



**U. S. Department of Justice**

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March 6, 2014

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Chief Judge Saris:

We write on behalf of the United States Attorneys who make up two sub-groups of the Attorney General's Advisory Committee at the Department of Justice: the Native American Issues Subcommittee and the Racial Disparities Working Group. We write to respectfully request that the United States Sentencing Commission consider forming a new American Indian Sentencing Advisory Group to study whether American Indian defendants in federal court face disparities in sentencing. If the Sentencing Commission forms such an Advisory Group, the Department of Justice would look forward to being an active participant in the Advisory Group's work.

The United States Sentencing Commission has previously worked to examine the issue of whether sentencing disparities that negatively impact American Indian

defendants exist in federal court. Under the Major Crimes Act (18 U.S.C. § 1153), federal courts have primary jurisdiction for many crimes committed in Indian Country that otherwise would be prosecuted in state courts of general jurisdiction. In 2003, in response to concerns that American Indian defendants were receiving longer sentence under the federal sentencing system than they would have received had they been prosecuted by their respective state court systems, the Sentencing Commission formed a Native American Advisory Group. This Advisory Group was charged by the Sentencing Commission to consider any viable methods to improve the operation of the then mandatory federal sentencing guidelines in their application to American Indians under the Major Crimes Act. The Advisory Group issued a Report on November 4, 2003, which concluded that, in one category of criminal charges,<sup>1</sup> the perception of an unfair disparity in the sentences received by American Indians in federal court versus state court was “well-founded.” *Report of the Native American Advisory Group*, November 4, 2003, p. iv. It should be noted that the Report also found a disparity that actually favored American Indian defendants in one of the other categories of criminal charges<sup>2</sup> that the Advisory Group studied.

Since the release of the Advisory Group’s 2003 Report, the issue of possible disparities between the sentences received by American Indians prosecuted in federal courts under the Major Crimes Act and the sentences received for similar crimes by non-Indians in state court has remained the subject of debate. Timothy J. Droske, *Correcting Native American Sentencing Disparities Post-Booker*, 91 Marquette L. Rev. 723 (2008); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 California L. Rev. 1409 (2011). Additionally, since Sentencing Commission’s previous Native American Advisory Group examined this issue, the concern regarding potential disparities in the sentencing of American Indian defendants in federal court has expanded to include the additional issue that American Indian defendants may experience disparate sentences when compared to defendants of other races within the federal sentencing system itself. Travis W. Franklin (2013) *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, Justice Quarterly, 30:2, 310-339, DOI: 10.1080/07418825.2011.605072 (study of Sentencing Commission data from fiscal years 2006 to 2008 found that American Indians are often sentenced more harshly in federal courts than white, African-American, and Hispanic federal offenders).

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<sup>1</sup> Aggravated assault cases in two federal judicial districts.

<sup>2</sup> Involuntary manslaughter cases. The involuntary manslaughter Sentencing Guideline was subsequently amended.

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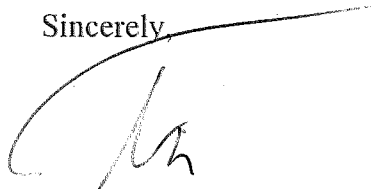
March 6, 2014

In addition to the studies and articles cited above, we can report that some United States Attorneys with responsibility for Indian Country prosecutions also hear concerns about sentencing disparities for American Indians in federal court from tribal leaders and from members of the federal judiciary. However, other United States Attorneys report that tribes in their District have not voiced concerns on this issue and that their Offices have seen no evidence of disparities impacting American Indian defendants in their Districts.

Finally, the work and report of the Sentencing Commission's previous Native American Advisory Group was completed before the United States Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005). We think it is important to have the Sentencing Commission establish a new advisory group to examine whether any sentencing disparities involving American Indian defendants exist, post-*Booker*.

In light of the forgoing, and in light of the Attorney General's Racial Disparities Working Group's efforts to address racial sentencing disparities in the federal criminal justice system where they can be documented, and on behalf of the Department of Justice we respectfully requests that the Sentencing Commission establish an American Indian Sentencing Advisory Group to study whether there exist any post-*Booker* sentencing disparities that impact American Indian defendants. Furthermore, we request that if any such disparities are, in fact, documented, the Advisory Group be empowered to develop strategies to address them. Should the Sentencing Commission wish to discuss the issues raised here in further, the Department would be happy to oblige. We look forward to working with the Sentencing Commission on this important issue.

Sincerely,



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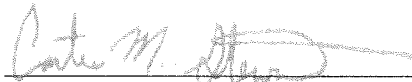
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Chair, Attorney General's Native American  
Issues Subcommittee

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Working Group

Cc: Commissioners  
Ken Cohen, Staff Director  
Kathleen Grilli, General Counsel