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REPORT OF THE NATIVE AMERICAN ADVISORY GROUP

NOVEMBER 4, 2003

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	i
II.	INDIAN CRIMES AND FEDERAL SENTENCING	
	A. Background	1
III.	OVERVIEW OF FEDERAL AUTHORITY AND THE MAJOR CRIMES ACT ..	4
	A. The Historical Context	4
	B. The Major Crimes Act	5
IV.	THE AD HOC ADVISORY GROUP’S FORMATION AND METHODOLOGY.	10
V.	MURDER AND MANSLAUGHTER	13
	A. Second Degree Murder (18 U.S.C. § 1111)	13
	B. Manslaughter (18 U.S.C. § 1112)	14
	1. <u>Involuntary Manslaughter</u>	14
	2. <u>Recommendations Relating to Involuntary Manslaughter</u> ..	16
	3. <u>Voluntary Manslaughter</u>	18
	4. <u>Recommendations Relating to Voluntary Manslaughter</u>	18
VI.	SEXUAL ABUSE OFFENSES	19
	A. Sexual Abuse is a Serious Problem	20
	B. Longer Federal Sentences For Sexual Abuse Affect Native Americans Disproportionately	21
	C. Recommendations relating to Sexual Abuse Offenses	25
	1. <u>Create New U.S.S.G. § 2G1.3 To Separate “Travel Offenses” from Heartland Native American Offenses in Guidelines</u>	25
	2. <u>Establish a Sex Offender Treatment Program modeled on the successful Drug and Alcohol Program (DAP) Model.</u>	26
VII.	AGGRAVATED ASSAULTS	30
	A. Recommendations Relating to Aggravated Assault:	33
VIII.	THE ROLE OF ALCOHOL IN MAJOR CRIMES ACT CASES	35
IX.	TRIBAL CONSULTATION	37
X.	CONCLUSION	39
	APPENDIX A	

**REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN
SENTENCING ISSUES – NOVEMBER 4, 2003**

I. EXECUTIVE SUMMARY

A. OVERVIEW

This Advisory Group was formed in response to concerns raised that Native American defendants are treated more harshly by the federal sentencing system, than if they were prosecuted by their respective states. The Advisory Group was charged by the Sentencing Commission to “consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act.”

Given this charge, the Advisory Group focused on two primary questions: 1) whether Native Americans are unfairly sentenced by the operation of the federal sentencing guidelines under the Major Crimes Act; and 2) if so, how can that unfairness be redressed. To answer these questions, the Advisory Group focused on jurisdictions with large Native American populations. The Advisory Group compared the sentences received by Native American defendants charged under the Major Crimes Act and sentenced pursuant the federal sentencing guidelines with those defendants sentenced in their respective state courts for analogous crimes. Specifically, the Advisory Group considered the offenses of manslaughter, sexual abuse, and aggravated assault. This review revealed that the impact on Native Americans by federal criminal jurisdiction and the application of the federal sentencing guidelines varies both from offense to offense and between jurisdictions. Thus, for each offense, the Advisory Group makes the following recommendations to address these differing effects.

B. MANSLAUGHTER

The Advisory Group's recommendations relating to manslaughter were determined before the most recent changes to the sentencing guidelines. However, as this Advisory Group believes these proposed changes will best improve the operation of the federal sentencing guidelines in their application to Native Americans, the Advisory Group stands by its conclusions and recommendations.

The Advisory Group urges the Sentencing Commission to consider revising the involuntary manslaughter guidelines so that the base offense level for reckless conduct is a level 18. The Advisory Group also recommends the addition of specific offense characteristics. The Advisory Group recommends that the Commission include: (1) a four level increase if the death occurred while driving intoxicated or under the influence of alcohol or drugs; (2) a two level offense increase if the actions of the defendant resulted in multiple homicides; and (3) a two level increase if the use of a weapon was involved in the offense.

The Advisory Group sees no reason to justify any increase in the base offense level for involuntary manslaughter arising from criminally negligent conduct. Thus, it recommends that this base offense level remain at level 10.

Under the recommendations of the Advisory Group, a defendant pleading guilty to involuntary manslaughter for drunk driving, with a criminal history of category I, would face an offense level of 22, which would be reduced by three levels for acceptance of responsibility, to an offense level of 19. This level would result in a sentence range of 30 to 37 months, which is more than double the range previously set for such cases. The high end of 37 months would be midrange of the statutory maximum.

C. SEXUAL ABUSE OFFENSES

Based on the data reviewed by the Advisory Group, it seems clear that federal sentences for sexual abuse are longer than those for like offenses in state courts. Because of the jurisdictional framework which results in Native Americans being prosecuted by the federal government rather than the states for these offenses, Native Americans receive longer sentences than if the federal government did not have such jurisdiction. However, it seems equally clear to the Advisory Group that sexual abuse is a major concern on the reservations covered by federal jurisdiction. There is also evidence that these longer sentences were at least in part motivated by a desire to appropriately respond to these very serious cases arising on reservations.

Given these conclusions, the Advisory Group makes no recommendation to lower the sexual abuse guidelines themselves. However, the Advisory Group recommends that the Commission (1) consider the intent of Congress when determining whether to amend the guidelines for sexual abuse offenses in the future to avoid increasing the sentencing disparity for Native Americans convicted of these offenses, (2) separate out “travel” offenses, under proposed U.S.S.G. § 2G1.2, from other sexual abuse offenses to prevent any additional unintended disparity, and (3) encourage the formation of a sexual abuse treatment program modeled on the highly successful Drug and Alcohol Program (DAP), presently utilized for drug offenders.

D. AGGRAVATED ASSAULT OFFENSES

Perhaps more than any of the other offenses included within the Major Crimes Act, it was the sentences for aggravated assault that gave rise to the perception of unfairness in the treatment of Native Americans under the federal sentencing guidelines, which led to the formation of this Advisory Group.

This perception is well-founded based on the data reviewed by this Advisory Group. Federal sentences for aggravated assault are indeed longer than state sentences. Because Native Americans are prosecuted federally for assaults, they receive longer sentences than their non-Native counterparts in state court.

To address this disparity, the Advisory Group strongly recommends that the Sentencing Commission reduce the base offense level for aggravated assault by two levels. This reduction is a conservative approach to the disparity found by the Advisory Group between state and federal sentences. It would impact all offenders convicted of aggravated assault, the majority of whom are Native Americans. This change would address both the perception and the reality of unfairness in the application of the federal sentencing guidelines to Native Americans.

E. ALCOHOL

Data on all offenses reviewed by the Advisory Group confirms the devastating role that alcohol addiction plays in reservation crime. Because of the limited resources devoted to addressing this issue, the Advisory Group strongly recommends that, other than the enhancement noted above relating to involuntary manslaughter, no enhancements be added to the Guidelines for alcohol use during a criminal offense. Data confirms that such an enhancement would disproportionately impact Native Americans.

F. TRIBAL INVOLVEMENT

The Advisory Group strongly encourages the Sentencing Commission to continue what it has begun in forming this Advisory Group. The Advisory Group encourages the Commission to formalize mechanisms for consulting with affected tribal communities concerning whether to make changes to the federal sentencing guidelines for crimes covered by the Major Crimes Act. Such changes invariably

impact Native Americans more heavily than any other group. The Advisory Group strongly urges the Commission to consult on an on-going basis with national Indian organizations and the affected Indian communities.

G. CONCLUSION

The changes proposed in this report begin to address some of the concerns raised and identified regarding the application of the federal sentencing guidelines to Native Americans. Only by further consultation with the communities impacted by the application of the federal sentencing guidelines under the Major Crimes Act can the perceptions and realities of bias be avoided in the future.

II. INDIAN CRIMES AND FEDERAL SENTENCING

A. Background

Federal criminal jurisdiction is an important fact of life for Indian people on Indian reservations in a way far different than for other Americans. For most Americans, routine felony offenses are prosecuted primarily by state governments; federal prosecutions occur only if there is a particular federal interest or a problem with national or international scope, such as terrorism or narcotics. Until 1885, a similar model existed in Indian country. Indian tribal governments handled tribal offenses, and the United States undertook cases only rarely and usually pursuant to specific terms in Indian treaties. At that time, most Indians were not even citizens of the United States, and tribes exercised substantial rights of self-government.¹

In 1885, however, Congress fundamentally changed this regime by enacting the Major Crimes Act, 18 U.S.C. § 1153, a statute that federalized six felony offenses involving Indians in Indian country. The Act has since been expanded to include more than 20 felonies. Under this law and its amendments, as well as other federal statutes, the United States has displaced Indian tribal governments for purposes of felony criminal justice. Although misdemeanor offenses continue to be prosecuted by tribal prosecutors in tribal courts, felonies are exclusively a federal responsibility.

The effect of the federal Indian country jurisdiction is reflected in federal case statistics. While Indian offenses amount to less than five percent of the overall federal caseload, they constitute a significant portion of the violent crime in federal court. Over eighty percent of manslaughter cases and over sixty percent of sexual abuse cases arise from Indian jurisdiction.

¹ *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

Nearly half of all the murders and assaults arise from Indian jurisdiction.² In a geographical sense, Indian offenses are a major part of the practice of federal criminal law in several very large federal districts, such as Arizona, New Mexico, South Dakota and Montana, and a significant part in others, such as Minnesota, Nevada and Washington.³

Indian jurisdiction involves two components: one is a political classification, and the other is a geographical consideration. In order for a case to qualify for such jurisdiction, in addition to the traditional elements of the criminal offense, the government must prove that the defendant is an “Indian”⁴ and that the offense occurred in “Indian country.”⁵ The classification that a defendant is an “Indian” is a political, as opposed to racial, classification.⁶

² See generally U.S. Sentencing Commission, *2001 Sourcebook of Federal Sentencing Statistics*; U.S. Sentencing Commission, *Manslaughter Working Group Report to the Commission* (1997).

³ *Id.*

⁴ There is no statute that defines the term “Indian” as it is used in the Major Crimes Act. Because it has been held to be a political designation, it is most often proven by tribal membership or enrollment.

⁵ 18 U.S.C. § 1151 defines “Indian country” as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While “reservations” are a subset of “Indian country,” the terms are both used in this report to denote “Indian country.”

⁶ *United States v. Antelope*, 430 U.S. 641 (1977).

In cases brought under the Major Crimes Act, the federal sentencing guidelines control sentencing. The Major Crimes Act applies only to Native Americans, and only when they commit crimes on Indian lands, as defined by 18 U.S.C. § 1151. In singling out particular communities defined by tribal membership and geography and by displacing tribal governments that handle many of the other important governmental responsibilities in these communities, the United States has undertaken a substantial responsibility for public safety and criminal justice in Indian communities.

It is with this responsibility in mind that the United States Sentencing Commission formed an advisory group to consider issues regarding the sentencing of Native Americans under the Major Crimes Act. A public forum sponsored by the South Dakota Advisory Committee to the U.S. Commission on Civil Rights was held in December 1999, in Rapid City, South Dakota. Concerned members of the Native American community testified about issues affecting the administration of justice and Native Americans in South Dakota. The Sentencing Commission convened its own hearing on this issue in Rapid City on June 19, 2001.

In response to the recommendations of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights report and the testimony at the Sentencing Commission hearing, the Sentencing Commission established the Native American Ad Hoc Advisory Group.⁷ The Sentencing Commission charged this Ad Hoc Advisory Group to “consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act.” The Ad Hoc Advisory Group held its first meeting in June of 2002. This Report seeks to provide a brief description of the federal criminal

⁷ This Group was later renamed the Ad Hoc Advisory Group on Native American Sentencing Issues.

jurisdictional provisions that are relevant in the context of the Major Crimes Act, to explain the methodologies in identifying and assessing the problems related to sentencing Indians under the Major Crimes Act, and to explain the Ad Hoc Advisory Group's findings and recommendations.

III. OVERVIEW OF FEDERAL AUTHORITY AND THE MAJOR CRIMES ACT

A. The Historical Context

Federal authority over Indian Country is derived from a basic doctrine of federal Indian law: the sovereign status of Indian tribes. In *Cherokee Nation v. Georgia*,⁸ one of the earliest cases examining the tribal/federal relationship, the U.S. Supreme Court characterized the Indian tribes as "domestic dependent nations" because their rights as independent nations had been diminished and they occupied the Reservations at the sufferance of the United States.⁹

Although the *source* of federal power has often been unclear and at times has even been thought to reside outside the Constitution,¹⁰ the *existence* of Congress' legislative power over

⁸ 30 U.S. (5 Pet.) 1 (1831).

⁹ In later cases, the Supreme Court has consistently affirmed that the Indian tribes are subject to the jurisdiction of the federal government. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). See generally Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982); William Canby, AMERICAN INDIAN LAW (1988); Jon M. Sands, *Indian Jurisdiction in Federal Court* in DEFENDING A FEDERAL CRIMINAL CASE Ch. 20 (1998); Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT. R. 153 (1998); Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. UNIV. L. REV. 1627 (1998); Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 ARIZ. L. REV. 521 (1976).

¹⁰ *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

criminal offenses on Indian lands has been upheld consistently since it was firmly established in the Nineteenth Century in *United States v. Rogers*¹¹ and *United States v. Kagama*.¹²

The defendant in *Rogers*, a White man, had sought to avoid federal prosecution for the murder of another White man in Indian territory by claiming Indian status for himself and the victim, through marriage and adoption into the Cherokee Tribe. The Court rejected the assertion, holding that “Congress may by law punish any offense there, no matter whether the offender be a White man or an Indian.”¹³ Likewise, in *Kagama*, an Indian challenged the constitutionality of the Major Crimes Act, arguing that Congress lacked the power to extend federal laws to an Indian in Indian country, at least when the victim was another Indian. The Supreme Court found the Act to be within Congress’ constitutional authority because the federal government owed a duty of protection to the Indian tribes. As the Court has stressed far more recently, “Congress had undoubted constitutional power to prescribe a criminal code applicable in Indian Country.”¹⁴

B. The Major Crimes Act

The Major Crimes Act is an intrusion into the otherwise exclusive criminal jurisdiction of Indian tribes.¹⁵ Under the Major Crimes Act, federal felony jurisdiction is generally exclusive

¹¹ 45 U.S. (4 How.) 567 (1846).

¹² 118 U.S. 375 (1886).

¹³ *Rogers*, 45 U.S. (4 How.) at 572.

¹⁴ *United States v. Antelope*, 430 U.S. 641, 648 (1977).

¹⁵ See *Keeble v. United States*, 412 U.S. 205 (1973); *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991); *United States v. Center*, 750 F.2d 724 (8th Cir. 1984).

under the Major Crimes Act, and thus, state jurisdiction is precluded.¹⁶ In several states, Congress has affirmatively departed from the federal Indian country criminal justice model by extending state criminal jurisdiction and, as a practical matter, disclaiming most of the federal responsibility for public safety and criminal justice within Indian country.¹⁷

While neither the language in the federal statutes nor legislative history prohibits tribal governments from exercising concurrent jurisdiction over criminal acts, tribal courts have been limited in the sentences that they may impose to one year of imprisonment and/or a fine of \$5,000. Tribal courts have the power to bring such prosecutions independently of the federal government. Thus, a defendant may face prosecution from the tribal court and then face prosecution from a federal court for the same offense. Because Indian tribes are separate sovereigns with inherent powers predating the existence of the United States, the Supreme Court held in *United States v. Wheeler*¹⁸ that dual prosecutions for the same offense under these circumstances do not violate the double jeopardy clause of the United States Constitution. Dual

¹⁶ 18 U.S.C. § 1153. The specific offenses under the Major Crimes Act are murder, manslaughter, kidnaping, maiming, felony child sex abuse, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under 16, arson, burglary, robbery, and felony theft.

¹⁷ A number of states were transferred criminal jurisdiction over reservations within their borders by Public Law 280 (1953), now codified at 18 U.S.C. § 1162(a). These states include Alaska, California, much of Minnesota, Nebraska, much of Oregon and Wisconsin. Florida, Idaho, Iowa, and Nevada, as well as a handful of other states, also took over some aspects of jurisdiction in Indian country pursuant to this law. Some have also retroceded jurisdiction back to the tribes. Tribal consent is now required for any assumption of jurisdiction by a state.

¹⁸ 435 U.S. 313 (1970).

prosecutions are rare, though not unheard of, because of limitations in tribal prosecutorial and court resources and the limited nature of tribal jurisdiction.¹⁹

Because criminal jurisdiction under the Major Crimes Act and other federal statutes and case law is so fragmented,²⁰ different participants in the same or similar crimes may be subject to prosecutions by different sovereigns under different laws, depending on whether they are Indian or non-Indian.²¹ This result has been held not to violate principles of equal protection. In *United States v. Antelope*, the Supreme Court found federal legislation with respect to Indian tribes “not based on impermissible (racial) classifications” because it is “rooted in the unique status of Indians as ‘separate people’ with their own political institutions.”²² Therefore, “Indian,” as construed by the Court, is a political, as opposed to racial, classification.

While some acts are federal crimes no matter where in the United States they are committed or by whom, the Major Crimes Act enumerates particular Indian Country offenses that can be tried in federal court. The list of offenses, in the Major Crimes Act includes manslaughter, sexual abuse offenses and aggravated assaults. This list has been judicially extended to include such things as firearm and conspiracy counts. Courts have held that even

¹⁹ See, e.g., *United States v. Billy Joe Lara*, 324 F. 3d 635 (8th Cir. 2003), *cert. granted* (September 30, 2003). The case involves whether 25 U.S.C. § 1301, which gives tribes the authority to prosecute non-member Indians in Indian country, is a restoration of sovereign tribal authority or a delegation of federal authority. The Court’s decision will likely clarify the nature and source of federal authority in Indian country.

²⁰ See 25 U.S.C. §§ 1152 and 1153 and *United States v. McBratney*, 104 U.S. 621 (1882).

²¹ For example, if Indian-1 and non-Indian-2 assault non-Indian-3 in Indian Country, the Indian-1 will be prosecuted by the federal government and the non-Indian-2, if prosecuted, will be prosecuted by the state.

²² 430 U.S. 641, 648 (1977).

though firearm offenses are not listed in the Major Crimes Act, federal jurisdiction exists. Jurisdiction lies under 18 U.S.C. § 924(c) when the underlying felony, e.g., murder, is listed in the Major Crimes Act since the Act provides that the laws and penalties of the United States apply to its offenses.²³ Conspiracy also has been held to be a general law of the United States and therefore applies to Indians as well as others notwithstanding the location of the crime.²⁴ Thus, as a practical matter, a prosecution under the Major Crimes Act may produce a conviction for an offense not specifically listed in the Act, but which is nonetheless subject to sentencing under the federal sentencing guidelines.²⁵

The federal sentencing guidelines apply to crimes under the Major Crimes Act. Courts were initially split on the issue of what sentencing law applies to those offenses (notably

²³ See *United States v. Laughing*, 855 F.2d 659 (9th Cir. 1988); *United States v. Goodface*, 835 F.2d 1233 (8th Cir. 1987).

²⁴ See, e.g., *United States v. Dodge*, 538 F.2d 770, 776 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). Compare *United States v. Markiewicz*, 978 F.2d 786, 799-800 (2nd Cir. 1992), *cert. denied*, 506 U.S. 1083 (1993) (not all federal statutes with general applicability apply to Indian territories but only those that involve a peculiarly federal interest, to which include firearm offenses and conspiracies aimed at obstruction of federal law enforcement interests) with *United States v. Begay*, 482 F.3d 486, 499 (9th Cir. 1994) (declining “peculiar federal interest” approach of the 2nd Circuit since conspiracy is a crime of nationwide applicability and the objects of the conspiracy were listed substantive offenses under the Major Crimes Act).

²⁵ In *Keeble v. United States*, 412 U.S. 205 (1973), the Supreme Court explained that if the crime is not one of the offenses listed under the Major Crimes Act, the case cannot initially be brought in federal court. However, the Court further explained that a defendant can be convicted of a lesser included offense not listed in the Major Crimes Act. It held that, because Indians are entitled to be tried under the Act “in the same manner” as non-Indians committing the same crimes, an Indian charged with committing a felony against an Indian victim under the Act was entitled to a lesser included offense instruction despite the absence of any independent federal jurisdiction over the lesser offense.

The Ad Hoc Advisory Group limited its discussion to three areas of substantive offenses: manslaughter, sexual abuse, and assault. The Ad Hoc Advisory Group so limited its discussions to these areas as they form the bulk of cases arising under the Major Crimes Act.

burglary) that are to be “defined and punished” according to state law. In 1990, Congress amended 18 U.S.C. § 3551(c) to make the guidelines applicable to the Major Crimes Act offenses and other offenses arising in Indian country.

During the development of the guidelines the Commission was urged, at public hearings and in written submissions, to consider the special circumstances of Indian offenders and to be sensitive to the concerns of tribal governments.²⁶ When the guidelines were finally issued however, with the exception of prior tribal offenses,²⁷ special considerations of Indians and their communities were not addressed in the guidelines.

In districts that regularly deal with Indian defendants, federal courts have recognized the unique sentencing considerations that are present in prosecutions arising under the Major Crimes Act. In *United States v. Big Crow*, for example, the Eighth Circuit upheld the appropriateness of a downward departure, from four to two years imprisonment, in an Indian assault case.²⁸ The departure was based on the high rate of unemployment, alcohol abuse and socio-economic deprivations on an Indian Reservation. The Eighth Circuit, in affirming the departure, found that

²⁶ See, e.g., Tova Indritz, Testimony before U.S. Sentencing Commission, Denver, CO (Nov. 5, 1986); Letter from Fredric F. Kay, Federal Public Defender, Dist. of Arizona, to the Hon. William W. Wilkins, Chair, U.S.S.C. (Aug. 9, 1989). See generally Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With "Reservations"*, 9 FED. SENT. R. 144, 145 (1996).

²⁷ U.S.S.G. § 4A1.2 (2003) states that while tribal court convictions will not be counted for purposes of criminal history calculations, they may be considered under § 4A1.2 “Adequacy of Criminal History Category.”

²⁸ 898 F.2d 1326 (8th Cir. 1990).

the Commission had not considered the tribal culture and the devastating socio-economic difficulties found on the Reservations.²⁹

IV. THE AD HOC ADVISORY GROUP'S FORMATION AND METHODOLOGY

The United States Sentencing Commission formed the Ad Hoc Advisory Group in June 2002. The decision to form the group was based in large part on testimony presented before the Commission at a public meeting held in Rapid City, South Dakota on June 19, 2001. The Sentencing Commission convened the June 2001 meeting in response to a recommendation contained in a March 2000 report by the South Dakota Advisory Committee to the U.S. Commission on Civil Rights stating that “[t]he discriminatory impacts of Federal sentencing guidelines must be rigorously scrutinized.”³⁰ The Sentencing Commission heard concern voiced from a wide range of individuals about the administration of justice and the impact of the Federal Sentencing Guidelines on offenses arising from Indian Country. This testimony, along with concerns expressed by various groups regarding the impact of the Federal Sentencing Guidelines on offenses arising from Indian Country, prompted the Sentencing Commission to form the Ad Hoc Advisory Group. Specifically, testimony revealed that there was a perception among

²⁹ Departure on this basis was reaffirmed in the case of *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993).

³⁰ *Native Americans in South Dakota: An Erosion of Confidence in the Justice System*, South Dakota Advisory Committee to the United States Commission on Civil Rights (March 2000).

members of the Native American community that they are sentenced more harshly under the Federal Sentencing Guidelines than they would be if prosecuted by their states.³¹

In forming this Ad Hoc Advisory Group, the United States Sentencing Commission charged it to “[c]onsider any viable methods to improve the operation of the Federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act.” The members of the Ad Hoc Advisory Group were drawn from those with experience in federal prosecution of Indian crimes on the various Indian Reservations. Members of the Ad Hoc Advisory Group include federal judges, Assistant United States Attorneys, United States Probation Officers, representatives from the Department of Justice, the Department of Interior, the United States Commission on Civil Rights, Victim/Witness specialists, private practitioners, academics, and Federal Public Defenders. Staff support was provided by the United States Sentencing Commission. The Ad Hoc Advisory Group members also brought with them a diversity of geography and tribal affiliation.

The Ad Hoc Advisory Group has met several times. The meetings took place at the U.S. Sentencing Commission in Washington, D.C. and in Phoenix, Arizona. The Ad Hoc Advisory Group, as charged, limited its study to those federal offenses most often prosecuted under the Major Crimes Act, 18 U.S.C. § 1153, and thus subject to the operation of the Federal Sentencing Guidelines. It drew from past reports of the Commission, past and current research and data on

³¹ Perceptions of racial bias are troubling in and of themselves. Such perceptions foster disrespect for and lack of confidence in the criminal justice system. It is important to note that many of the perceptions of those who testified were, as noted in this report, an accurate assessment of the impact of federal criminal jurisdiction and the operation of the federal sentencing guidelines on Native Americans convicted under the Major Crimes Act.

federal offenses, and a review of data and statistics from state courts with a high percentage of Indian defendants, where the statistics were readily available.

The Ad Hoc Advisory Group broke itself down into various Sub-Committees to review specific issues. The Sub-Committees were charged with the following issues: assault, murder and manslaughter, sexual offenses, and report drafting. The membership on the Sub-Committees was structured to be diverse and reflective of the Ad Hoc Advisory Group as a whole. Topics selected were those offenses that had a significant percentage of Indian offenders and were areas that the United States Sentencing Commission and the Department of Justice had targeted for review and examination.

The Sub-Committees examined the relevant data from the United States Sentencing Commission on their offenses, state data and sources, and literature in the field. The Sub-Committees drafted reports, which were then submitted to the Ad Hoc Advisory Group as a whole, and revised. Data was ultimately used from three states with large Native American populations: Minnesota, South Dakota, and New Mexico. Despite the efforts of Commission staff to obtain sentencing data from other states with large Indian populations, such as Arizona and Montana, that data was unavailable for consideration, as it is not collected centrally in those states. Though there was a continuing concern on the part of the Ad Hoc Advisory Group, because of the limitations of the data set upon which it could base its analysis and from which it could draw conclusions, the Ad Hoc Advisory Group believes the conclusions contained in this report are supported by the best available data.³²

In addition to the topics addressed by the Sub-committees, there were a number of

³² The Ad Hoc Advisory Group wishes to thank the Sentencing Commission staff for their assistance obtaining data and information.

additional topics discussed and considered by the Ad Hoc Advisory Group. Some of those topics are referred to in this Report. In some instances, where the Ad Hoc Advisory Group determined that a proposal was not a viable method to improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act, this Report does not discuss it in detail. For example, there was a proposal to recommend that the Commission amend Chapter 4 to include tribal convictions in the computation of criminal history scores. After some consideration, the Ad Hoc Advisory Group ultimately decided against pursuing this proposal. The discussion among the Ad Hoc Advisory Group members revealed that there was concern that such an amendment would raise significant constitutional and logistical problems. Thus, the Ad Hoc Advisory Group is not recommending that such a change be implemented. Other issues, upon which the Ad Hoc Advisory Group has chosen not to make specific recommendations, likewise are not addressed in this Report.

In producing this Report, the Drafting Sub-Committee drew upon the Sub-committee reports and the data presented to the Ad Hoc Advisory Group as a whole. This Report represents all recommendations of the entire Ad Hoc Advisory Group membership.

V. MURDER AND MANSLAUGHTER

A. Second Degree Murder (18 U.S.C. § 1111)

The Ad Hoc Advisory Group decided not to address second degree murder. Many second degree murder defendants are Native Americans. However, Native Americans do not constitute the overwhelming percentage of defendants convicted of this offense. This situation stands in contrast to the percentages of Native Americans convicted for other homicide offenses (i.e., voluntary and involuntary manslaughter). As such, the Ad Hoc Advisory Group concluded

that the appropriateness of punishment for second degree murder fell outside its charge.

B. Manslaughter (18 U.S.C. § 1112)

1. Involuntary Manslaughter

The statutory penalty for involuntary manslaughter is not more than six years and a \$250,000 fine. The Sentencing Guidelines assign the base offense level of 10 for criminal negligence and 14 for recklessness. *See* U.S.S.G. § 2A1.4. Guideline commentary defines “reckless” as referring to “a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.” U.S.S.G. § 2A1.4, App. Note 1. The commentary further states that this includes nearly all convictions for involuntary manslaughter under 18 U.S.C. § 1112. The commentary notes that a “homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.” Application Note 2 defines “criminally negligent” as “conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.” *Id.* at App. Note 2.

The Ad Hoc Advisory Group benefitted from the findings and recommendations of the Manslaughter Working Group Report to the Commission (December 15, 1997). The Ad Hoc Advisory Group has also benefitted from the updating of the report by Commission staff. In reviewing the data, it is apparent that involuntary manslaughter is overwhelmingly an offense that involves Native Americans. Close to 75% of the cases involved defendants who were Indian, and the “heartland” of Indian country cases involved alcohol-related vehicular

homicides. It should be stressed, however, that these cases represent a relatively small number of cases in comparison with the total number of offenders in the federal criminal justice system. There were, for example, a total of approximately 30 cases of involuntary manslaughter in 2001 (reckless) while there were less than 5 involuntary manslaughters that were criminally negligent in the same year. The total number of involuntary manslaughter cases for 2000 and 2001 were less than 80.

The U.S. Sentencing Commission has charged the Ad Hoc Advisory Group to specifically examine this area. The Ad Hoc Advisory Group was aware of the request by certain U.S. Senators to amend the Guideline to “raise the sentencing range of imprisonment to impose harsher penalties for committing homicides while driving drunk.” This request was made in October 2002. The Commission’s interest in this issue led to a proposal published for comment, to possibly raise the base offense level for involuntary manslaughter found to be reckless from a level 14 to either level 16, 18, or 20; and for involuntary manslaughter found to be criminally negligent, from base offense level 12 to base offense level 16. In a comment submitted to the Commission on February 18, 2003, the Department of Justice proposed raising the base offense level for reckless conduct to a base offense level 20 and criminal negligence to a base offense level 16, plus adding specific offense characteristics. The Federal Defenders, in a comment submitted the same day, proposed raising the base offense level for reckless conduct to 16 and adding a two level increase for specific offense characteristics.

The Commission held a hearing on this matter in November 2002. At that hearing, the Chair of this Ad Hoc Advisory Group presented recommendations regarding proposed changes to the sentencing guidelines for manslaughter. On May 1, 2003, the Commission submitted to Congress amendments to the Guidelines to become effective November 1, 2003. Those amendments included changes to the involuntary manslaughter guideline found at U.S.S.G. § 2A1.4. Specifically, the amendment increases the base offense level in § 2A1.4(a)(2) for reckless involuntary manslaughter offenses from level 14 to level 18. Further, the amendment also increases the base offense level in § 2A4.1(a)(1) for criminally negligent involuntary manslaughter offenses from level 10 to level 12. However, that decision does not change the recommendations made by the Ad Hoc Advisory Group to improve the functioning of the Sentencing Guidelines in Indian Country.

2. Recommendations Relating to Involuntary Manslaughter

The Ad Hoc Advisory Group studied the mandatory maximum sentences of other jurisdictions for the offense of vehicular manslaughter, as well as the median sentences imposed, and compared these with federal sentences. In light of this, the Ad Hoc Advisory Group would propose that:

The base offense level for involuntary manslaughter be raised to level 18. The Ad Hoc Advisory Group would also recommend the addition of specific offense characteristics. There would be (1) a four level increase if the death occurred while driving intoxicated or under the influence of alcohol or drugs; (2) a two level increase if the actions of the defendant resulted in multiple homicides; and (3) a two level increase if the offense involved use of a weapon in the offense.³³

³³ These recommendations are based on a statutory maximum of six years.

In recommending these adjustments, the Ad Hoc Advisory Group wished to address cases involving vehicular manslaughter while intoxicated, most of which involve Native American defendants. A four level increase targets the harm of drunk driving, while distinguishing it from other involuntary homicide offenses. A two level adjustment for use of a weapon targets the increased harm when weapons are used. The research of the Ad Hoc Advisory Group and the Commission also revealed that 9% of the convictions for vehicular manslaughter involved multiple deaths. The Ad Hoc Advisory Group was concerned, however, that commentary be added that indicates that a vehicle could only be considered a weapon if it was so specifically used. An example would be if a defendant deliberately drove a car into a crowd, as opposed to a death resulting from drunk driving.

The Ad Hoc Advisory Group recommends no change in the base offense level for criminally negligent homicide, which is set at level 10. There are very few of these cases, and they involve conduct that is usually not alcohol-related. There appears to be no need or call for the raising of this base offense level.

Under the recommendations of the Ad Hoc Advisory Group, a defendant pleading guilty to involuntary manslaughter for drunk driving, with a criminal history of category I, would face an offense level of 22, which would be reduced by three levels for acceptance of responsibility, to an offense level of 19. This would have a sentence range of 30 to 37 months, which is more than double the range previously set for such cases. The high end of 37 months would be midrange of the statutory maximum. The Ad Hoc Advisory Group feels that this addresses specific concerns expressed by some senators and the Department of Justice regarding drunk driving.

The Ad Hoc Advisory Group does not feel that specific offense characteristics related to prior offenses of driving while intoxicated convictions or driving status are appropriate. Such concerns are better left, the Ad Hoc Advisory Group feels, to the criminal history calculations and specifically as a basis for possible departure upward for adequacy of criminal history.

3. Voluntary Manslaughter

Presently, voluntary manslaughter has a statutory penalty of not more than ten years and a \$250,000 fine. The base offense level for voluntary manslaughter is 25. There are no specific offense characteristics.

The Ad Hoc Advisory Group again referred to the working group report of the Commission discussed above. It adopts a recommendation, which the U.S. Sentencing Commission proposed to Congress, that the statutory maximum be increased from ten years to 20 years to reflect the severity of the conduct, and to bring it into line with the continuum of the involuntary manslaughter recommendations and second degree murder. In addition, such an increase would allow increased sentencing flexibility at the higher end.

Voluntary manslaughter, like involuntary manslaughter, is primarily an offense involving Native American defendants. The numbers of voluntary manslaughter cases, however, are even less than for involuntary manslaughter. In 2001, for example, there were less than 20 voluntary manslaughter cases subject to federal jurisdiction; in 2000, there were less than 10.

4. Recommendations Relating to Voluntary Manslaughter

In reviewing the data and the recommendations from the manslaughter working group, the Ad Hoc Advisory Group recommends that the base offense level stay the same. It recommends, however, that there be a two level increase for use of a weapon and a four level increase for use of a firearm. Such an increase would address the use of weapons and firearms in

such situations which, by their nature, arise from quarrel or heat of passion.

Other factors that arise in voluntary manslaughter offenses, such as domestic violence, criminal history, and so forth can be addressed in the appropriate chapters that deal with those subjects. For example, criminal history conduct that is assaultive in nature will either be assessed criminal history points, or receive an adjustment for prior restraining orders, or be a basis for an upward departure. Similarly, if the victim has a vulnerability, an adjustment under vulnerable victim may be appropriate.

The Ad Hoc Advisory Group recognizes that the nature of voluntary manslaughter is an intentional killing which is mitigated by an emotion, passion or quarrel, that lessens the culpability of the defendant. For this reason, extensive amendment of voluntary manslaughter was not deemed necessary aside from the above recommendations.

VI. SEXUAL ABUSE OFFENSES

Adequately improving the application of the federal sentencing guidelines to sexual abuse offenses committed by Native Americans presented one of the greatest challenges for the Ad Hoc Advisory Group. These challenges arose from data³⁴ relied upon by the Ad Hoc Advisory Group, which demonstrated that sexual abuse is a serious problem in Indian Country and that a disparity exists between sexual abuse offense sentences in the federal courts and those in state courts. This disparity, although not racially motivated, disproportionately affects Native

³⁴ Federal sentence data for FY 2001 was provided by the Commission staff. Late in the Advisory Group's tenure, some data was also made available for FY 2002. Unless otherwise noted, FY 2001 data is used in this section. Finally, data was obtained by the Commission staff on "expected time to be served" from Minnesota, New Mexico, and South Dakota, and this data was broken down by offense.

Americans because of the jurisdictional framework that places a far higher proportion of Native Americans in federal court. However, information available to the Ad Hoc Advisory Group also showed that some of this sentencing disparity was by design, for these sentences had been set at their present levels to address egregious sexual abuse cases that arose in Indian Country. Compounding this was the state of research into these offenses, which produces unclear or conflicting conclusions on how to effectively treat these types of offenders. As such, the Ad Hoc Advisory Group has limited its recommendations to two areas.

The Ad Hoc Advisory Group recommends, consistent with a proposal currently under consideration within the Commission, that the “travel”³⁵ sex offenses be addressed in a new Guideline, U.S.S.G. § 2G1.3, and segregated from the other crimes currently addressed in U.S.S.G. § 2A3.2. Over time, this separation may help limit unintended increases in the disparity in sentences for Native Americans if Congress continues to target the travel offenses for increased sentences. The Ad Hoc Advisory Group also recommends that, similar to the statutorily mandated Drug and Alcohol Program (“DAP”), sex offenders who complete the Sex Offender Treatment Program through the Federal Bureau of Prisons be eligible to receive a modest reduction in their sentences.

A. Sexual Abuse is a Serious Problem

The Ad Hoc Advisory Group cannot state strenuously enough that sexual offenses are a serious problem in Indian country. Native Americans twelve and older are more than three times as likely to be victims of sexual assault or rape than any other group identified by the Bureau of

³⁵ “Travel” offenses as used in this document refers to those offenses in which a defendant travels to meet or transports a minor for prohibited sexual activity.

Justice Statistics in its 1999 report on “American Indians and Crime.”³⁶

The Ad Hoc Advisory Group urges more study of sex offenses in Indian country generally. The Advisory Group encourages the Commission, and indirectly the Congress and relevant federal agencies, to do what they can to explore and ultimately ameliorate issues of sexual abuse in Indian country. If any eventual reforms also diminish or eradicate the disparity for Native Americans between federal and state sentences as discussed below, a further purpose would be served.

B. Longer Federal Sentences For Sexual Abuse Affect Native Americans Disproportionately

Native Americans are far more likely to be sentenced for sexual abuse under federal law than are non-Native Americans.³⁷ This is because of the jurisdictional framework under which sexual abuse offenses by Native Americans on Indian reservations generally are prosecuted under federal law and thus sentenced under the Sentencing Guidelines. This is of great significance because sentences for sexual abuse offenses in the federal courts are more severe than state sentences. In South Dakota, for example, the mean sentence for all state sexual offenses was 81 months, while the mean sentence for federal offenders was 96 months. The

³⁶ This figure is computed from the data in Tables 1 and 4, on pages 2 and 3 of that report respectively. Note, however, that the BJS also concluded that Native Americans are more likely than any other group to be victimized by someone from another racial group. This fact alone, therefore, does not support a conclusion that Native Americans are more likely to *commit* sexual assaults and rape. Also note that the BJS study only addressed victims over the age of 12.

³⁷ The 2000 Census reports that Native Americans compose roughly 1.5 percent of the population of the United States, but Native Americans were the offenders in over half (132 of 240) of the sexual abuse convictions in federal courts in Fiscal Year 2001. In the states examined by the Advisory Group, Native Americans comprised only 6 percent of the sexual abuse offenders in state courts, but over 90 percent of the sexual abuse offenders in federal courts.

corresponding numbers for New Mexico were 25 months and 86 months, respectively.³⁸ If only the more severe class 1 and 2 felony offenses in New Mexico are considered, the state mean sentence is 43 months.³⁹

There is no evidence that Native Americans are sentenced differently in material respects than non-Native Americans either in state or in federal courts. The sentences received by Native Americans in both state and federal court were very similar to those received by non-Native Americans.⁴⁰ The disparity noted above arises from a comparison of sentences received in the respective courts. It is the jurisdictional framework that places more Native American offenders in federal court, and when coupled with the longer federal sentences, it results in a disparate impact on Native Americans.

Multiple factors may contribute to this difference between state and federal court sentences, but the Ad Hoc Advisory Group notes that federal sentences for non-Native Americans are also more severe than state sentences. The Ad Hoc Advisory Group therefore concludes that federal sentences are more severe than state sentences for sexual abuse offenses.

³⁸ Data from Minnesota is not discussed here. It is of very limited use because there was only one federal sex offender in Minnesota in the data set. For reference, the mean sentence for state offenders in Minnesota was 53 months.

³⁹ This mean also excludes exploitation offenses.

⁴⁰ Thus, there currently is no compelling evidence that racial prejudice plays any role in sentencing of Native American sex offenders. Native American sex offenders may be sentenced to longer terms than non-Native Americans in South Dakota state courts. *South Dakota Criminal Justice: A Study of Racial Disparities* by Richard Braunstein, *South Dakota Law Review*, Volume 48, Issue 2, pgs 171-207 (2003). However, the Advisory Group has concluded that the data and methodology used in that study are not suited for comparison to the available federal data.

The perception among some Native Americans that they as a group receive harsher penalties for sexual abuse offenses than non-Native Americans is accurate.

The recently enacted PROTECT Act of 2003 will increase the disparate impact of federal sentences on Native Americans. Given the timing of this Act, the Ad Hoc Advisory Group did not have an opportunity to fully consider and analyze all of its implications on Indian country. However, two implications stand out immediately. Section 106 of that Act, the “two strikes you’re out” provision, imposes a mandatory life sentence on anyone convicted in the federal courts of a second sex crime in which a minor is a victim. Additionally, section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(I) to U.S.S.G. § 4B1.5, so that any sexual offender who engages in “prohibited sexual conduct” with a minor on two or more occasions demonstrates a “pattern of activity” and is subjected to a five level increase in the offense level, with a minimum of 22.⁴¹ The Ad Hoc Advisory Group is very concerned about the effect of these provisions on Native American defendants. These provisions will increase the average federal sex offense sentence overall, thus increasing the disparity between federal and state sentences for these offenses. In addition, data provided to the Ad Hoc Advisory Group by Commission staff confirms that the statutory guideline amendment will dramatically affect Native Americans more than other persons. In combination, these changes are certain to increase dramatically the existing disparity between state and federal sentences.

Also troubling is the fact that Congress neither consulted with nor seems to have

⁴¹ The previous version of the Application Note required, in addition, at least two different victims.

anticipated the consequences of the PROTECT Act on Native Americans.⁴² Native Americans and their special place in the jurisdictional framework are not mentioned.⁴³ This silence suggests that Congress has enacted legislation that will have a demonstrable impact on Native American offenders, already subject to greater sentences in federal courts, without having heard from those most impacted nor giving any thought to that impact.⁴⁴ In considering this impact, it is important

to note that, based on FY 2002 data, Native Americans were are all but absent from the pool of

⁴² As stated in the Senate Report on the bill, “[the purpose of S. 151, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act or ‘PROTECT Act of 2003,’ *is to restore the government’s ability to prosecute child pornography offenses successfully.*” S.Rep. 108-2, at 1 (emphasis added). Neither the Senate Report nor the House Conference Report, H.R.Rep. 108-66, discusses the impact of the Act’s provisions on Indian country, where there are very few pornography convictions.

⁴³ Several provisions do identify tribes as potential recipients of funding and assistance, and “Indian country” is included in the jurisdictional provision for the “two strikes you’re out provision.” But the *impact* on Native Americans goes without notice.

⁴⁴ The PROTECT Act also affects the term of supervised release for Native Americans, and other, sex offenders. As the Ad Hoc Advisory Group began work in 2002, the longest period of supervised release (post-incarceration) available to the federal courts was five years, even for the most severe offense. The PROTECT Act substantially extended the possible term of supervised release for serious sex offenses. Subsection (k) was added to 18 U.S.C. § 3583 which provides:

Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, *is any term of years or life.*

(emphasis added.) In its April 30, 2003, supplement to the Guidelines, the Commission recommended that maximum supervised release term for offenders subject to Guideline §4B1.5. Application Note 5(A). Because of the time of this change, the Ad Hoc Advisory Group has not had adequate time to consider its implications for Indian Country. However, it notes that, given the jurisdictional framework, this change along with other provisions of the PROTECT Act will disproportionately affect Native Americans.

pornography and “travel” offenders.

The Ad Hoc Advisory Group has elected not to recommend any specific changes to the Guidelines that would directly reduce or eliminate the sentencing disparity identified. However, the following recommendations (1) reduce the probability that Native American offenders will inadvertently be targeted by future legislation regarding pornography and “travel” offenses, (2) may indirectly reduce the sentencing disparity, and (3) are intended also to ameliorate the harms caused by sex offenders in Indian country.

C. Recommendations Relating to Sexual Abuse Offenses

1. Create New U.S.S.G. § 2G1.3 To Separate “Travel Offenses” from Heartland Native American Offenses in Guidelines

The Ad Hoc Advisory Group understands that the Commission is currently considering the creation of a new U.S.S.G. § 2G1.3, that would remove the so-called “travel” offenses from U.S.S.G. § 2A3.2. The Ad Hoc Advisory Group strongly endorses such a Guideline, and any similar measures that may be identified in the future that would separate crimes normally addressed by state law from those falling under Congress’ interstate jurisdiction.

Fiscal Year 2002 data demonstrates that virtually no Native Americans are sentenced for child pornography, internet, or similar sex crimes. And yet, as mentioned above, the efforts of Congress to combat those very crimes will likely increase the disparity between federal and state courts for the sex crimes for which Native Americans form the largest pool of federal offenders—crimes that would generally be sentenced under state (or tribal) law but for the unique jurisdictional characteristics of Indian country. Wherever possible, the Guidelines should attempt to delineate between these groups of offenses to increase the likelihood that Native American offenders will not inadvertently be swept in by future acts of Congress or the

Commission.⁴⁵ While such separations will not decrease the present disparity between federal and state sentences, they may prevent growth in the disparity.

2. Establish a Sex Offender Treatment Program Modeled on the Successful Drug and Alcohol Program (DAP) Model.

The DAP program is a creation of Congress. Congress mandated that Federal Bureau of Prisons (BOP) make available substance abuse treatment to all inmates who have a “treatable condition of substance addiction or abuse.”⁴⁶ One of the components of this program allows the BOP to reduce by up to one year the sentence of any nonviolent offender who successfully completes a residential substance abuse program. The Ad Hoc Advisory Group believes that a similar incentive program, tailored to the unique needs and challenges of sex offenders, could have significant benefits in Indian country while incidentally countering a portion of the disparity in sentences.

Correctional treatment is one of the statutorily recognized purposes of sentencing.⁴⁷ The Commission likewise has recognized the importance of treatment.⁴⁸ There is a growing body of literature and studies that support the effectiveness of sex offender treatment in reducing

⁴⁵ The PROTECT Act of 2003 increases the penalties under 18 U.S.C. § 2421 for interstate transportation of an individual for certain sexual purposes. It is apparent that Congress included the provision requiring interstate transportation to satisfy constitutional requirements. Certain Indian reservations span state boundaries. The Ad Hoc Advisory Group questions whether Congress intended to categorically subject on-reservation offenses that happen to involve transportation across a state boundary to increased penalties. The Ad Hoc Advisory Group recommends that, if feasible, on-reservation offenses not be treated as “travel” offenses under new bifurcated Guidelines.

⁴⁶ 18 U.S.C. § 3621(a)(5).

⁴⁷ 18 U.S.C. § 3553.

⁴⁸ U.S.S.G. § 4B1.5, App. Note 5.

recidivism of sex offenders.⁴⁹ It is with this background in mind that the Ad Hoc Advisory Group recommends establishing a sex offender treatment program modeled on the DAP program, including a sentence reduction for successful completion of treatment.⁵⁰

The Advisory Group examined the available and forthcoming in-custody treatment options to provide guidance in setting up the proposed DAP-type program. The BOP presently has a Sex Offender Treatment Program (SOTP) at the Federal Correctional Institution (FCI) in Butner, North Carolina. It is an intensive, residential treatment program for male sex offenders. Inmates voluntarily participate in the program, which is aimed at reducing the risk of recidivism by teaching sex offenders to manage their sexual deviance through cognitive-behavioral and relapse prevention techniques.⁵¹ There are three program components: assessment, treatment,

and release planning. Currently, only one percent of sex offenders in the federal prisons receive

⁴⁹ See e.g., Orlando, Dennise, "Sex Offenders," *Special Needs Offenders Bulletin*, a publication of the Federal Judicial Center, No.3, Sept. 1998, at 8 (available at [http://www.fjc.gov/public/pdf.nsf/lookup/SNOBull3.pdf/\\$file/SNOBull3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SNOBull3.pdf/$file/SNOBull3.pdf)); Alexander, M.A., "Sexual Offender Treatment Efficacy Revisited," 11 *Sexual Abuse: A Journal of Research and Treatment* 2, at 101-117 (cited in Center for Sex Offender Management, "Recidivism of Sex Offenders," 13-14 (May 2001) (available at www.csom.org/pubs/)); Looman, Jan et al., "Recidivism Among Treated Sexual Offenders and Matched Controls: Data from the Regional Treatment Center (Ontario)," 15 *JOURNAL OF INTERPERSONAL VIOLENCE* 3, at 279-290 (Mar. 2000) (showing reduction from 51.7 percent to 23.6 percent with treatment).

⁵⁰ It is not clear to the Advisory Group whether additional statutory authority would be required or if a DAP-style program could be adopted through the Guidelines. The Advisory Group defers to the Commission and its staff regarding how best to implement any sentence reduction program.

⁵¹ See, Orlando, "Sex Offenders," supra note 49, at 14.

treatment.⁵²

The SOTP seeks to select the most motivated and treatment appropriate inmates. To be accepted, among other criteria, an inmate must: volunteer to participate in the program, demonstrate a commitment to change, have 18-36 months remaining to serve, not have a pending charge or detainer that interferes with release to the community, be literate and demonstrate sufficient intelligence to participate in psychotherapy, not be psychotic or suffer from a psychiatric illness that would prevent him from participating in the program fully, and not have a history of violence or of inflicting serious physical injury to victims, a history of failed sex offender treatment, or any other element in his background indicating he would not be a good candidate for the SOTP.

Members of the Ad Hoc Advisory Group spoke with BOP personnel at the Butner facility, including Dr. Andres E. Hernandez, Director of the SOTP.⁵³ BOP information demonstrates that Native Americans who have participated in the SOTP have done well and that their treatment outcomes are no different than any other group of sex offenders. However, there are obstacles which can impede their entry into the program. These obstacles include

⁵² Dr. Andres E. Hernandez, BOP Director of the Sex Offender Treatment Facility at Butner, North Carolina. The BOP intends to create additional SOTP sites in the next several years. While the SOTP is currently turning inmates away, the additional capacity should also help to accommodate additional inmates encouraged to participate in treatment through the institution of any DAP-style program.

⁵³ Dr. Hernandez was authorized to speak on behalf of the Federal Bureau of Prisons regarding the SOTP, Native American participation in the program, and related issues. Other BOP personnel informed the Ad Hoc Advisory Group that because the BOP's SOTP program is still quite new, it will be a number of years before significant recidivism data is available regarding the program's participants. BOP personnel confirmed the Ad Hoc Advisory Group's general conclusions regarding the current state of recidivism research in the literature.

geography,⁵⁴ a general distrust of government, a strong sense of self-reliance,⁵⁵ and the shame and embarrassment associated with a conviction for a sexual abuse offense. The Advisory Group believes that the creation of a DAP-type program would help overcome these obstacles to treatment for Native Americans.

Information obtained from the BOP confirms that the added incentives created by such a program would encourage participation in the SOTP, and thus would be positive for a number of reasons. As noted above, full acceptance of responsibility and commitment to change is a prerequisite for admission into the SOTP.⁵⁶ Dr. Hernandez stated that a modest reduction in sentence could provide a very useful incentive to encourage sex offenders to fully accept responsibility for their crimes *and* successfully complete the SOTP.

The incentive to participation provided by a modest sentencing reduction for those who successfully complete the SOTP is also warranted given the disparity between federal and state sentences. The disparity indicates that there is some latitude for a reduction, the reduction would be a reward for engaging in treatment that is likely to reduce recidivism, and the accompanying acceptance of responsibility may be of tremendous benefit to the victim and, if relevant, the

⁵⁴ Geography is a major barrier because the vast majority of Native American sex offenders prosecuted in the federal courts are from western states far from North Carolina.

⁵⁵ This creates a barrier to any treatment and is not limited to sexual abuse.

⁵⁶ “Acceptance of responsibility” in this context is different from the acceptance required by the Sentencing Guidelines for a reduction in sentence at the outset. Acceptance of responsibility and commitment to change in the treatment context involves a much fuller understanding and internalization of the effects of one’s actions. The phrase is used herein in its fuller, treatment-oriented sense.

While it might facially seem that offenders who admit responsibility and engage in treatment for an external purpose might not truly benefit from treatment, Dr. Hernandez stated that it would be very difficult for someone who did not truly accept responsibility and sincerely desire treatment to successfully complete the program.

victim's family. As such, the Ad Hoc Advisory Group strongly recommends that a program allowing sentence reductions of up to twelve months, similar to the DAP program, be instituted for sexual offenders who successfully complete the SOTP. In place of or in addition to the requirements for the SOTP listed above, elements of the sentence reduction program would include:

- Successful completion of a residential treatment in the final years of incarceration.
- Like the DAP program, those completing the residential treatment program would be eligible for a sentence reduction of up to 12 months.⁵⁷
- Offenders who use a gun in the commission of their offense should not be eligible for any sentence reduction, even if they are otherwise eligible for admission into the SOTP.

VII. AGGRAVATED ASSAULTS

The Major Crimes Act provides for federal jurisdiction over the most serious assault offenses when Indians commit them within Indian country. Assaults comprise the greatest percentage of offenses prosecuted under the Major Crimes Act. As a result of federal jurisdiction, Commission data shows Indians are more likely than any other ethnic group to be

⁵⁷ Dr. Hernandez explained that the longer a sex offender denies his (or her) responsibility, the more difficult it can be to ultimately accept responsibility and successfully complete treatment. Thus, early acceptance is likely to benefit the offender and in turn potential future victims who would benefit from reductions in recidivism. Early acceptance likely would also benefit to past victims. Dr. Hernandez stated that it is the common understanding among his peers that early acceptance of responsibility would often aid in the healing of those victims. Victims often feel some combination of shame or responsibility that can be alleviated, at least in part, by their attacker or abuser fully accepting responsibility. This is especially true in cases of incest, in which family members often support the offender and ostracize the victim. In short, Dr. Hernandez indicated that early acceptance of responsibility could prevent significant harm to the victim and, where relevant, the victim's family. As such, the Ad Hoc Advisory Group recommends that this DAP-style sentence reduction be designed to give the BOP the flexibility to incorporate such potential benefits.

incarcerated federally for assault. While Indians represent less than 2% of the U.S. population, they represent about 34% of individuals in federal custody for assault.⁵⁸

Given this, it is not surprising that this offense, more than any other, was the focus of concern during the Rapid City hearing that led to the formation of this Ad Hoc Advisory Group. Many of those who testified expressed their concern that the sentences for federal assault offenses were more severe than those meted out by state courts for the same offense. As such, the Ad Hoc Advisory Group was particularly sensitive to this issue. To address this issue, the Ad Hoc Advisory Group determined whether those perceptions were supported by the sentencing data available and what steps could be taken to alleviate any disparity found.

The perceptions of those who testified are accurate, based on the data reviewed by the Ad Hoc Advisory Group. Federal sentences for assaults are longer than state sentences for assaults.

The Ad Hoc Advisory Group reviewed data from two states with significant Indian populations, New Mexico and South Dakota. Data from other states with significant Indian populations such as Arizona, Montana, and North Dakota were not available. While data on Indian sentencing in these States might further improve the understanding of the issue, the strong data from New Mexico and South Dakota was sufficient to allow the Ad Hoc Advisory Group to draw conclusions and make recommendations.

As a preliminary matter, the Ad Hoc Advisory Group, sought to establish a standard by which to gauge potential disparity. The Ad Hoc Advisory Group determined that disparity exists between state and federal aggravated assault sentences when the average state sentence falls

⁵⁸ Commission data provided to the Ad Hoc Advisory Group shows about 34% of those convicted of assault in the federal system are Indian, 27% are White, 20% are African American, 17% are Hispanic, and 2% are classified as other.

outside the sentencing discretion for a comparable guideline range under the Sentencing Guidelines.⁵⁹ Anything less could be accounted for by flexibility intentionally established as part of the Sentencing Guidelines scheme. Anything more than this range, would appear to be a disparity not inherent in the flexibility built into the extensive structure of the Guidelines.

An issue evaluated and dispensed with early in the process, was the question of potential disparity within the federal sentencing structure. The average sentence received by an Indian offender nationally in Federal court for assault is 34 months. The average sentence received by a non-Indian offender is 30 months. As noted earlier, the Ad Hoc Advisory Group established that the threshold for prima facie disparity exists when the difference in sentences between two groups exceeds the range of a single Guidelines offense level. An enumerated offense level under the Federal Sentencing Tables is 30-37 months. The disparity between Indian and non-Indian offenders falls within the sentencing discretion of this single offense level. Thus, the Ad Hoc Advisory Group concluded that this difference was unlikely to be the result of racial bias.

The Ad Hoc Advisory Group primarily relied upon sentencing data drawn from South Dakota and New Mexico. It was clear from the first review that a disparity in sentencing exists between the federal and state systems in both cases.

For example, the average sentence received by an Indian person convicted of assault in South Dakota state court is 29 months.⁶⁰ The average assault sentence received in South Dakota

⁵⁹ Comparable guideline range as used in this document refers to those guideline ranges within which a particular sentence could fall. For example, a 30-month sentence could fall within ranges 24-30, 27-33, or 30-37. Thus, these would be the comparable guideline ranges.

⁶⁰ See also *South Dakota Criminal Justice: A Study of Racial Disparities* by Richard Braunstein, S. D. L. REV., Volume 48, Issue 2, pgs 171-207 (2003). Though compiled using slightly different parameters than the Commission data, Braunstein's research would indicate an even slightly greater disparity exists. (The average state sentence for Indians committing assault

federal court is 39 months. With a difference of ten months, the federal assault sentence is about 34% higher than the average state assault sentence. In terms of sentencing ranges contained within the Guidelines manual, in order to account for this ten month difference, one must go down two levels.⁶¹ Under the Ad Hoc Advisory Group's established standard, there is a substantial disparity between assault sentences received by Indians in South Dakota state courts and sentences received by Indians in South Dakota federal court. When one considers the data from New Mexico, the disparity between state and federal sentences for assault is even more dramatic. The average sentence received by an Indian person convicted of assault in New Mexico state court is six months. The average for an Indian convicted of assault in federal court in New Mexico is 54 months. While the New Mexico statistics are based in part on low level offenses which would generally not be prosecuted in federal court, the difference in sentence length is so great even the elimination of these offenses does not negate the significance of the disparity. The six month versus 54 month difference covers a number of offense levels (15), and thus easily it meets the prima facie disparity test.

A. Recommendations Relating to Aggravated Assault

It is clear to the Ad Hoc Advisory Group that disparity exists between the sentences of Indians convicted of assault in the state systems and those convicted of similar offenses in the federal courts. As with sex abuse, this disparity is driven by the jurisdictional framework under which Native Americans are prosecuted federally and not under the state criminal system. However, that is where the similarities between sexual abuse and assault end. Unlike some types

in Braunstein's study was 22 months.)

⁶¹ The three Federal Sentencing Table offense levels encompassing the average of the State and Federal sentences in South Dakota are 24-30, 30-37, and 37-46 months.

of sexual abuse, jurisdiction and sentencing of Native Americans for assault does not appear to be the result of an intentional effort by Congress to target assault because of a unique federal interest or tribal concern. The assault statutes are among the earliest federal laws, and they were apparently intended to provide for law and order in areas not policed by the various states. Generally, states oversee the administration of criminal law dealing with assault, and the sentences states hand down for assault are much less severe than federal assault sentences. For states analyzed by Commission staff, federal assault sentences are, for the most part, higher than state sentences. The inclusion of Indian Country under federal assault jurisdiction, which has resulted in a disproportionate percentage of Indian offenders incarcerated for federal assault, would appear to be an accident of history and geography. As such, the disparate impact does not appear to have been borne of racial animus. Irrespective of this motivation, disparity exists.

Given this, the Ad Hoc Advisory Group strongly recommends that the Commission lower the base offense level for assault to lessen the disparity between federal and state sentences, thus diminishing the impact on Indian defendants. To accomplish this, the Ad Hoc Advisory Group recommends a two-level reduction in the base offense level. This represents a conservative approach to the disparity found by the Ad Hoc Advisory Group. In reaching this recommendation, the Ad Hoc Advisory Group chose to be guided by the South Dakota data. This was done because there was some concern that the sentences in New Mexico were not representative of those in other states. By lowering the base offense level for assault by two levels, federal sentences would more closely reflect state sentences. As a result, Indians, who are disproportionately convicted of federal assault, would receive sentences closer to those received

by non-Indians convicted of similar crimes off the Reservation (and thus outside of federal jurisdiction).

VIII. THE ROLE OF ALCOHOL IN MAJOR CRIMES ACT CASES

The Ad Hoc Advisory Group noted that across the board, alcohol plays a significant role in all violent crime arising in Indian Country. As reported in “Childhood Sexual Abuse in a Southwestern Tribe,” alcoholism contributed to “major changes in Indian life with erosion of traditional family networks, a change in parental roles and a growing sense of isolation and disconnection from the past” and “has become a ‘way of life’ for some American Indian families, resulting in ‘severe and permanent family disintegration and chaos.’”⁶² As with many of the social, and therefore criminal, problems on our nation’s reservations, alcohol is apparently a significant and destructive factor.

The devastating effect of alcohol addiction on the reservations is compounded by the lack of adequate resources to treat this addiction. To the extent that the Commission can recommend that Congress provide funding for additional treatment programs in Indian Country, the Ad Hoc Advisory Group would strongly support such encouragement.

To improve the operation of the federal sentencing guidelines in their application to Native Americans under the Major Crimes Act, the Ad Hoc Advisory Group has two specific recommendations to deal with the role alcohol plays in offenses under the Major Crimes Act.

⁶² Robin, R.W., Chester, B., Rasmussen, J.K., Jaranson, J.M., & Goldman, D., *Prevalence, characteristics, and impact of childhood sexual abuse in an Southwestern American Indians tribe*, 21 CHILD ABUSE AND NEGLECT 769-787 (1997)(Internal quoted omitted).

These recommendations recognize that the role and the effect of alcohol abuse varies from offense to offense.

In certain offenses, the Ad Hoc Advisory Group believes alcohol plays its historical legal role in that it mitigates the culpability of an offender. However this was not always the case. For example, as discuss above, the Ad Hoc Advisory Group determined that because of the role alcohol plays in involuntary manslaughter cases arising from drunk driving, an additional special offense characteristic should be added to the Guidelines for that.⁶³

The Ad Hoc Advisory Group was not unmindful that such an increase would impact Native Americans heavily. Indeed, the Ad Hoc Advisory Group considered information that confirms that such a special offense characteristic will most heavily impact Native Americans in that over 80% of those convicted of involuntary manslaughter in the federal system were Native Americans. In spite of this fact, the Ad Hoc Advisory Group believed such an enhancement was appropriate due to a number of factors. For example, many such vehicular homicides are committed by offenders with prior opportunities for treatment. Additionally, some Ad Hoc Advisory Group members believe that effective information campaigns about the dangers of drinking and driving have heightened awareness that people should not drink and drive.

With this notable exception, the Ad Hoc Advisory Group strongly recommends against the Commission adding any enhancements for alcohol into the Guidelines because of their unquestionable impact on Indian Country. Given the lack of resources devoted to meaningful treatment on reservations, the extent of the problem on reservations, and the impact alcohol has

⁶³ See *infra* § V.B.2. “Recommendations Relating to Involuntary Manslaughter”.

on mens rea, the Ad Hoc Advisory Group believes such an enhancement would unjustifiably increase the disparity already present in the sentencing of Native Americans.

IX. TRIBAL CONSULTATION

Given the Major Crimes Act's exclusive applicability to sovereign Indian communities defined in federal law by tribal status and tribal territory, the federal Indian country criminal justice framework, of which the Major Crimes Act is the centerpiece, lacks a clear analogue in the federal criminal justice system. Yet this regime is not peculiar; it is mirrored by numerous federal programs outside the criminal justice system in which the government of the United States possesses a range of responsibilities to Indian tribes, including in such traditional areas of governance as schools and education, health services, and even law enforcement. In meeting these other responsibilities and indeed in virtually every federal program outside the criminal justice area, federal government agencies have adopted a consultative approach toward Indian tribes.⁶⁴ Like myriad other government agencies, the Sentencing Commission should consult

⁶⁴ Every President since Richard Nixon had endorsed the notion that tribes should be partners in the development of policy in federal programs affecting Indians. *See generally* President Nixon's Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (1970) (stating that "[s]elf-determination among the Indian people can and must be encouraged"); President Reagan's Statement on Indian Policy, 1 PUB. PAPERS 96, 99 (1983) (asserting that "[t]his administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes"); President George Bush's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, PUB. PAPERS 662 (1991) (noting the "administration's policy of fostering tribal self-government and self-determination."); President Clinton's Memorandum of Government-to-Government Relations with Native American Tribal Governments, 59 FED. REG. 22951 (1994) (stating that "I am strongly committed to building a more effective day-to-day working relationship

with Indian tribes in creating policy applicable to such offenses.

Consultations should occur, not only nationally, but also on a tribe-by-tribe basis. While some tribes may desire a strong federal criminal justice presence, other tribes may wish to prosecute and punish offenders within their own criminal justice framework. Indeed, for tribes such as the Navajo Nation that have a sophisticated police force and criminal justice system, federal policy makers should consider tailoring federal policy to the wishes of the tribe. One policy cannot and should not indiscriminately bind all of the numerous individual Indian tribes which range dramatically in size of population and physical jurisdiction.

Since 1994, it has been the official policy of the United States to consult with Indian tribes individually on important issues of sentencing under the Major Crimes Act. Congress explicitly recognized the importance of working on a tribe-by-tribe basis in federal sentencing policy when it enacted the federal “three strikes” provision and the federal death penalty. In both of these provisions of federal sentencing law, Congress determined that these provisions should be applied on a tribe-by-tribe basis and only with tribal consent.⁶⁵ Thus, for Indian defendants prosecuted under the Major Crimes Act, these provisions apply only if the relevant tribe has “opted” to allow these federal provisions to apply.

The Commission, as seen by forming this Ad Hoc Advisory Group, has begun to take seriously the unique obligations of the United States to Indian tribes under the Major Crimes Act

reflecting respect for the rights of self-government due to the sovereign tribal governments”); President George W. Bush’s National American Indian Heritage Month 2002, A Proclamation, Exec. Procl. 7620, 67 Fed. Reg. 67773 (2002).

⁶⁵ See 18 U.S.C. §§ 3598 (death penalty) & 3559(c)(6) (“three strikes” provision). Congress also created a tribal option for the provision that lowered the minimum age from fifteen years to thirteen years for juveniles to be transferred to adult status for violent felonies. 18 U.S.C. § 5032.

and important statutes that make up federal Indian policy. As the Commission considers the proposals contained in this report, the Ad Hoc Advisory Group strongly urges the Commission to follow the practice of Congress and of other federal agencies and consult specially with national Indian organizations and with the affected Indian communities as it considers and crafts the important federal programs that uniquely affect them.

X. CONCLUSION

In order to accomplish the mission of improving the application of the federal sentencing guidelines to Native Americans under the Major Crimes Act, the Ad Hoc Advisory Group recommends changes to particular guideline sections. Perhaps more importantly, it also recommends that the Commission establish formal mechanisms for continuing to consult with the Native American communities most directly impacted by changes to the federal sentencing guidelines sections covered by the Major Crimes Act. It is only through meaningful participation can the perceptions of bias expressed at the Rapid City hearings be prevented in the future.

APPENDIX A

Native American Advisory Group Members

The Honorable Lawrence L. Piersol, Chair, Native American Advisory Group

- Chief Judge, U.S. District Court, District of South Dakota, 1999-present
- U.S. Army, JAG Corps, 1965-1968
- Private practice, Sioux Falls, South Dakota, 1968-1993

Robert Ecoffey

- Director, Office of Law Enforcement Services, Bureau of Indian Affairs
- Former U.S. Marshal, South Dakota
- Member, Oglala Sioux Tribe

Philip N. Hogen

- Director, National Indian Gaming Commission
- Former Associate Solicitor for Indian Affairs, U.S. Department of the Interior
- Former U.S. Attorney, South Dakota
- Former Vice Chair of National Indian Gaming Commission
- Member, Oglala Sioux Tribe

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- Senior Litigation Counsel, District of Arizona
- Tribal Liaison and Victim Witness Program Supervisor for the U.S. Attorney's Office, District of Arizona
- Former Deputy Majority Counsel, Senate Indian Affairs Committee
- Member, Hopi Tribe
- Hopi Tribe Appellate Court Judge

Magdeline Jensen

- Chief U.S. Probation Officer, District of Arizona
- Former Probation Administrator, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts
- Former U.S. Probation Officer, Southern District of California

Thomas L. LeClaire

- President, The MGU Companies
- Former Director, Office of Tribal Justice, U.S. Department of Justice
- Former Assistant United States Attorney, 1989-2000
- Member, Mohawk Nation

Elsie Meeks

- Vice Chair, U.S. Commission on Civil Rights
- Testified at Rapid City, South Dakota hearing, June 2001
- Member, Oglala Sioux Tribe

The Honorable Donald W. Molloy

- Chief Judge, U.S. District Court, District of Montana, 2001-present
- U.S. Navy, Naval Aviation, 1968-1973
- Law clerk, Hon. James Battin, U.S. District Court, District of Montana, 1976-1978
- Private practice, Billings, Montana, 1978-1995

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- Partner, Nordhaus Law Firm, Albuquerque, New Mexico
- Indian law specialist
- Panel moderator at Rapid City, South Dakota hearing, June, 2001

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- Victim Witness Specialist, U.S. Attorney's Office, South Dakota
- Former criminal investigator for Crow Creek Sioux Tribe
- Member, Crow Creek Sioux Tribe
- Testified at Rapid City, South Dakota hearing, June 2001

Celia Rumann

- Assistant Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota
- Former Assistant Federal Public Defender

Jon Sands

- Assistant Federal Public Defender, Arizona
- Chair, Federal Defender Committee on the Sentencing Guidelines

Tracy Toulou

- Director, Office of Tribal Justice, U.S. Department of Justice
- Former Assistant U.S. Attorney in Montana
- Descendent, Colville Confederated Tribes

Kevin Washburn

- Associate Professor, University of Minnesota Law School
- Former General Counsel, Indian Gaming Commission
- Former Assistant U.S. Attorney in Albuquerque
- Former Trial Attorney, Indian Resources Section, U.S. Department of Justice Environmental and Natural Resources Division
- Member, Chickasaw Nation of Oklahoma