

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002



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Honorable Kevin Washburn

July 2, 2015

Dear Tribal Leader,

Earlier this year, the United States Sentencing Commission announced the formation of a Tribal Issues Advisory Group (TIAG) which will consider methods to improve the operation of the federal sentencing guidelines as they relate to American Indian and Alaska Native defendants, victims, and tribal communities.

As part of its work, the TIAG will examine several topics such as whether disparities exist in the application of federal sentencing guidelines to defendants from tribal communities, or in the sentences received by such defendants as compared to similarly situated state defendants. The group will also examine whether the guidelines should be changed to better account for tribal court convictions, tribal court orders of protection, youthful offenders, or child victims. Finally, the TIAG will consider how the Commission should engage with tribal communities in an ongoing manner, and how to better facilitate communication and relationship-building among federal and tribal representatives in the sentencing process. The TIAG will report to the Commission on its findings and recommendations no later than May 16, 2016.

The Commission invites you to consult with the TIAG about the scope and specifics of its work on these subjects. The attached framing paper provides additional background on the Commission, the federal sentencing guidelines, and topics relevant to the sentencing of defendants from American Indian and Alaska Native tribes.

The telephonic consultation will occur on **Thursday, August 13, 2015, at 2:00 p.m. EDT**. To register and receive call-in information, please send an email with your name and Tribal affiliation to consultation@ussc.gov. In addition, the Commission will accept written comments until the close of business on **Monday, August 31, 2015**. Written comments can be submitted via email to consultation@ussc.gov or (if necessary) via regular mail to:

U.S. Sentencing Commission
Office of Legislative and Public Affairs
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

If you have any questions about the consultation, or if you have trouble with registration or submitting comments, please contact the Commission's Public Affairs Officer, Jeanne Doherty, at 202-502-4502 or jdoherty@ussc.gov.

I hope that you will be able to participate in this important government-to-government consultation, and I look forward to working with you on these important issues.

Very truly yours,

A handwritten signature in black ink that reads "Ralph R. Erickson". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right.

Ralph R. Erickson
Chief Judge, District of North Dakota
Chair, Tribal Issues Advisory Group

**TRIBAL CONSULTATION ON THE WORK OF THE
U.S. SENTENCING COMMISSION’S TRIBAL ISSUES ADVISORY GROUP,
RELATING TO THE IMPACT OF FEDERAL SENTENCING GUIDELINES ON
DEFENDANTS FROM TRIBAL COMMUNITIES**

Background on the Commission and the Sentencing Guidelines

The United States Sentencing Commission (Commission) is an independent agency in the judicial branch. Its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.

The U.S. Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. The sentencing guidelines established by the Commission are designed to:

- incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation);
- provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors;
- reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

How the Guidelines Work

The sentencing guidelines take into account both the severity of the offense and the defendant’s criminal record to assign a guideline range for a criminal sentence. The guideline range is determined by consideration of several factors unique to the crime (to determine the “offense level”) and the defendant (to determine the “criminal history category”). Using the Sentencing Table, a copy of which is attached to this paper, the intersection of the defendant’s offense level and criminal history category will determine the applicable guideline range in a criminal case. The Supreme Court of the United States has stated that the guidelines must serve as “the starting point and initial benchmark” for the sentencing of a federal defendant.

A judge may depart upward or downward from the guideline range if the judge determines that the range fails to adequately meet the purposes of sentencing, and after consideration of several statutory factors set forth in 18 U.S.C. § 3553(a), namely: (1) the nature and circumstances of the offense, and the history and characteristics of the defendant; (2) the purposes of sentencing; (3) the kinds of sentences available; (4) the sentencing guidelines; (5) the guideline policy

statements; (6) avoiding unwarranted sentencing disparities; and (7) the need to provide restitution.

The Tribal Issues Advisory Group

Under the Sentencing Reform Act, the Commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.

As part of those duties, in February 2015, the Commission announced the formation of a Tribal Issues Advisory Group (TIAG), to consider methods to improve the operation of the federal sentencing guidelines as they relate to American Indian and Alaska Native defendants, victims, and tribal communities.

The TIAG is comprised of 23 individuals, including representation from a number of tribal nations. The membership includes five federal judges, two appointees each from the Department of Justice (DOJ) and Department of the Interior (DOI), a Federal Defender representative, a tribal Chairman, two tribal judges, a tribal prosecutor, a tribal victim specialist, a former tribal law enforcement leader, and several academics and practitioners of Indian law. In addition, each of the Commission's standing advisory groups has designated a non-voting liaison to the TIAG. The complete list of TIAG members is attached to this paper.

As part of its work, the TIAG will examine several topics such as:

- whether disparities exist in the application of federal sentencing guidelines to defendants from tribal communities, or in the sentences received by such defendants as compared to similarly situated state defendants;¹
- whether the guidelines should be changed to better account for certain factors such as:
 - a defendant's frequency and severity of prior tribal court convictions;
 - whether the crime was committed while the defendant was subject to a tribal court order of protection;
 - the age of the defendant, with special attention on youthful offenders;
 - whether the crime involved a child victim;
- how the Commission should engage with tribal communities in an ongoing manner, and how to better facilitate communication and relationship-building among federal and tribal representatives in the federal sentencing process.

The TIAG will consider and develop Commission data on the sentencing of Native American defendants as part of its study. As background, a recent Commission publication on this topic is attached to this paper.

¹ To ascertain whether such disparities exist, and the extent of those disparities, the TIAG will analyze sentencing data from the following state jurisdictions: Minnesota, North Dakota, Oregon, and South Dakota. Despite high numbers of federal cases involving Native American defendants in other states, such as Arizona and New Mexico, data from those jurisdictions is either unavailable or unusable for purposes of this study, because those states do not record certain necessary demographic information, including race.

The TIAG must report to the Commission on its findings and recommendations no later than May 16, 2016. The TIAG now seeks tribal input to inform its work on the topics listed above, and other topics relevant to the impact of the federal sentencing guidelines on defendants from tribal communities.

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C	12	10-16	12-18	15-21	21-27	27-33
	13	12-18	15-21	18-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
Zone D	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

U.S. Sentencing Commission
Tribal Issues Advisory Group Members

CHAIR

Honorable Ralph Erickson

Chief U.S. District Judge, District of North Dakota

JUDICIAL APPOINTEES

Honorable Diane Humetewa (Hopi)

U.S. District Judge, District of Arizona

Honorable Roberto Lange

U.S. District Judge, District of South Dakota

Honorable Brian Morris

U.S. District Judge, District of Montana

Honorable Jeffrey Viken

Chief U.S. District Judge, District of South Dakota

DEPARTMENT OF INTERIOR APPOINTEES

Mike Berrigan

Associate Solicitor for DOI, Division of Indian Affairs

Honorable Kevin Washburn (Chickasaw)

Assistant Secretary for Indian Affairs

DEPARTMENT OF JUSTICE APPOINTEES

Honorable Michael Cotter

United States Attorney, District of Montana

Tracy Toulou (descendant of the Colville Confederated Tribes)

Director of the Office of Tribal Justice

FEDERAL PUBLIC AND COMMUNITY DEFENDER APPOINTEE

Neil Fulton

Federal Defender for South and North Dakota

AT-LARGE MEMBERS

Dave Archambault II (Standing Rock Sioux)

Chairman, Standing Rock Sioux

Honorable Robert Blaeser (White Earth Nation)

Chief Judge, White Earth Nation

Kathleen Bliss Quasula (Cherokee Nation)

Partner, Lewis Brisbois Brisgard & Smith LLP
Commissioner for Nevada Indian Commission

Honorable William Boyum (Eastern Band of Cherokee Indians)

Chief Justice, Cherokee Supreme Court

Wendy Bremner (Confederated Tlingit and Haida Indian Tribes of Alaska and descendant of the Blackfeet Nation)

Bureau of Indian Affairs, Victim Specialist

Barbara Creel (Pueblo Jemez)

Professor of Law, University of New Mexico School of Law
Director, Southwest Indian Law Clinic

Troy Eid

Shareholder, Greenburg Traurig LLP

Miriam Jorgenson, Ph.D.

Professor Public Policy, University of Arizona
Research Director, Native Nations Institute

Brent Leonhard

Tribal Attorney, Confederated Tribes of the Umatilla Indian Reservation

Edward Reina (Salt River Pima Indian Community)

Director, Public Safety Tohono O'odham (retired)

STANDING ADVISORY GROUP LIAISONS (NON-VOTING)

Angela Campbell

Practitioners Advisory Group Liaison

Rick Holloway

Probation Officers Advisory Group Liaison

T. Michael Andrews

Victims Advisory Group Liaison

▶ THERE WERE 75,836 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2014.

▶ OF THESE CASES, 1,316 INVOLVED NATIVE AMERICAN OFFENDERS.

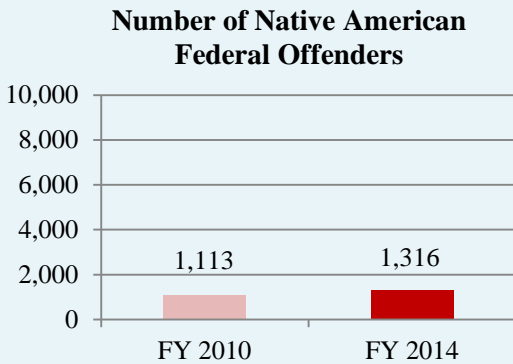
▶ NATIVE AMERICANS ACCOUNTED FOR 1.9% OF ALL OFFENDERS AND 4.9% OF UNITED STATES CITIZEN OFFENDERS.

Quick Facts



Native Americans in the Federal Offender Population

Native American offenders account for a small, but increasing portion of federal offenders. The number of Native American offenders has increased by 18.2% over the last five years.



Offender and Offense Characteristics

- In fiscal year 2014, most Native American offenders were male (78.6%).
- Almost all Native American offenders (99.6%) were United States citizens.
- The average age of these offenders at sentencing was 35 years.
- Almost half of Native American offenders (45.7%) had little or no prior criminal history (i.e., assigned to Criminal History Category I)¹. The proportion of Native American offenders in other Criminal History Categories was as follows:
 - ◆ 14.9% of these offenders were in Category II;
 - ◆ 17.6% were in Category III;
 - ◆ 8.2% were in Category IV;
 - ◆ 5.2% were in Category V; and,
 - ◆ 8.4% were in Category VI.
- Districts with the highest proportion of their overall caseload comprising Native American offenders were:
 - ◆ District of South Dakota (56.5% of overall caseload);
 - ◆ District of Montana (32.9%);
 - ◆ Eastern District of Oklahoma (26.1%);
 - ◆ District of North Dakota (18.0%); and,
 - ◆ Northern District of Oklahoma (12.6%).
- Weapons were involved in 19.3% of offenses involving Native American offenders, compared to 8.4% of all cases in fiscal year 2014.

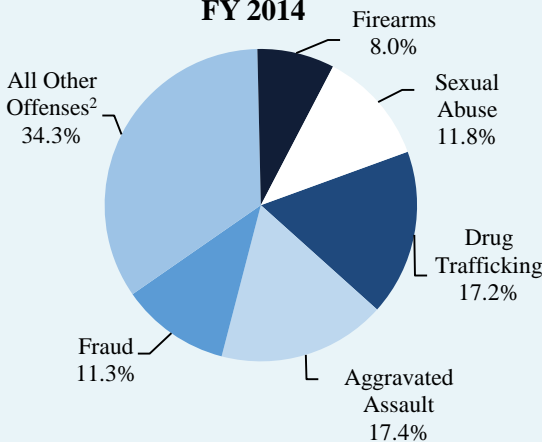
Punishment

- The majority of Native American offenders were sentenced to imprisonment (88.1%), which is slightly lower than the rate for all offenders in fiscal year 2013 (89.2%).
- Native American offenders were convicted of an offense carrying a mandatory minimum penalty at almost half the rate (11.2%) of offenders as a whole (21.9%).
- The average sentence length for Native American offenders was 51 months, compared to 47 months for offenders generally, and 60 months for all United States citizens.
 - ◆ The average sentence length for Native Americans convicted of an offense carrying a mandatory minimum penalty was 132 months.
 - ◆ The average sentence length for Native Americans not convicted of an offense carrying a mandatory minimum penalty was 41 months.

Top Five Districts Native American Federal Offenders FY 2014

District of South Dakota (N=293)
District of Arizona (N=272)
District of New Mexico (N=105)
District of Montana (N=99)
District of North Dakota (N=60)

Most Common Offenses Native American Federal Offenders FY 2014



¹ Tribal offenses are not counted in determining the criminal history score under the sentencing guidelines. See USSG §4A1.2(i).

² No other type of offense accounted for more than 3% of all offenses.

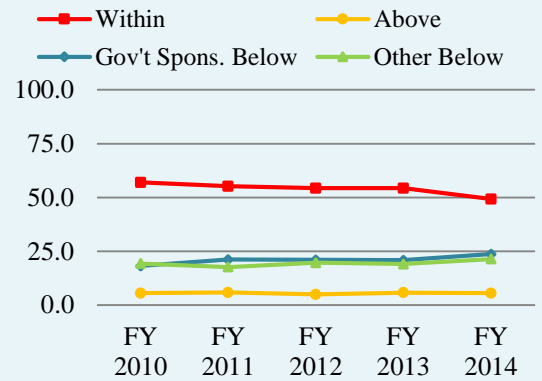
Quick Facts

Native Americans in the Federal Offender Population

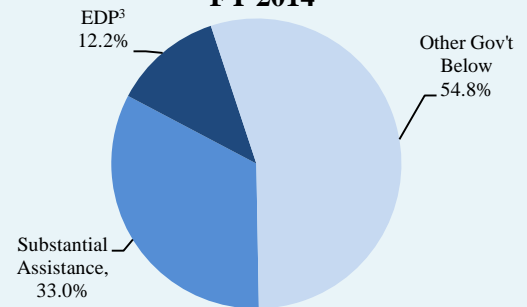
Sentences Relative to the Guideline Range

- The rate of within range sentences for Native American offenders has steadily decreased over the last five years (57.0% in fiscal year 2010 decreasing to 49.3% in fiscal year 2014).
- The rate of government sponsored below range sentences has increased over the last five years (from 18.2% in fiscal year 2010 to 23.7% in fiscal year 2014).
 - ◆ Substantial assistance departures were granted in 7.8% of cases involving Native American offenders in fiscal year 2014. This represents 33.0% of all government sponsored below range sentences for these offenders.
 - In fiscal year 2014, these offenders received an average reduction in their sentence of 54.2%.
 - ◆ Native American offenders received a below range sentence sponsored by the government for reasons other than substantial assistance or participation in an Early Disposition Program³ in 13.0% of cases in fiscal year 2014.
 - In fiscal year 2014, these offenders received an average reduction in their sentence of 47.7%.
- The percentage of Native American offenders that received a non-government sponsored below range sentence increased over the last five years (from 19.3% of these cases in fiscal year 2010 to 21.4% in fiscal year 2014).
 - ◆ In fiscal year 2014, these offenders received an average reduction in their sentence of 44.8%.
- The average guideline minimum for offenses involving Native American offenders has increased over the last five years, from 58 months in fiscal year 2010 to 60 months in fiscal year 2014.
- The average sentence imposed on Native American offenders has slightly decreased over the last five years, from 54 months in fiscal year 2010 to 51 months in fiscal year 2014.

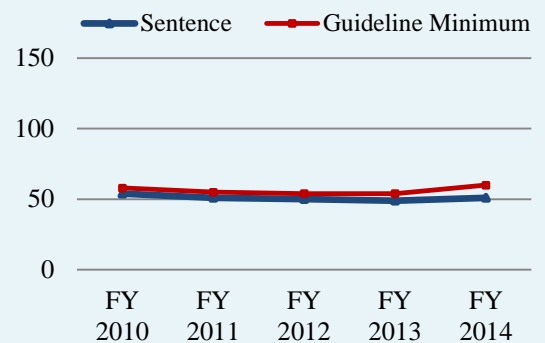
Sentence Relative to the Guideline Range



Government Sponsored Below Range Sentences FY 2014



Average Sentence and Average Guideline Minimum (in months)



³“Early Disposition Program (or EDP) departures” are departures where the government sought a sentence below the guideline range because the defendant participated in the government’s Early Disposition Program, through which cases are resolved in an expedited manner. See USSG §5K3.1.

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