

# PROBATION OFFICERS ADVISORY GROUP

*An Advisory Group of the United States Sentencing Commission*

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## **Tribal Issues** February 8, 2018

With more than 500 sovereign Tribal Nations across the country, U.S. Probation Officers are well acquainted with the richness and diversity of Native American culture and the unique sentencing and supervision issues that arise within Indian country. In preparing for this testimony, POAG reached out to colleagues working in high concentration tribal areas and it is clear our agency works hard to foster positive relationships with tribal nations. These relationships are essential to our ability to gather information in the sentencing process and to effectively supervise individuals on reservations. As the Commission is aware, Judicial Districts in tribal areas generally have high-risk profiles marked by cases frequently involving violence and hands-on sex offenses.

In evaluating the Commission's amendment to §4A1.3, POAG is generally supportive of the proposed commentary. However, before discussing the amendment, it is important to understand the realities in the field of gathering records from tribal courts and law enforcement agencies.

As the primary record gatherers in the sentencing process, U.S. Probation Officers often face challenges obtaining records in tribal areas. Some districts reported working with over 20 different tribal nations that demonstrate varied levels of responsiveness. Tribal arrest and conviction records are rarely revealed in automated record queries, which requires officers to coordinate directly with the tribal courts. While some tribal nations are very reliable making records available by mail or email, others require officers to physically travel to the court – at times requiring hours of travel. Other tribal courts are reported to be completely unresponsive.

Feedback indicates that some tribal areas have modern automated systems, while many others rely on non-automated and non-standardized handwritten notes requiring manual searches through paper files. Officers indicate that records often lack clarity regarding guilty findings, time spent in custody and attorney representation. Tribal courts also range from having systems supported by law-trained attorney's/judges with tribal bar associations to courts being operated by lay-people. It is important to understand this landscape to appreciate the challenges District Courts face assigning value to tribal court convictions in federal sentencing.

Officers surveyed by POAG described common characteristics of Native American criminal history profiles. First and foremost, alcohol related arrests are prevalent – ranging from public intoxication/disorderly conduct to DWI and violent assaults. Mere possession of alcohol is unlawful on many reservations and tribal law enforcement agencies are known to routinely utilize jail as de facto detoxification facilities. At the extreme, a subset of Native American defendants demonstrate patterns of purposeful violent conduct, many times domestic in nature, with histories of unlawful possession and use of weapons.

With regard to the proposed amendments, POAG is in favor of the subdivisions (C)(i) and (C)(ii), but we do not believe they should be threshold factors for upward departure. While POAG believes due process protections are an important factor, they should not be determinative given the diverse patterns of practice in tribal courts and the varied factual scenarios presented.

POAG also supports subdivisions (C)(iii) and (C)(iv) in evaluation of tribal criminal proceedings. The scoring rules for prior federal, state or local convictions need to be a guiding factor in providing valuation to upward departures. Given the characteristics of Native American criminal history profiles, rules associated with recency, treatment of minor offenses and double counting need to be consulted in determining whether and how far to upwardly depart.

Lastly, POAG is opposed to the adoption of subdivision (C)(v). We understand that some tribal courts have sophisticated systems that adhere to constitutional due process protections. The creation of these institutions is rightfully a great source of pride for many tribal communities and this commentary is a reflection of that pride. However, POAG is concerned about potential disparity that may be wrought by adoption of this commentary – where a handful of tribal nations are treated more harshly under the guidelines than others. We believe that District Courts have the ability to consider the spirit of subdivision (C)(v) within the commentary provided at (C)(i) and (C)(ii) without singling out individual tribes to be treated differently.