

FEDERAL PUBLIC DEFENDER

Southern District of Texas

Lyric Office Centre
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1634

FEDERAL PUBLIC DEFENDER:

MARJORIE A. MEYERS

First Assistant:

H. MICHAEL SOKOLOW

Telephone:

713.718.4600

Fax:

713.718.4610

October 20, 2014

Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comment on Possible Formation of Tribal Issues Advisory Group

Dear Judge Saris:

The Commission has requested comment on the merits of forming a Tribal Issues Advisory Group to study operation of the federal sentencing guidelines on crimes committed in Indian Country and other areas that have a significant Native American population. Defenders believe that the formation of such a group would take time and attention away from other significant public safety challenges facing many tribes and the efforts underway to address those issues, is not the most effective way for the Commission to understand the impact of the guidelines on Native Americans convicted of federal felony offenses, would embroil the Commission in a political controversy that does not have an easy solution, would not further public safety, and is an unwise expenditure of the Commission's resources when many other guidelines are fatally flawed and in need of repair.

I. Numerous New Federal Initiatives are Underway as Part of An Effort to Address the Many Challenges that Affect Crime in Indian Country.

Over the past several years, tribal issues have received considerable attention from Congress and the Department of Justice. Numerous initiatives, discussed in greater detail below, are underway that will alter how tribal justice systems, the Department of Justice, and other stakeholders respond to crime in Indian Country, but it is too soon to tell how successful these

efforts will be.¹ Implementation of the Tribal Law and Order Act (TLOA) is still in its infancy. The recommendations of the Indian Law and Order Commission are new and need to be considered by Congress and the Department of Justice. The provisions of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), which clarify tribal power to issue and enforce protection orders in domestic violence cases and gives tribes special jurisdiction over certain defendants who commit acts of domestic violence or dating violence or violate protective orders, will not be fully effective until 2015. The Department's new policies in partnering with federally recognized tribes to fight crime and enforce law have not yet been finalized.² And just a few weeks ago the Justice Department announced the award of 169 grants to help tribes enhance and support tribal justice and safety.³ With all of these initiatives, as well as others, still at the early stages, a Commission advisory group would distract, rather than add value at this time. The Commission should wait and see how current efforts play out before deciding whether to involve itself with complicated social and criminal justice issues that have plagued tribal communities for hundreds of years and that demand culturally sensitive solutions specific to each tribe.

- The Tribal Law and Order Act (TLOA) was signed into law in 2010. It is an ambitious piece of legislation – designed to change the operation of justice systems throughout the hundreds of Indian Tribes and Nations. Because implementation has required “significant coordination among federal agencies and all components of tribal justice systems,”⁴ change has come slowly and various institutional actors are still sorting out their respective roles, planning a course of action, and executing those plans. For example, only eight tribes have implemented “enhanced sentencing,” which permits tribes to impose longer periods of imprisonment for certain offenses, provided the court provides specific

¹ This letter discusses only a few of the major initiatives. Others are included in a Department of Justice publication: *Indian Country Accomplishments of the Justice Department, 2009-Present*, www.justice.gov/sites/default/files/tribal/legacy/2014/02/21/ic-accomplishments.pdf.

² See U.S. Dep't of Justice, *Proposed Statement of Principles for Working with Federally Recognized Indian Tribes* (Nov. 2013), www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/statement-of-principles-for-working-with-tribes.pdf.

³ U.S. Dep't of Justice, *Justice Department Awards \$87 Million to Enhance, Support Tribal Justice and Safety* (Sept. 22, 2014), <http://www.justice.gov/opa/pr/justice-department-awards-87-million-enhance-support-tribal-justice-and-safety>.

⁴ National Congress of American Indians, *Tribal Law & Order Resource Center*, “*Tribes Exercising Enhanced Sentencing*,” <http://tloa.ncai.org/tribesexercisingTLOA.cfm>.

procedural protections. Another twelve tribes are close to implementation and many more are in the process.⁵

- The Tribal Justice Plan, a congressionally mandated report directed by TLOA, also is in its early stages of implementation. The Plan, which is designed to “address incarceration and alternatives to incarceration in Indian Country,” was provided to Congress in 2011.⁶ It is a long-term plan, with a major theme of being “flexible enough to allow tribes to develop strategies tailored to their specific public safety needs and tribal history and culture.”⁷ Because the Plan’s focus is on making “alternative interventions culturally specific to individual Nations,” it is not compatible with the federal sentencing guidelines, which prohibit consideration of cultural issues and focus on promoting uniformity. Nor is a U.S. Sentencing Commission advisory group of a select number of individuals compatible with the Plan, which calls for incarceration and reentry strategies to be “tribally led.”⁸
- The bipartisan Indian Law & Order Commission released its report last November. The report, *A Roadmap for Making Native American Safer*,⁹ is described as “one of the most comprehensive assessments ever undertaken of criminal justice systems servicing Native Americans and Alaska Native communities.”¹⁰ The report sets forth numerous findings and recommendations with an emphasis on strengthening tribal criminal justice systems and relying less on federal “command and control” policies.¹¹ One of its recommendations is to

⁵ *Id.*

⁶ U.S. Dep’t of Justice and U.S. Dep’t of Interior, *Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems* (August 2011), <https://www.bja.gov/Publications/FinalTLOATribalJusticePlan.pdf>.

⁷ *Id.* at 2.

⁸ *Id.* at 5.

⁹ Indian Law & Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States* 9, 17, 38 (2013) (*Roadmap*), http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer.pdf.

¹⁰ *Id.* at *i*.

¹¹ *Id.* at *viii*.

permit tribes to “opt out” of the existing scheme where federal and state laws control criminal justice in tribal communities.¹² Other recommendations encourage Congress to (1) establish a special appellate court: the United States Court of Indian Appeals; (2) amend the Major Crimes Act; and (3) provide resources for alternatives to incarceration.¹³ Notably, the report makes no recommendations that the U.S. Sentencing Commission should become more involved in tribal matters. Congress held a hearing on the recommendations on February 12, 2014, and the Department of Justice is still studying them. Which of the recommendations Congress, the Department of Justice, or the Department of the Interior will adopt remains to be seen, but given the bipartisan nature of the report, some changes seem likely.

- The Violence Against Women Reauthorization Act of 2013 generally takes effect in March 2015. A Pilot Project, which authorized certain tribes to begin exercising special jurisdiction over certain domestic violence cases sooner, began this year.¹⁴ Also new this year is the award of \$87 million in grant money to support tribal justice and safety. Many of these awards focus on early intervention programs that are designed to interrupt or deter violence against Native American women – an intervention proven to avoid more serious violence. As such programs take hold, the role of the federal criminal justice system and the federal sentencing guidelines in tribal communities should lessen.
- A little over a year ago, the Federal Interagency Reentry Council released its agenda for addressing the reentry needs of Native Americans.¹⁵ The Council set forth an ambitious agenda of expanding data collection, increasing coordination, exploring transition assistance, and focusing on employment, education, health, and housing opportunities.¹⁶ The Department of Justice addressed these issues in its 2014 Reentry Tool Kit, noting how the “[t]he public safety challenges faced by

¹² Roadmap, *supra* note 9, at ix-xi

¹³ *Id.* at xi, xxiii, xxiv.

¹⁴ Dep’t of Justice, *Violence Against Women Act (VAWA) Reauthorization 2013*, <http://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0>.

¹⁵ Federal Interagency Reentry Council, *Reservation Communities 2* (2013), http://csgjusticecenter.org/wp-content/uploads/2013/06/SnapShot_Reservation.pdf.

¹⁶ *Id.* at 2.

reservation communities are exacerbated by the unique situations faced by American Indians returning home after serving federal prison sentences for crimes of violence.”¹⁷

As this summary reveals, many agencies are working on numerous initiatives to tackle the myriad problems connected to crime in Indian Country. One recurring theme for those initiatives is that policies and programs should be culturally sensitive and delivered in consultation with each individual tribe. Because of the unique needs of each tribe, it would be impossible for the Commission to craft guidelines that are consistent with those themes. And even if the Commission were inclined to permit a more tribe-specific or individualized approach within the guidelines, it is premature for the Commission to jump into these complicated and vexing issues.

II. An Advisory Group Aimed at Examining Whether Native Americans Face Disparities in Federal Sentencing is Ill-Conceived and Any Attempt to Correct for State/Federal Disparity Would Embroil the Commission in a Political Controversy.

Disparity between sentences given to Native Americans in federal court versus their counterparts in state court is a significant and longstanding problem. The Indian Law and Order Commission noted “that Federal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction.”¹⁸ Based on a South Dakota dataset, the Indian Law and Order Commission noted that “[f]ederal sentences for assault during 2005 were ‘twenty-five months longer than those for Native Americans sentenced in state court and thirteen months longer than those for whites sentenced by the state.’”¹⁹ Unless the Commission is willing to abandon an effort to write comprehensive guidelines that uniformly apply to all federal offenses and, instead, write separate, culturally sensitive, guidelines that apply only to the Major Crimes Act after considering state sentencing schemes from multiple jurisdictions, it cannot even begin to resolve the biggest problem with operation of the federal sentencing guidelines for crimes committed in Indian Country or by Native Americans.

¹⁷ U.S. Dep’t of Justice, *Reentry Toolkit for United States Attorney’s Offices* 15 (2014). These situations include the absence of any “Residential Reentry Centers (RRCs) (halfway houses) on or near Indian Country lands,” high unemployment, “a lack of affordable and adequate housing,” and the absence of local “health and employment services” needed for successful reentry. *Id.*

¹⁸ *Roadmap*, *supra* note 9, at 119.

¹⁹ *Id.*

Prosecutors and judges are better situated than the Commission, through its guidelines, to correct for that disparity. Prosecutors exercise significant discretion in what charges to bring and whether to support a below guideline sentence. The statistics show that prosecutors are sponsoring below range sentences for Native Americans more than other persons convicted of a federal felony offense. In fiscal year 2013, the government sponsored below range rate for Native Americans for reasons other than substantial assistance or participation in an Early Disposition program was 10% compared to 5.2% nationally.²⁰ Judges also have the power to correct for disparity, imposing non-government sponsored below range sentences on Native Americans in 19.1% of cases, which is about the same as the national rate (18.7%).²¹

Although we are troubled that more prosecutors and judges are not trying to make sentences for Native Americans more equitable by reducing them,²² the Commission has not signaled a willingness to correct for disparity, which has existed ever since the guidelines took effect. Last year, the Commission had an opportunity to consider the disparity between state and federal sentences when it promulgated amendments as a result of VAWA 2013. We shared with the Commission information about how states, including those like Minnesota that prosecute crimes in Indian country, treat strangulation.²³ We also urged the Commission not to expose Native Americans convicted of federal offenses to significantly longer sentences than their state counterparts who face misdemeanor convictions and minimal jail time for the same conduct. Notwithstanding that information, the Commission chose to increase sentences rather than keep them closer to what would happen in a state prosecution. That action exacerbated existing disparity.

Trying to address the long-standing disparity that exists between Native Americans sentenced in federal court and those sentenced in state court would also entangle the Commission in a messy political battle that has many stakeholders divided. For example, some commentators and practitioners familiar with the problems created by the federal sentencing guidelines have argued that Congress should amend the Sentencing Reform Act so that the guidelines do not apply to offenses committed under the Major Crimes Act. Others have argued that Native

²⁰ See USSC, *2013 Sourcebook of Federal Sentencing Statistics*, Tbl. N; USSC, *Quick Facts: Native Americans in the Federal Offender Population 1* (2014).

²¹ *Id.* (both sources cited in footnote 20).

²² See also *Roadmap*, *supra* note 9, at 119 (noting that while judges now have more “maneuvering room . . . to exercise downward discretion and make Federal sentences for Native Americans more equitable, by 2008 at least, statistics showed that judges were not reducing their sentences for Native American defendants”).

²³ Written Statement of Neil Fulton, Public Hearing Before the U.S. Sentencing Commission, Washington, D.C., at 8-9 (Feb. 13, 2014).

Americans should be sentenced under tribal sentencing guidelines. Still others insist that anyone convicted of a federal offense should be subjected to the same sentencing rules as anyone else convicted of a federal offense.²⁴ To the extent that the latter position, which represents the Commission's actions to date, continues to prevail, the Commission can do nothing but lower sentences across the board for the crimes most prevalent in Indian Country. That action can be done without expending resources on an advisory group or delaying action while the advisory group is formed and meets.

The Commission should also avoid getting prematurely entangled in a contentious dispute about whether tribal convictions should be counted toward criminal history points.²⁵ Currently, “[s]entences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).”²⁶ Some advocates of tribal sovereignty have pushed for such convictions to be counted.²⁷ But to adopt a blanket rule treating all tribal convictions the same would ignore: (1) how tribes are allowed to adopt their own tribal justice systems – some of which are modeled on the adversary system and others on non-adversarial systems rooted in indigenous justice activities such as peacemaking; and (2) how some tribes are establishing plans to implement the due process and defense function requirements of TLOA and VAWA 2013 while others are years away or choosing not to implement them.²⁸ The current approach in the guidelines, which affords tribal court sentences

²⁴ See generally Timothy Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 Marquette Law Review 723, 767, 773, 791-92 (2008).

²⁵ A related dispute about whether tribal convictions can be used a predicate offender under 18 U.S.C. § 117(a) has divided the courts. Compare *United States v. Bryant*, 2014 WL 4815099 (9th Cir. 2014) (prior uncounseled tribal court conviction could not be used a predicate offense) with *United States v. Cavanaguh*, 643 F.3d 592 (8th Cir. 2011) (uncounseled tribal conviction could be used as predicate conviction because Sixth Amendment does not apply in tribal court) and *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011) (same).

²⁶ USSG §4A1.2(i).

²⁷ See Testimony of Kevin Washburn, Public Hearing Before the U.S. Sentencing Commission, Phoenix, Ariz, at 54 (Jan. 21, 2010). But see Barbara Creel, *The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative*, UNM School of Law Legal Studies Research Paper Series, Paper No. 2014-01, 355 (2013) (“It is ridiculous and contrary to notions of access to justice that such uncounseled tribal court convictions are relied upon in federal court in the name of tribal sovereignty”).

²⁸ See generally Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. Disc. 88 (2013) (discussing how implementation of TLOA depends upon the financial and cultural position of each tribe). Because tribes within a single federal district are approaching implementation of TLOA and VAWA 2013 in different ways, for the guidelines to count tribal sentences in determining the criminal history score would create unwarranted disparity. For example, the Standing Rock Sioux Tribe in North and South Dakota is close to implementing the provisions of TLOA. The Oglala Sioux Tribe at Pine Ridge Reservation in South Dakota, however, is not.

the same comity given to foreign sentences and which provides for a departure where the court believes it appropriate to consider the sentence, is a better mechanism to recognize tribal sovereignty and account for the diverse practices in tribal justice systems.

III. The Commission Has Alternative Ways of Engaging with Tribal Communities.

Our position that the Commission should not form a Tribal Issues Advisory Group does not mean we believe the Commission should ignore the concerns of tribal communities. Whenever the Commission considers amendments to sentencing guidelines that govern the offenses enumerated in the Major Crimes Act²⁹ – e.g., murder, manslaughter, sexual abuse, and assault – it should go beyond publishing notices in the federal register and instead provide notice to all tribal communities about those proposals and issues for comment. It should also invite to its hearings a broader cross-section of persons familiar with tribal issues. This would give all of the tribes, rather than a select few individuals on an advisory group who cannot possibly speak for all tribes without conducting extensive hearings and listening sessions, an opportunity to provide information relevant to the Commission’s decision-making.

Such an approach would be consistent with the Commission’s past observations and the Department of Justice’s thoughts on working with tribes. The Commission recognized in 2004 that “the impact on Native Americans resulting from federal criminal jurisdiction and the application of the federal sentencing guidelines varies both from offense to offense and between jurisdictions.”³⁰ The Department of Justice’s *Proposed Statement of Principles for Working with Federally Recognized Indian Tribes* also acknowledges that “each tribe’s history and contemporary culture are unique, and that solutions that work for one tribe may not apply to others.”³¹ Because Indian Country covers so many tribes – many of which are scattered across hundreds of thousands of square miles of remote territory – we think it would be extraordinarily difficult to form an advisory group that is sufficiently representative of such a diverse group of people.

²⁹ The Major Crimes Act covers the following offenses: “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country.” 18 U.S.C. § 1153.

³⁰ USSC, *2004 Annual Report* 17 (2004).

³¹ Dep’t of Justice, *Proposed Statement of Principles for Working with Federally Recognized Indian Tribes Principles*, at 1, <http://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/statement-of-principles-for-working-with-tribes.pdf>.

IV. Federal Agencies Responsible for Public Safety in Indian Country Should Focus on Ensuring that Tribes Have the Services Necessary for Crime Prevention and Rehabilitation of Persons Who have Committed a Criminal Act.

We are troubled that the Native American Issues Subcommittee and the Racial Disparities Working Group of the Attorney General’s Advisory Group at the Department of Justice believe that focusing on how the federal sentencing guidelines operate in Indian Country should be a priority. Tackling the problem of high crime rates that exist in many tribal communities is an important goal, as is ensuring justice and treating people fairly. Studying the operation of the federal sentencing guidelines and whether judges impose different sentences on Native Americans after *Booker*, will not further either goal. Crime rates are higher in many tribal communities because thousands upon thousands of people living in isolated environments are deprived of essential services necessary to survive and thrive. Poverty is well above the national average; unemployment rates are extraordinarily high – “often above 50 percent”; housing is frequently “substandard” and “overcrowded”; phone service does not exist for “up to 50 percent of households”; educational opportunities are “marginal”; and disease rates are high. Substance abuse has plagued generations of Native families, but treatment is “largely unavailable.”³² Reentry services for people returning to their communities after serving a period of imprisonment are virtually non-existent.

The best way to lower crime rates and to achieve justice in tribal communities is to provide adequate funding and services for tribal members. While the provision of funds and services is beyond the Commission’s control, the Commission could encourage Congress to take steps to (1) implement the Law and Order Commission’s recommendations to improve upon alternatives to incarceration that are designed to meet the needs of Native Americans who have been convicted of a crime, and (2) develop culturally appropriate reentry and halfway house programs for individuals returning to tribal communities after serving a period of imprisonment.

V. The Commission’s Limited Resources are Better Used on Addressing Other Problems with the Guidelines.

Like many federal agencies, the Commission does not have unlimited resources or staff. It must judiciously use its resources to address the most pressing problems with federal sentencing policy. Native Americans comprise 2% of all persons sentenced under the guidelines.³³ Given these small numbers and the multitude of other initiatives focused on public safety in tribal communities, discussed above, we encourage the Commission to avoid immersing

³² See generally National Congress of American Indians, *Economic Development & Commerce & Education, Health & Human Services*, www.ncai.org.

³³ USSC, *Quick Facts: Native Americans in the Federal Offender Population* (2014).

itself in the complex issues surrounding crime and justice in Indian Country. Instead, the Commission should focus its efforts on other issues over which it has greater control and for which there are no competing initiatives. These include simplification of the guidelines, an examination of how certain guidelines fail to further the purposes of sentencing, and continuation of its work with Congress to move forward with a sensible sentencing policy that does not depend upon lengthy prison sentences with no empirical relationship to the purposes of sentencing.

As to matters of sentencing disparity, we strongly encourage the Commission to correct that disparity by responding to feedback from judges about the guidelines most in need of repair. That feedback helps to show which guidelines fail to capture the purposes of sentencing set forth in 18 U.S.C. § 3553(a). As we have discussed in the past, these include the child pornography guideline, the career offender guideline, the illegal reentry guidelines, and the economic crimes guideline. The career offender guideline is especially problematic because it calls for lengthy sentences, dramatically overstates the risk of recidivism, and has an adverse impact on Black individuals convicted in federal court.³⁴ The rate of government sponsored below range sentences in career offender cases, for reasons other than substantial assistance or participation in an Early Disposition program, has increased dramatically in the past five years from 5.7% in fiscal year 2008 to 13.9% in fiscal year 2012.³⁵ The average reduction was 80 months.³⁶ The rate of non-government sponsored below range sentences for persons classified as “career offenders” increased from 22.1% in fiscal year 2008 to 27.6% in fiscal year 2012.³⁷ The average reduction was 68 months.³⁸ This data shows that the career offender guideline, which calls for lengthy sentences and which is broader than Congress required in the Sentencing Reform Act, is in need of repair.

The Commission’s recent data release also shows dissatisfaction with the firearms guideline. Only 56% of cases sentenced under §2K2.1 were within the range. Non-government sponsored below range sentences were imposed in 23% of cases.³⁹

³⁴ USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). Persons qualifying for the career offender guideline had a 52 percent recidivism rate, and the rate for those qualifying on the basis of prior drug offenses was only 27 percent.

³⁵ USSC, *Quick Facts: Career Offenders* (2014).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ USSC, *3d Quarter Release, Preliminary Fiscal Year 2014 Data*, at tbl. 5.

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May 12, 2014

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In closing, we remain concerned about the many issues related to crime in Indian Country and the longstanding problems with unfairly long federal sentences imposed on our Native Americans clients. We do not believe, however, that the formation of a Tribal Issues Advisory Group will solve any of the problems and that other initiatives stand a better chance of bringing justice and much needed services to tribal communities.

We appreciate the Commission's consideration of our views and look forward to working with the Commission in the coming amendment cycle.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

/s/ Jon Sands

Federal Public Defender for the District of Arizona

/s/ Neil Fulton

Neil Fulton

Federal Public Defender for the Districts of North
and South Dakota

cc: Hon. Ketanji Brown Jackson, Vice Chair
Hon. Ricardo H. Hinojosa, Vice Chair
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Rachel Barkow, Commissioner
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