted with frequently  
19          is whether or not our personal experiences are  
20          normative or whether or not they are parochial.

21                 And one of the things that we were  
22          looking for statistical data for was to answer

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1 that question, because we do know that while  
2 there's universal accord that sentencing  
3 disparity exists, there is not universal  
4 acceptance as to what that disparity is. In some  
5 parts of the country there's a perception that  
6 the disparity is that federal sentences are short  
7 and in some that they're long. And in our part  
8 of the world it's firmly believed that the Indian  
9 country sentences are uniformly long.

10 It is also true that in the Southwest  
11 there's more of a split and the inability to get  
12 the data has made that difficult for us to really  
13 tease out. Our hope is that at some point the  
14 data can be developed in a way that allows us to  
15 tease those things out.

16 Having said that, I don't want to  
17 distract from the meaningful work that we have  
18 accomplished and that we have recommended some  
19 concrete changes to the sentencing guidelines,  
20 which we think are important. We have  
21 recommended some things that only Congress can  
22 fix and the question becomes how do we move

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1 forward from here? And we have also identified  
2 at least one issue with juvenile and youthful  
3 offenders that we think is much broader than just  
4 an Indian country issue, although for juvenile  
5 offenders they are primarily Indian country  
6 juveniles that we see.

7 I think I've gone on longer than I  
8 should. I want to just once again close by  
9 thanking you and I'll let Judge Lange explain to  
10 you the drafting process.

11 JUDGE LANGE: All right. Thank you,  
12 Judge Erickson.

13 I want to echo Judge Erickson's  
14 gratitude to the Commission and to the members of  
15 the TIAG for the work that was done.

16 Drafting for a group of 20 different  
17 committee members is a challenge. And I did not  
18 do it alone. There was a Drafting Committee that  
19 I worked with comprised of representatives of all  
20 four of the working groups. Diane Humetewa,  
21 who's a district court judge in the District of  
22 Arizona, and Neil Fulton, a federal public

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1 defender for North and South Dakota represented  
2 the group that dealt with the tribal court  
3 convictions. Bill Boyum, who is a supreme court  
4 judge for the Cherokee Nation worked with me from  
5 the Tribal/Federal Working Group. Mike Cotter,  
6 U.S. Attorney in the District of Montana,  
7 represented the Sentencing Disparities Group.  
8 And Angela Campbell, who's a private  
9 practitioner, worked for the Juvenile Justice  
10 Group.

11 We formed relatively early in the  
12 process and did the status update for all of you  
13 late last year. We chose to do the status update  
14 reporting from the four working groups, and that  
15 became the format as you see in the final report  
16 of the TIAG. The final report initially was  
17 drafted after our Arizona meeting in February.  
18 The committee did some of the work. Some of the  
19 work was from the various working groups as well.

20 There was a process as you'd expect of  
21 the drafts going back to the working groups for  
22 feedback, other revisions that were done.

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1       Ultimately this was presented to the entire TIAG  
2       in March -- or excuse me, in April with final  
3       revisions. The sentencing disparity section was  
4       the latest to come together because there was  
5       some delay and some hope that there would be  
6       further data that could be used to make more  
7       specific recommendations. Ultimately the final  
8       draft was approved in May.

9               I would say that this draft represents  
10       a consensus of all of the members. There is one  
11       place, and that is the treatment of tribal court  
12       convictions, where I think it's more appropriate  
13       to describe it as a substantial majority joining  
14       in that recommendation. But it was an  
15       interesting process, one that I had a great deal  
16       of help with, and in particular I would like to  
17       thank Nicole Snyder for her help in this regard.  
18       She and my judicial assistant Leslie Hicks did  
19       much of the work in terms of just making sure the  
20       changes got made. And I think as a group we're  
21       comfortable and proud of the final outcome.

22               CHAIR    SARIS:       Are    there    any

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1 questions? Yes, go ahead.

2 COMMISSIONER BARKOW: Thanks very  
3 much for this report, which is excellent.

4 It's okay -- we're on the topic of the  
5 report if we want to ask --

6 (Simultaneous speaking.)

7 CHAIR SARIS: Yes, although I think  
8 we're going to have -- the subcommittees are  
9 going to come present on -- I think, right, on  
10 the substantive recommendations?

11 JUDGE ERICKSON: Right. Right.

12 COMMISSIONER BARKOW: I guess I  
13 wanted to get a little bit of a sense of the  
14 majority in favor of the use of tribal  
15 convictions. I guess if there was a spectrum of  
16 views from the group. To the extent there wasn't  
17 absolute unanimity, what kinds of things might  
18 have been the source of the -- where you --

19 JUDGE ERICKSON: Well, I --

20 COMMISSIONER BARKOW: -- couldn't get  
21 complete consensus, I guess.

22 JUDGE ERICKSON: Yes, let me

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1 address --

2 COMMISSIONER BARKOW: If it's okay  
3 to --

4 (Simultaneous speaking.)

5 JUDGE ERICKSON: Yes, I think that if  
6 you look at the inner workings of the  
7 committee --

8 CHAIR SARIS: But we'll probably hear  
9 about it again, right?

10 JUDGE ERICKSON: Yes, we will.

11 CHAIR SARIS: That's fine.

12 JUDGE ERICKSON: And I'll be quite  
13 brief on this.

14 I think that if you think about what  
15 happens with tribal court convictions, there  
16 really are two fundamental questions that come to  
17 play. The first question is what are the  
18 attributes of tribal sovereignty that are tied up  
19 in the tribal court and what dignity should be  
20 afforded to the tribal courts and the tribal  
21 court judgments? And right now we treat them as  
22 we would foreign courts. And so, there's that

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1 issue.

2 And so, there is a concern among some  
3 of our members, a minority, that would put a  
4 higher priority on the tribal court's dignity.  
5 There's another group of people that -- and this  
6 would be a clear majority of the committee,  
7 nearly two-thirds, not quite, that says, well,  
8 you know, the problem with that is that tribal  
9 courts are very different. There are over 500  
10 tribal nations, over 300 tribal courts.

11 The tribal courts range from being  
12 very traditional, in which there would be very  
13 few parameters set that we would recognize as  
14 being consonant with the ordinary due process in  
15 a western system. They range to a set of tribal  
16 courts that are very nearly western in their  
17 nature and have a full panoply of due process  
18 rights. And frankly, they function at as high  
19 or higher a level of due process as any state  
20 court.

21 And what happens with all of us who  
22 serve in this capacity is we come from different

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1 areas where we have different experiences and it  
2 depends on what the courts look like where you  
3 are.

4 Now amongst the majority there was a  
5 concern that if we just said all tribal  
6 convictions should score regardless, that there  
7 would be a tendency to have much higher criminal  
8 history scores and it would exacerbate the  
9 disparity that already exists in Indian country  
10 sentencing.

11 On the other side there was a  
12 recognition while that may be possible that it  
13 was not consonant or consistent with tribal  
14 dignity as sovereign nations to not treat their  
15 convictions with that type of dignity. As we  
16 went about the business of resolving it; and  
17 you'll hear a lot more about it, we drafted what  
18 we perceived to be a way to make it work for every  
19 single tribe because it gives the district judge  
20 the opportunity to really evaluate the tribal  
21 courts that have imposed those prior judgments  
22 and how they should be viewed.

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1           The other thing that you just should  
2           be aware of is that the tribal courts have a broad  
3           variation between the nature of the record  
4           keeping that they have, some of which have  
5           fantastic records that are better or as good as  
6           any state in the union. Others keep almost no  
7           records. You could write them on the back of a  
8           matchbook cover. And so that's a problem.

9           Did I answer the question, Bob?

10           JUDGE LANGE: Absolutely. And I  
11           would add to that some tribes do provide criminal  
12           history to the presentence writers. Some tribes  
13           will not do so because they have a sense that  
14           their members are being treated too harshly. And  
15           I happen to have four, sometimes five tribes that  
16           have members whom I routinely sentence. And I  
17           have both situations. I have one tribe that will  
18           not provide criminal history on defendants at  
19           all. Some tribes that do. So that would create  
20           a disparity if it's counted uniformly in my own  
21           case law.

22           And I think it was unanimous among the

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1 five federal judges that it ought not to be  
2 automatically counted, but rather sort of  
3 guidance for where an upward departure is  
4 appropriate in criminal history category.

5 JUDGE ERICKSON: Thank you.

6 CHAIR SARIS: I know you've  
7 emphasized the importance of consultation, and I  
8 have been thrilled that you've gone into Indian  
9 country and that basically such a broad array of  
10 people were consulted as part of this report. As  
11 we as the Commission go forward -- the issue of  
12 consultation is daunting because there are so  
13 many tribes; and there are 500 tribes and  
14 probably, as you say, in huge swaths of the  
15 country, different regions with different points  
16 of view -- what kinds of things would you think  
17 consultation should involve and how?

18 JUDGE ERICKSON: Well, we consulted  
19 with -- every federally-recognized tribe was  
20 given notice as well as other people who are  
21 academics interested in Indian country. We sent  
22 out notice. We had the cooperation of the

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1 Department of the Interior, Bureau of Indian  
2 Affairs in sending out notice. And we held a  
3 telephone consultation, which actually we felt  
4 was really very useful. We heard from a number  
5 of people from around the country. And so, I  
6 think that that's a tool that you can use on a --  
7 with more routine matters. If in --

8 CHAIR SARIS: Like a listserv? Is  
9 that what it is --

10 JUDGE ERICKSON: Yes, well, it was  
11 just a -- Nicole can probably answer this, but  
12 for us it looked like a big giant conference call  
13 where we were all in different parts of the  
14 country on our telephones and answering  
15 questions. And I'm afraid that the technology  
16 piece was sort of beyond me, but I called the  
17 consultation to order. I made a brief statement.  
18 People asked questions from all over the country,  
19 some of whom I know, some of whom I don't know.  
20 And we had a number of people from the -- and  
21 really we're kind of stealing the thunder of the  
22 federal committee, and so I should let them

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1 explain it.

2 JUDGE LANGE: That's okay.

3 JUDGE ERICKSON: But we answered the  
4 questions and they made statements and it was  
5 really a very kind of -- for us relatively  
6 painless. You'll have to ask your staff how  
7 painful it was for them, because they sure made  
8 it look painless from where we sat.

9 I do think that there are issues that  
10 are uniquely tied to Indian country that really  
11 the Commission ought to consider meeting in one  
12 of the larger Indian country states when those  
13 sorts of issues come to bear, because I do think  
14 that -- for example, if you look at it, if you  
15 decide to change the sexual assault guidelines,  
16 almost all the sexual assault cases that we see  
17 in federal court come out of Indian country and  
18 has unique application there and we ought to look  
19 at consulting on a more direct basis there.

20 And if you think about the Indian  
21 Nations, some of them are huge and it becomes  
22 relatively easy to identify where it might make

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1 sense to hold a field hearing. But on the  
2 ordinary run-of-the-mill kinds of things that  
3 effect Indian country that are not sort of  
4 substantial changes, it seems to me that this  
5 sort of telephonic consultation would be  
6 appropriate.

7 CHAIR SARIS: All right. Well, thank  
8 you very much.

9 For our next panel we will hear  
10 recommendations from two of the TIAG  
11 subcommittees. First we will again hear from  
12 Judge Roberto Lange about the recommendation of  
13 the TIAG's Tribal/Federal Working Group. Next  
14 we will hear from the co-chairs of the Tribal  
15 Court Convictions and Court Protection Orders  
16 Subcommittee.

17 Barbara Creel is professor of law at  
18 the University of New Mexico School of Law where  
19 she directs the Southwest Indian Law Clinic. Ms.  
20 Creel is also a member of the Pueblo Jemez Tribe.

21 Brent Leonhard is the tribal attorney  
22 for the Confederated Tribes of the Umatilla

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1 Indian Reservation.

2 We welcome you. Thank you for coming  
3 such a long distance and we're excited to hear  
4 your comments. Thank you.

5 For this Judge Erickson is staying as  
6 the -- somebody to ask questions of and he'll be  
7 here to chime in. So welcome to all of you.

8 So I don't know if you've agreed which  
9 order to go in.

10 JUDGE ERICKSON: Yes, Judge Lange is  
11 going to present on behalf of the Tribal and  
12 Federal Working Group. I would just note that  
13 Judge Morris from the District of Montana and  
14 Judge Boyum, who's on the Supreme Court of the  
15 Eastern Band of Cherokee Indians are both  
16 unavailable to be here, and they were the chairs  
17 of this working group. But Bob was on the  
18 working group.

19 And so, Judge Lange?

20 JUDGE LANGE: Thank you, Judge  
21 Erickson.

22 In addition to Judge Morris and Judge

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1 Boyum on this working group were Wendy Bremmer,  
2 who is with the BIA as a victim's assistant; Kevin  
3 Washburn, who was at the Department of the  
4 Interior and now I believe is at the University  
5 of New Mexico; fascinating guy, really enjoyed  
6 Kevin; and Tracy Toulou, who's with the  
7 Department of Justice.

8 I think it's important to be mindful  
9 in discussing a tribal/federal working  
10 relationship of the history that exists in this  
11 nation of the treatment of Native Americans and  
12 tribal groups. It has been a history where the  
13 Federal Government has imposed its will for the  
14 most part on Native Americans and on tribes  
15 rather than working together and consulting  
16 together. There is an outline that I believe was  
17 submitted separately regarding the history. I  
18 won't belabor that. That's not our purpose in  
19 being here.

20 But with that background this working  
21 group thought that it would be a valuable  
22 recommendation to the Sentencing Commission to

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1 consider a standing advisory group on Native  
2 American issues and on Indian sentencing. We  
3 began by calling this the mini-TIAG idea. Our  
4 charter included no more than 20 members, and we  
5 thought a group of 6 to 8 individuals with a  
6 cross-section of a federal judge, a Department of  
7 the Interior, Department of Justice  
8 representative, federal public defender, tribal  
9 judge and a couple of at-large members, hopefully  
10 Native Americans, would be a good cross-section  
11 to work with.

12 And the idea of that group would be to  
13 not only advise the Sentencing Commission on  
14 issues that particularly affect Indian country,  
15 but also perhaps to help or actually do  
16 consultation with Indian tribes as was done by  
17 the TIAG as a whole.

18 The thought then was that perhaps  
19 every decade or so there could be a reformulation  
20 of a group like this to study in particular  
21 possible sentencing disparities and make  
22 recommendations for changes in the guidelines.

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1 As you know from reading the report and will hear  
2 later, the TIAG was frustrated with the absence  
3 of the ability to do good comparisons of possible  
4 sentencing disparities.

5 And then the other suggestion that  
6 Judge Erickson has mentioned, the consideration  
7 of having hearings in or near Indian country for  
8 issues -- revisions of the guidelines that  
9 particularly affect Indian country.

10 There were some more general  
11 recommendations that this group came up with;  
12 this was a very wide-thinking group, about how we  
13 could improve relations with tribes and Native  
14 Americans generally. And I know there's been  
15 some communication between Judge Erickson and the  
16 FJC and AO about establishing a working group.  
17 Some of the federal judges discussed mentoring  
18 new judges who would take the bench in Indian  
19 country districts, and there was discussion also  
20 about encouraging greater law enforcement in  
21 Indian country where non-Indians, whites, non-  
22 Indians offend against Indians possibly even

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1 through encouraging greater use of misdemeanor  
2 CVBs.

3 That's the summary of the  
4 Tribal/Federal Working Group recommendations.

5 JUDGE ERICKSON: Any questions  
6 related to that?

7 CHAIR SARIS: Okay. I think what  
8 we'll do is just take everybody and then we'd  
9 jump in and ask. That way we get through  
10 everybody. Is that okay?

11 JUDGE ERICKSON: That's fine.

12 CHAIR SARIS: Okay.

13 JUDGE ERICKSON: The next report will  
14 come from the Tribal Convictions and Protection  
15 Orders Working Group. Brent and Barbara will  
16 report on that.

17 I don't know if you've figured out  
18 who's going to speak first.

19 MR. LEONHARD: I think I'll go first.

20 JUDGE ERICKSON: All right. The one  
21 thing I would say, if I've mis-spoken on anything  
22 and it needs to be corrected, feel free to correct

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1 me at any time. Okay?

2 MR. LEONHARD: Great.

3 JUDGE ERICKSON: Very good.

4 MR. LEONHARD: So I'm Brent Leonhard.  
5 I'm an attorney with the Office of Legal Counsel  
6 for the Confederated Tribes of the Umatilla  
7 Indian Reservation. By way of background I've  
8 been a state prosecutor, head of the prosecution  
9 unit at White Mountain Apache, head public  
10 defender at Colville Tribe, and a Special  
11 Assistant United States Attorney in Arizona and  
12 Oregon. Umatilla was the first jurisdiction in  
13 the nation along with the State of Ohio to  
14 implement sex offender registration under the  
15 Adam Walsh Act. It was the first tribe to  
16 implement felony sentencing under the Tribal Law  
17 and Order Act of 2010, and the first tribe along  
18 with Tulalip and possibly Pascua Yaqui to be  
19 authorized to exercise criminal jurisdiction  
20 authority of non-Indians in domestic violence  
21 cases under VAWA.

22 So there's a great deal of interest

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1 and concern about public safety in Indian  
2 country, and coming into this group on these  
3 issues my position has been strongly that tribal  
4 court convictions should be considered  
5 automatically in calculating sentences the same  
6 way as state court convictions because if you go  
7 to Umatilla tribal court, all the due process  
8 that are given them are the same you'll find in  
9 any municipal or state court system, if not more.

10 And it doesn't matter if it's a  
11 felony, misdemeanor, Indian or non-Indian. We  
12 give them all the same rights. And in fact,  
13 anybody who wants an attorney gets an attorney  
14 whether or not they have the income. So there's  
15 a great deal that you'll find in tribal court  
16 that provides all the protections you'd be  
17 concerned about.

18 However, coming into this group it was  
19 immediately apparent within our subcommittee that  
20 there's a broad diversity of views from people  
21 from a broad diversity of backgrounds, and in  
22 fact diametrically opposed positions. And we

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1 were tasked with trying to come to a consensus on  
2 a recommendation for the Commission, and from our  
3 sub-group I think we did. It was a difficult  
4 task. TIAG as a whole I think a majority did.

5 So the recommendation is that instead  
6 of automatically counting under 4A1.2 to continue  
7 to allow for enhancements under 4A1.3. However  
8 it gives some guidance to federal judges as to  
9 what to look for in those circumstances. And  
10 there are five factors that we've laid out. And  
11 one is whether or not due process, like the U.S.  
12 Constitution due process rights have been  
13 guaranteed.

14 Second is if the conviction itself was  
15 pursuant to the Tribal Law and Order Act or VAWA,  
16 2013. Those mandate that all of those due  
17 process, federal constitutional due process  
18 rights are in place.

19 Third is whether or not it's already  
20 been counted. So you can have tribal court crime  
21 occur on the reservation, tribe prosecutes it,  
22 gets a conviction and then the feds later take it

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1 and get a conviction for the same crime.  
2 Shouldn't be counted twice.

3 Fourth is whether or not if it were a  
4 state conviction it would have been counted under  
5 4A1.2. So public intoxication, those sorts of  
6 crimes wouldn't be counted.

7 And fifth is I think the most  
8 important one to me. It reflects a real  
9 understanding of tribal nations and a real  
10 respect for tribal nations, and that is what the  
11 tribal nation itself would like done with its own  
12 court convictions. I think that they're the most  
13 capable of deciding whether or not it's  
14 appropriate, they're the most likely to reflect  
15 what the community wants and expects, and they're  
16 from the local jurisdiction where these occurred.  
17 So I think that's a very important factor.

18 However, our group has not made any  
19 one factor determinative. It isn't exhaustive,  
20 but I think those are helpful factors for any  
21 federal judge to look to. So we've made that  
22 recommendation.

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1           In regard to protection orders, it was  
2           a difficult issue as well. I mean, as to whether  
3           there should be enhancements for categorical or  
4           for particular crimes based on an underlying  
5           violation of a protection order. It's a much  
6           larger issue than TIAG to address, and we don't  
7           feel terribly comfortable addressing that  
8           directly.

9           On the question of whether that will  
10          disparately impact Indian defendants in the  
11          federal system, the reality is we just don't have  
12          any data. We don't know how many tribal court  
13          convictions get considered, how they're  
14          considered, if it's consistent in obtaining them,  
15          any of that.

16          So our recommendation is to pursue  
17          more data so that that can be looked at in the  
18          future. However, there is one recommendation,  
19          and that is to actually define what a protection  
20          order is under the federal guidelines. And it's  
21          a simple way to do it and it would treat state,  
22          tribal and territorial protection orders equally.

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1           So the definition would refer back to  
2       18 USC 2266, which is a definition of protection  
3       order under the full faith and credit provisions  
4       of federal statute, as well as 2265, which  
5       guarantees due process was in place for those  
6       protection orders, which is really simple of  
7       jurisdiction, notice and opportunity to be heard.  
8       I think those are reasonable things and I think  
9       that would be helpful in making it very clear  
10      that tribal, state and federal -- or tribal,  
11      state and territorial protection orders are  
12      treated equally.

13           So that's what I have to present. I  
14      want to thank you for allowing me to be part of  
15      this group. It was a diverse group. It was  
16      insightful for me to hear from people who are  
17      just as passionate on these issues and  
18      diametrically opposed to my position, so it was  
19      good.

20           CHAIR SARIS: Professor Creel?

21           MS. CREEL: Thank you. I'm Barbara  
22      Creel, an enrolled member of the Pueblo of Jemez,

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1 one of the 19 Indian pueblos in New Mexico.

2 As a Native American Indian I am one  
3 of the few people that can be subjected to legal  
4 double jeopardy, dual successive prosecutions in  
5 tribal and federal court for the same offense.  
6 I also legally can be denied indigent defense  
7 counsel and imprisoned. Also, those un-  
8 counseled prior convictions can be used against  
9 me in a federal prosecution. Take these ideals  
10 and try to square them with the United States  
11 Constitutional principles of due process and the  
12 U.S. Sentencing Commission's goals of fairness  
13 and to remove disparity, increase predictability  
14 and justice for all.

15 Coupled with the statistics that  
16 Native Americans face: overall incarceration in  
17 federal court, juveniles, men and women outside  
18 of our representation in the United States  
19 population, as well as the violent crime  
20 statistics that we face, both men and women are  
21 subjected to violence at a greater rate than any  
22 other population in the United States.

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1           These are not the statistics that  
2           define me as a person or my people, but they are  
3           a reality in the United States. And my co-  
4           counsel, or my co-chair has deftly tried to  
5           explain our roles as attorneys. And my role as  
6           a former Assistant Federal Public Defender and as  
7           a mother and a tribal member came into play when  
8           I analyzed the data that was given to us by the  
9           Sentencing Commission, as well as the cases and  
10          the stories that we hear from the people in the  
11          field. We had a shared commitment to separate  
12          sovereignty, tribal sovereignty and respect for  
13          tribal courts and the work the tribal courts do  
14          in prosecuting some serious crime on the  
15          reservation.

16                 I tried to decide what word I was  
17                 going to use. "Diametrically opposed" kept  
18                 coming up for me as well. We were on opposite  
19                 sides of the spectrum on how to both promote that  
20                 respect for tribes and tribal sovereignty when  
21                 you take it outside to a foreign government in  
22                 the United States. That's when my law professor

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1 and my federal defender experience kicked in.  
2 And looking at the United States Constitution and  
3 what is afforded for people who are not citizens  
4 of the United States, I thought that Indian  
5 citizens should at least have that much.

6 We had some very difficult  
7 conversations among our working group that  
8 included Mr. Ed Reina who was the Director of  
9 Public Safety at Tohono O'odham formerly, Judge  
10 Diane Humetewa, a member of the Hopi Nation,  
11 federal defender Neil Fulton, who saw this work  
12 every day in tribal and federal court in North  
13 and South Dakota, myself, Mr. Leonhard and a  
14 victim's advocate Mr. Mike Andrews. And we  
15 wrestled with the ideas both as our  
16 responsibility as attorneys and representatives  
17 of our community, as well as our other  
18 commitments.

19 One of the things that happened, as  
20 Chief Judge Erickson explained, was that tribal  
21 sovereignty has gotten tangled up with respect  
22 for the decisions of the tribal government. What

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1 we tried to do is untangle those two and look at  
2 what the United States Constitution affords to  
3 people throughout the United States and we found  
4 some help in 18 USC 2265 and 66 that defined the  
5 due process that should be afforded for a court  
6 order, a protection order.

7 And so, our committee's charge to look  
8 at tribal convictions, criminal history and  
9 protection orders dovetailed quite well together.  
10 And we wanted to afford at least that level of  
11 due process for Native Americans when looking at  
12 both tribal criminal history and tribal  
13 protection orders.

14 I can tell you that I do have a deep  
15 respect for my sovereign government and their  
16 decision making, but we have such a vast array of  
17 tribes in the United States. According to the  
18 National Archives when the Indian Reorganization  
19 Act was passed in 1934, about 200 tribes adopted  
20 a constitutional-based government out of about  
21 360 at the time, and that constitutional  
22 government mirrored the United States, which is

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1 very different than a traditional government that  
2 I come from and my people know.

3 The Pueblo of Jemez was under three  
4 separate sovereigns: Spain, Mexico and the United  
5 States, and has kept their -- our government  
6 intact throughout time. It's very different than  
7 a United States mirror constitutional government.  
8 And at the time in 1934 the laws on the books of  
9 the United States prohibited attorneys for  
10 Indians in courts of federal regulations and in  
11 tribal courts. That stayed on the books until  
12 1961. And so, we have a very different history  
13 with the United States and the imposition of what  
14 is called justice.

15 I want to thank Judge Erickson and  
16 Judge Viken for their foresight and for their  
17 commitment. When I work with Native people in  
18 Indian country; and there are -- over half of the  
19 federal judicial districts include Indian  
20 country; most of them are in the West, it's really  
21 difficult to feel like there is justice for all,  
22 even the appearance of justice when you see the

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1 degradation of rights under the United States  
2 Constitution. And Chief Judge Erickson and Chief  
3 Judge Viken have given me hope that there are  
4 people that are endeavoring to understand the  
5 issues that tribal people face and the difficulty  
6 under federal jurisdiction.

7 And I want to also thank my co-chair  
8 Brent Leonhard for his unwavering commitment to  
9 the respect given to the Umatilla Tribe as well  
10 as other tribes that are working very hard in  
11 Indian country and the other council members or  
12 committee members who were really very adamant  
13 and passionate about their positions. And they  
14 didn't give up. I think our recommendations  
15 based on those discussions reflect a really  
16 intelligent consensus in order to provide due  
17 process, the kinds of due process rights that all  
18 Americans can expect.

19 And I thank you for giving me the  
20 opportunity to work on the Tribal Issues Advisory  
21 Group and I encourage the Sentencing Commission  
22 to continue the work in consultation with tribes

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1 throughout the nation. Thank you.

2 CHAIR SARIS: Just off the bat I have  
3 a question about -- if you were to look at these  
4 factors -- and I really -- would you put as a  
5 minimum that the due process rights have been met  
6 in backing up the tribal conviction? I mean, is  
7 that sort of first legally required in your  
8 opinion? And second, should as a policy  
9 matter -- we never -- a judge never considers a  
10 conviction unless it had been achieved with a due  
11 process, and then get to the other factors?

12 JUDGE ERICKSON: One of the things if  
13 you just look at what the Indian Civil Rights Act  
14 does, it allows prosecutions to move forward in  
15 Indian country without certain conditions that  
16 would seem to us to be very basic, right? And  
17 so, things can happen in Indian country that just  
18 wouldn't happen anywhere else.

19 And in saying that I want to also  
20 remind everyone that there are high-functioning  
21 courts that are, as I've said, equal to or frankly  
22 much better than state or municipal courts around

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1 the country, I mean from a Western due process  
2 model. But if you just think about it, there's  
3 no requirement in a tribal court that -- well,  
4 you can have a traditional court in which there's  
5 actually no confrontation that actually takes  
6 place. You may have a sentencing circle that  
7 involves people sitting down, discussing a  
8 problem, arriving at a settlement imposed by  
9 elders. You may have a court that requires a  
10 religious test in order for someone to be an elder  
11 or a judge on that court. I mean, those things  
12 happen in Indian country and they become models  
13 that are really very different than anything that  
14 we would ordinarily see.

15 That being said, they also bring to  
16 the table things that we can learn from. I mean  
17 I'll tell you what, I have learned as much from  
18 watching a sentencing circle work and how it  
19 brings peace and justice in a way that is  
20 different than the Western model that is of  
21 absolute importance to me as a judge, and I have  
22 from time to time from the bench engaged in some

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1 of those types of conversations to the way that  
2 it's possible.

3 I want you to think about -- this is  
4 a personal view. It's not TIAG's view. But I  
5 want you to think about this: The common law as  
6 it's developed in the United States is the  
7 product of a subjugated people. The Anglo-Saxon  
8 law had overlain on top of it a Norman conquest  
9 law and it developed in a way that brought  
10 together the best elements of Norman law and the  
11 best elements of Anglo-Saxon law to what I  
12 believe is the best legal system the world has  
13 ever known. It is not however a perfect legal  
14 system.

15 And I know that tribal nations would  
16 hate to be called subjugated peoples, but the  
17 reality of it is what they bring to the table in  
18 this grand panoply of judicial systems is a great  
19 laboratory of justice that as we look at  
20 restorative models, as we look at moving forward,  
21 they provide us with opportunities to learn, to  
22 know and to move forward in a way that really is

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1 sort of mind-boggling.

2 All that being said, not all tribal  
3 convictions are alike, and there are some that  
4 frankly if you look at them, the courts function  
5 in a way that is so foreign from the traditional  
6 Western model that it's difficult to really say  
7 what does this conviction actually mean?

8 The other thing is that some tribal  
9 governments are struggling. These are small  
10 entities sometimes without very good funding with  
11 a long history of internal dissention. They may  
12 have disparate clans that have been pushed  
13 together onto a piece of land by the Federal  
14 Government 100 years ago and those clan  
15 differences continue to be a significant problem.  
16 And so the clan that's in takes one position. A  
17 next clan wins the next tribal election. They  
18 take a different position. Files disappear  
19 sometimes in tribal courts.

20 I mean, if you're the federal judge,  
21 you know what the tribes' courts look like in the  
22 district where you're serving. At least you

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1       ought to. And I think that the tools that we put  
2       in place give us an opportunity to really  
3       honestly evaluate the process and to score those  
4       things in a way that makes sense.

5                   And I want to give both Brent and  
6       Barbara an opportunity to respond to what I just  
7       said because however else you look at this, I am  
8       still a white guy talking about what goes on in  
9       Indian country, and think that frankly people  
10      that work in Indian country probably have a lot  
11      more to say than I do.

12                   MR. LEONHARD: I'd like to respond to  
13      it. I am a white guy working in Indian country,  
14      but if the question is whether that -- does due  
15      process restraints have to be in place before  
16      considering an upward departure, my answer would  
17      be no. If it's an automatic, yes.

18                   But if you're talking about upward  
19      departure in Indian country generally, on that  
20      basis it's deeply problematic. Crime is a  
21      serious problem in Indian country and tribes have  
22      been hamstrung in their ability to hold people

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1       accountable with the Indian Civil Rights Act.  
2       Even with the Tribal Law and Order Act you can  
3       only sentence up to three years if it's murder,  
4       rape, whatever. And those cases get prosecuted  
5       in Indian country. It would be deeply  
6       disconcerting with somebody who has 10 prior  
7       very, very serious convictions out of a tribal  
8       court that doesn't have those factors in place  
9       that you might be used to.

10               The other thing to consider is that I  
11       think, in my experience, tribal courts are much  
12       more truth seeking than federal and state  
13       systems. They aren't as hung up on process and  
14       the importance of process. They want to get to  
15       what happened. And they're much more focused on  
16       trying to come up with a conviction that tries to  
17       heal everybody.

18               So the fact that they don't look like  
19       the federal or state model does not mean that  
20       they don't guarantee due process. Within that  
21       community it's the understanding of what process  
22       is due and fair and reflects their cultural

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1 values and whatnot. I don't think you should  
2 discredit the convictions that come out of those  
3 simply because they don't look like what comes  
4 out of state and federal court particularly if  
5 you're talking about upward departure.

6 CHAIR SARIS: Well, that's what we're  
7 talking about.

8 MR. LEONHARD: Yes. Yes. So, no, I  
9 would not in any way make that a minimum factor.

10 MS. CREEL: I think the problem that  
11 you're listening to now with the question of due  
12 process and upward departure is that you're  
13 comparing apples and oranges. And tribal courts  
14 traditionally served a very different purpose  
15 than the crime and justice punishment of the  
16 Western model, the adversary model.

17 So when we start talking about how  
18 sophisticated a tribe is or how functional it is,  
19 it makes -- those are judgment calls that are  
20 denigrating the work of tribal courts. And we  
21 can't use that language. We have to look at the  
22 process that was due. That's why the compromise

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1 of treating a tribe as a foreign nation is  
2 ultimately the best idea to try to weigh this  
3 out, because they're different. They're not  
4 United States courts. They're not Article 3  
5 courts. And they even shouldn't be compared to  
6 state courts.

7 What I come down to with your question  
8 with regard to due process are two things: One  
9 is a valid conviction in tribal court is illegal,  
10 unconstitutional in the United States  
11 constitutional courts. That means that a  
12 person -- I represented a man who represented  
13 himself against a law-trained prosecutor and got  
14 eight years in the tribal court order. He was  
15 denied counsel. They didn't have an indigent  
16 defense system and there was no one that -- there  
17 was no way he would get the note out from jail,  
18 but he needed help. We didn't even know he  
19 existed until after he'd received the sentence.

20 The second one is the racial  
21 disparity. Non-Indians don't have this problem.  
22 They will have -- at least be afforded counsel in

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1 state courts, municipal courts or be able to hire  
2 one themselves. They can waive counsel or they  
3 can go pro se by choice, but the judge is going  
4 to go through a panoply of questions and a  
5 colloquy about the rights that they're giving up.  
6 And so the racial disparity even under the  
7 Violence Against Women Act is really paramount  
8 and something that we discussed that non-Indians  
9 are guaranteed counsel in tribal court if they're  
10 facing prosecution. In tribal court in order to  
11 make sure that non-Indian citizens' rights are  
12 the same in tribal, state and federal. That's  
13 not true for Indians.

14 COMMISSIONER BARKOW: Do you mind if  
15 I ask you where do -- who appoints counsel for  
16 those people in tribal courts? Who's paying or  
17 funding the counsel representative?

18 MS. CREEL: That was the question from  
19 the very beginning, like who's going to pay for  
20 this, right? They're separate sovereigns, but  
21 who pays for counsel? The tribe -- it's indigent  
22 defense counsel, and so the tribe, the government

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1 is required to provide that if they're going to  
2 have enhanced sentencing or take on the special  
3 criminal jurisdiction in domestic violence cases.

4 CHAIR SARIS: But they're not  
5 required for Indians?

6 MS. CREEL: Only if they're going to  
7 seek a sentence longer than a year. So that's  
8 that zero to one year sort of gap that has been  
9 thrown by the wayside.

10 The idea that tribes have to do this  
11 because there isn't any other group that can do  
12 this is just wrong, because the Federal  
13 Government does have jurisdiction in many of  
14 those cases, but they're not -- they don't reach  
15 the level of a major crime or some kind of  
16 important purpose in Indian country. And that's  
17 what we see a lot of in Indian country, frankly,  
18 is that there aren't -- we aren't statistically  
19 present enough to warrant the kind of resources  
20 that are needed in these really difficult  
21 problems of crime and punishment that you all  
22 know very well.

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1                   JUDGE ERICKSON: Just for background  
2 information the ordinary jurisdictional limits of  
3 a tribal court is one year unless they qualify  
4 for enhanced sentencing abilities under TLOA and  
5 VAWA. And then they can sentence up to three  
6 consecutive three-year terms. But generally  
7 speaking, if you get convicted of murder in a  
8 tribal court that doesn't qualify, you get one  
9 year, all right, as a maximum sentence.

10                   And so, what happens in those courts  
11 that haven't complied and therefore are not  
12 qualified under these enhanced sentencing acts,  
13 many of them provide -- there's a lot of lay  
14 public defenders, some no public defenders at all  
15 and some law-trained defenders. And it's just a  
16 very broad spectrum. And so, that's kind of the  
17 lay of the land.

18                   MS. CREEL: And even in the court that  
19 we viewed in Standing Rock Sioux where they had  
20 a law-trained prosecutor and a law-trained  
21 defender, people were routinely pleading guilty  
22 to the charges without -- immediately after

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1 arraignment or without more because they were  
2 seeking drug treatment and the judge was  
3 sentencing them to 30 days or more, we were told  
4 they were allowed to go to county drug treatment.  
5 And so, those are the kinds of things that you  
6 might see to deal with a case load, but that  
7 conviction would be valid in United States  
8 courts, but I don't know that it would be  
9 something -- it leads you to something to look  
10 into and drill down to see what the circumstances  
11 were of those guilty pleas.

12 JUDGE ERICKSON: And so what you do  
13 find in Standing Rock obviously in North Dakota  
14 you do find that people get sentences of longer  
15 than 30 days for the sole purpose of accessing  
16 drug treatment, or you may see a sentence of  
17 banishment, which is something that you don't  
18 really see --

19 MS. CREEL: We saw that, too.

20 JUDGE ERICKSON: -- in a lot of  
21 places. And that's because of the bad man  
22 language in the Great Sioux Nation treaties, the

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1 Fort Laramie treaty. And so, those sorts of  
2 things exist out there. And so, there are just  
3 some things that happen that would be unusual,  
4 and so the question is how exactly do you treat  
5 a banishment sentence if you're the judge? I  
6 mean, the conviction really is get out, we've had  
7 enough of you. Okay? And what does that really  
8 mean?

9 CHAIR SARIS: Sounds good.

10 JUDGE ERICKSON: Yes.

11 (Laughter.)

12 MR. LEONHARD: So on the issue of  
13 people pleading without a public defender at  
14 arraignment to seek treatment and maybe agreeing  
15 to more than 30 days in order to get it, that's  
16 not unusual. I mean in municipal and state  
17 courts those sorts of things happen as well. So  
18 that's not unique to Indian country. It happens  
19 all the time. And I want you to consider those  
20 things.

21 But I think fundamentally the problem  
22 with putting too many restraints on looking at a

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1 tribal court conviction is that public safety in  
2 Indian country is a serious crisis, a serious  
3 problem and if you can't treat somebody who  
4 engages in serious crime seriously, it's going to  
5 happen again and again and again and again and  
6 again. And it does in Indian country all the  
7 time.

8 As for cases that are very serious  
9 cases like rape, murder, those sorts of things,  
10 they're routinely not prosecuted by the Federal  
11 Government. Tribes are often the ones that are  
12 left having to deal with it. So they're very  
13 serious crimes. They aren't minor crimes. And  
14 they need to be considered. Whatever the process  
15 was it needs to be considered. Doesn't mean the  
16 judge accepts it, but it needs to be considered.

17 COMMISSIONER FRIEDRICH: I have a  
18 question for the two judges. I'm just curious,  
19 when you took the bench it seems like there's so  
20 many details about these individual tribes that  
21 you need to know before you sentence an  
22 individual from the tribe. Does the FJC give you

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1 any particular training on the tribes? I mean,  
2 we could list all kinds of departure factors  
3 here, but we're really not going to give the kind  
4 of guidance that the judges need to make informed  
5 decisions without a lot of detail on all of these  
6 nuances that each of you have mentioned. And I  
7 can imagine you've mentioned hundreds, so you  
8 really need some specialized training, don't you?

9 JUDGE LANGE: There is no formal  
10 training when becoming a district judge in Indian  
11 law even if you're in an Indian country  
12 jurisdiction. That is part of the reason why  
13 several of us discussed the possibility of  
14 mentoring incoming judges.

15 Now, I will say that -- I'm not sure,  
16 Judge Erickson, if your experience was the same,  
17 but I'd lived in South Dakota nearly all of my  
18 life. I had represented a tribe. I was not  
19 terribly active in doing federal defense work,  
20 but the existing judges were very helpful to me  
21 in understanding the issues in Indian country  
22 sentencing. And of course immediately it's a

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1       baptism by fire, at least where I am. So I did  
2       come to appreciate those issues on the fly. But  
3       we thought about that, and that's part of the  
4       reason why we've contacted the AO and the FJC  
5       about forming a working group.

6                   Judge?

7                   JUDGE    ERICKSON:        Yes, I was  
8       fortunate. I grew up in a little town that's  
9       nestled between two separate Indian reservations  
10      in North Dakota. Thirty miles to the north  
11      there's a Chippewa reservation. Thirty miles to  
12      the east there's a Sioux reservation. My  
13      mother's family were French-Canadian trappers and  
14      traders. My family's history with Native people  
15      goes back to the 1600s. My family wouldn't be  
16      here but for their relationship with Native  
17      peoples. And so, there has never been a time in  
18      my life where I haven't been exposed to Native  
19      peoples.

20                   That being said, I was completely  
21      unprepared for what happened with federal  
22      sentencing and tossed to the wolves. And I'm

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1       telling you, federal Indian country jurisdiction  
2       is complicated. I have a chart that I wrote out  
3       that I put on the bench that -- just shorthand as  
4       to who I've got jurisdiction over and why. It  
5       still sits on the bench. I look at it far less  
6       frequently today than I did when I first started,  
7       but it was like fed to the wolves. I mean, it  
8       truly is.

9                   And for judges that sit in Indian  
10       country they have a different level of attachment  
11       to Indian country prosecutions. I was fortunate  
12       that Judge Rodney Webb had been around a long  
13       time, had been the U.S. Attorney, was willing to  
14       mentor me. I know that there are other judges  
15       including judges on our committee who literally  
16       walked into court, had no idea that they -- what  
17       it meant to have jurisdiction over Indian country  
18       and no one bothered to tell them anything and  
19       they came out of baby judge's school with like  
20       the same training that all of you had and just  
21       had to figure it out on their own.

22                   COMMISSIONER BARKOW: I wanted to ask

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1 a question about that fifth factor that you all  
2 listed about whether or not the tribal government  
3 has expressed a desire that their convictions  
4 should be counted. And I'm just curious how you  
5 get that information. I mean, how you would know  
6 what they've expressed and would they know what  
7 purpose it was going to be used for. So a judge  
8 trying to follow that particular factor, what  
9 would the process look like to get that  
10 information?

11 MR. LEONHARD: I think we talked about  
12 that a little bit and I think we left it alone.  
13 I think each tribe is different and who you  
14 contact is different and what their expectation  
15 for the communication is different. So I think  
16 it's important to treat each tribe as what they  
17 are, separate sovereigns, and dealing with them  
18 immediately.

19 COMMISSIONER BARKOW: So I guess to  
20 drill down a little bit on that, does that mean --  
21 like so if you had a court that didn't tell you  
22 about the conviction or they don't want to use --

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1 is that their way of expressing don't use this or  
2 is there kind of a formal mechanism that you find  
3 out the position is X? I'm just trying to figure  
4 out if this is -- how this would operationalize  
5 for --

6 MR. LEONHARD: It could be through  
7 consultation. A board could pass a resolution  
8 saying what its desire is one way or the other.  
9 It could be any number of different ways. In  
10 Umatilla we're working on -- we have access to  
11 federal criminal databases which most tribes  
12 don't. We're working on trying to get our  
13 convictions in the NCIC and what have you so that  
14 you'll have them automatically that way. But  
15 each tribe is different and there are different  
16 expectations, different backgrounds, different  
17 cultures. I think you need to approach them  
18 individually.

19 COMMISSIONER FRIEDRICH: From your  
20 experience and outreach for this group do you  
21 have a sense of what percentage of those tribes  
22 that actually have the due process protections

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1       that our Constitution guarantees -- what  
2       percentage of those would nonetheless say don't  
3       count them? Do you have any sense from your  
4       survey and telephone calls, or did you not get  
5       into that kind of detail with them?

6                   JUDGE LANGE:     There are relatively  
7       few tribes, my understanding, that have been  
8       certified in TLOA or VAWA.

9                   I don't know if you know, Brent, how  
10      many.

11                   MR. LEONHARD:    I think there's a  
12      little more than eight for each.

13                   JUDGE LANGE:     Out of 566, 315  
14      separate -- or 316, I think, separate tribes.

15                   COMMISSIONER FRIEDRICH:  But of those  
16      eight would they -- I mean, by creating those due  
17      process protections is it in part so that their  
18      convictions are considered or completely divorced  
19      from --

20                   MR. LEONHARD:    Depends on the tribe.  
21      I mean, different tribes may have different  
22      opinions.

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1                   JUDGE ERICKSON: Each of these tribes  
2                   are unique in the way that they approach their  
3                   question of whether they want to qualify or don't  
4                   want to qualify is a unique decision. And the  
5                   reality of it is for some the driving force is,  
6                   look, there are high declination rates on serious  
7                   crimes by the United States Attorneys. And that  
8                   happens in a lot of places where the tribes are  
9                   small, the districts are large and the U.S.  
10                  Attorney does not see as one of their primary  
11                  goals the prosecution of Indian country crime.  
12                  Well, if you sit in North Dakota or South Dakota  
13                  or Arizona and New Mexico, our U.S. Attorneys  
14                  understand and perceive that a big piece of what  
15                  they do is the prosecution of Indian country  
16                  crime. And there's a difference.

17                  So someone might say the enhanced  
18                  sentencing penalties, they're huge for us,  
19                  because we could have someone who is guilty of a  
20                  sexual assault, an attempted murder and we can't  
21                  get anyone to turn their head. And so, we want  
22                  to be able to sentence them to the longest

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1 sentence possible and we're willing to provide  
2 those sorts of due process rights. Or they might  
3 look at it and just say we just are much more  
4 comfortable with the Western model and we want to  
5 adopt that.

6 On the flip side you may have a very  
7 traditional Indian Nation that says we're very  
8 comfortable with what we've done forever and this  
9 represents our culture, our people. And we  
10 afford all the due process we believe is  
11 appropriate and the penalties that we believe are  
12 appropriate are the penalties that we impose.  
13 And we don't need to look beyond our own culture  
14 and our own traditions.

15 And so, that's the sort of -- I don't  
16 think you can infer anything in any individual  
17 case without actually knowing the tribal  
18 organizational structure and what the tribe is  
19 doing and asking them why.

20 In a consultation process some federal  
21 judges are in regular contact with tribal judges  
22 and tribal chairs. Others, even with significant

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1 Indian country cases, are uncomfortable with  
2 that. And so, that consultation thing I think  
3 that part of what we've got to do is we've got to  
4 get the judges to understand that it's perfectly  
5 okay to consult with them.

6 JUDGE LANGE: Just briefly, I would  
7 not think it the role of the federal judge to  
8 seek out the tribe to find out whether we should  
9 be counting their convictions or not. Ideally I  
10 would foresee a tribal council vote probably at  
11 the behest of the U.S. Attorney looking to see,  
12 well, should we be making the argument that there  
13 should be upward departures here from various  
14 convictions in various tribes within the  
15 district? I would think that practically is how  
16 it ought to work as tribal resolution --

17 MS. CREEL: But, Your Honor, there's  
18 no petit policy that's applicable to tribal  
19 convictions and there is no avenue for tribes to  
20 divulge this information that you're asking. So  
21 it would probably be up to the council or the  
22 probation --

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1 CHAIR SARIS: We do need to wrap up,  
2 but I just want look to protection orders for a  
3 minute.

4 MS. CREEL: Yes.

5 CHAIR SARIS: Is that a -- what I  
6 didn't get a sense of is I assume it's primarily  
7 sexual assault, the protection orders for  
8 domestic violence. Is that primarily what we're  
9 talking about?

10 MS. CREEL: The concern?

11 CHAIR SARIS: Yes.

12 (No audible response.)

13 CHAIR SARIS: No. No?

14 MR. LEONHARD: There could be just  
15 sexual assault versus regular assault or  
16 anything.

17 CHAIR SARIS: So are protection  
18 orders across the span of the different tribal  
19 jurisdictions a common way of handling that? Is  
20 that why this is such a big issue for you?

21 JUDGE ERICKSON: These are insular  
22 communities and there's lots of people that are

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1       closely connected and there would not necessarily  
2       be family connections that you would --

3                   CHAIR SARIS:   I see.

4                   JUDGE ERICKSON:  -- that we would see.  
5       And there are protection orders that may  
6       sometimes be put in place because of violence of  
7       threats of violence.  Some of them would fit very  
8       neatly into the standard state definition of a  
9       domestic violence protection order.  Some of them  
10      would be pretty far removed.

11                  Being called a grandfather is an  
12      honorific title in many respects.  It's a person  
13      who has obtained a certain age who is closely  
14      related, acts as a mentor and guide.  And so,  
15      they would be viewed as part of this family  
16      structure being very close, but not uncommon for  
17      somebody to walk in and have their third  
18      grandfather die and everybody looks and says say  
19      what?  And it's just the way it is.  I mean, and  
20      so these protection orders may be recognizable  
21      and are sort of the traditional Western construct  
22      and may not.

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1           Just like the process that Judge Lange  
2           just described as to how you consult, that would  
3           be very common in some tribes that they would go  
4           about that, but I'm going to tell you that there  
5           are tribal entities that exist in North Dakota  
6           where they do really expect that there is at least  
7           once a year that the federal judge will sit down  
8           and talk with the tribal chair and the tribal  
9           commission. It's the long tradition that's been  
10          going on since the first federal judges were  
11          appointed and it's sort of an ordinary thing.

12                   CHAIR SARIS: Yes, I'm just trying to  
13           get -- because that's one big recommendation is  
14           protection orders and it makes sense to me, the  
15           definition, but why is it such a big deal? Is  
16           it a crime with --

17                   MS. CREEL: Your Honor, in the  
18           materials that we were given from the Sentencing  
19           Commission staff there was a memo that was  
20           prepared in conjunction with the Victims Advocacy  
21           Group, and the idea was that how should tribal  
22           protection orders be handled under the sentencing

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1 guidelines? And what we found was there just  
2 isn't any data. And so, the question is sort of  
3 like tribal court convictions, like should they  
4 be given the same weight, should they be counted,  
5 should a violation of one allow for or require an  
6 upward departure or an automatic enhancement as  
7 a special characteristic or sentencing factor?  
8 And there just isn't the data.

9 And so, where we ended up was we  
10 looked and looked and looked, but all we could  
11 come up with was in order to understand the issue  
12 we should at least define that tribal court  
13 protection orders are within that universe of  
14 protection orders that are under 18 USC 2265.

15 CHAIR SARIS: Okay. Thank you. Are  
16 there any other --

17 MS. CREEL: Is that right?

18 COMMISSIONER PRYOR: I have one. I  
19 mean, I've got to tell you the tribal court  
20 convictions piece concerns me. The protection  
21 orders not as much. I'm concerned about an  
22 application note that says no factors shall be

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1       determinative.  These may be relevant.  And it's  
2       a host of factors.  It seems to me that it invites  
3       disparity.  It's not something that can be  
4       meaningfully reviewed when it's applied.

5                   Do you have a reaction to that?

6                   JUDGE ERICKSON:  Judge Pryor, what I  
7       would say is the way it sits right now you're  
8       asked to consider tribal court convictions when  
9       you feel it's appropriate, and it provides no  
10      guidance.  And I'm just telling you that as a  
11      federal judge who sits down on the first day on  
12      the bench, boy, I would sure like to know what  
13      are the sorts of factors I ought to consider.  
14      There's no case law that's developed in this  
15      area.  It's just sort of if you do it, then the  
16      question is on review is it an abuse of  
17      discretion?

18                   And what you get back from the  
19      appellate courts is the judge explained  
20      something, no abuse of discretion.  If you say  
21      nothing and just do it, then they say, well, we  
22      can divine from the record that it makes some

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1 sense, if they can. Or they say, yes, we don't  
2 get it. Try again, judge. Explain to me.

3 COMMISSIONER PRYOR: That's  
4 necessarily going to mean though, isn't it, that  
5 similarly situated offenders are going be treated  
6 dissimilarly?

7 JUDGE ERICKSON: But they already  
8 are. And I think the way it is now --

9 COMMISSIONER PRYOR: Shouldn't we do  
10 something to make that better? I mean --

11 JUDGE ERICKSON: Well, I think that  
12 this actually does make it better because it  
13 gives us a list of factors to actually look at  
14 and to work with. I mean, I think the -- I just  
15 think that it actually does provide some guidance  
16 to judges in Indian country. It will take it  
17 from being a purely arbitrary decision making  
18 process to something with some structure and it  
19 allows a decisional rubric to move forward.

20 I continue to just say that you could  
21 take this and make it a guideline and say this is  
22 where we're at rather than having it in an

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1 application note. The issue there becomes that  
2 if in fact there is a broad problem with a  
3 sentencing disparity already, it's going to  
4 aggravate it.

5 CHAIR SARIS: I think it's time for  
6 our break. I want to thank the panel very much.  
7 And we'll -- 10 minutes and we'll be back for the  
8 next panel. Thank you.

9 MS. CREEL: Thank you, Your Honor.

10 (Whereupon, the above-entitled matter  
11 went off the record at 12:20 p.m. and resumed at  
12 12:34 p.m.)

13 CHAIR SARIS: It's fun during the  
14 break to talk to everyone, but we've got to get  
15 to this next panel, who will discuss  
16 recommendations from the Sentencing Disparities  
17 Subcommittee and the Youthful Offender  
18 Subcommittee.

19 First Judge Jeffrey Viken is the Chief  
20 United States District Judge for the District of  
21 South Dakota and he chaired the Sentencing  
22 Disparities Subcommittee for the -- I say ty-ag,

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1       you say tee-ag?  Whatever.

2                   JUDGE ERICKSON:  Bob said tee-ag.  We  
3       all say ty-ag.

4                   CHAIR SARIS:  Okay.

5                   (Laughter.)

6                   CHAIR SARIS:  See, there are some  
7       things you didn't work out.  That's fine.

8                   And Kathleen Bliss Quasula is a  
9       private practitioner from Las Vegas, Nevada, a  
10      commissioner for the Nevada Indian Commission and  
11      a member of the Cherokee Nation.  She served as  
12      chair of the Youthful Offenders Subcommittee and  
13      of course we still have Judge Erickson who will  
14      chime in.  So thank you all for being with us.

15                   Do we start with you, Judge Viken,  
16      or --

17                   JUDGE VIKEN:  Yes, thank you, Judge  
18      Saris.  I appreciate it.  And I do echo Chief  
19      Judge Erickson's comments about the privilege it  
20      is to serve on the Tribal Issues Advisory Group  
21      to the United States Sentencing Commission.

22                   The committee that I chaired was

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1 charged with looking at sentencing disparities in  
2 Indian country jurisdiction. I had an  
3 extraordinary committee, and like Judge Erickson  
4 it is really the most extraordinary group of  
5 thinkers from disparate backgrounds with which I  
6 have ever worked.

7 I had Mike Cotter, the U.S. Attorney  
8 in Montana, of course a major Indian country  
9 jurisdiction; Judge Robert Blaeser, who's the  
10 chief judge of the White Earth Nation in  
11 Minnesota; Troy Eid, of course who's been  
12 involved in VAWA and many other Indian policy  
13 issues nationally; and Dr. Miriam Jorgenson, who  
14 is an extraordinary statistician. She's at the  
15 University of Arizona and is the research  
16 director for the Native Nations Institute, and  
17 her understanding of and hard questions put with  
18 regard to the compilation of data and its utility  
19 was critical. And then Kathleen Bliss assisted  
20 us greatly and Professor Creel also participated  
21 in some of our conference calls.

22 Our process was that we did meet by

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1 conference call at least monthly and worked  
2 through it that way.

3 Now, let's start out with I think a  
4 very important question that Judge Saris asked  
5 and which our committee was I guess helpful in  
6 developing a solution. I do think on TIAG  
7 there's a universal view that the United States  
8 Sentencing Commission should find a way, a  
9 method, a process to consult with Indian nations  
10 and tribes.

11 One of the ways to do that as a  
12 practical matter, Judge Saris, is to adopt this  
13 recommendation that there be a mini-TIAG or an ad  
14 hoc Tribal Issues Advisory Group which will  
15 continue on with a smaller group of members and  
16 resources yet to be determined as to which most  
17 effective, but a group that can with their  
18 experience and background and wisdom go around to  
19 the Native nations who are subject to the federal  
20 sentencing guidelines and consult and determine  
21 whether there are real or imaginary positions  
22 with regard to sentencing disparities for Native

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1 people in federal courts, and whether or not  
2 there's a real or imaginary perception with  
3 regard to the handling of Native people from  
4 those tribes and nations in state courts.

5 So when you think about a burglary  
6 being committed inside the boundaries of a county  
7 which is subject to Major Crimes Act  
8 jurisdiction, where I am, Oglala Lakota Nation  
9 County, you can walk five feet across the line  
10 and commit exactly the same offense as a Native  
11 person and be subject to state court jurisdiction  
12 only, no federal jurisdiction, no tribal or  
13 federal jurisdiction. It will be tribal and  
14 federal jurisdiction within Indian country. And  
15 so, the handling of these people just puts  
16 forward some very fundamental questions.

17 One could look at the application of  
18 the sentencing guidelines to Major Crimes Act  
19 jurisdiction in Indian country as an unhappy  
20 marriage. You've struggled here even this  
21 morning in our brief conversations with how do  
22 these systems fit together. And if the

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1 Sentencing Commission's organic act charges you  
2 in part with defining fairness in federal  
3 sentencing as the avoidance of disparity, you run  
4 into very specialized problems in dealing with  
5 Native nations and tribes. The fit is  
6 complicated and the fix is not easy to identify.

7 And so, this consultation process is  
8 critically important. It's not only a treaty  
9 obligation of the United States Government  
10 generally, but certainly if you're going to work  
11 on the sentencing of Native people under the  
12 Major Crimes Act and other federal jurisdiction  
13 applying only to Indian country and members of  
14 tribes and people subject to federal jurisdiction  
15 in Indian country, that consultation is  
16 absolutely critical.

17 That is a piece of your work which  
18 needs to be addressed and that is a part of the  
19 loop that needs to be closed. And so, we'd  
20 really -- our committee and I think TIAG  
21 generally would encourage you.

22 If we define fairness and sentencing

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1 in part as avoiding disparities, the treatment of  
2 like offense behavior differently under different  
3 circumstances, I have to tell you that our group  
4 looking at sentencing disparities cannot bring to  
5 you much guidance beyond what was provided to you  
6 in 2003. Here we are 13 years later. You had a  
7 report in 2003 advising the Commission that the  
8 data did not exist in order to make comparisons  
9 which would be reliable enough or deep enough  
10 that you could formulate guideline or policy or  
11 commentary language. And we come to you now and  
12 again say to you that this is the reality.

13 Let's just look at the first component  
14 of that. We are in no position as an advisory  
15 group or you as a commission even to compare  
16 potential disparities or real disparities in the  
17 sentencing of Native people under federal  
18 criminal jurisdiction in federal courts. Just  
19 in federal courts.

20 So when we think of Arizona, New  
21 Mexico, Montana, North and South Dakota and the  
22 other districts which have substantial federal

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1 Indian country jurisdiction, we have no ability  
2 to compare the sentences between what Judge  
3 Erickson and I are doing or what Brian Morris, a  
4 judge in Montana, or Dana Christensen in  
5 Montana -- what we're doing. Why is that?

6 Because when we submit our judgment  
7 and order of conviction and our Statement of  
8 Reasons, nowhere is there demographic data with  
9 regard to did this person fit the legal  
10 definition of an Indian? Well, if it's in 1153,  
11 if that's a Major Crimes Act offense, they did.  
12 All right. But unless the United States  
13 Probation Office starts putting in presentence  
14 reports, I'm told, that identifies the 1153  
15 Indian country jurisdiction, your staff at the  
16 Commission has no way to compile data even on the  
17 sentencing of Native people under the federal  
18 sentencing guidelines on Indian country offenses.  
19 We are not there.

20 And so, we have made specific  
21 recommendations as to the type of data which  
22 should be compiled so that we can determine even

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1 within our own federal sentencing system whether  
2 disparities exist between the districts. It  
3 seems to me that would be a fundamental goal for  
4 the Commission to address.

5 Now, to accomplish that we've made  
6 some recommendations working with the Judicial  
7 Conference committees, working with the United  
8 States Probation, seeing that the appropriate  
9 data for jurisdiction in Indian country is  
10 compiled so it can be compared. The only time  
11 it's been done certainly in recent history was  
12 the Special Coding Project for the Violence  
13 Against Women Act Reauthorization. There the  
14 jurisdictional data was compiled and it could be  
15 used as a database.

16 So beyond that we then looked at the  
17 much more complicated issue of what about the  
18 perception in Indian country that a Native person  
19 is treated differently in state court as opposed  
20 to federal court for sentencing purposes for the  
21 same or very similar criminal conduct: assault,  
22 burglary, larceny. Okay? Basic offenses.

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1       Because the Major Crimes Act of course removed  
2       from the sovereign nations the power to prosecute  
3       rape, murder, manslaughter, the whole list of  
4       Major Crimes Act offenses. So the tribes may  
5       have their own authority over that, but the  
6       Federal Government has exclusive jurisdiction  
7       with regard to felony sentencing of more than a  
8       year in prison.

9               So what do we do with that? Well,  
10       what happens is we're even in a less helpful  
11       position in 2016 than we were in 2003. States  
12       are not compiling data. Arizona and New Mexico,  
13       very significant Indian country jurisdictions  
14       with large numbers of Native people subject to  
15       federal jurisdiction, are keeping no records with  
16       regard to whether a person would qualify as an  
17       Indian person for purposes of federal  
18       jurisdiction so that a comparison could be made.

19               You'd think the correctional system  
20       might have demographic information on the people  
21       being incarcerated in Arizona and New Mexico.  
22       Not true. There's actually nothing. And so,

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1 Minnesota, North and South Dakota, Oregon  
2 provided what data was available, but of course  
3 what we found was for your purposes it would be  
4 an insufficient and unreliable database from  
5 which to draw any conclusions. That leaves you  
6 in a very unfair position, and our committee made  
7 some specific recommendations.

8 Now, I think it's easier to deal with  
9 how do you create a database to avoid sentencing  
10 disparities or study the issues among federal  
11 sentences involving federal/Indian country  
12 jurisdiction. When you get on the state side,  
13 you have what, I think something like 34  
14 districts that have significant Indian country  
15 jurisdiction. They all have their own state  
16 laws. They all have their own sentencing  
17 systems. Some of them have guidelines; some of  
18 them do not. So to ask the question is  
19 necessarily to invoke the reality that there are  
20 sentencing disparities which are very hard to  
21 study.

22 Now, can it be done? Well, if the

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1 states would compile the data necessary for the  
2 United States Sentencing Commission to develop  
3 databases and proper analysis, then yes, we could  
4 have comparisons as to whether Native people are  
5 treated differently in federal and state court  
6 for the same or similar conduct. We are in no  
7 position to do so for a lack of data.

8 The recommendations would include  
9 something that some people would perhaps consider  
10 a bit far-fetched. It would take an act of  
11 Congress of course to tie federal funding for  
12 correctional systems or law enforcement in the  
13 states, then federal money flowing out to the  
14 states. And to put in there a requirement that  
15 data be compiled so that at least we know in the  
16 United States what's going on with regard to this  
17 aspect of sentencing in the states and our  
18 ability to compare it to federal sentencing.

19 Now, whether that's practical or not  
20 is something that certainly the Commission can  
21 consider. And we've made other recommendations  
22 to try to accomplish those things. But to say

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1 that we were surprised from our various  
2 backgrounds on the committee to find that this  
3 data did not exist, that would be an  
4 understatement. We were very demanding.  
5 Professor Jorgenson had a wide range of ideas on  
6 what should be compiled and how it could be  
7 analyzed, and much of that, notwithstanding the  
8 intellectual effort, did not take us anywhere.

9 This will not be an elegant process.  
10 If you're going to start comparing state  
11 sentencing data and outcomes with the wide range  
12 of sentencing alternatives available to state  
13 judges and try to compare it to the federal  
14 system, you're going to run into a very  
15 significant problem unless uniformity can be  
16 accomplished in the way it's compiled.

17 And then of course; Kevin Blackwell,  
18 who was extraordinarily helpful to us, pointed  
19 out that the elements of a federal statute and  
20 the elements of a state statute, they don't match  
21 perfectly. So one can always take the position  
22 that the data is unreliable because the elements

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1 of the offenses that we're studying don't match  
2 exactly. Exactitude is not going to work on many  
3 levels for you when you're in Indian country. It  
4 simply will not. It is an alternative historical  
5 reality and a form of federal jurisdiction that  
6 will present challenges to you that you will find  
7 nowhere else in the federal sentencing system.

8 And so, we present our report to you.  
9 We strongly encourage consultation and serious  
10 consideration of what TIAG has come forward with  
11 for your future consideration.

12 JUDGE ERICKSON: Before there are any  
13 questions, there is one thing that I think you  
14 probably are concerned about, and that is the  
15 idea when we talk about comparison to state court  
16 convictions, it seems like, well, that's sort of  
17 a run-of-the-mine question that we've already  
18 moved beyond for everyone else in the system,  
19 that state sentences are different than federal  
20 systems. That's just a reality of separate  
21 sovereigns. So why does it matter in Indian  
22 country?

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1           It matters in Indian country for two  
2 fundamental reasons: First of all, the Major  
3 Crimes Act took away the jurisdiction of the  
4 tribes to deal with these crimes that were  
5 traditionally matters that were left to the  
6 states.

7           Second of all, many prosecutions occur  
8 under the Assimilative Crimes Act, and under the  
9 Assimilative Crimes Act we actually absorb the  
10 state crime and the state elements to that crime  
11 and we try them in federal court. So in federal  
12 court I try felonies that are just run-of-the-  
13 mine street crime that nobody else tries. And  
14 that's why I have the best job for a federal judge  
15 anywhere, as a trial judge, is that I continue to  
16 try ordinary street crime like I did as a state  
17 trial judge and I have all of the usual and  
18 customary federal questioning cases as well.

19           But the reality of it is that if you  
20 think about this -- and it happens in cases, it's  
21 happened in a case, Norquay, which I think is a  
22 1990 case out of the 8th Circuit, where a white

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1 man and an Indian man commit a crime jointly.  
2 The Indian man tried in federal court gets a  
3 sentence that's twice as long as his co-defendant  
4 who's tried in state court. And you know what?  
5 You end up in situations where grandmothers come  
6 to me and they stand in front of me and say why  
7 did my son go to prison or my grandson go to  
8 prison for longer than those white boys did? And  
9 there is no profoundly good answer to that  
10 question.

11 And so, the reason why it matters is  
12 just the fundamental justice of it all, and  
13 particularly with the Assimilative Crimes Act.  
14 I mean, I'll just tell you the strangest thing  
15 I've ever tried. At one point I tried a felony  
16 DUI case. I mean, it's like really? Who knew  
17 you did that in federal court? But it can  
18 happen.

19 MS. QUASULA: Let's see. Good  
20 afternoon.

21 The Juvenile and Youthful Offenders  
22 Subcommittee was tasked with the responsibility

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1 for looking at the impact of the sentencing  
2 guidelines on youthful offenders, because as we  
3 know juveniles, those under the age of 18, the  
4 sentencing guidelines don't apply unless that  
5 juvenile then is transferred to adult status.

6 So what I'm going to address with you  
7 are some specific recommendations that we're  
8 making and then also the weight of the Sentencing  
9 Commission to make some recommendations to the  
10 Executive Branch, as well as the Legislative  
11 Branch.

12 First though I want to give you a  
13 little bit more background about this particular  
14 subcommittee. We were comprised of probation  
15 officers, United States probation officers.  
16 Lori Baker was our most recent member. Rick  
17 Holloway, a senior probation officer who worked  
18 in South Dakota, had enormous experience,  
19 retired, but a member of the Probation Officers  
20 Advisory Group. Rick was incredibly significant  
21 in his voice that he loaned to us and to this  
22 report and some of the recommendations because he

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1 saw it from the ground.

2 We also were so fortunate to have Eric  
3 Shepard from the Indian Affairs section of the  
4 Solicitor's Office and Angela Campbell. I can't  
5 tell you how wonderful it was to work with her,  
6 too, because Angela Campbell has actually -- she  
7 was a federal public defender prior to going into  
8 private practice. She's also successfully  
9 litigated before the United States Supreme Court.  
10 She's responsible for the Burrage decision, or  
11 also pronounced as "barrage," according to Mr.  
12 Burrage.

13 A little bit more background about  
14 myself. I was a federal prosecutor for 22 years.  
15 I served in the U.S. Attorneys Offices for the  
16 Northern District of Oklahoma, where I started;  
17 the District of New Mexico, where I predominantly  
18 prosecuted Indian country cases and was a tribal  
19 liaison both there as well as Northern District.  
20 My last 12 years were in the District of Nevada,  
21 where I was with the Organized Crime Strike  
22 Force. I've been in private practice now as a

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1 criminal defense attorney, so I've changed  
2 positions. New hat, same Constitution. And  
3 that has given me yet another perspective.

4 I also want to say that my husband Ted  
5 Quasula was a member of the TLOA Commission. He  
6 was a commissioner appointed by President Obama  
7 along with Troy Eid, who was the chair. Within  
8 the TLOA Commission, which I think its report,  
9 with unbelievable consultation in person through  
10 regions of the United States -- if you haven't  
11 read that report, I think it's a good context for  
12 you -- that Miriam Jorgenson was also a key member  
13 of the working group that helped write the TLOA  
14 report. There's an entire chapter that's devoted  
15 the juvenile justice, a very disconcerting, if  
16 not demoralizing chapter.

17 While the Federal Government probably  
18 deals with juveniles more than anyone else, any  
19 other body -- and I neglected to say another  
20 incredibly key member of our group was Chairman  
21 Dave Archambault, who is the chairman of Standing  
22 Rock, one of the Indian nations we visited and

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1 observed. He, too, gave us a very personal and  
2 unique perspective into the formation of the  
3 recommendations that we're giving to the  
4 Commission.

5 That said, even though the sentencing  
6 guidelines don't apply to juveniles, juveniles  
7 encompass 98 percent of federal prosecutions.  
8 It's very high as far as juveniles go. I  
9 personally prosecuted a lot of juveniles,  
10 transferred them to adult status for unbelievably  
11 heinous crimes. But we had to go beyond that to  
12 really address what we saw was the important  
13 situation here, and that was to expand it into  
14 considerations by the sentencing judges as to  
15 youthful offenders.

16 And so here's what we came up with.  
17 We all know that juveniles and youthful offenders  
18 are different. They have different brain  
19 development. They have different life  
20 experiences. And especially when you're talking  
21 about Indian country there are different  
22 cultural, social, traditional values that should

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1 not be disrupted if at all possible because of  
2 the effect.

3 We also know from the studies that we  
4 cited in our report that when you sentence a  
5 youthful offender to a term of imprisonment,  
6 you've got to look at the impact of that detention  
7 or term of imprisonment, because based upon the  
8 studies that we saw, gasp, you're almost  
9 guaranteed recidivism. So we want our  
10 recommendations to actually be looked at as  
11 having an effect in the impact on the disposition  
12 of conduct of what occurred with that juvenile or  
13 youthful offender.

14 So here's what we came up with, if I  
15 may just kind of rattle it off very quickly.  
16 We're actually asking for a modification to the  
17 offender characteristics that would be contained  
18 in Chapter 5H1.1. And we laid it out on page 33  
19 of the report. And we added in our  
20 recommendations to modify the language.

21 Instead of looking at age as something  
22 that requires a combination of factors, that you

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1 can look at age alone, so long as it's consistent  
2 with 18 USC Section 3553, because of course the  
3 nature of the offense, things like that are going  
4 to be something that we believe we shouldn't fall  
5 back from, but also look at these social  
6 behaviors, activities, relationships, things  
7 like that that I just mentioned. So that would  
8 be in Chapter Five, part H.

9 So we're also asking for a new  
10 departure basis. So in 5K it would be 2.25 where  
11 there's actual -- a basis for a sentencing judge  
12 to depart downward based upon a youthful offender  
13 given the factors that we have there. So those  
14 are the two specific provisions that we're  
15 recommending the Commission look at and modify or  
16 add in the case of 5K2.25.

17 Additionally, we would like the  
18 weight, the brilliance, the power of the  
19 Commission to make recommendations to those who  
20 do have the power to address whether or not a  
21 prosecution is going to be one that asks for a  
22 term of imprisonment under the guidelines. And

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1 that is to ask the Executive Branch, specifically  
2 the United States Attorneys Offices, to expand  
3 their view on pretrial diversion. Okay? All  
4 right. So I was an Assistant U.S. Attorney.  
5 I've actually done pretrial diversions. Okay?  
6 You go to other offices, it's just something  
7 that's unheard of. It's something that's just  
8 not done. So we would like a little urging that  
9 would show a pretrial diversion under certain  
10 circumstances is appropriate with a youthful  
11 offender. Again, we're looking at what is the  
12 impact of that sentence? And so, pretrial  
13 diversion is one of those options.

14 Also we are asking that the Commission  
15 take a look at -- and I know that this stems from  
16 recommendations by the Practitioners Advisory  
17 Group as well as the POAG, and that would be to  
18 simplify the sentencing table where there would  
19 be alternatives to incarceration and you would  
20 have a section A and then B as opposed to four:  
21 A, B, C and D.

22 So anything under A would allow the

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1 sentencing judge to impose a sentence of  
2 imprisonment or a combination of different means  
3 of sentencing that particular defendant based  
4 upon such factors as the youth, socioeconomic  
5 ties, tradition, culture, etcetera.

6 (Cuckoo clock chiming.)

7 MS. QUASULA: So the two-zone is  
8 something -- it's either I'm making you guys go  
9 cuckoo or --

10 (Laughter.)

11 VICE CHAIR BREYER: That would be  
12 our --

13 (Laughter.)

14 VICE CHAIR BREYER: That's my  
15 problem.

16 MS. QUASULA: Oh.

17 (Laughter.)

18 MS. QUASULA: Sorry, Your Honor.

19 VICE CHAIR BREYER: It's actually a  
20 commentary on some of my judicial decisions.

21 MS. QUASULA: Okay. Then finally one  
22 thing that would be a legislative fix, and this

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1 does then go back into the consultation and the  
2 need for recognition of tribal consultation, and  
3 that's to actually fix the Juvenile Delinquency  
4 Act, which is 18 USC, Section 5032. TLOA also  
5 made a very strong recommendation to Congress for  
6 this fix. And what it does is it basically adds  
7 a certification that the U.S. Attorney has  
8 consulted with the tribe about what to do with  
9 the kid. That's the requirement with state  
10 authorities. States don't have jurisdiction for  
11 the most part over these crimes, so the tribes  
12 should be able to weigh in. And we made that  
13 consultation, not with the tribal court; we're  
14 very specific about it, with the prosecuting  
15 authority of that particular tribe.

16 U.S. Attorneys Offices could  
17 accomplish this pretty easily because since 1994  
18 Attorney General Janet Reno required U.S.  
19 Attorneys Offices to create a position of tribal  
20 liaisons. I know, I was one of the first ones  
21 being in Oklahoma. So it's been around for a  
22 long time as far as the U.S. Attorneys Office

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1 being able to consult.

2 Thank you so much. I know it's hard  
3 right before lunch. My stomach's growling.

4 COMMISSIONER MORALES: I'll say a few  
5 things.

6 MS. QUASULA: Yes.

7 COMMISSIONER MORALES: Thank you  
8 first of all for your recommendation about the  
9 pretrial diversion because you may or may not  
10 know the Department is definitely focused on  
11 that. You're preaching to the choir a little  
12 bit. We're really interested in those types of  
13 programs and we're trying to replicate them and  
14 multiply them around the country.

15 I do also want to note that as you  
16 know the Executive Office of U.S. Attorney does  
17 that. They have the tribal liaisons. They've  
18 always been very focused on it and we are honored  
19 here today to have some representatives of that  
20 office who came here to express their support for  
21 the TIAG and the work that you've done. And as  
22 you know, always want to hear from you whether

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1 through the TIAG or outside the TIAG as to the  
2 issues and experts on it.

3 But if I can go beyond that a little  
4 bit, it's been stated and restated by now a few  
5 times in the last couple of hours, but I also  
6 wanted on behalf of the Department to thank the  
7 ty-ag or the tee-ag for the impressive and very  
8 important work that you've done.

9 In my long Department career in policy  
10 making I've been part of many, many groups and I  
11 think it's really special what we've heard as to  
12 how this group has come together, especially  
13 keeping in mind what everybody's noted that it  
14 came from such a diversity of backgrounds and  
15 opinions and the fact that there were  
16 diametrically opposed positions on some things  
17 and that you've all come together with a report  
18 or recommendations that you all support.

19 I think it's very impressive and we're  
20 just -- I'm impressed and we're very, very  
21 grateful to everyone that participated, to the  
22 Commission for putting it together, to Nicole who

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1 everybody lauded as sort of the engine behind it.  
2 So I just wanted to put that for the record how  
3 thrilled we are. And we're sorry that our  
4 members to the TIAG couldn't be here, Director of  
5 Tribal Justice Tracy Toulou and U.S. Attorney  
6 Mike Cotter, but again we've been in  
7 communications with them and they've -- it's just  
8 everyone to a fault has spoken so highly of how  
9 this group has come together that -- again,  
10 you've been congratulated a lot already, but you  
11 can always use more.

12 CHAIR SARIS: I'm going to jump in and  
13 ask you, Judge Viken -- so some of this data is  
14 not within our control, and what's your  
15 recommendation as to what we can do in terms of --  
16 not the federal to federal, but the state data so  
17 that we're not back here in another decade with  
18 the same report saying, gee, we told you 10 years  
19 ago we couldn't do this?

20 JUDGE VIKEN: Judge Saris, unless a  
21 uniform system can be developed requiring the  
22 states to compile the data necessary for the

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1 Sentencing Commission to conduct the type of  
2 analysis to determine sentencing disparities in  
3 the states, we're going to be in the same position  
4 10 years from now.

5 Now, what we thought through from our  
6 different backgrounds the only real tie to the  
7 states and their corrections systems and their  
8 justice systems is federal money. And Congress  
9 of course accomplishes many things in this  
10 society by enacting a sensed federal need for  
11 information with the provision of federal  
12 resources. And that's why this recommendation  
13 tied together a requirement that states provide  
14 the data.

15 And of course you have a very skilled  
16 staff that can identify with Professor Jorgenson  
17 or others -- identify exactly what type of data  
18 you need to compile so that the request isn't  
19 overly burdensome, whether the states would want  
20 something with regard to their ability to develop  
21 systems within their states to provide the data.  
22 Those are all policy issues and those are matters

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1       that this Commission would have to raise with  
2       Congress if you're serious about compiling it.  
3       But until you do so, no advisory group is going  
4       to come forward with reliable information of the  
5       type of empirical data the Commission uses to  
6       make its policy and guideline judgments.

7                   CHAIR   SARIS:       Well, what Judge  
8       Erickson said is true. I mean, I often hear the  
9       complaints in Massachusetts that the federal  
10      sentences are so much tougher than the state  
11      sentences, and it resonates in many states I  
12      think across the nation. But the strength of the  
13      argument is the strongest in these I guess  
14      assimilative crimes. Is that what it would be?  
15      Is there a way of studying that sub-group of  
16      crimes where really the concern of disparities --  
17      it's peaking. Normally it's a state crime, but  
18      you're picking up the crime and you're trying it  
19      in federal court. So would there be a way of us  
20      facilitating a study of that sub-group of crimes?  
21      I don't even know how many there are of them  
22      really as a practical matter.

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1                   JUDGE VIKEN:     Well, look, if you  
2     undertake that task, we have to begin with the  
3     reality that -- for example, just take Arizona  
4     and New Mexico, major Indian country districts  
5     and states with large Native populations. Their  
6     justice systems and their courts and their state  
7     governments are not even determining whether a  
8     Native person, non-Native person, Hispanic or  
9     African-American person was the subject of  
10    sentencing. The demographic data is absent.  
11    There is none.

12                   And so, for you to make any sort of  
13    determination -- for example, in a state  
14    assimilated crime; take burglary for example,  
15    there's no federal definition. We look to state  
16    law. You take the state definition of burglary.  
17    One would think we could compare federal  
18    sentences under the Assimilated Crimes Act for  
19    burglary in federal court and compare it in the  
20    same district, Arizona or New Mexico, the state  
21    in which the district resides with the sentencing  
22    data for burglary.

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1           You can't determine because there is  
2 no data if an Indian person was involved in the  
3 state sentencing, whether the Indian or Native  
4 person involved fit the definition of an Indian  
5 person for purposes of federal jurisdiction. You  
6 can't begin because you don't have that  
7 information. I think it would be a mistake to  
8 get overly concerned about the states having  
9 different elements of something as fundamental as  
10 burglary or larceny.

11           You could always throw a barrier up as  
12 a statistician and say there's no reliable data  
13 for the Commission to consider because the  
14 elements don't match perfectly. I think that's  
15 a false approach to the compilation of analysis  
16 of data. But that's how fundamental the question  
17 is under the Assimilated Crimes Act, Judge Saris.

18           CHAIR SARIS: Yes, I'm just trying to  
19 get my handle around what we can do about it,  
20 whether there's a --

21           JUDGE VIKEN: You know, one of --

22           CHAIR SARIS: -- Short of maybe

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1 writing -- asking was it -- there must be  
2 committees in Congress who focus on this, just to  
3 ask them to think about this.

4 JUDGE VIKEN: Well, how about their  
5 Department of Justice, the Bureau of Justice  
6 Statistics and the Department of Justice.

7 CHAIR SARIS: That would be another.

8 JUDGE VIKEN: Well, there isn't any  
9 information because the states don't provide it.  
10 They can only deal with the data that flows to  
11 them from the states and if the Indian country  
12 jurisdiction states aren't providing data to the  
13 Department of Justice, there can be no  
14 compilation. That's where we are.

15 JUDGE ERICKSON: Well, one of my great  
16 fears about disparity, if you don't ever develop  
17 any kind of statistical basis to understand  
18 what's going on and we never answer this question  
19 and there continues to be this sort of  
20 disparity -- one of the perceived problems and  
21 anecdotal problems in Indian country is because  
22 the sentences in federal court are so harsh that

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1 information that should be being sent on to the  
2 Department of Justice for review for question of  
3 prosecution just never gets there, that the local  
4 law enforcement community tries to fix it as best  
5 they can because as they see it, the alternative  
6 is we get a sentence in tribal court that's six  
7 months to a year and it's something.

8 Or if we send them off for federal  
9 prosecution, they're going to get seven years,  
10 which is twice what they would serve in state  
11 court and they're going to serve 85 percent of  
12 the sentence. And there is no parole and there's  
13 no diversion, meaningful diversion programs and  
14 there's no deferred prosecution or deferred  
15 imposition of sentence programs, all of which  
16 exist in great numbers in states. And it  
17 contributes to a low level of lawlessness on the  
18 reservations, which is a huge continuing problem  
19 on some Indian nations. In some Indian nations,  
20 right?

21 And once again, we can't say this is  
22 a blanket problem, but if you talk to people in

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1 Indian country, there's a sort of -- we throw up  
2 our hands because our choice is we send our  
3 children away for the better part of a decade or  
4 we treat it like it's a misdemeanor. It's a hard  
5 choice and people are making it every day  
6 although very few people will stand up in public  
7 and say that's a decision they're making.

8 I mean, anecdotally we hear that  
9 happens. To paraphrase kind of a Yogi-ism, ain't  
10 nobody talking about it today. I mean, it's just  
11 kind of how it is, I think.

12 CHAIR SARIS: On the juveniles where  
13 is the closest -- where are the juvenile  
14 facilities? Is part of this that they're sent  
15 so far way?

16 MS. QUASULA: Well, yes, that's  
17 always been a concern. And I think it's  
18 relatively fluid, but they're typically based  
19 upon a contract with the Bureau of Prisons, so  
20 they're private facilities that are operating  
21 under contract. And when I was in New Mexico,  
22 that was always a very deep concern about these

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1 youth being hauled off so far. Devil's Lake.  
2 That was always something that struck fear is  
3 that the kid's going to Devil's Lake.

4 There was a facility for a while I  
5 know outside of Santa Fe, New Mexico. It seemed  
6 to be operating pretty well because they actually  
7 understood Indian country to some extent. And  
8 the federal judge sitting in Santa Fe, that I've  
9 got to give great praise to, Judge Martha  
10 Vazquez, was one of the first judges who actually  
11 went to that juvenile facility and took a look at  
12 it to make sure that they were actually doing  
13 what they said that they would be doing. I don't  
14 even know if it exists anymore. But there are  
15 very few.

16 And so, that's yet another reason  
17 for -- not only with juveniles, but even if you  
18 have a youthful offender, if you're talking about  
19 a kid from Indian country, there's no federal  
20 facility in New Mexico. They're going to go  
21 probably to Stafford, Arizona. But that's still  
22 going to be so far away if you're talking about

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1 Jicarilla, which is over by the Colorado border.

2 So, and then of course designations  
3 are by the Bureau of Prisons as to where that  
4 person's going to go. So that's why we want the  
5 Commission to look at the impact. What is the  
6 impact of the sentence if I impose a sentence to  
7 a term of imprisonment on this youthful offender,  
8 especially a first-time offender, especially a  
9 non-violent offender? Unfortunately a lot of the  
10 youthful offenders are going to be committing  
11 crimes of violence, but what is the context with  
12 which that occurred, excuse me.

13 So, yes, that's definitely something  
14 for consideration. In our report we cite two  
15 facilities for juveniles, one in Idaho and  
16 then -- I can't recall where the other one is.  
17 Devil's Lake. But they're very few and far  
18 between. But it's not that common, I don't  
19 believe, for juveniles, those under the age of  
20 18, to actually be sentenced to a term of  
21 incarceration.

22 CHAIR SARIS: I see. So that's the

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1 atypical case? It's the most violent of the  
2 violent?

3 MS. QUASULA: Right. And then if  
4 it's the most violent of the violent, depending  
5 on their age and what their prior criminal  
6 history is, then it's probably a situation where  
7 you want to move to transfer that juvenile. If  
8 a juvenile has a prior predicate, it may be a  
9 mandatory transfer.

10 CHAIR SARIS: So it doesn't happen  
11 that much that juveniles, except the most violent  
12 offenders, are being sent to --

13 JUDGE ERICKSON: Well --

14 CHAIR SARIS: -- jail or  
15 incarcerated?

16 JUDGE ERICKSON: There's kind of a  
17 constant state of flux with these juvenile  
18 facilities and the reality of it is -- I want you  
19 to think about what she just said. They take  
20 people from New Mexico and send them to Devil's  
21 Lake, North Dakota. That's 1,000 miles away from  
22 home. These are people who maybe never ever have

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1       been 100 miles away from their homes before.  
2       They are completely isolated from their cultural  
3       group, they're completely isolated from their  
4       families. I mean, this is not an ideal situation  
5       for rehabilitation under any circumstances. And  
6       even in North Dakota it is not infrequent for us  
7       to have kids that are taken from Belcourt, North  
8       Dakota and sent 600 miles away. All right?

9               And when we say they're the violent,  
10       the most violent offenders, that's true, but  
11       they're still juvenile-type offenses sometimes.  
12       I mean, the reality of it is -- I want you to --  
13       there are no juvenile drug treatment centers. I  
14       mean, if you think about it, if you have a tribe  
15       that has 6,000 people, it's a sovereign nation,  
16       it ought to have the full panoply of protections  
17       and social services that a state would have.  
18       They may have limited access, if at all, into the  
19       state mental health and mental treatment  
20       situations.

21               So if I get a sex offender in North  
22       Dakota, it is not uncommon for them to be sent

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1       600 miles away. And you may have a 15, 16-year-  
2       old kid where I'm the judge. I have to decide  
3       in like -- they're terrible cases. I mean, like  
4       say a fondling case involving a 6-year-old sister  
5       and 15-year-old boy. Well, we've got to make a  
6       choice. It's like what do we do next? I mean,  
7       do we take this 15-year-old, we send him 700 miles  
8       away to the nearest place where they'll provide  
9       that kind of sex offender treatment, or do we try  
10      and cobble something together that we can kind of  
11      make work in the state court, move them in with  
12      his auntie or his uncle and see what happens next?

13

14                   And I'm telling you, this is not an  
15      easy day for Ralph. I mean, and I'm sure it's  
16      not for anybody who does this kind of work. I  
17      mean, you're sitting there and there is no magic  
18      wand, and that's true in a lot of federal cases,  
19      but it breaks your heart when you're looking at  
20      a 15-year-old kid.

21                   CHAIR SARIS: I know we're running  
22      late here. Does anyone else --

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1 (No audible response.)

2 CHAIR SARIS: Thank you very much.

3 MS. QUASULA: Thank you so much.

4 CHAIR SARIS: Thank you.

5 I think Judge Erickson is going to  
6 wrap up. Right?

7 JUDGE ERICKSON: Yes, well, I'm  
8 wrapped up. I just want to say --

9 (Laughter.)

10 JUDGE ERICKSON: I wanted to say thank  
11 you very much. I apologize for talking too much.  
12 It's in my nature.

13 CHAIR SARIS: Well, let me just say  
14 this, that it's -- you've fulfilled everything  
15 that we wanted when we set you up. And I know  
16 how hard you worked and you've given us a lot of  
17 food for thought. So thank you very much.

18 (Whereupon, the above-entitled matter  
19 went off the record at 1:19 p.m.)

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