

United States District Court

District of North Dakota

655 1st Ave. North, Ste. 410

Fargo, ND 58102-4952

Fax: (701) 297-7085

Tel: (701) 297-7080

RALPH R. ERICKSON
CHIEF DISTRICT JUDGE

September 4, 2014

United States Sentencing Commission
One Columbus Circle, NE Suite 2-500, South Lobby
Washington, DC 20002-8002

re: Tribal Issues Comment

Dear Judge Saris and Members of the Commission,

The United States Sentencing Commission's call for comments on the wisdom of formation of a Tribal Issues Advisory Group is welcome news. I whole-heartedly support the formation of such a group and would love to serve on the group, if one is formed.

For over a decade I have served as a district judge in a district with a significant number of Indian Country cases. Prior to my time as a federal judge I served for nine years as a state district judge. I was raised in a small farming community that was within thirty miles of two separate Indian Reservations. Long before that, my family was involved in businesses that tied our well-being to that of the Native Americans they traded with. For as long as I can recall I have been exposed to Indian Country issues.

The relationship between the federal government and the tribes has been a complicated one to say the least. Through the years many promises have been made and few have been kept. The men and women who made these promises were for the most part well-intentioned but often lacked the ability to carry through on the promises. People of good will must acknowledge that a problem exists in Indian Country and that it is at least in some meaningful part the fault of the Federal Government.

Indian Country sentencing issues are a limited, but significant part of the problem in my experience. In saying that, I recognize that Indian Country issues are not uniform throughout the various reservations in the country. One of the great difficulties that we face in Indian Country is that every judge working on Indian Country cases perceives that the issues he or she confronts are normative. In fact, each reservation has some unique characteristics and it appears that some regional variation exists as well, but at the present time there is such a dearth of information that it is difficult to have meaningful discussions on Indian Country sentencing generally.

One of the biggest needs in any discussion involving Indian Country sentencing is finding sufficient data that actually allows for meaningful conversations. We need to move beyond mere anecdotal discussions into a framework where our discussions can be evidence based. The opportunity before the USSC and the DOJ to develop a record that

allows us to make fact-based decisions may well be a once in a generation opportunity. I urge the USSC to form the Advisory Group and participate in this process which has the potential to improve the lives of some of the most vulnerable populations that exist in our country.

In our region there seems to be a widespread recognition that Indian Country sentencing creates wide disparities among people sentenced for virtually the same crime in the same location. Some of the reasons for the disparity are simply federalism based. Being tried in the federal courts is likely to result in a longer sentence for many offenses. The Sentencing Commission, Congress, and the Courts have frequently expressed the view that mere sentencing disparity with state sentences is not really an issue that should alone drive federal sentencing policy. There is wisdom in this approach. After all, no sovereign should give up its own view on justice or sentencing law and policy simply to arrive at uniformity.

Even so, Indian Country sentencing gives rise to an additional set of issues beyond the usual federalism concerns. For starters, the trust relationship between the United States Government and the tribes imposes upon the federal government the highest fiduciary duty to deal with the tribes in a manner that promotes stable, law abiding and prosperous communities. This trust relationship is further complicated by the understanding in the federal courts that being an Indian is a political determination not a racial one. To the average Native American being an Indian means membership in both a separate sovereign nation and a racial identification. When Native American citizens face widely disparate sentences for identical crimes they often ask if it is a matter of race. Finally, the passage of the Tribal Law and Order Act (Pub. L. 111-211) and the Violence Against Women Reauthorization Act (Pub. L. 113-4) have increased tribal court jurisdiction and realigned some important facets of Indian Country law enforcement and prosecution on the ground. Each of these considerations favor the formation of an Advisory Group.

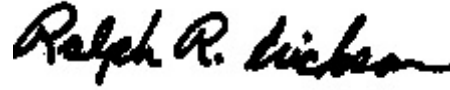
I suspect that you will hear from a number of judges from this region of the country—many of whom will decry the sentencing disparity that exists in Indian Country. Such observations are real in my experience. It is not true, however, that the disparity is uniformly harsher. In many areas, the law is decidedly harsher than it would be under state law—in others it is substantially less severe. The problem is not so much that sentences are long—it is that a non-Indian committing exactly the same crime, in exactly the same manner, in exactly the same place could face a substantially different sentence than an Indian—and in the greater Native American community this disparity is viewed as a race based problem. This is exacerbated by the fact that many of the crimes are ordinary street crimes not traditionally federal offenses. Native Americans can and do question why the sentences for these ordinary street crimes are different merely because the person convicted is found to be an Indian. The formation of the proposed Advisory Group will provide a forum for these issues to be fleshed out through the use of reliable information and statistics.

It is apparent to me that Indian Country sentencing presents a myriad of questions at this time—with few clear answers. The proposed Advisory Group gives the Sentencing Commission the opportunity to work hand-in-glove with the DOJ to develop a factual record that separates anecdote from reality. It will allow all of us to understand Indian Country sentencing better. And, it will afford Congress and the USSC an

opportunity to address the real problems in Indian Country sentencing. I firmly believe that this can be an important step in improving the lives of Native Americans living on reservations and I urge you to move forward with the proposed Advisory Group. As I previously noted, if there is a group formed I would welcome the opportunity to serve on it.

Thank you for this opportunity for input. I deeply appreciate your consideration. If you have any questions, please feel free to contact me at any time.

Very truly yours,

A handwritten signature in black ink that reads "Ralph R. Erickson". The signature is written in a cursive, slightly slanted style.

Ralph R. Erickson
Chief Judge
District of North Dakota