

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON
IMPLEMENTING THE VIOLENCE AGAINST WOMEN
REAUTHORIZATION ACT OF 2013

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THURSDAY,
FEBRUARY 13, 2014

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The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center - West, One Columbus Circle, NE, Washington, DC, at 8:45 a.m., Patti B. Saris, Chair, presiding.

PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RICARDO H. HINOJOSA, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, Commissioner
JONATHAN J. WROBLEWSKI, Ex Officio

ALSO PRESENT

RUSSELL BUTLER
DR. JACQUELINE CAMPBELL
HON. MICHAEL W. COTTER
NEIL FULTON
SAM HIRSCH
HON. ROBERTO LANGE
PAULETTE SULLIVAN MOORE

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

8:49 a.m.

CHAIR SARIS: Good morning,
everybody. I want to thank everybody for
coming this morning, which is not a given.

Today, of course, we are having
our hearing on the Violence Against Women
Act. And before we do so, I wanted to
introduce you to the Commissioners, and I
would like to begin to my immediate right,
which is Judge Ricardo Hinojosa. Judge
Hinojosa is the chief district judge for the
Southern District of Texas and has been a
district judge on that court since 1983.
Judge Hinojosa has served on the Commission
since 2003. While he currently serves as a
vice-chair of the Commission, Judge Hinojosa
was also the chair of the Commission.

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Now not next to him, because we keep going back and forth here, is Judge Charles Breyer. He is a senior district judge for the Northern District of California. Judge Breyer has served as a United States District Court judge since 1998. He joined the Commission last year and also serves as a vice-chair.

So Dabney Friedrich, who is on the Commission, actually sent me a text, panicked; she's at the Metro station waiting for the train, should be here, but she is not right now. And immediately prior to her appointment she served as associate counsel at the White House, previously general counsel to Chairman Orrin Hatch at the United States Senate Judiciary Committee, and as an assistant U.S. attorney, first with the Southern District of California, and then for the Eastern District of Virginia.

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And then over here; so I'm going back and forth, this is Judge William Pryor, who also joined the Commission last year. Judge Pryor is a United States circuit judge for the 11th Circuit Court of Appeals appointed in 2004. Before his appointment to the federal bench, Judge Pryor served as an attorney general for the State of Alabama.

And then going down to -- we switched all of this because of the time change, Ketanji Jackson couldn't come because her kids are home from school. And she was confirmed as a United States district judge for the District of Columbia last year and is a vice-chair.

And I'm going to jump to Rachel Barkow, who is also a new member of the Commission. She is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focused her teaching and research on criminal and administrative law. She also served as the faculty director of the Center on the Administration of Criminal Law at the Law School.

And finally, way over to my left is Commissioner Wroblewski, who is the designated ex-officio member of the United States Sentencing Commission, representing the Department of Justice. He serves as the director of the Office of Policy and Legislation in the Department's Criminal Division.

So I want to thank everybody for coming this morning, because sometimes, you know, it's toughest for the local folks coming in, as I know some of you did, trying to deal with the Metro, etcetera. So welcome to the Sentencing Commission's hearing on implementing the Violence Against Women Reauthorization Act of 2013. And I want to thank all the witnesses who came through snow and sleet and rain and ice to get here.

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I actually first heard of this important issue -- because living in Boston I don't always hear about these issues; although we have our own share of domestic violence, but I didn't hear about the traumatic effect of it on the Native American community. And I actually learned about it by reading a book called "The Round House" by Louise Erdrich. It had the same impact on me that perhaps other books have had on other people on social justice issues. I was taken with the book, and then came to find out that this was going to be one of our priorities of this year when Congress passed the Act.

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Because it impacted federal criminal law in lots of different areas, we've been studying it to decide what changes needed to be made. The legislation has been prominently in the news. One of the major changes that the Violence Against Women Reauthorization Act of 2013 made was to give tribal courts jurisdiction, for the first time, over domestic violence offenses committed by non-Native American offenders against Native American victims in Indian country.

The first tribes selected for a pilot program implementing the new grant of jurisdiction were designated late last week and the *Washington Post*, among others, wrote about the crisis of domestic violence against Native American women. While the jurisdiction issue is, for the most part, beyond our scope, the legislation also amended federal criminal law, in part to address the same issue of tribal violence.

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So we're eager to hear from all of you about this difficult issue. And we're just first going to hear from Judge Lange, who came from South Dakota. When you hear his testimony -- there's almost no one who knows more about this subject than Judge Lange does from the judiciary. We will then hear a second panel on Executive Branch and Defense perspectives followed by a short break. And finally we will hear expert and community perspectives.

We'll ask each witness to speak for about five minutes, with the exception of Judge Lange, who we've asked to speak for about 10 minutes. We've read your written testimony. We got it. So if you could highlight your key points and then we'll jump in and ask questions and learn from all of you. So thank you for coming here and helping us with these issues.

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And now I turn to Judge Lange. And I will just give very short bios of folks. Judge Lange is a United States district judge for the District of South Dakota in the Central Division located in Pierre, South Dakota. He was a district court judge since October 2009. Before joining the bench, Judge Lange spent 20 years in private practice with the firm of Davenport, Evans, Hurwitz & Smith in Sioux Falls, South Dakota. During that time he focused on complex commercial litigation, personal injury and product liability cases. Judge Lange earned his undergraduate degree from the University of South Dakota in 1985 and he received a law degree from Northwestern University School of Law in 1988. Thank you so much for coming this distance.

HON. LANGE: Thank you for having me. This weather makes me feel at home, unfortunately.

(Laughter.)

HON. LANGE: In the District of South Dakota there are nine Native American Indian reservations. I see criminal cases from five of those reservations presently. My written remarks contain some information about the problems in Indian country. There was one mistake in my written remarks. I commented that five of the nation's poorest 11 counties are within South Dakota and are on Native American Indian reservations. It was pointed out to me that the most recent data is that 6 of the poorest 11 counties in the United States are in South Dakota. All six of those are on Native American Indian reservations. On Native American Indian reservations the unemployment is high, alcoholism is rampant, housing overcrowded, the crime rates are very high. The District of South Dakota is number one in the percent of cases that involve violent crimes, juveniles and sexual assaults. We're number two in the criminal cases conducted by judge per year. And in the Central Division of the District of South Dakota where I draw cases, I do outpace my fellow judges in

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violent crime, sexual assault, juveniles,
and in an ordinary year, in the criminal
trials as well. I may not know more than
any other judge on these topics, but I would
not be surprised to find out that I see more
of the cases than any other federal district
court judge. It is an unusual criminal load
in the District of South Dakota. My
written remarks are somewhat broader, but I
think it makes more sense to concentrate on
the proposed changes that have been
promulgated to Section 2A of the Sentencing
Guidelines.

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Section 2A2.2 is a guideline that concerns aggravated assault. This guideline I frequently apply in assault resulting in serious bodily injury cases and assault with a dangerous weapon cases. And I think it appropriate that this guideline now be the one that district court judges look for, for the new subsection that's been added to Section 113, subdivision 8, where there is a 10-year maximum penalty for an assault of a spouse, intimate partner or dating partner by strangling, suffocation or attempting to strangle or suffocate.

That 10-year maximum penalty is the same that applies for assault resulting in serious bodily injury, and assault with a dangerous weapon, so it makes sense that Section 2A2.2 be the guideline provision that the new subsection 8 apply. And it might make sense to turn and look at those suggested revised guidelines as I elaborate on my thoughts.

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Presently there's a base offense level of 14. In almost every ARISBI or AWDW case, there are going to be enhancements. It's not an assault with a dangerous weapon unless (b) (2) provides an enhancement. And at least under 8th Circuit law, and I believe this is the law in other circuits, shod feet are considered a dangerous weapon. So we oftentimes will have an enhancement under (b) (2) even when the defendant has pled guilty or been found guilty of assault resulting in bodily injury, because the defendant has kicked the victim while the victim is down.

In fact, the 8th Circuit has even said that teeth are a dangerous weapon, although I've always thought that it has to be something external to the body such as shod feet, or a chair, or something that is used as a weapon under Section 1B1.1's definition of a dangerous weapon.

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With there typically being some sort of enhancement under (b) (2), unless the defendant used solely his or her hands -- and I'll usually use the masculine pronoun because most violent offenders are, in fact, men, although there are some women who get charged and convicted under an offense where this guideline would apply. But generally there is going to be a (b) (2) enhancement, and the guidelines get high in a hurry, because there is almost always going to be a (b) (3) enhancement as well to the offense level.

There is going to be bodily injury. There certainly is going to be serious bodily injury if assault resulting in serious bodily injury is the offense of conviction. And so it's not uncommon that a defendant is looking at a guideline offense level that is 14, plus 4 if a dangerous weapon is used, plus 5 for the serious bodily injury and is already up at the level of 23.

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Now the question becomes: where do we put, or where do you put an enhancement for a strangling, suffocating or attempting to strangle or suffocate? Strangulation, suffocation, attempts to strangle and suffocate are very dangerous behaviors. It can be life-threatening behavior.

I've not seen many cases where there's been strangling or suffocating, but I have seen a few. In one instance there was bodily injury with bruising around the neck; in another instance there was not. In suffocating, one wouldn't expect a bodily injury unless there's something else going on. In strangling there may or may not be bruising around the neck. So if that is the only behavior that the defendant engaged in by which to commit the assault, there may not be an enhancement or an increase in the offense level under (b) (3).

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It is the thought, and my thought, and those with the Probation and Pretrial Services Office in the District of South Dakota, that something akin to the second option ought to apply and that perhaps a cap, whether it's 10 or 12 levels, ought to apply not only to the subdivisions 3 and 4, but the subdivisions 2, 3 and 4. Because a defendant can, and often times does get an enhancement for a dangerous weapon that is akin to feet, or of all things a guitar, I've seen, or some object that in the defendant's rage he happens to grab and use.

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If there is not some capping of the total offense level increases under Section 2A2.2, the levels can be quite high in a big hurry. If one looks at a 14 as a base offense level, again let's say shod feet were used, a kick, once, to the midsection can be enough to get the 4 level enhancement increase in offense level. Serious bodily injury, five more levels. And then, if we are looking at another three to seven levels for strangulation, that can get the total offense level up to 29 to 33.

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Looking at the midpoint of that, 30, if we don't decrease for acceptance of responsibility and look at someone in criminal history category 3, the range is 121 to 151 months. That seems a bit high, and that's taking the middle range. So I think it makes sense to have some cap, be it at 10 or 12 offense levels, that applies to subdivisions 2 and 3 of 2A2.2b, because all of those subdivisions deal with the nature of the injury and the mode of inflicting the injury. And so, my suggestion is to consider option 2, but to have the cumulative adjustment from the applications of subdivisions 2, 3 and 4 be capped at some level, 10 or 12.

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If that is the case, if for example the cap is 10, a defendant under a similar scenario that I described earlier in criminal history category 3, offense level 24 would have a guideline range of 63 to 78 months, with acceptance of responsibility credit, that could drop to 46 to 57 months. That's the suggestion that comes from myself and the people from the Probation and Pretrial Services Office in the District of South Dakota with whom I've spoken, regarding Section 2A2.2. I'd move on, then, to the minor assault provision.

CHAIR SARIS: We'll wait to the end to ask questions.

HON. LANGE: All right. I don't mind being interrupted. It makes it more interesting on this end.

The minor assault guideline provision is Section 2A2.3. Minor assault is commonly applied where it's assault by striking, beating, or wounding where the maximum penalty is going from 6 months to 12 months, or it's a simple assault. Most of the cases I see where I'm applying Section 2A2.3 are cases where there has been some plea bargain to a reduced offense, or perhaps a jury trial, where the jury has deemed the defendant not guilty of the greater offense but guilty of a lesser included offense.

And some defendants face multiple assault charges for multiple instances and will plead to an assault resulting in serious bodily injury on some different occasion, and then get the benefit of some bargain of a simple assault or an assault by striking, beating or wounding.

Here, as my written remarks noted, it makes sense to us in the District of South Dakota to have a change where, if the victim sustained bodily injury, there's an increase of two levels. And this is akin to option 2. If there is substantial bodily injury, the increase would be three levels. The nature of the injury ought to drive, at least in part, the sentence that a defendant receives. And then that there be another level increase, a one-level increase to deal with someone who is under the age of 16 or is a spouse, intimate partner, or dating partner.

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The changes to the Violence

Against Women Act do have a greater focus on assaults against spouse, intimate partner or dating partner. A spouse, intimate partner or dating partner, or someone under the age 16, is akin to, but does not quite qualify for the chapter 3 adjustment for a vulnerable victim. It's in the neighborhood. And there's a two-level adjustment that is available under Section 3A1.1(d)(1) if there's a particularly vulnerable victim. And some of the examples are, for example, cancer patients that are being preyed upon in a fraud scheme. But a spouse, dating partner, and a child under 16 do not necessarily qualify for the adjustment.

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We think under minor assault that it makes sense, rather than have option 1 to have option 2, but consider the two-level increase for bodily injury, a three-level increase for substantial bodily injury, and then an additional one-level increase if it's a spouse, dating partner, intimate partner, or a victim who's under the age of 16.

If one looks at what that does to the offense level and the criminal history category, it does bring these sort of offenses toward zone B in the 6 to 12 months, the 8 to 14 months, which does fit with the statutory maximums, 6 months or 12 months, on these sort of offenses, depending on the criminal history category that a defendant may fall into.

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Last, in terms of the amendments to Section 2A, is the amendment to Section 2A6.2 that is being proposed. This is the guideline on stalking or domestic abuse. As my written comments note, I am seeing more and more cases brought under Section 117 for domestic abuse by a repeat offender. And this is the guideline provision that customarily applies in those cases.

The people that I spoke with in the District of South Dakota favored, I believe it was option 2, where if there's going to be a separate enhancement for strangling, suffocating, or attempting to strangle or suffocate, in Section 2A2.2, there ought to be a similar increase in the offense level under Section 2A6.2, which I believe -- on, that's actually option 1 that we favored. I'm sorry. We had two option 2s and this time option 1.

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It seems from the amendments brought about by the Violence Against Women Act there is a greater focus on the protection of the spouse, intimate partner, or dating partner from strangling, suffocation or attempting to strangle or suffocate. One would think that Section 2A2.2 would be where we would look, but it is possible, under certain circumstances, Section 2A6.2 may be the guideline that's referenced. And in that case, it made sense to me, and to those who write the reports and work daily with the guidelines, that there be some increase captured in 2A6.2 for strangling, suffocating or an attempt to do so.

I included in my written remarks some other areas where I find myself deviating, varying from the guidelines more than in other cases. I will say that I find the Sentencing Guidelines to be tremendously valuable. I follow them more frequently, I understand, than the norm. They do provide very valuable guidance in determining what sentence to impose. It is the first thing that I look at when applying the Section 3553A factors. And I very, very much appreciate the work, the time commitment of all of you in working on these guideline provisions. On behalf of all of the judges of the District of South Dakota, we thank you for what you do.

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CHAIR SARIS: Thank you very much. Let me kick it off and ask -- one of the things we heard from some of the other testimony was whether or not there was a disparity between what was happening in federal court versus what was happening in state court. And then the question I have: When you say this might get too high, is that in comparison with what's happening in the South Dakota state courts, or a general sense of the judges as to what's just?

HON. LANGE: Yes. Yes, in part. In state court, in South Dakota, a judge has the opportunity to impose a stiff sentence initially and then, within a certain amount of time, draw the defendant back and impose a lesser sentence. That happens. We don't have that luxury, and I wouldn't want it anyway.

Also, in South Dakota, a person can qualify for parole having served, depending on the nature of the offense, sometimes it's as little as one-third of the time that they've been in prison.

Now, the State of South Dakota has a very high incarceration rate relative to, for example, the State of North Dakota, even though the populations are somewhat similar. But nevertheless, there is a general sense that sentences are heavier in federal court than in state court. And indeed, in drug cases when the state officials -- my sense is, and anecdotally I've heard, when state officials are looking at somebody who's a bit more of a serious offender, they'll cooperate with the federal authorities and find a way of getting that individual into federal court to get a better whack at, you know, a longer sentence.

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There is -- well, as noted in my written remarks, written comments; I don't keep track necessarily, but my sense is, perhaps 80 percent of the defendants I see, maybe even above that, are Native American. And there is some strong feeling among the Native American community that there's a certain unfairness in the length of sentences that they can receive. In tribal court there is a maximum of one year. No tribe has satisfied the requirements of the Tribal Law and Order Act in South Dakota, and I don't believe any tribe has nationally yet.

So the tribal court's authority is capped at a one-year sentence for any tribal member. And obviously in federal court -- not necessarily inappropriately, but in federal court, the sentences are far longer. So there is that sense that, as one can call it, from some perspective an unwarranted sentencing disparity. Some people have the view that federal court sentences are too harsh.

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VICE-CHAIR BREYER: Well, I'd be curious -- on that subject, you suggested a cap of 10 to 12, which is an option in 2A2.2(b)(2). And I'm trying to get a sense, but I don't think I can have the sense, but I have a sense that you have the sense, of what is an adequate sentence? What is a sufficient sentence? I was appalled at the number of cases that you have. I mean it's incredible that you have the volume and that your district is number one in the country in these types of cases. So I think you're right on the line, the firing line, and you can give us an idea as to are these sentences too severe? Are they adequate? Should we look at these numbers from the point of view, as to whether or not, in your opinion, they're appropriate, they're doing the task or they're not.

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HON. LANGE: Well, the sentences can get high under Section 2A2.2 in a hurry. If asked for my opinion, I would cap at 10, knowing that there is provision 5K2.8 that does allow an upward departure if a defendant's conduct was unusually heinous, cruel, brutal or degrading to the victim. So my preference would be to cap at 10. I mean, we're aware that there are circumstances that we can depart upward. It's hard to generalize because each individual crime is distinct, each individual defendant is distinct.

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But your question asked me to somewhat generalize and say are these sentences too harsh? For some, certainly. For others, no. I wouldn't want to see the offense levels go much higher. Personally, and really I can speak on behalf of all the judges in the District of South Dakota, we wouldn't want to see criminal history points stemming from tribal court convictions. We can, after all, depart upward if the criminal history category under-represents the seriousness of the criminal history, or the likelihood of re-offending. And sometimes I have based on what I see out of tribal court.

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So I would say these are, the guidelines result in sentencing ranges that are certainly high enough. And maybe the data indicates to you whether in violent crimes there's a lot of downward variance. I suspect there are other types of crimes where there is significantly more downward variance than assault resulting in serious bodily injury and assault with a dangerous weapon. But I would suggest under 2A2.2 a cap that applies to all of the subdivisions of (b) at 10.

COMMISSIONER BARKOW: I have one question about the 2A2.2.

HON. LANGE: Yes?

COMMISSIONER BARKOW: So under the 8th Circuit case law that you discussed, where it seems like it's a very broad interpretation of what counts as a dangerous weapon, I guess I'm just curious how much of your position is contingent on the fact that that is the case law in your circuit. So if it was a different view to what a dangerous weapon was, and it was just limited to something external to someone's body, if you'd still want the overall cap, or is part of what's driving the overall cap the fact that (b) (2) is so common because it includes shod feet or teeth?

HON. LANGE: I would still suggest an overall cap because -- well, teeth is rare. I've seen that twice, and actually the most recent case the 8th Circuit recognized the other panel had found it a dangerous -- waffled on it. But shod feet are commonly used --

CHAIR SARIS: Which we never see.

(Laughter.)

HON. LANGE: Shod feet are commonly used, but I've seen shod feet cause significant closed-head injuries, multiple times. It is dangerous to be kicking somebody who's down in the head. And it's just not driven by shod feet. Somebody can get out of control, grab a chair and throw it. Ah, dangerous weapon, at least under the 8th Circuit case law. So it isn't unique, and I will say I don't disagree with the 8th Circuit. Maybe on teeth I do, although I'm not sure the 8th Circuit now disagrees with me on that.

But what drives my thought about a cap of 10 on all the subdivisions isn't that shod feet, in particular, can be a dangerous weapon. It's just that the guidelines do get high in a hurry. And a dangerous weapon can be any broad range of things.

CHAIR SARIS: Judge Hinojosa?

VICE-CHAIR HINOJOSA: Judge, I guess most of the victims are Native Americans in Indian country, and you've described a concern about how there are, obviously, harsher sentences in the federal system as opposed to the state system. Is there any feeling with the community in Indian country that the federal sentences are closer to what they should be as opposed to the state sentences, or is the concern mostly that there's this disparity and the federal sentences are much harsher?

HON. LANGE: I'm not a Native American, and I really wish I were, given the position that I have. There's also a little bit of a problem being a federal district judge, you're not sure you're getting genuine feedback. Sometimes people want to tell you what they think you may want to hear, and I really wish there was greater candor.

What my sense is -- and occasionally I'll hear it in court, but what my sense is is the Native American community can be somewhat split. I think that those who are in tribal law enforcement like the fact that federal court sentences can be long. There is, after all, assaulting a federal officer that does extend to protecting tribal police, tribal investigators and the like. But I think the majority of tribal members probably would view the sentences in federal court as too long. Of course, victims differ from families of defendants, but I think the majority of people who are tribal members would view a case going federal as meaning, oh, boy, it's going to be a long sentence.

VICE-CHAIR HINOJOSA: Do you have what we have in our part of the country, which is also not a well-to-do part of the country, the difficulty with the rush to having cooperating witnesses that will come forward after an assault, and is that an issue?

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HON. LANGE: It can be. I think the bigger issue we have is, oftentimes the victims are intoxicated themselves, and sometimes to the point of having some memory loss.

These are relatively small communities. South Dakota has only about 800,000 people in the entire state. And the Native American population is under-counted by the census, but approximately 10 percent of the state is Native American, maybe 80,000, perhaps even 100,000. These are insular communities, and I think that sometimes does make it difficult for a victim to come forward, for fear of some retribution. There are gangs, as mentioned in the written statements, on the reservations. I think that tends to be a bit of an impediment by the time I see the cases that come forward.

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There are in domestic assault cases, of course, situations where the victim, almost always a woman, is still in a relationship with the defendant, sometimes a husband, sometimes the father of her children, sometimes someone she's still in a relationship with. And those certainly, are difficult cases, certainly for the victim and somewhat in turn for a sentencing judge, when the victim is encouraging lenience.

COMMISSIONER WROBLEWSKI: Thank you, Judge, so much for coming. I have two quick questions: first of all, you mentioned in your testimony that you did not want to see tribal convictions count as part of the criminal history. Assuming that appropriate procedures are in place for those tribal convictions, I'm curious why you feel that way, and why the judges in South Dakota feel that way.

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And secondly, because we have heard from some of the tribes just the opposite; they would like them to be counted, in part to show respect for the convictions that are obtained in tribal court. So I'm curious for that.

And then also, are you seeing in South Dakota, especially in the central part of South Dakota, more cases in the last few years brought by the U.S. attorney's offices? And do you think that's good thing, a bad thing? Do you have any views about the work that the Justice Department is doing in South Dakota and any words of advice?

HON. LANGE: I'll answer the second question first. The case load, since when I became a district court judge in 2009, in the Central Division of the District, of substantial compliance has essentially doubled. The number of cases has not quite doubled. The number of defendants being charged has more than doubled, in that four-year time frame.

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And there are a number of factors, but certainly one of the factors is that the U.S. Attorney for the District of South Dakota has developed, I believe, a better working relationship with tribal officials and tribal police, which results in more cases being investigated by tribal police being referred into federal court. And hopefully, during my tenure it's been more of a, "welcoming" is maybe the wrong word, but a court that people feel comfortable, more comfortable coming into. I hope so, at least.

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Now, with regard to counting tribal court convictions towards criminal history points, there are multiple problems with doing that. Currently, and this isn't unique; this occurs from time to time, there is one tribe that will refuse to provide our Probation and Pretrial Service writers with criminal conviction information on their tribal members, because they're concerned that's going to result in higher sentences if we have that information. That's the Cheyenne River Sioux Tribe, a relatively big tribe. So they're refusing to provide that information. I still get similar information, because the tribal police cooperate and they provide me the arrest history.

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I presume, if I see; and believe it or not, I've seen it, 270 arrests for public intoxication, for protective custody, I can assume the guy probably has a drinking problem and convictions related to conduct while drinking. So there's that dilemma, is the cooperation with tribes varies from tribe to tribe, and varies from time to time, and from who's on the tribal council.

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There's also the problem that, at least in South Dakota, there is no public defender in tribal court available to those who are charged. They go into court either pro se, or they go into court with what's called a lay advocate, an untrained individual who likes to act like a lawyer in tribal court. There are some times where tribal judges, who are hired and fired by the tribal council, are very capable lawyers, and there are some times when they are not. There are some times when they're not even lawyers. Tribal prosecutors, their turnover is quite rapid, because it's usually low paying. They may not be tribal members. It's not, usually, not their choice of community in which to be living.

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So there are problems with trying to assign points to tribal court convictions. And again, as mentioned, there is Section 4A1.3(a)(1) that allows an upward departure if there's reliable information. And a tribal court conviction can be considered reliable information. Maybe not conclusive. It certainly doesn't come with the due process that we're accustomed to seeing in state court and certainly providing in federal court. But if there's reliable information that indicates that the defendant's criminal history category substantially under-represents the seriousness of his criminal history, or the likelihood he would commit crimes; again, not picking on the man, but using the male pronoun, then we can, and I have, departed upwards. I think that's, at least at this juncture, the more appropriate way to deal with tribal criminal conviction, tribal court criminal convictions.

CHAIR SARIS: Thank you,
Jonathan.

COMMISSIONER FRIEDRICH: Can I get in one last question?

CHAIR SARIS: Sure.

COMMISSIONER FRIEDRICH: I apologize for missing the beginning of your testimony, but I wanted to make sure I understood your position. Did you testify that you think that any enhancement for strangulation should be limited to the spouse or dating partner, intimate partner across the board or just with respect to certain guidelines?

HON. LANGE: That's interesting. I hadn't thought through that.

COMMISSIONER FRIEDRICH: Because our proposal does it only with respect to minor assault, and I can't quite recall why we did that.

HON. LANGE: Well, no, it is in Section 2A2.2, which is the aggravated assault.

COMMISSIONER FRIEDRICH: Option?

HON. LANGE: Option 2. And I did talk a bit about that. But that is an interesting question. Congress has --

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COMMISSIONER FRIEDRICH: No, but
-- what's that?

CHAIR SARIS: Dabney, those are
every other pages.

COMMISSIONER FRIEDRICH: No, no,
I've got the full one. But as I look at the
aggravated assault, we have the enhancement,
but where is the restriction to spouse or
intimate dating partner?

HON. LANGE: It's not there --

COMMISSIONER FRIEDRICH: Right.
So my question is: one, I thought I heard
you testify it should be there; and two,
should it be there with respect to
aggravated assault and minor assault, or one
or the other?

HON. LANGE: I didn't testify
that it should be there with respect to only
spouse, intimate partner or dating partner.
I was silent on that, because I actually
hadn't thought through that, and I hadn't
noticed that the enhancement doesn't contain
a restriction to spouse, dating partner or
intimate partner.

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However, when I was talking about the minor assault, Section 2A2.3, I did mention that there ought to be a separate enhancement if there's somewhat of a -- "vulnerable victim" is the wrong word to use, but, you know, something like a person under the age of 16 or a spouse, intimate partner, or dating partner.

So, perhaps something to consider is whether strangling, suffocating or attempting to strangle or suffocate, which is dangerous behavior regardless of who the victim is, ought to be met with -- and then something separate like a one-level increase if it happens to be someone who is, maybe "quasi-vulnerable" is the right word to use? It isn't a vulnerable victim as that's defined in the Section 3 adjustment, but --

COMMISSIONER FRIEDRICH: So you're saying there should be an additional enhancement, but that the suffocation enhancement shouldn't be restricted to a certain class?

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HON. LANGE: Not having thought through it entirely, I'm inclined to think that probably makes sense, because that is dangerous behavior regardless of who the victim is. I have not seen -- You know, a defendant in a factual basis statement often won't acknowledge that he strangled, suffocated or whatnot, but I don't believe I've even seen an allegation of that occurring outside a domestic assault to anyone.

COMMISSIONER FRIEDRICH: Thank you.

CHAIR SARIS: Thank you very much.

HON. LANGE: Okay.

CHAIR SARIS: It was very helpful.

HON. LANGE: My pleasure.

CHAIR SARIS: And your comments I'm sort of scribbling down. Thank you.

HON. LANGE: Thank all of you.

CHAIR SARIS: So safe travels.

HON. LANGE: Thank you.

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CHAIR SARIS: So we're moving up to our next panel, Panel II, the Executive Branch and defense perspectives.

So welcome. I have to say again, because I can't say it enough, thank you for coming through the snow to get here, although I think you're all from places where you're no stranger to snow storms.

The panel will be done in a little bit different order than originally was set, but I think it makes sense. So beginning will be Sam Hirsch. Mr. Hirsch has served since March 2009 as the Deputy Associate Attorney General at the Department of Justice working with the Office of Tribal Justice, the Civil Rights Division, the Environment and Natural Resources Division and the Access to Justice Initiative. Prior to joining the Department of Justice he worked in private practice here in Washington, D.C.

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Honorable Michael Cotter has served as the United States Attorney for the District of Montana since 2009. As U.S. Attorney he has established the Indian Country Crime Unit within the District and in 2012 he worked with the Associate Attorney General to develop a multi-agency collaboration with tribal governments to create a sexual assault response team in the six Montana reservations under federal jurisdiction. Prior to becoming the U.S. Attorney he spent many years in private practice.

And Neil Fulton. Mr. Fulton has served as the Federal Public Defender for the Districts of North Dakota and South Dakota since 2010. From 2007 to 2010 he served as Chief of Staff to South Dakota Governor Mike Rounds, and prior to that worked in private practice. Welcome.

Mr. Hirsch?

MR. HIRSCH: Thank you.

CHAIR SARIS: And I forgot to tell you, it's sort of like the -- and they do it in the 1st Circuit. If you hadn't noticed, there's these little lights that go off and that basically show when the five minutes is up. And of course I don't do that to the second. Of course we wouldn't do that. But at some point you'll see me starting to get antsy. So please try and keep it within about five minutes or so.

MR. HIRSCH: Sure. Sure. Good morning and thank you so much for having us here this morning. I'm really honored to be up here with such terrific public servants from Montana and the Dakotas, respectively. I feel like we got a little taste of their weather this morning.

(Laughter.)

MR. HIRSCH: My background, unlike the gentlemen on either side of me, is not as a criminal lawyer, but I actually have an Indian law background and in my capacity as Deputy Associate Attorney General have worked on a lot of the public safety issues the Department has worked on over the last five years. And in particular, I worked on the Violence Against Women Reauthorization Act of 2013 where the Department took a relatively unusual step of drafting and publicly proposing legislation that then ultimately was passed by Congress. And with regard to the parts we're focusing on today, almost verbatim was passed by Congress.

The history of this is that after Attorney General Holder came to office in 2009 he made it clear that public safety in Indian country was going to be a top priority of the Department. And we set out on a series of listening sessions in Indian country culminating in a listening conference in Minnesota in late 2009 where we heard lots of horrific stories about public safety in Indian country, and in particular a lot about domestic violence and dating violence in Indian country.

The statistics in this area are not as clean and clear as we might hope, and that's something we're working on, but what we do know is pretty shocking. For example, the Centers for Disease Control and Prevention's most recent survey showed that 46 percent of Native American women have been subject to rape, physical violence and/or stalking in their lifetimes, which is a truly shocking figure.

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A couple figures are less well known about Indian country, though I think provide some useful background. One is that because of the policies of opening up Indian lands to non-Indian development, especially in the late 1800s and early 1900s, about three-quarters of the folks who live on Indian reservations and in other Indian tribal lands according to the Census Bureau, are non-Indian. Three-quarters non-Indian, one-quarter Indian. And also, if you look at Native American women who are married, over half of them, about 54 percent in all the recent censuses, are married to non-Indians. These numbers vary enormously from reservation to reservation. We have 566 federally-recognized Indian tribes. In some of these reservations over 90 percent of the population is Indian. In some of them over 90 percent of the population is non-Indian. So when we talk about Indian country, we really need to be careful about not adopting a cookie-cutter one-size-fits-all solution because the variance from tribe to tribe and reservation

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to reservation is enormous.

But given the number of non-Indians living on Indian lands and marrying and dating Indians, one thing became clear, which is that there was a very meaningful and destructive gap in criminal jurisdiction because, under a 1978 ruling of the Supreme Court, tribes lacked criminal jurisdiction over non-Indians who commit crimes, including a crime committed by a non-Indian husband against his Indian wife in their home on the reservation in front of their children who might be tribal members. That would be something that the local prosecutor could not prosecute, the local prosecutor being the tribal prosecutor. And that was an extraordinary gap.

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So we set about to put together a legislative package that resolved that issue by saying that if tribes had the right due process protections in place, and many do; not all, but many do, that they could exercise criminal jurisdiction over non-Indians who commit certain crimes of domestic violence against Indian victims in Indian country. That was the tribal criminal jurisdiction piece.

There was a tribal civil jurisdiction piece to the package that recognized tribes' power to issue and enforce protection orders, civil protection orders involving both Indians and non-Indians. Again, the importance of covering non-Indians was foremost in our mind there.

And then third were all the amendments that we're talking about today to the federal assault statute, Section 113. Those were passed almost verbatim as proposed by the Department of Justice. The net effect of all of this is to try to create a somewhat more sensible division of labor. What we know about domestic violence is it's a crime that involves very high rates of recidivism and often what we call an escalating ladder of violence. When you look at women who are murdered -- and there are some places in Indian country where the murder rate for women is literally 10 times the national average. When you look backwards from those cases typically you see lesser offenses leading to more and more serious ones. And we believe that it's necessary to have sort of graduated penalties appropriate to the escalation.

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And we also believe that early intervention is critically important, which is why regardless of the Indian or non-Indian status of the defendant we wanted the local prosecutors to have the ability -- meaning tribal prosecutors -- to go in and nip these problems in the bud primarily through misdemeanor -- prosecuting misdemeanor crimes with domestic violence.

And we believe that the division of labor where the Justice Department could then focus more on the most serious crimes and the local tribal prosecutors could focus on the lesser crimes that are often the first rungs on that ladder of escalating violence is an ideal way to improve the situation on the ground and start to roll back those horrible statistics that I mentioned earlier. Thank you.

CHAIR SARIS: Thank you.

Mr. Cotter?

HON. COTTER: Thank you very much, Your Honor, for having me here and, Commissioners, for the opportunity.

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I thought what I would do is give you a very brief description of Montana Indian country and then some things that we have done in Montana that we have found somewhat successful, some initiatives that we've undertaken in partnership with the Department. And then also I want to talk about the Bakken Oil Play that is in Northeastern North Dakota as well as -- I'm sorry, Northwestern North Dakota and Northeastern Montana. I got it turned around. Anyway, in Montana we have seven reservations, and there are 325 federally-recognized reservations across the United States. In our state, we're much like South Dakota, six-and-a-half percent, seven percent of our population is Native American. We have a total of about 80,000 Native Americans -- I'm sorry, 70,000, 40,000 of which live on reservations. We're a really big state. We've got 147,000 square miles. We have about a million people, so there's a lot of room for mischief in that state. We are the prosecutors, much like county attorneys, for

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six of the reservations. We are responsible for the major crime stats.

And the big hurdle that we have -
- and not an obstacle, but a hurdle. But the reality of it is our reservations are all remote. A lot of people live in our population centers. But I will give you an example: Fort Peck Indian Reservation, which is up in Northeastern Montana. It's on the Hi-Line. It's near the Canadian border. Our federal court house that services that reservation is Great Falls. The distance from the court house and from our office to that reservation is 340 miles one way on a two-lane highway. We do not have in-state air travel to those facilities, so it's very difficult. And South Dakota and North Dakota are much like that.

The other thing is three of our reservations are actually in land masses larger than the state of Delaware. Individually. So they're big pieces of property and they are remote. 2009 when I got this job it was apparent that the Indian country was under-resourced as well as under-serviced. We had two AUSAs in the office at that time prosecuting cases on six reservations. One of our AUSAs actually put 45,000 miles on her vehicle going out to do her MBTs and meet with the reservations.

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But we have been able to staff up. Now in Indian country we have six AUSAs, and an AUSA is assigned to each reservation. And what we have been able to do in the recent years with our initiatives, one that we are quite proud of is our biweekly staffing of cases. Our AUSAs will meet with, along with the FBI Agent, every two weeks, with the tribal prosecutor and the tribal law enforcement officer and they will visit and review and staff cases that have become known to the reservations over the preceding two weeks. And based upon that meeting a decision is made between the tribal prosecutor and our AUSA. Where best does this case get prosecuted? Is it going to be in federal court or is it one that's going to go to tribal court, or will it be handled in both courts?

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We have done that since 2010. It has benefited us greatly. Our relationship with the tribes has increased immensely, the communication, and it calls for accountability. And we have found that the resolution of cases either in federal court or tribal court since 2010 is about just short of 75 percent of the cases. So justice is being obtained either in federal court or tribal court.

The other thing, we thought about Navy Shield. That was during the pendency of VAWA in 2011. And we tried to fill a gap. And what we were doing is there were cases that we simply couldn't do. We brought misdemeanor cases, misdemeanor assault cases, as well as 117 cases against non-Natives in order to stem the problems that we were facing. We found it successful. We prosecuted probably 15 people in that time period both as misdemeanor and as felons.

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One thing that we noticed, or I noticed along with the AUSAs: We brought Fearless Justice, we call that. That was an initiative. In these small communities where a person is victimized, where a witness is going to testify in an assault case, for example, or whatever it is, there can be intimidation, obstruction of justice, there can be shunning. There is an attempt, an over-attempt to prohibit justice being obtained. And as a consequence, we put the word out that if we could find meritorious cases, we would prosecute those cases. And we have. And in that category of cases we've prosecuted approximately a dozen cases, and we found it successful.

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The other is SARTs. That was with the Attorney General. That was the Sexual Assault Response Team. That is the use of resources, both local, the county -- it's a team. It's doctors, behavioral folks, prosecutors, both tribal, federal and county, along with victim witness people from the FBI, BIA and from our office. And there is a coordinated effort. These meetings occur once every month in cases or review so there is some level of justice and conclusion. Medical treatment is provided, but also there's an evaluation of the case whether or not it's meritorious to move forward.

The very last thing -- and thank you. I know I've gone over. The Bakken. The Bakken is an oil play. You read about it in the newspaper a lot.

CHAIR SARIS: It's a what?

HON. COTTER: I'm sorry. It's a geological formation. There is oil. And as a consequence it's like a gold rush. We have had move into North Dakota and into Montana 20 to 30,000 -- these are remote areas -- 20 to 30,000 oil field workers who are drilling. They're working on drilling rigs. They're hauling water. They're providing labor.

And the interesting thing about that formation is -- a third of it is in North Dakota, one third is in Montana, there's actually a third up in Canada, in Saskatchewan and in Manitoba, who are all experiencing the same thing, an influx of people. They bring with them problems. You get 20 to 30,000 young men between the ages of 18 and 30 -- most of them are men. They got a pocket full of cash, not much to do. So we do have tremendous traditional crime problems with guns, drugs, things like that.

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And the Bakken is bookended by the Fort Berthold Reservation, which is in North Dakota, and the Fort Peck, which is in Montana. So we have the interesting jurisdictional issues of the state line, the international line and then the tribal jurisdiction. And we have found that there has been an influx of men. They have partnered up with native women and there are the assaults that occur in those areas.

I thank you. I did run over and I appreciate it.

CHAIR SARIS: Thank you.

HON. COTTER: Thank you.

CHAIR SARIS: Mr. Fulton?

MR. FULTON: Thank you, Judge Saris. I have to say that in the competition for daily snowfall pool I did not see the Beltway edging South Dakota and Sochi for the gold medal.

(Laughter.)

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MR. FULTON: You know, as I think about how the Commission approaches this, I want to really talk today about caution and clarity in this area, and that results from the nature of practice that we see on these types of cases, and also the nature of what VAWA is really intended to do.

First about the nature of practice, Judge Lange really hits the nail on the head about how many of these issues play out in court, and that's consistent for the most part with our practice in North Dakota as well. But these are unique cases in a way from what the Commission typically sees. And the first way that they're unique is that the vast majority of them are coming from a vast minority of districts. These cases are coming from a very few number of districts across the country because they mostly deal with Indian country or federal enclaves. So the number of places to gain experience is much more limited and the potential for disparity is in some ways lesser and greater because of the nature of the local reservations and the lack of number of people dealing with the issues.

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Also important I think is to recognize that in many ways, unlike what I would call typical federal court practice, we are dealing with street crime, what is typically state court-type crime. And that does a couple of things: One of the most important things it does is that, unlike what again I would call typical federal court practice, most of our plea bargains turn more on charge bargains than sentencing bargains. To give an example: In a typical assault case that we would see it's very, very common for it to be charged out as an assault with a dangerous weapon and an assault resulting in serious bodily injury. The negotiation typically stems not so much about what happened or what the sentence is, but what charge will be pled to. Even in pleading cases down you will see charge bargains down to an assault by striking, beating or wounding or some other simple assault.

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To pick up on a little bit of the question though about then how sentencing plays out, the practice in North and South Dakota is very much that our U.S. Attorney's Office takes very seriously and consults with victims and victims' families on any plea bargain that's reached, and that includes application of the Sentencing Guidelines.

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So one of the things that's important I think for the Commission over here as well is this is really an area where post-Booker, the guidelines have maintained the gravitational pull to a degree that I think is unusual compared to other guideline areas. Most sentences are guideline-based sentences in this area. Variances I would say are infrequent and not very severe. You know, typically variances are not dramatic in these areas. Departures are unusual. Variances are unusual. And so as a result there is a clarity in the sentencing practice that perhaps doesn't exist in some other areas; guns and drugs in some areas, and there's less variance frankly from judge to judge and district to district in this area than I think there might be in other areas.

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And I think it's important as the Commission formulates a response to the implementation of VAWA that that clarity and that consistency within a district is maintained, and that's the reason I would caution moving slowly and with the least disruption to the existing system that exists.

Also in the background of this I think the Commission just has to think about when you're thinking about disparity and the reception of this in Indian country. Indian country is one of those things that has to be experienced. It really can't be explained. And there is a sensitivity in Indian country about sentencing, about the criminal justice system and about the role of the Federal Government in Indian country. In both North and South Dakota, just like Mr. Cotter described in Montana, the role of the U.S. attorney is very much as a state's attorney for Indian country.

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I think, Judge Saris, it was you that asked the question how is that received? Well, that depends on the individual. There are those people who are very receptive to the Federal Government's presence in Indian country and there are those people who are very hostile to it.

And so I think as the court implements VAWA and its creation of new federal law enforcement tools, but also tribal law enforcement tools, you need to be attentive to the relationship of sentencing both in tribal court and in federal court. And so I would caution the Commission not to move too quickly, too dramatically to very severe sentences for many of the reasons Judge Lange articulated, but also because of the relationship to those sentences that are available in tribal court, because that is an issue that to Native people is important and I think it's one that in this unique area the Commission really needs to think about.

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A second thing that I think is very important for the Commission to think about as you implement this is the nature of VAWA and what VAWA really was for. VAWA was not an instance where Congress set forth to increase penalties. The primary purpose of VAWA, as Mr. Hirsch identified, is to expand tools for law enforcement. To that extent it is very appropriate. There were jurisdictional gaps that existed both for non-Native offenders in Indian country and in some instances for Indian offenders in Indian country. VAWA was intended to plug that hole.

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And so as we laid out in our written comments, I think it's important given the nature of the limited number of communities that are doing this, the gravitational pull that exists in 2A2.2(2)(3) for the Commission to move slowly on these areas and recognize that getting VAWA implemented as a jurisdictional tool will provide you an opportunity to gain experience and perhaps come back and address some of these specific offense conduct issues rather than feeling like they all need to be addressed up front. I would really encourage the Commission to move slowly on that, let experience guide what we do here a little bit more. We feel like we need to get every answer right out of the chute.

CHAIR SARIS: Thank you very much. Questions?

VICE-CHAIR BREYER: I have a question of Mr. Hirsch and Mr. Fulton.

You said that there has now been substantial compliance with tribes in terms of the due process. Could you give me a ballpark figure as to what percentage of the overall Native American population is now subject to tribal justice which comports with the due process part, you know, so I get some sense of how quickly it's occurring?

MR. HIRSCH: It's a very hard thing to quantify, Judge, as you might well imagine.

Let me give a little bit of background: The Indian Civil Rights Act had put a six-month ceiling on sentences originally in tribal court starting in 1968. That was amended to 12 months in 1986. It wasn't until 2010 that Congress said tribes could convict and sentence folks for up to nine years, up to three years per offense. But to do that they had to meet certain due process requirements, including having law-trained judges and indigent defense counsel.

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At the time they passed that, many tribes were already doing those things, and more are doing it today. So what we're seeing is in order to take advantage of this enhanced sentencing authority and sentence people for up to three years per offense, there's a magnetic force and tribes are getting law-trained judges, providing public defender services and so on and so forth. The exact numbers I can't tell you right here, but it's a very significant number.

In order to prosecute non-Indian domestic violence offenders under VAWA 2013, they also have to meet those same requirements. And right now there is, just to give you a sense of scope, there is an inter-tribal working group of 39 tribes that are all working on how they're going to implement that jurisdiction. And there are quite a few others outside the group that are looking to them as examples. So many, many tribes have these kinds of protections in place.

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I can't speak specifically to the Dakotas as my friend here can or Judge Lange did. And again, I remind you that there's a huge amount of variance from tribe to tribe. So there are some tribes that don't yet have law-trained judges. Huge numbers do.

CHAIR SARIS: Is it possible to sort of just submit something afterwards and let us know how many jurisdictions are qualified to -- I don't know what the right word is -- "certified," "qualified" to take this greater jurisdiction?

MR. HIRSCH: There is a survey that is being done by the Department of Tribal Criminal Justice Systems, but it is not complete at this time and I don't know what the date of completion is on that. But once that has been completed, and I think that may be a matter of months, then we could certainly submit that. Prior to that I'm not sure there is a systematic survey. That's part of the reason we're taking it south. But we will do whatever we can to help fill that hole.

CHAIR SARIS: Okay.

VICE-CHAIR BREYER: Mr. Fulton, I'm very concerned about a disparity that may or may not exist between state court prosecutions and tribal prosecutions, is that if a non-Native American is involved in that domestic violence, again the male, and he gets one type of sentence. And then you go to a very similar or identical incident on a tribal reservation and they get a sentence that is 5 times or 10 times that, that's of some concern. Is that your experience or is there some parity between state prosecutions and federal prosecutions? Maybe Mr. Cotter could answer as well.

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MR. FULTON: Sure. I would tell you, Judge Breyer, that for the most part I would say there's not particular parity. And Judge Lange is very much right when he says these are very insular communities. And when the Commission looked at the issue of Native Americans some years back; I know Judge Piersol from South Dakota was on the study group for that, they found that there was an unfair disparity towards Native American men and the sentences they received in federal court.

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What I would tell you is you have to look in many instances, particularly with these domestic violence issues at tribal court practice. In our little part of the world how many people have made steps towards implementing the Tribal Law and Order Act and VAWA is zero. When you have six of the most impoverished counties in the country and the other ones ain't far behind, you don't have the ability to deal with basic infrastructure needs, so getting law-trained judges that are independent and certainly law-trained public defenders in place doesn't get very high on the priority list.

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So what we see in many instances, there are a lot of instances where tribal law enforcement agencies are intervening in domestic violence. A very common practice ultimately is that people would be uncounseled and they were entering guilty pleas because much like the tribal officials don't have resources for prosecution and defense function, they don't have much in the way of resources for incarceration. So the people know the sooner they plead, they move on. And so we get a lot of uncounseled very quick pleas even in domestic violence situations.

And I think it's important to recognize that habitual offender prosecutions for domestic violence in federal court are very common in both districts. And I forget what the circuit split status is on this, but in the 8th Circuit at least uncounseled tribal court convictions for domestic violence can be predicates to these felony convictions.

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So what I would tell you is in the domestic violence arena there is a real concern about the interplay of these two environments and that tribal law enforcement is trying to intervene and doesn't have a tremendous amount of resources. So it's, I have to acknowledge, not tremendously fair to the victim side of the house and the law enforcement side of the house. But on the flip side, when we then go into federal court we have defendants who have not received due process and counseling who are subject to an enhanced federal penalty because they went through this -- I hate to say the word "deficient" system, but a system that certainly doesn't have the type of resources that we have.

CHAIR SARIS: So a career offender?

MR. FULTON: Wouldn't count for career offender, but for the separate crime of -- because the tribal court convictions wouldn't count, but I would say, you know, departures for under-representative criminal history are not uncommon, but they can count as the predicate offenses to the habitual domestic offender prosecution in federal court.

CHAIR SARIS: Thank you.

MR. HIRSCH: Judge, may I respond to the disparity point and then I think my colleague may follow?

First of all, half the Section 113 prosecutions in the country aren't based in Indian country.

Second of all, those that are, a large number of them are against non-Indian defendants, because we have exclusive jurisdiction over non-Indian on Indian crime. We have concurrent jurisdiction over Indian on Indian.

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Next, I would say that the actual report from 2003 showed a lot of variance by offense. For some offenses there was a disparity in that report. For other offenses they studied, they only studied three offenses, there was not a disparity. So you have to look offense by offense.

Also the states here aren't uniform. In that report they show that the average Indian who is convicted of assault in New Mexico was getting a 6-month sentence and in South Dakota was getting a 29-month sentence. That's a five to one disparity between two states. There's hardly uniformity there.

The other thing is what we were really trying to do is -- in VAWA was take care of a situation where there was effectively a six-month cap on most of these prosecutions. And if the case was not Indian on Indian, there was no federal jurisdiction at all.

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So now we have a system where there are graduated penalties for assault resulting in serious bodily injury and assaults by suffocation or strangulation. And that actually tracks the state laws in this area much more closely than it used to. And in particular, on strangulation and suffocation there are now 35 states that have strangulation or suffocation-specific statutes. At the time we proposed this it was about 25. And the modern trend is definitely to have enhanced sentences available for that extremely dangerous crime. And we have a lot of interesting background on the dangers of the crime in our written testimony. But you'll see that those state laws very frequently have maximum sentences of 10 years or more.

CHAIR SARIS: Do you have a median sentence for those 35 states' statutes?

MR. HIRSCH: They range enormously. I mean literally there's a state that I think provides three years of hard labor. There's others that have a 15-year max, 10-year max. There are some that have less than 10.

HON. COTTER: You took the words right out of my mouth, Sam.

(Laughter.)

COMMISSIONER BARKOW: Could I ask a question? If you could comment on Judge Lange's suggestion to us in the earlier panel. If you look at 2A2.2, he had suggested that if we impose the cap, that it apply to (b) (2) (3) and (2), (3) and (4) as opposed to just (3) and (4). And I'd just like to know what you all think about that. So the idea would be if we did impose a cap of 10 or 12 levels, or another number, that it wouldn't just apply to (3) and (4), but it would apply to (2), (3) and (4), so the use of a dangerous weapon.

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And then the other -- I could ask my other question now or I could wait until you answer that one, but I'm curious on the supervised release suggestion that the Government had filed in their testimony, that judges should recommend that the offender participate in a program as long as it's readily available within 50 miles of the defendant. I just want to know the feasibility of that for defendants, given your description of the area in which they live. How common would it be that you'd have a program within 50 miles, and is that something that you have experience -- they can get to, they have the means to travel to? It would be a condition that would make sense for those people.

MR. FULTON: Literally and figuratively a lot to write on this comment.

(Laughter.)

CHAIR SARIS: Depends which way you look at it.

(Laughter.)

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MR. FULTON: In response to Judge Lange's proposal, yes, I think there should be a cap for all the reasons, and it should be for (2) through (4) for all the reasons he identified. And also to the degree this didn't become clear there, in my experience it's very rare that these types of assaults, both domestic violence and non-domestic violence, are discrete where there is one weapon. I mean it is very typically weapons that are to hand. I mean I have seen pipes, bottles, baseball bats, guitar, vacuum cleaner, teeth as he identified. Shod feet are very common. And so I think to maintain some proportionality here there needs to be an aggregate cap. You know, I think that is important.

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In terms of the availability of counseling and other services, that becomes very episodic, even within North and South Dakota. Some tribes have relatively very strong programs available for drug and alcohol counseling, for domestic violence counseling. In many instances we try and take advantage of those as part of a plea negotiation. And they get utilized where they exist. In some of the other tribes it's just not there.

And then even where it does exist, it's very important to recognize that transportation issues are huge. I mean snowfalls like this are what we deal with all the time. Then you got to remember you have people that are very geographically isolated. In many instances they don't have vehicles and they've got to have vehicles to get wherever they're getting. There's no mass transit.

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So to really strongly suggest I think would be imprudent because judges know what resources are there and they very aggressively take advantage of them when and where they exist.

MR. HIRSCH: First on the question about 2A2.2, the Commission had asked where in the three to seven-level range strangling and suffocation should fall. And our proposal is five, which is consistent with the serious bodily injury increase in level, which is also five. And that makes sense to us in part because Congress has made assault by suffocating or strangling and assault resulting in serious bodily injury, both 10-year maximum offenses. So they have said that those are roughly on par. So in the three to seven range you gave us, we thought five was the right answer.

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We also do agree that there should be a cap, but our cap refers only to (b) (3) and (b) (4). And we went with the lower end. You said in the 10 to 12 range is what you'd propose. We suggested 10 would be the correct cap, but that's assuming (b) (2) is not in there. If you wanted to include (b) (2), then we don't think 10 would be an appropriate number. It would have to be significantly increased in order to have the right level of punishment. And I think Mr. Cotter can probably speak to that.

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On the supervised release issue, again the diversity of Indian country is just immense. There are many reservations that are either literally in or neighboring contiguous to a major metropolitan city. So there are some places where this is entirely practical. There are other reservations where there's just extreme isolation and there might not be the opportunities within 50 miles, and there's no demand here that they go beyond that. But certainly for many folks who live in Indian country they are within 50 miles of that kind of program.

COMMISSIONER BARKOW: Was 50 just selected because that's a -- you thought that was a feasible --

MR. HIRSCH: I think it's an hour's drive, basically.

COMMISSIONER BARKOW: About an hour?

MR. HIRSCH: Yes. Yes.

HON. COTTER: One of the things that would be available on most reservations through Indian Health Service, there would be some type of programs if there was going to be supervision. And I think and the Department thinks that it is highly recommended that supervision occur. It's critical. And the things that need to be addressed are going to alcoholism, substance abuse, anger management, things that are available, you know, in metropolitan communities as well. But it is critical.

MR. FULTON: Maybe just one follow-up point just on this proportionality in the five-level enhancement. I mean I think also important to recognize here is with strangulation we're talking hands being used as weapons, and five levels would be consistent with discharge of a firearm. Just for whatever that's worth in considering this.

HON. COTTER: May I comment to that?

CHAIR SARIS: Yes.

HON. COTTER: Strangulation is very personal. It is a hands-on offense. The lethality is incredible. And we have referred to studies, pages 8 through 11 in our documents, that show the person strangled once has a six times increase in being killed, being an unsaved victim. So it's different than a firearm. It's different than a knife. This is a hands-on offense. It is. And the defendant is telling the victim I might not kill you this time, but I can kill you.

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CHAIR SARIS: Thank you. You say, Mr. Fulton, in your testimony, "Specifically we urge the Commission to avoid treating an assault with intent to commit sexual abuse or abuse of sexual contact;" this is in the first paragraph, "the same as a completed or attempted sexual abuse or abuse of sexual contact." And I was sort of thinking in my own mind what would be the kinds of cases that you're talking about here since an attempted sexual abuse and assault with intent would seem to capture not every, but so many offenses? What were you thinking here would be the real problem?

MR. FULTON: I think the main thing would be, Judge Saris, is this is an area again on clarity where avoiding cross-reference on this one --

CHAIR SARIS: By the way, it's page 2.

MR. FULTON: I will tell you in our districts sexual and what I'll call ordinary violence rarely intersect. We don't see a lot of instances where there's an act of physical violence that's tied to an act of sexual violence. I've talked to my counterparts in other districts and it's very common in theirs.

I think what we're saying here again goes back to my discussion of the nature and practice of charge bargaining and those issues. I mean we in VAWA here have created the new offense for assault with intent to commit a sexual assault. I will candidly confess I have difficulty conjuring in my mind frequency and types of offenses that will get -- you know, people would charge it that way necessarily.

Our concern is primarily that in those instances where say for example it is charged out as an assault with intent to commit sexual assault and also some other aggravated assault, if the charge bargain is reached, that someone's going to plead an assault, have the relative certainty of 2A2.2, U.S. Attorney's office has consulted with the victim family, that's acceptable to them, it's acceptable to the defendant, that then there is this sort of moving part of the cross-reference.

Sentencing in this area is really, I would tell you, rarely about what happened. Usually there is a pretty clear sense of what happened that's reached on a factual basis in the plea colloquy and it's not really in dispute. Or there's been a trial and the dispute has been resolved.

So our concern here really is that when we've created a new offense, the new offense should refer to its own guideline, because I think it's just going to need to be informed by the experience of prosecutors and judges on the ground what types of offenses are going to get charged under that, get convicted under that as opposed to really having to me what would become very amorphous and we'll have the potential to have unwarranted disparity to cross-reference over.

CHAIR SARIS: It's the cross-reference that worries you?

MR. FULTON: Cross-reference is the real worry for us.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: Mr. Fulton, I wanted to follow up on your proposal. You suggest that we either create a new guideline or, if we reference these offenses to 2A2.2, we have graduated base offense levels based on the underlying offense. So you're suggesting a base offense level of 16 for more serious offenses and a 14 for others. If we were to take that course of action, in addition would you agree that there should be enhancements for suffocation and bodily injury and all the like, are you just saying this should be the total offense level at the end?

MR. FULTON: Well, if you put it into a 2A2.2 there are it appears probably going to be --

COMMISSIONER FRIEDRICH: Right.

MR. FULTON: -- some of those enhancements.

COMMISSIONER FRIEDRICH: But you're saying the cap should be 20? I just want to make sure I understand your testimony.

MR. FULTON: I would say that we would agree with the comments earlier that an aggregate cap like exists for the other specific offense conducts would be appropriate. So I'm sorry if I'm not tracking.

What we did in looking at 16 and 14 was try to slot this in proportionally in relation to the guidelines that currently exist for sexual assault higher and above the guideline for aggravated assault, absent application of the specific offense conducts.

So, yes, I mean I think some of this depends on what the Commission decides to do on strangulation and as to whether it is going to be a specific offense conduct that applies across the board. And again, this is one of the reasons I would caution some degree of caution. I mean what VAWA did again is create these new offenses. And so to pull strangulation out and now apply it across the board as an enhancement I think is kind of taking a flier here.

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And I'm certainly not trying to minimize what Mr. Cotter says about the severity of strangulation. Nobody can. But at the same time, if you look at the definition that's proposed, it is very broad and there's a big difference between a very purposeful, very violent, very almost-murder strangulation and a domestic violence assault where the hands come across the neck for a brief period of time. And I think it's just important that the Commission move slowly and gain some experience on what the judges again in a very small community dealing with these issues see on that.

COMMISSIONER FRIEDRICH: So do you agree with DoJ's recommendation that it's akin to serious bodily injury?

MR. FULTON: The --

COMMISSIONER FRIEDRICH: The strangulation enhancements, if we were to add one.

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MR. FULTON: I guess,
Commissioner Friedrich, I think about it not
so much on the injury side as maintaining
its proportionality to other weapons, and
that's just kind of how my mind works on it.
And it is a hard one to slot in because,
again as Mr. Cotter said, these are very
individualized offenses and application
varies a lot. So what I would tell the
Commission is be very cautious on trying to
have one approach that can fit all
circumstances, because it can vary pretty
dramatically.

COMMISSIONER FRIEDRICH: Mr.
Hirsch referred to the number of states that
now have strangulation as an offense. And
I'm just curious; either of you can answer,
where those two fall in gradation compared
to say assault with serious bodily injury.
Are they on par? Below? Above? Do you
know?

MR. FULTON: My understanding is that in many jurisdictions strangulation exists in some instances as a misdemeanor offense, in some instances as a felony. So I don't think anyone has good data on where they're fitting on par. And again, I think they're going to be very individualized because the purpose behind it in the application and the surrounding circumstances are going to be I think just more individualized than a lot of other offenses are.

MR. HIRSCH: I don't know how to compare state strangling and suffocating statutes with state serious bodily injury statutes, which was your direct question. I do know that when we proposed it as a 10-year offense, that was consistent with the more recent state enactments from the last decade or so. And as I said, another 10 states have done it since 2011, since we actually proposed the language. And the more recent ones I don't think are generally misdemeanors. They're mostly not only felonies, but pretty high-level felonies.

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CHAIR SARIS: Any other
questions?

(No audible response.)

CHAIR SARIS: All right. Thank
you. Thank you very much.

HON. COTTER: Thank you.

CHAIR SARIS: This has been very
helpful.

We're going to take a 15-minute
break.

(Whereupon, at 10:23 a.m., the
proceeding went off the record until 10:40
a.m.)

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CHAIR SARIS: Before I get to the privilege of introducing our next panel, I wanted to mention that Judge Saunooke, who is a tribal member of the Eastern Band of Cherokee Indians and serves as an associate justice of the Cherokee Court could not be here because North Carolina was completely iced and snowed in. So I want to make it clear for the record as well as to everyone here that we will hopefully be rescheduling him. We have March hearings on something completely different and hopefully he'll come in and speak to us then. But if he can't, we certainly have his written testimony. So we are missing him here today, but we are not going to lose the benefit of his testimony.

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Today though we have all of you who braved the snow and sleet. And I wanted to introduce -- I'm going from, Russell Butler. Mr. Butler is the Executive Director of the Maryland Crime Victims' Resource Center and he serves as our Chair of the Commission's Victims Advisory Group. He is an adjunct professor at the University of Baltimore Law School. Welcome.

Dr. Jacqueline Campbell trudged in with me this morning through the snow. She is the Anna D. Wolf Chair of the Department of Community and Public Health at Johns Hopkins University School of Nursing. She's been a member of their faculty since 1993, has authored 7 books and more than 220 articles related to violence against women and women's health. She is also the chair of the board of directors for Futures Without Violence and has served on the board of the House of Ruth Battered Women's Shelter and as a member of the congressionally-appointed U.S. Department of Defense Task Force on Domestic Violence.

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Paulette Sullivan Moore. Ms.

Moore is the Vice-President of Public Policy for the National Network to End Domestic Violence in Washington, D.C. She had previously served as the Director of Public Policy for the Delaware Coalition Against Domestic Violence and has practiced as both a prosecutor with the Delaware Attorney General's Office and as a defense attorney with Community Legal Aid. She also is the general counsel for the Newcastle City Council in Newcastle, Delaware and is a former member of the board of directors of the ACLU of Delaware.

Welcome to all of you. Thank you. Mr. Butler?

MR. BUTLER: Thank you, Judge.

It's my honor to be here on behalf of the Victims Advisory Group to sort of give you our collective thoughts on the VAWA amendments. And I know Judge Saris said that you had read the testimony, but I'd like to -- and I'll try not to repeat, but I'm going to start with the attachment, "Jennifer Example," one of the VAG members, who had a personal experience. And I think that her words are probably more than I could imagine.

And I think Dr. Campbell will talk about that, but the terror, her indication that it's, you know, worse than a gun or a severe beating, the trauma and the significant harm. And I think those led the VAG to believe that these enhancements should involve all cases that have, you know, similar terror or trauma. It doesn't matter whether it's domestic violence or stalking, dating, you know, if this occurs, you have these harms. So we would hope that the Commission would make sure that if this strangling/suffocation occurs, that it's consistently treated with any victims and there would be the same aggregated conduct under the guidelines.

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One of the things that we noted in reviewing the assault provisions under the guidelines was that there was some inconsistency, and one of the inconsistencies we noted was with protective orders, and that some of the assault guidelines had an aggravated factor if there was a protective order. And we thought that was very important because whether it be an aggravated assault, a simple assault, assault with intent to mur -- if you're violating something and you have an order to have no contact, we think that is enhanced conduct that should be applicable regardless of the type of assault. And we hope that as the Commission goes forward that that be considered.

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As you've heard testimony, now some of the tribes have civil authority to issue protective orders. The military has bar orders. And I would say we don't have Indian country here, but in the State of Maryland we have Andrews Air Force Base, we have Pax River, we have the Naval Academy, we have Aberdeen Proving Ground, we have Fort Meade. So we have a lot of federal enclaves. So these issues are not just in tribal areas as well.

But we think that, you know, when there's a lawful order that no should mean no and if you're told not to have contact with somebody and you do, that's a more severe circumstance and that judges should be considering that in terms of calculating of the guidelines.

Another question that you asked about was supervised release. And we think that that's probably one of the most important things that the Commission can do, is to come up with some good language regarding supervised release. And there are duties in the rights of victims to be reasonably protected from the accused under the Crime Victims' Rights Act. And the Commission has very generic language in 6A1.5, but there should be very specific language that this should be part of the supervised release provisions. I think to protect the possibility from future harm, this is one of the most important things that we believe that the Commission can do.

Last but not least, you've heard that upward departures are available, and maybe they're not used very often. And I think that if you look at the language, which we have in our testimony, you know, we understand and we're not going to weigh in as to whether, for example, tribal convictions should be counted, you know?

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But where there are tribal convictions, military convictions, foreign convictions, civil adjudications being found in violation of protection orders and issuing of protective orders, you know, these are things that are very appropriate for upward departures and the commentary should reflect that these domestic violence, sexual assault, dating violence, stalking should be included in there. So we would ask the Commission to consider that as it moves forward.

Thank you for your time. I'm looking forward to answering any questions you might have.

CHAIR SARIS: Thank you. Dr. Campbell?

DR. CAMPBELL: Good morning, and I too am honored to be here, and I will speak on behalf of my own research as a nurse and other research that's been conducted by medical examiners and particularly Gael Strack and the group in San Diego.

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And I want to emphasize first of all that it only takes 5 to 10 seconds of pressure to lead to unconsciousness in a strangulation event, and there's a lot of research now that's been done in terms of how much damage is done when someone loses consciousness from a strangulation event. And we have data; and I wrote it up for you, in terms of long-term neurological problems. And it can be considered a traumatic brain injury because there's anoxia to the brain, which is a form of traumatic brain injury.

And as I said, 5 to 10 seconds. Then it only takes another two to three minutes for someone to die. And even if they do not die at that time, there's an increased chance of death within the next 24 to 48 hours after being strangled to unconsciousness from either the throat closing or an increased risk of stroke or choking on one's own vomitus.

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So we have several ways that there is indeed severe bodily injury from the majority of these strangulation events, or as abused women call them, an episode of choking.

It's also noteworthy that we have data -- well, earlier it was mentioned in terms of vulnerable populations, and I would maintain that one category of vulnerable populations would be pregnant women. And we have data that 34 percent of pregnant women have had an episode of non-fatal strangulation from a partner or ex-partner.

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We also have a little bit of data from Indian country, both in Canada and also in Oklahoma where we find a similar prevalence as in other categories of abused women. Somewhere between 30 percent and 50 percent of abused women report at least one episode of choking or strangulation. It's oftentimes repeated. We actually from Oklahoma have data that shows that women who are Native American have a 1.5 percent increase, self-reported episodes, of non-fatal strangulation over and above white women.

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And we also have high rates, has been mentioned, of homicide, domestic violence homicide amongst Native American women, and we have found in prior data that approximately 24 percent of women who are killed by a partner are strangled to death. And many of them have had prior episodes of strangulation. As was mentioned before, from our data we find that women who have had a prior episode of non-fatal strangulation are 6.7 times more likely to be amongst those that are killed by an intimate partner. So it increases the risk of a domestic violence homicide by 6.7 percent.

So again, I would maintain that there is severe bodily harm involved in most episodes of strangulation and that even the ones that don't lead to unconsciousness are oftentimes followed by that ladder of escalation that was mentioned, which means more episodes of strangulation as one goes on.

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Intent is very difficult to actually infer from cases. However, with the kinds of enhanced light that we use now the internal examination to determine swelling in the throat, finding petechiae on the scalp, et cetera, which most of our nurses are trained, our forensic nurses are trained to examine for strangulation and to document it, if we can get victims of strangulation to a good medical exam, which of course is a challenge in Indian country, I understand, but not always, and get the medical documentation of the grievous bodily injury, then maybe we don't have to infer intent as often.

And I look forward to answering questions.

CHAIR SARIS: Thank you.

MS. MOORE: Good morning. Thank you so much for having us here.

I wanted to talk -- I know that my comments to you were more my questions to you, giving you things to think about than my providing you with any information. I don't know a lot about federal sentencing. I didn't prosecute in federal court. What I do know is that victims tell us that they are so much more interested in the quality of the time that's served than they are in the length of the time that's served.

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One of the things that I've learned is that there are very few certified domestic violence intervention programs offered within the system when someone is incarcerated. To whatever extent the Commission can recommend that both during incarceration and then -- so pre-release and then post-release that attention be paid to did someone come in with a history of domestic violence? And if so, shouldn't we as a society benefit from having them involved in certified domestic violence intervention programming right there while we have them as a captive audience? This is assuming that they are incarcerated and they don't have to travel 50 miles or so for the rehabilitative effect of that.

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There are no studies that tell us that those programs work. What the studies do tell us is that the longer that one is involved in certified domestic violence intervention programming the less likely the recidivism rate is. Programs also tell us that there's a difference between anger management and certified domestic violence intervention programs.

So in answer to your question about should we pay some attention to and what attention should we pay to post-incarceration or early release methods, I would recommend that victims also tell us that they contacted police because they need an intervention, they need someone to stop the short-term instant abusive behavior, but they would also like longer-term fixes. And one of the things they realized is that programming in addition to things like certified domestic violence intervention -- but mental health counseling, job readiness, victims have told us, and job skills are things that they would like to see offenders have.

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One of the realities is that every victim does not leave her offender. One of the realities is that our judicial system doesn't allow that total disengagement if the victim and the offender have children in common, for example. And we also know that offenders who are domestic violence victims are serial. And so we need to address, figure out how to stop the abuse. And using a period of incarceration can be useful in doing that.

The other thing we know is that for someone that's going into a reentry program, an offender going into a reentry program at least use one of Dr. Campbell's tests to have a sense of whether or not the re-offending is likely to occur, again so some treatment modalities are included in the post-release.

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Another thing is that, especially when we're trying to figure out where an offender should, how he should reenter society and where he should live, there's a lot of pressure often put on spouses or the parent of the offender's children to take that offender in, both from the offender and from our corrections system. And that's another example where we need to certainly make certain that there's a lot of follow-up.

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And then the final comment I'm going to making is hearing probation officers get really upset with victims, because victims call and say he is contacting me, he is engaging me and he's not supposed to. And the burden on that has to be the burden of the offender. The offender has to be the one to show that he is staying the distance away from the victim. The burden shouldn't have to be the victim going back into the system attempting to get a new charge because the probation officer -- and I know the federal probation is gone now, but that's from the state perspective. But just making certain that when a person is being released that there are these conditions and that they're being adhered to would be great.

I'm sorry. Can I say two more things?

CHAIR SARIS: Yes, ma'am.

MS. MOORE: Tribal convictions should be counted because these crimes escalate and because that's why we fought so hard in VAWA to get the tribal provisions in. The other aspect of that is that there are five pilot studies going on right now with tribal jurisdictions being able to prosecute. So we do want to pay attention to how they develop.

And then Sunday night I sat on a sofa next to a 20-year-old wife who's been a recent victim of domestic violence. She's only been married for a year and for six months she's been abused. And one of the things that happened to her is that she was strangled. It's a very serious offense, strangulation. It is I think the equivalent of attempted murder.

Thank you for listening and I will entertain any questions you might have.

CHAIR SARIS: Can I ask, how many strangulations result in people losing consciousness, because sometimes you hear from people that, you know, someone goes up to them and says I'd like to kill you and then it's over. How many of them turn out to be very serious, the equivalent of the kinds of cases that you talked about?

DR. CAMPBELL: There is not as good data as we would like to have on that, partly because self-reported loss of consciousness is very difficult. And part of what goes along with loss of consciousness is loss of memory. And amongst NFL players, amongst -- you name it, when you work them up for post-concussive syndrome, for instance, people have a difficult time remembering exactly if, when, how they lost consciousness. They'll report different foggy things like that.

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So, and I'm sorry to not be very precise on that, and I wish I had better data, but we found that it's difficult without some sort of a physical exam. And we're only starting to systematically do the physical exam, have people worked up for traumatic brain injury, post-concussive kinds of syndrome issues that will get better data on that.

CHAIR SARIS: So assuming there's a range, right?

DR. CAMPBELL: There is a range.

CHAIR SARIS: It goes from --

DR. CAMPBELL: There's absolutely a range.

CHAIR SARIS: -- the guy pushes his --

DR. CAMPBELL: Yes.

CHAIR SARIS: -- wife up against and says I could kill you versus someone who's literally sitting there with a thumb on the throat. So would you say we should make that gradation, or that's just --

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DR. CAMPBELL: Well, you know, I think that's one place to cut it is around loss of consciousness, but as I mentioned, I think a medical exam is probably the best way to get that. And so, you know, I would say routinely we ought to be doing a medical exam. When first responders come to a home, they should be asking about choking specifically. One of the things will happen when a woman loses consciousness is she'll be incontinent. She'll wet herself. But obviously this isn't something she's going to volunteer to the police officer. But if they ask about that, that's a very good objective sign of losing consciousness.

So a very complicated answer to a straightforward question. I wish we had better data on that.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: But, Dr. Campbell, for those victims who do not come forward and have a medical exam right away because they don't report it, but who later develop obvious neurological problems or brain injury, when you see them later can the tests that are done determine that it's as a result of something like strangulation or that it's just --

DR. CAMPBELL: Not --

COMMISSIONER FRIEDRICH: -- you can't tie?

DR. CAMPBELL: Yes, it's difficult to tie it causally, but we have looked at our data in terms of those who have reported at least one strangulation event. Abused women are much more likely to have these long-term serious symptoms.

One of the confounders there is oftentimes those same women have had head injuries. You know, they've been slammed against walls by the same abuser. And that's, you know, another form of head injury and we know with TBI the more, you know, head injuries you've had -- a lot of them have had multiple episodes of choking. But definitely we can see more of those long-term symptoms in terms of memory problems, dizziness, et cetera and so forth amongst women who have reported a choking episode than amongst women who never had that.

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VICE-CHAIR BREYER: I wanted to pursue the strangulation lines, because until you mentioned it I hadn't thought about drawing lines and trying to figure out whether that makes sense in cases in which there has been an intentional strangulation that does not result in a loss of consciousness. What could you say about that? Can you say anything about it medically? I mean obviously we had other witnesses describe what it means psychologically and medically?

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DR. CAMPBELL: Not much. And again, we haven't been thinking about that specifically for very long, but when you think about a strangulation that does not result in loss of consciousness, if you're talking about only 10 seconds of pressure to cause at least a beginning loss of consciousness, it's not very long. You know, and most women when they talk to me describe the intent to subdue them is -- you know, they may not be intending to kill, but they are intending to subdue. And subdue means losing consciousness. So they may not have that, you know, conscious intent to kill, but intent to subdue, that's -- and it's oftentimes the forearm against the neck, against the wall until she slumps to the floor, which is loss of consciousness. You don't slump to the floor without loss of consciousness.

The case that Mr. Butler was talking about was definitely -- she was losing consciousness. And if anybody had done a, you know, immediate medical exam would have found the anoxia.

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COMMISSIONER WROBLEWSKI: Thank you all again for coming. We really appreciate it. Ms. Moore, it's good to see you again. I think we met a few weeks ago -

MS. MOORE: Yes.

COMMISSIONER WROBLEWSKI: -- and had a discussion about resources at the Justice Department.

MS. MOORE: Yes.

COMMISSIONER WROBLEWSKI: Can you just talk just a little bit about that? I know that in your network it includes organizations that provide victim resources to victims in Indian country.

MS. MOORE: Yes.

COMMISSIONER WROBLEWSKI: Can you talk a little bit about how much resources, the needs?

And also, Dr. Campbell, is there anything that you can say about the effectiveness of treatment of the perpetrators, the supervision and treatment issue that we've touched on just a little bit?

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MS. MOORE: We heard statistics a little bit earlier, and the harm to the Native American women is incredible. And all of the more rural parts of our country need more resources, and Native lands include that. Indian country includes that. When people are just so removed from services, when communities are so impoverished, it's just very difficult for them to have adequate services.

Now we're really happy that one of the things that all of you have been thinking about is how to save some of the dollars in the DoJ budget by having some -- eliminating some of the minimum mandatory laws and doing some of the reentry work so that we hope to see more of that money poured into the programming aspects of VAWA's implementation, so that coalitions can exist on all of the tribal lands to help advocate for victims of domestic violence so that domestic violence shelters and so that sexual assault service agencies can exist in order to provide services for victims.

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And then there also has to be, under another line of the Department's budget there also has to be money for these continued certified domestic violence intervention programs and these continued batterers' programs, because again, if they don't get fixed, they're going to just continue. And so that's the other piece of the work.

CHAIR SARIS: I wanted to ask a question about -- oh, did you want to add something?

DR. CAMPBELL: I did want to add something about the effectiveness of some of the offender intervention programs. And as I'm sure all of you are aware, there's been some very mixed results on tests that have been done. However, none of those tests have ever been done on Indian country, so we don't know whether or not they are effective. There are many tribal ideas around some justice kinds of answers that are a little bit different, more community justice sorts of strategies, but they have not been tested either.

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One offender intervention that has been tested that I keep thinking would be wonderful on Indian country is Chris Murphy through NIDA funding has found an offender intervention, offender for domestic violence intervention program combined with a substance abuse treatment program, those two done together. Usually they're done separately; and oftentimes one or the other, which is not useful, for substance-abusing offenders, which is a big category in Indian country. A big category everywhere else, too. But, you know, particularly perhaps a strategy. And unfortunately that has not been taken up widely at all. And, you know, that would be an opportune thing to pilot as part of some new resources for Indian country for offenders.

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MS. MOORE: If I could add one thing to that. The other thing is that a lot of our programs that we've designed are very mainstream Anglo heterosexual programs. And a number of communities, African-American communities, Latino communities have a more community-based approach that as a model, as Jacqueline mentioned, could also probably serve on Indian land perhaps well. But those are alternative programs.

I think our goal is to end the domestic violence and to reduce the recidivism. And I think those alternate community programs need to have a shot.

CHAIR SARIS: On a different subject, just going on a point that Mr. Butler made about protective orders, I used to be a state court judge and it was often the case that the offender violated the protective order, more often than not maybe. But also sometimes it was because he was the father of the children, or because they were married and he was the bread winner. So I'm trying to understand the recommendation that suggests essentially -- and I should add often hence to new violence. So that's why there's a problem. But it was sometimes at the invitation of the wife.

You suggested we have an enhancement or perhaps even a whole new guideline for victims for whom they were abused or assaulted in violation of a protective order. Is that something that you've seen any state doing, or is that just something that the advisory group thought would be a good thing because of the problem?

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MR. BUTLER: Well, the guidelines already provide that. 2A2.2(a)(5) provided for one of the assaults. And it didn't seem consistent in terms of policy that for other assaults that the same wasn't used. Because clearly if a person cannot follow the lawful order; and I'm sure all of you who are judges who've had people on probation or supervised release, you know, if they disregard the order of a court, or a tribe, or a military bar order, it seems to me that it's not just the crime itself was committed, but they also violated the lawful order of an entity that had legal authority. So it seemed to us that that should be a consistent policy and --

CHAIR SARIS: That's why you wanted something in chapter 3?

MR. BUTLER: Well, yes, because you could go through all of the assault provisions and add it, but it seemed to me that you could take it out and move it from 2A2.2(a)(5) to a -- what I call 3A1.6 so that if there was any crime which -- especially the assault-related crimes after there was an order or -- I don't know, it doesn't have to be an order. It could be a lawful direction. It could be a bar order. It could be a tribal directive not to have contact. That it seemed to be a consistent policy that this person is not only violating the criminal offense, but also some other legal authority. And it should be subject to enhanced penalties.

CHAIR SARIS: So you want to at the very least add "tribal order," to the tribe's issue orders?

MR. BUTLER: Tribe, military.

You know, you have bar orders and yet people, you know, violate those. So, yes, I think there should be a consistent policy. I think it's a good policy in 2A2.2. I just think that it should be across the board, and that's what the VAG is recommending.

CHAIR SARIS: Any other questions?

(No audible response.)

CHAIR SARIS: I guess the one last question I would have -- so are any particular certified batterers' programs tested to be effective? We're trying to look at our supervised release standards. And is there any particular one that if we were to make recommendations to courts, either tribal territory -- of course as you all point out, this happens across the United States of America. Is there any, or is it just premature to sort of say you should --

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DR. CAMPBELL: It depends on where the study was done, how it was done and what kind of design was used. There is not conclusive persuasive evidence that the -- and of course it depends on how the program was implemented. You know, there's a thousand ifs, ands and buts with that. But there is some evidence that can be effective for some abusers in some settings, the standardized kind of certified abuser interventions, but not the kind of evidence you want to write home about.

And so, there's a lot of recommendations to use different offender interventions for different kinds of abusers, which makes sense, be they different in terms of race/ethnicity/cultural background or be they different in terms of whether or not they have severe PTSD, like from military veterans. And we do have an offender intervention program that's been developed just for veterans that has been shown to be effective, for veterans with PTSD.

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So it may be that we need to --
rather than have a one-size-fits-all, which
we have also found though in substance abuse
treatment. So I don't know why that's like,
oh, no, we can't have, you know, different
kinds of interventions. I think we can. We
need to test them in Indian country.

CHAIR SARIS: Anybody?

(No audible response.)

CHAIR SARIS: Thank you. Thank
you for coming in and we're listening, we're
learning. Thank you. We should come out
with amendments and submit them to Congress
by April. And then if they don't reject
them, they'll go into effect in November. So
thanks.

(Whereupon, the hearing was
concluded at 11:16 a.m.)

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