Testimony Before the U.S. Sentencing Commission
February 8, 2018

Chairman Pryor, Members of the Commission, I want to thank you for the invitation to appear here today on behalf of the Tribal Issues Advisory Group. For people interested in fair sentencing in Indian Country this is an important moment. As I welcome a chance to answer your questions, I will be brief. As you are aware the TIAG filed written comments on the proposed tribal issues amendments to the Sentencing Guidelines.

You will note that the TIAG generally supports the proposal regarding the commentary to § 4A1.3(a), which seeks to give guidance to courts on when an upward departure may be appropriate based on tribal court convictions. We offer this support because we are convinced that no single threshold requirement or determinative is, or should be, dispositive and that an approach that guides the sentencing court through a totality of the circumstances analysis best serves the interest of justice in sentencing Indian offenders. Such a policy will advance both the constitutionally mandated individualized analysis of sentencing considerations and the goal of sentencing uniformity as is embodied in the Sentencing Guidelines.

Our support is not without a request for further consideration of nuanced issues that present an interplay between the unique characteristics of tribal sovereignty and about tribes and traditional western notions of due process and procedural fairness. With this rubric in mind, TIAG seeks to address the first, second, and fifth subsections.

Turning to the first factor. The proposed language for the first factor is:

> (i). The defendant was represented by a lawyer, had the right to a trial by jury, and received due process protection consistent with those provided criminal defendants under the United States Constitution.

TIAG urges the Sentencing Commission to reject this notion of due process as a threshold factor to apply §4A1.3(a). In 2016, there were 351 functioning tribal courts in the United States. These tribal courts range from tradition laden elder led sentencing circles to western style courts that function much like state and federal trial courts. Tribal nations are not political subdivisions of the United States; rather each is a federally recognized sovereign. Within these tribal nations, any attempt to elevate western notions of due process to a threshold will be viewed as an attack on tribal sovereignty and the right of self-governance.

Within this functioning sovereignty, rights are recognized and protected by the United States Constitution and the protections afforded under the Indian Civil Rights Acts of 1968 (ICRA). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court stated that due process and the rights set forth in ICRA, while similar, are not identical, For this reason, TIAG does not believe that due process, as recognized in state and federal courts, should not be the threshold–rather, the appropriate question to ask is whether or not the tribal court at issue is providing the protections required under ICRA.

As just one example, as recently as 2016, in *United States v. Bryant*, 136 S. Ct. 1954, the Supreme Court reaffirmed that the sixth amendment did not extend to tribal courts. Setting a due process threshold would effectively disenfranchise tribal courts that operate entirely consistent with the Indian Civil Rights Act.

TIAG also urges the Commission to continue to include, as a separate subpart, subpart (ii). This subpart states:

> (ii). The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act (TLOA) of 2010, Pub. L. 111-211 (July 29, 2010) and the Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. 113-4 (March 7, 2013).

TIAG believes that separation of the two subparts at issue TLOA and VAWA address different types of prosecutions and provide for different types of protections for defendants, and that the two subparts should both be included and separate.

Finally, TIAG believes that the wishes of the tribes regarding the use of their convictions for federal sentencing is an appropriate, though not determinative factor, to be taken into consideration in sentencing. There are nearly 570 recognized tribes running 351 operating tribal courts with the other tribal nations presumably relying on the state courts as their criminal courts under Public Law 280. Within these 351 courts is a wide variance of knowledge and understanding of the federal sentencing guideline system. During our consultation process with the tribes on these issues, we came to understand that there is a wide difference of opinion on how the tribes would express this intention. In the consultative process, it became apparent that some tribal representatives wished to do a case-by-case ad hoc evaluation of each defendant. TIAG believes that such a process violates the spirit of uniformity embraced in the Sentencing Guidelines and urges the Commission to amend the comment to make plain that the expectation is that the tribal governing authority would present a resolution accompanied by a mechanism for providing conviction information to the United States District Courts. Likewise, federal judges should be made aware that

when considering the desires of the tribal nation that a formal expression by the tribe is not to be given weight unless it has general applicability to all cases.

Finally, TIAG wishes to note that not all federal district courts are equally equipped by experience or training to appreciate the disparate circumstances and approaches of different tribal courts. For those of us who work regularly with tribal courts, we have developed a familiarity to the unique aspects and characteristics of the tribal courts within our jurisdictions. Likewise, those of us who serve in Indian Country jurisdictions should have a sense of the history and experiences of the tribal nations within our districts. I believe that the current proposal, with the amendments TIAG proposes, will provide a functional rubric that provides some uniformity of application and still avoids the "one size fits all" trap that has all to often been imposed on Indian Nations.

Thank you for the opportunity to address you.