FOIA Number: 2006-1704-F

FOIA MARKER

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Collection/Record Group: Clinton Presidential Records

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Subseries:

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FolderID:

Folder Title:
Peter McDonald: [Loose Materials] [Folder 1] [2]

Stack:	Row:	Section:	Shelf:	Position:
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Charles Ruff, Meredith Cabe to the President; RE: Recommended Denials of Executive Clemency for Petitioners Peter MacDonald, Sr. and Donald L. Benally [partial] (1 page)	02/26/1999	b(6)
002. report	Report to the President Recommending Denial of Executive Clemency for Peter MacDonald, Sr.; RE: Personal [partial] (3 pages)	09/21/	b(6)
003. report	Report to the President Recommending Denial of Executive Clemency for Donald L. Benally.; RE: Personal [partial] (1 page)	09/21/1998	b(6)
004. report	Report to the President Recommending Denial of Executive Clemency for Donald L. Benally.; RE: Personal [partial] [duplicate of 003] (1 page)	09/21/1998	b(6)
005. report	Report to the President Recommending Denial of Executive Clemency for Peter MacDonald, Sr.; RE: Personal [partial] [duplicate of 002] (3 pages)	09/21/1998	b(6)
006. letter	Jeff Bingaman to Charles Ruff; RE: Peter MacDonald [partial] (1 page)	12/18/1998	b(6)
007. letter	Jeff Bingaman to Charles Ruff; RE: Peter MacDonald [partial] [duplicate of 006] (1 page)	12/18/1998	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

December 21, 2000

Dear Representative Udall:

Thank you for your letter to the President recommending a commutation of sentence for former Navajo Nation Chairman Peter MacDonald.

I have shared your concerns with the President and his other advisors. The President appreciates your taking the time to write him regarding this matter, and you can be assured that this case will be thoroughly reviewed. If I can be of any further assistance, please do no hesitate to contact me.

Best wishes.

Sincerely,

Kay Casstevens
Deputy Assistant to the President
and Deputy Director for Legislative
Affairs

The Honorable Tom Udall
House of Representatives
Washington, D.C. 20515

MC

THE WHITE HOUSE

WASHINGTON

December 21, 2000

MEMORANDUM FOR BETH NOLAN
COUNSEL TO THE PRESIDENT

FROM: KAY CASSTEVENS
LEGISLATIVE AFFAIRS

SUBJECT: PRESIDENTIAL CORRESPONDENCE

Enclosed please find a copy of a letter that was sent to the President from Rep. Tom Udall (D-NM).

I do not believe this letter requires a response at this time. However, I would appreciate your consideration of this correspondence, bearing in mind the future Administration's possible action on this issue.

Thank you very much for your assistance in this matter. If you have any questions, please feel free to call Courtney Crouch, Office of Legislative Affairs, at 456-7500.

Enclosure

FYI

from M. Forman

Lynn G. Cutler
02/25/2000 02:24:07 PM

Record Type: Record

To: Daniel W. Burkhardt/WHO/EOP

cc: Maria Echaveste/WHO/EOP
Subject: letter give to President

This letter was given to the President by President Kelsey Begaye of the Navajo nation. This matter is currently being handled by counsel, so please deal with it accordingly. Thanks.

THE NAVAJO NATION

Kelsey A. Begaye, *President* **Taylor McKenzie, M.D.,** *Vice-President*

February 25, 2000

The President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

The people of the Navajo Nation support the former Navajo Nation Chairman Peter MacDonald, Sr.'s application for a compassionate release, and strongly urge you to grant this request. Peter MacDonald has served eight years of a fourteen year federal prison sentence, and due to his rapidly deteriorating health, he is now serving his sentence at the Fort Worth Medical Facility in Fort Worth, Texas. The beliefs and need for healing and reconciliation of the Navajo people make it imperative that Peter MacDonald be released and allowed to return to the Four Sacred Mountains of the Navajo Nation.

It is with extreme pain and sadness for the Navajo people to see their former leader suffer the affects of incarceration knowing that he achieved so much for the Navajo Nation throughout his life. As a young man, Peter MacDonald proudly served as a Navajo Code Talker in the United States Armed Forces during World War II. After his service in the Armed Forces, Peter MacDonald became highly educated and was a successful electrical engineer before returning home to become an instrumental role model and leader of the Navajo Nation. As the leader of the Navajo people, Peter MacDonald brought international recognition to the Navajo Nation which allowed the Nation to grow economically and socially. During his four terms as Chairman of the Navajo Nation, Peter MacDonald was dedicated to ensuring that the Navajo people receive health and general welfare services that were previously lacking.

It is a part of the Navajo way of life for one who has committed a wrong to make restitution. It is also part of the Navajo way of life to forgive one another. Peter MacDonald is quite aware of the effects his actions have caused to the Navajo people and to others. Peter MacDonald has and continues to express his heartfelt apology for the crimes he committed and further suffers from severe mental anguish for not being able to right his wrongs in a manner prescribed by Navajo custom. The Navajo people in turn anxiously await Peter MacDonald's return to the Navajo Nation in order for our own wounds to heal. The continued incarceration of Peter MacDonald only serves to stifle this healing process. The entire Navajo Nation remains

in a state of heartache and confusion due to our inability to close this chapter of Navajo history. The Navajo people's healing process can not be completed without Peter MacDonald's return.

Prior to his federal convictions, Peter MacDonald was tried and convicted under Navajo Nation law for the same circumstances and events surrounding his federal convictions. In 1995, through a formal Navajo Nation Council resolution, Peter MacDonald was pardoned for those crimes. In this same body of legislation, the Navajo Nation respectfully requested from the United States Government Peter MacDonald's release from federal prison in order for him to return to the Four Sacred Mountains where the Navajo people belong.

It is time for the United States to break the bonds of paternalism and to allow the Navajo people to handle internal matters such as this according to our Navajo customs. Peter MacDonald's release will not only strengthen the relationship between the Navajo Nation and the United States, but it will also strengthen the integrity of the Navajo way of life which will ensure a future for Navajo people. To not allow the Navajo people to handle this situation according to Navajo custom will further add to the erosion of Navajo culture which has been the trend of United States-Indian policies. Due to the differences of the strong beliefs of the Navajo culture and the Euro-American culture, the United States Government's intentions to protect the Navajo people from Peter MacDonald's wrongs, undoubtedly inadvertent, only further victimizes and threatens the Navajo people and our culture.

Mr. President, in the spirit of compassion and humanity, please grant a compassionate release to the former Navajo Nation leader, Peter MacDonald, Sr. It is only with the release of our former leader that the Navajo people can be reconciled and can continue on the path towards healing.

Sincerely,

THE NAVAJO NATION

Kelsey A. Begaye
President

THE WHITE HOUSE

WASHINGTON

February 26, 1999

THE PRESIDENT HAS SEEN
5-4-99

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF
MEREDITH E. CABE

SUBJECT: Executive Clemency Applications

The attached memoranda submit information concerning petitions for executive clemency. The first submits information about two petitioners, whose applications we recommend you deny. The second and third submit 75 petitions for pardons, and 163 petitions for commutation of sentence, which we also recommend you deny. For each of the attached cases, the Department of Justice recommends that you deny the application for clemency.

THE WHITE HOUSE

WASHINGTON

April 29, 1999

THE PRESIDENT HAS SEEN
5 4 99

MR. PRESIDENT:

The attached Ruff/Cabe memoranda seek your approval to deny executive clemency petitions. DOJ recommended that you deny them all and Chuck concurs.

COPIED
Ruff
Cabe
Podesta

The first memo recommends that you deny clemency for two individuals from Indian Country, Peter MacDonald (a former Navajo Nation official, whose previous clemency petition you denied in 1996, convicted of, among other things, fraud and racketeering during his official tenure, and illegal activities related to his attempts to regain power), and Donald Benally (a MacDonald supporter convicted of conspiracy to commit kidnaping and robbery, whose previous clemency petition you denied in 1997). The memo provides a detailed description of the facts in both cases and DOJ's reasons for recommending denials. *John Podesta and Lynn Cutler concur with Chuck's denial recommendation.*

Deny _____ Grant _____ Discuss ✓

The second memo recommends that you deny 75 pardon requests, four of which are from Arkansans: Edgar Lloyd Garrett, Carolyn Susanne Holderby (formerly Pettit), Moses Jubilee Lestz, and Robert Suvino.

Deny _____ Grant _____ Discuss ✓

The third memo recommends that you deny 163 commutation requests, three of which are from Arkansans: Stephen Byron Elliot, Jackie Lewis McMullen, and Richard W. Morgan.

Deny ✓ Grant _____ Discuss _____

Phil Caplan PWC
David Goodfriend DG

THE WHITE HOUSE

WASHINGTON

99 MAR 2 [illegible]

February 26, 1999

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF
MEREDITH E. CABE

SUBJECT: Recommended Denials of Executive Clemency for Petitioners Peter MacDonald, Sr., and Donald L. Benally

We have received recommendations from the Justice Department against granting executive clemency to two petitioners, Peter MacDonald, Sr., and Donald L. Benally. Mr. MacDonald and Mr. Benally were tried together, along with eight other codefendants. Both petitioners have applied for commutations of sentence and remission of financial obligations. This office concurs in the Justice Department's recommendation against granting clemency in both cases.

I. Peter MacDonald, Sr.

A. Offenses

Mr. MacDonald was convicted in two separate prosecutions in the U.S. District Court for the District of Arizona for (1) fraud and racketeering while serving in the government of the Navajo Nation, and (2) his actions in attempting to regain control of the Navajo government once his fraudulent activities were exposed. In 1992, Mr. MacDonald was convicted of: racketeering conspiracy; extortion by an Indian tribal official; mail fraud; wire fraud; and interstate transportation in aid of racketeering. He was sentenced to 60 months in prison followed by three years of supervised release, and was ordered to pay a $10,000 fine, $1.5 million in restitution to the Navajo Nation, and $800 in felony assessments.

In 1993, he was convicted of conspiracy to commit kidnaping and third degree burglary. He was sentenced to 175 months in prison and five years' supervised release, and was ordered to pay a $5,000 fine, $4,431.03 in restitution to the Navajo Nation, and $100 in felony assessments. His sentence was ordered to run concurrently with the then-remaining portion of his 1992 sentence.

He has finished serving the prison term for the racketeering and fraud conviction, and is now serving the remainder of his second sentence. Most of his aggregate fines, restitution payments, and felony assessments remain outstanding. Mr. MacDonald has applied for clemency once before, in 1996. Consistent with the Department of Justice's recommendation, you denied that petition.

B. Background

Between 1970 and 1982, petitioner was elected to three terms as Chairman of the Navajo Tribal Council of Delegates. As Council Chairman, petitioner both presided over the Council and served as head of the executive branch of government. He lost his 1982 bid for a fourth term, and worked instead for a private company. He was re-elected Council Chairman in 1986, and shortly thereafter discovered that Carlos Pimentel, one of his coworkers from the private sector, had a company which sought to do business with the Navajo Nation. Mr. MacDonald approved a contract with Pimentel's company on the condition that the company hire Mr. MacDonald's son.

Mr. MacDonald later hired Michael Morelli, another former coworker. He first hired Morelli as a consultant to the tribe, and later appointed him deputy director of the Navajo Nation Commission to Accelerate Navajo Development Opportunity ["CANDO"].

Soon thereafter, petitioner, Morelli, and Pimentel made plans to take control of Navajo Technologies Incorporated ["NTI"], a struggling computer company that had made a request to CANDO for a $100,000 loan. Pimentel took control of NTI. Morelli assisted NTI in securing its tribal loan -- but in the amount of $2.25 million. Over 3 million shares of stock were secretly set aside for Mr. MacDonald, who worked to obtain new contracts for NTI, both with the tribe and with other sources. Morelli resigned from CANDO to become vice president of NTI. Petitioner received kickbacks from Pimentel and Morelli, sometimes in the form of direct payments, at other times through third parties, who were asked to employ Mr. MacDonald's son as a consultant.

In 1989, because of the revelations of an ongoing investigation by the U.S. Senate Select Committee on Indian Affairs into suspected fraud and abuse in the Navajo government, the Navajo Council placed petitioner on administrative leave and removed his legislative and executive authority. Refusing to accept the Council's action, Mr. MacDonald met daily with supporters to engineer a return to his former position. He formed an advisory committee, and attempted to govern the Navajo Nation by passing resolutions counteracting all actions taken by the Tribal Council. He continued to occupy the Chairman's office, in violation of a restraining order. At one point, when Council members staged a march on the office in an attempt to get Mr. MacDonald to leave, fighting broke out. Mr. MacDonald threatened a violent overthrow of the government.

Navajo police ultimately enforced the restraining order and evicted petitioner. He then made plans to retake control of the Navajo administration and finance building. Mr. MacDonald's followers trained 20 or 30 people on the use of wooden clubs so those people could act as a security force in the planned government takeover. Mr. MacDonald, club in hand, drew maps of how the takeover should occur, and identified documents that should be stolen from government buildings. His associates directed the "security force" to kidnap a Navajo police lieutenant, and to steal a signature stamp and checks for the tribal bank accounts from the administration building.

In July, 1989, petitioner's security force, followed by 200 to 300 demonstrators, attempted to enter the Navajo administration and finance building. Navajo police officers were chased and

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Charles Ruff, Meredith Cabe to the President; RE: Recommended Denials of Executive Clemency for Petitioners Peter MacDonald, Sr. and Donald L. Benally [partial] (1 page)	02/26/1999	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - |44 U.S.C. 2204(a)|

P1 National Security Classified Information |(a)(1) of the PRA|
P2 Relating to the appointment to Federal office |(a)(2) of the PRA|
P3 Release would violate a Federal statute |(a)(3) of the PRA|
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors |a)(5) of the PRA|
P6 Release would constitute a clearly unwarranted invasion of personal privacy |(a)(6) of the PRA|

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RR. Document will be reviewed upon request.

Freedom of Information Act - |5 U.S.C. 552(b)|

b(1) National security classified information |(b)(1) of the FOIA|
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b(7) Release would disclose information compiled for law enforcement purposes |(b)(7) of the FOIA|
b(8) Release would disclose information concerning the regulation of financial institutions |(b)(8) of the FOIA|
b(9) Release would disclose geological or geophysical information concerning wells |(b)(9) of the FOIA|

attacked by the crowd, two officers' guns were stolen, and police vehicles were vandalized. Several officers were clubbed, sprayed with mace, and beaten. One officer's nose was shattered, and another was shot in the leg. Two demonstrators were shot and killed by police during the riot. A portion of the crowd entered the building and stole the papers, signature stamp, and checks they were directed to steal. Petitioner was prosecuted, along with 31 codefendants, for his actions in connection with that takeover attempt and ensuing unrest.

In 1996, Mr. MacDonald applied for executive clemency. The Department of Justice informed you of their recommendation against granting clemency, and you denied the petition in December, 1996.

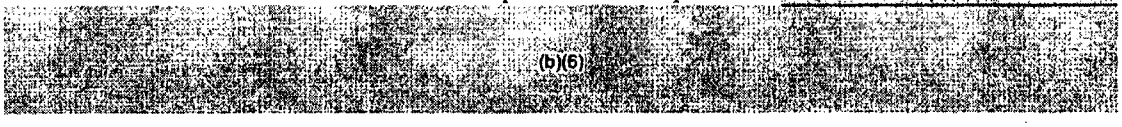
Mr. MacDonald has applied for reconsideration of that decision. Our office has participated in meetings and several phone conversations with Mr. MacDonald's supporters (including former President Thomas Atcitty, Council Speaker Kelsey A. Begaye, and other council members) and former Congressman Bill Redmond about this issue. Senator Jeff Bingaman has also expressed his support for clemency, as has the Chairman of the New Mexico State Corporation Commission. The current Navajo President, Milton Bluehouse, Sr., Speaker Begaye, and Navajo Supreme Court Chief Justice Robert Yazzie have contacted the Justice Department recently to reiterate their support. The New Mexico legislature passed a resolution requesting that you commute Mr. MacDonald's sentence.

C. Grounds for Clemency

Petitioner is now 69 years old and is incarcerated at the Federal Medical Center in Fort Worth, Texas. His projected release date is October, 2005. He has said he is "deeply remorseful for all that happened," and seeks clemency for "(1) Navajo religious and traditional reasons; (2) health reasons; and (3) prior public service and time served." According to his petition, he wishes to return to the Navajo reservation to "finish the healing process" in accordance with the Navajo tradition of forgiveness and reconciliation. He reports that he is in ill health, and cites his history of public service, including his service as a Navajo Code Talker in the Marine Corps during WWII.

With regard to the violence that occurred in the failed takeover attempt, petitioner maintains he is innocent of any wrongdoing. He contends that his supporters marched specifically against his advice, and that the ensuing event was a "tragedy that no one foresaw."

The Board of Prisons confirms his reports of health problems, (b)(6)



[001]

D. Department of Justice Recommendation

The current U.S. Attorney for the District of Arizona supports transfer of all currently confined defendants convicted in the riot case to federal correctional facilities closer to the Navajo

Clinton Library Photocopy

Nation (assuming this could be accomplished consistent with the prisoners' medical needs); he opposes commutation of petitioner's sentence and remission of his financial obligations. He also opposes transfer of Mr. MacDonald to a Navajo jail, because he believes the jail will not be able to attend to Mr. MacDonald's medical needs and that tribal officials will release him. He cites petitioner's failure to accept responsibility for his actions, as well as the fact that several of Mr. MacDonald's co-conspirators are still incarcerated for offenses committed at Mr. MacDonald's request, as reasons for his recommendation against commutation.

The U.S. Attorney also doubts that Mr. MacDonald's release would actually heal the rifts existing within the Navajo Nation. The political situation within the Nation is reportedly highly factionalized, sometimes according to people's support or lack thereof for Mr. MacDonald.

The judge who sentenced petitioner in the riot case opposes Mr. MacDonald's petition, as he did with Mr. MacDonald's 1996 petition. The judge who sentenced Mr. MacDonald in the racketeering case also remains opposed to clemency, because of the seriousness of petitioner's offenses, and because petitioner has never admitted wrongdoing. He would not oppose commutation of sentence if Mr. MacDonald could be precluded from living on the Navajo reservation and from taking any position of trust with the Nation. The U.S. Attorney notes that he does not believe such conditions would be honored.

The Department of Justice Office of Tribal Justice ["OTJ"] opposed clemency in 1996, but now recommends that his prison sentence be commuted, but that his supervised release sentence and his financial obligations remain. The OTJ believes that "deference to tribal sovereignty and self-determination militate[] strongly in favor" of granting the Tribal Council's request for clemency for Mr. MacDonald. OTJ also believes it would do serious damage to the relationship of the U.S. and Navajo governments if Mr. MacDonald dies in prison.

The Deputy Attorney General, however, recommends that the petition again be denied. He believes that the nature and duration of petitioner's offenses and the leniency[1] he has already received "present compelling reasons to deny executive clemency at this time." Notwithstanding the public service rendered early in his career, the evidence at his trial revealed "an extensive pattern of personally enriching graft and corruption" and serious breaches of public trust during his final term as Tribal Council Chairman.

Deputy Attorney General Holder does not believe petitioner's age, health, and institutional adjustment constitute compelling reasons for clemency. The Board of Prisons reports that while petitioner does suffer from health problems, his health is stable and manageable in the institution in which he is currently incarcerated. Should that change, the remedy of compassionate release

[1]His sentences were at the low end or middle of the sentencing guideline ranges, and his second sentence was ordered to run concurrently with the remainder of his first -- and both ran concurrently with tribal sentences already imposed. According to the Deputy Attorney General, Mr. MacDonald could properly have faced a sentence of 259 months for his crimes.

remains available, through a motion by the Director of the Bureau of Prisons to the sentencing judge. In addition, the Deputy Attorney General does not view petitioner's advanced age as a reason to grant clemency, because petitioner committed his crimes recently, as an older and trusted tribal official.

The Deputy Attorney General also rejects Mr. MacDonald's claim that his return to Navajo land will restore harmony. Petitioner fails to admit that he did anything wrong, despite compelling evidence to the contrary. In addition, citizen correspondence and the report of the U.S. Attorney demonstrate that many Navajo citizens remain offended by Mr. MacDonald's conduct and do not support clemency. He should especially not receive greater clemency than his codefendants, who were convicted for actions undertaken at Mr. MacDonald's direction. The Deputy Attorney General believes clemency would be viewed as vindication of the belief that Mr. MacDonald was a victim of a political prosecution by the U.S. government, and would undermine federal law enforcement's efforts to deter corruption and violent political confrontation. He believes the current Navajo government's support may not be truly representative of the sentiment of the Navajo people, because current and former leaders who supported Mr. MacDonald have personal ties to him, and because those opposed to the Tribal Council pardon were not permitted to address the Council before it voted. He questions the assertion that Mr. MacDonald's return is necessary for healing, because the Navajo government has only supported his return, and not that of his other codefendants who remain incarcerated away from the reservation.

We have spoken with Lynn Cutler, who agreed that the views of Mr. MacDonald's supporters do not appear to be representative of the views of the Navajo community as a whole.

II. Donald L. Benally

A. Offenses

Mr. Benally was convicted in the U.S. District Court for the District of Arizona of conspiracy to commit kidnaping and robbery. In February, 1993, he was sentenced to 151 months' imprisonment followed by five years' supervised release, and was ordered to pay a $5,000 fine and $4,431.03 in restitution to the Navajo Nation.

B. Background

Mr. Benally was one of the supporters of Peter MacDonald, Sr., in Mr. MacDonald's attempt to retake control of the Navajo Nation government after being placed on administrative leave in 1989. The events leading up to a violent incident at the Navajo administration and finance building are outlined above on pages 2 and 3. We will not reiterate those facts here, but will outline Mr. Benally's role in that event.

Mr. Benally headed the advisory committee appointed by Mr. MacDonald to counteract the actions of the legitimate Navajo government and to engineer Mr. MacDonald's return to power. He,

along with MacDonald, led meetings and strategy sessions that culminated in the attempted takeover of Navajo government buildings that erupted in violence. For example, it was Mr. Benally who brought the load of wooden clubs to the meeting where 20 to 30 people were armed and trained to serve as the "security force" for MacDonald and his supporters. He was prosecuted along with MacDonald and 30 others for the offenses leading up to and including that incident.

In July, 1996, Mr. Benally filed an application for commutation of sentence and remission of fine, which was denied in February 1997.

C. Grounds for Clemency

In his application for clemency, Mr. Benally contends that he has "served sufficient time." He asserts that he "accept[s] . . . responsibility" for his actions and "feel[s] remorse and regret as to the manner and tactics" he used to "[deal] with the Navajo political leadership dispute." However, he also asserts several legal challenges to the legitimacy of his conviction and sentencing, and claims he was the target of vindictive prosecution.[2] He claims that, if Peter MacDonald, Sr., is granted clemency that it is "only fair" that he be granted clemency as well. Senator Jeff Bingaman has expressed interest in Mr. Benally's request, and the Shiprock Chapter of the Navajo Nation has passed a resolution in favor of clemency.

Petitioner is 48 years old, is married, and has four children ranging in age from 7 to 21. He has served approximately 68 months of his 151 month sentence, and is projected for release in March 2004. The Bureau of Prisons reports that his "overall institutional adjustment" is good, and that he is in good health. He works in a brush factory at the correctional institution in La Tuna, Texas, and contributes half his pay toward his financial obligations. As of April, 1998, he has paid $725 toward his restitution requirement.

D. Department of Justice Recommendation

The U.S. Attorney for the District of Arizona states that he "fully supports" transfer of all the codefendants from the riot case to federal correctional facilities closer to the Navajo Nation. He opposes commutation of petitioner's sentence and remission of his financial obligations. He does not believe Mr. Benally should receive clemency if other codefandants do not, because he and Mr. MacDonald were the primary architects of the attempted takeover. He believes commuting Mr. Benally's sentence could promote greater division and unrest within the Navajo Nation.

The sentencing judge likewise opposes commutation of Mr. Benally's sentence, noting that he was very deliberate in sentencing the defendants in Mr. Benally's case. (Mr. Benally received the second-longest sentence, after Mr. MacDonald's). He also emphasizes that this case truly was about a violent riot, all of which was captured on videotape, and that it was the outgrowth of a

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[2]His conviction was upheld on appeal in U.S. v. Begay, 42 F.3d 486 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995).

conscious effort to take over a government where violence was specifically contemplated.

The Department of Justice Office of Tribal Justice opposes Mr. Benally's petition for clemency, contrary to its support of Mr. MacDonald's petition, because governmental leaders of the Navajo Nation have not expressed support for Mr. Benally's petition as they have for Mr. MacDonald's. The Shiprock Community Chapter's view, the OTJ notes, does not represent the view of the Nation's governing body.[3]

The Deputy Attorney General recommends you deny the petition. He believes Mr. Benally's application makes clear he continues to view his actions as parts of an internal dispute rather than as crimes, and his prosecution therefore as unjust. Granting clemency, therefore, might be seen as vindication of that position. Deputy Attorney General Holder believes it would be "fundamentally unfair" to grant clemency to the leaders of the unrest and not to the others convicted for lesser roles. In addition, he notes Mr. Benally has served less than half of his prison term. Deputy Attorney General Holder concludes that, given the seriousness of Mr. Benally's crimes, his failure truly to accept responsibility for his offenses, and the potentially divisive effect that commutation of Mr. Benally's sentence could have on the Navajo Nation, you should deny his petition.

DECISION:

DENY: _____

GRANT: _____

MORE INFORMATION: _____

[3]Chapters are political divisions of the Navajo Nation; "chapter houses" are rough equivalents of town halls. In 1989, there were approximately 100 chapter houses on the Navajo Reservation. See 42 F.3d at 491 n.5.

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THE WHITE HOUSE

WASHINGTON

'99 MAR 2 AM9:55

February 12, 1999

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF
MEREDITH E. CABE

SUBJECT: Recommended Denial of Pardon Requests

We have received the Justice Department's recommendations against granting pardons after completion of sentence for the petitioners listed below. After a review of the Department's memoranda summarizing each case, we have concluded that denial of these petitions is appropriate.

We will transmit your denial of the petitioners' requests for pardon in the following 75 cases unless you indicate that you want information on any of the cases listed. For your information, four are from Arkansas: Edgar Lloyd Garrett, Carolyn Susanne Holderby (f/k/a Carolyn Pettit), Moses Jubilee Lestz (f/k/a Michael Eugene Lestz), and Robert A. Suvino.

Name	State
Fowler Vestal Anderson	Tennessee
Harold Henderson Bennett, Jr.	Arizona
David Roscoe Blampied	Idaho
Terry Coy Bonner	West Virginia
Oliver Leonard Brown, Jr.	Florida
Charles Wilton Burris	Louisiana
Dennis Sobrevinas Capili	California
Michael Dominic Catanzaro	Michigan
Donna Denise Chambers, f/k/a Donna D. Jackson	Wisconsin
Russell Carl Clifton	California
Ramiro Cortes-Cobarrubias, a/k/a Ramiro Cortez-Covarrubias	Arizona
Berry Douglas Coleman	Virginia
Francisco Cuenca-Aguilar	Texas
Guy Phillip DiGrazia	Illinois
Rocco Patrick DeSimone	Rhode Island

Junior Fairweather	California
Ray Alvin Fletcher	Oklahoma
Elizabeth Marie Frederick	South Dakota
Edgar Lloyd Garrett	Arkansas
Thomas Franklin Gibbs	Florida
Howard Barry Godfrey	California
Gary Atamo Graham	New York
Neal L. Harrington	Florida
Jesse Junior Harrell	North Carolina
Carolyn Susanne Holderby, f/k/a Carolyn Pettit	Arkansas
Noel Edmond Hutchins	Missouri
Michael Shea Jackson	Nevada
Kimberly Allen Johns	Oregon
Jere Wayne Johnson	Oklahoma
August B. Juliano	New Jersey
Frankie Lee Keller	Texas
Clyde Elbert Kemp, III	U.S. Army--special court-martial
James Frank Kimberlin, Jr.	Nevada
Tony Leong Kwan	Arizona
Wayne Francis Langley	Maryland
Carlos Antonio Lemus-Gonzalez	Arizona
Moses Jubilee Lestz, f/k/a Michael Eugene Lestz	Arkansas
John Leighton Lodwick	Missouri
Nicholas Charles Loizos	West Virginia
Laurette Rhea Mabry	Georgia
Ralph Eugene Meczyk	Illinois
Stephen Alphonse Millet	U.S. Army--Fort Knox, Kentucky
Larry Gordon Newbold	Nebraska
Thomas Charles Pastorello, Jr., a/k/a Michael Charles Wilson and Jerry Don Hines	New Mexico
Alice Estelle Perkins	Virginia
Jose Rene Pineda-Martinez	Texas
Eardie Ray Pitts	Alabama
Emilio M. Porcalla	California

William Edward Rea	New York
Roger Dennis Renfroe	South Carolina
Victor Manuel Retana-Gutierrez	Texas
Theodore Alfred Rhone	District of Columbia
William Thomas Rohring	Minnesota
Patrick Clarence Richerson	Louisiana
Joseph William Salrin	Illinois
Michael Joseph Sanchez	Utah
Bernel Rudolph Sanders	Louisiana
Lawrence David Share	California
James Andrew Skelton	Tennessee
James Thomas Spaulding	New York
Larry Spencer, Jr.	Louisiana
Robert Spinosa	Massachusetts
Robert A. Suvino	Arkansas
Cleveland Tarver	Florida
Oliver A.C. Tice	Alabama
Olga C. Trevino	Texas
Darcy Alexander Vernier	California
Gwyn Doyal Waisner	Idaho
Bill Wayne Warmath	Tennessee
Frank Delma Wimberley	U.S. Army--Germany
Helen Roberta Wise	Georgia
Ralph Andrew Wood	Indiana
Andrew Keith Wright	Oklahoma
Rafael Zahgotah	Arizona
Marvin Jay Zylstra	Illinois

DECISION:

DENY: _____

GRANT: _____

MORE INFORMATION: _____

THE WHITE HOUSE

WASHINGTON

February 12, 1999

'99 MAR 2 P9:55

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF
MEREDITH E. CABE

SUBJECT: Recommended Denial of Commutation of Sentence Requests

We have received the Justice Department's recommendations against commuting the sentences and/or remitting the fines of the petitioners listed below. After a review of the Department's memoranda summarizing each case, we have concluded that denial of these petitions is appropriate.

We will transmit your denial of the petitioners' requests for commutation of sentence and/or remission of fines in the following 163 cases unless you indicate that you want additional information on any of the cases listed. For your information, three are from Arkansas: Stephen Byron Elliot, Jackie Lewis McMullen, and Richard W. Morgan.

Name	State
Joseph Aldana	California
Sandy S. Amoyaw	New York
Walter Arteta	New York
Donald D. Austin	Colorado
Lloyd Balliviero	Louisiana
Hayes Barker	Wisconsin
Darnell Barnes	District of Columbia
Manuel Barragan	Utah
Arthur J. Beshaw	Vermont
Douglas Paul Blankenship	Washington
Jose Bonillas-Castro	California
Kenneth Brack	Texas
Harry Harold Brill, III	Pennsylvania
Grace Denise Brown	Florida
Anthony Adolph Bryan	New York
David Bryant	Ohio

	New York
Leroy Bush	Florida
Miguel Angel Calero	Florida
Sharon Canby	Oklahoma
Frank Edward Cardenas	Florida
William Howard Carvell	Maine
Kevin Patrick Cassidy	Florida
John Gabriel Cassidy	Florida
Jose Chaipa-Lopez	California
Shane Craven	Louisiana
Felix Colon-Valiero	Louisiana
Funador Cotts	Illinois
Charles Crawford	Alabama
Alfred L. Cross, Jr., a/k/a Joseph Albert Hall	Tennessee
	Indiana
Jose Cruz, a/k/a Felix Caba	New York
Roy Alonzo Daniel	District of Columbia
Betty Jean Daniels	Alabama
Angelo Arthur Darin	Michigan
Lin Edward Davis	Oklahoma
Roger Davis	Virginia
Maximo De La Cruz	New York
Anthony Clive Desnoes	Florida
John Francis D'Acquisto	New York
Dwight H. Dion	South Dakota
Willie Joe Dixon, Jr.	Florida
Francisco Campos Duenas	California
Michael T. Dugan II	Indiana
S. Norman Duncan	Florida
Macario Duran	California
Thomas Earl Earp	Maryland
Stephen Byron Elliott	Arkansas
Stephen Anene Ezeoke	Texas
John Phillip Fitzpatrick	District of Columbia
Mateo Raymundo Flores, Jr.	Texas
Jesus Flores-Flores	Kansas
Abel Fernandez-Nunez	California
Lorenzo Fuentes-Jimenez	Georgia

Timothy Lynn Galbraith	Michigan
Felipe Gandarilla-Medina	Arizona
Jose Garcia-Gonzalez	Oregon
Jose Pedro Gonzalez	Texas
Maurice H. Givens	Missouri
Jose Manuel Gomez	Florida
Tomas Gonzales-Cruz	Oklahoma
Roger Thomas Good Shield	South Dakota
Jorge Sofrony Gordillo	California
Tonya Yvette Greene	Virginia
Roger Ray Griffin	North Carolina
Robert Burton Guest, Jr.	Georgia
Garland Guidry	California
Gloria Zamora Guzman	Florida
Ralvyn Harris	Louisiana
Anne Herman	Georgia
Rudy Hicks, a/k/a Timmy Rudy Hicks	New York
Randall Hill	Georgia
Christopher L. Jackson	Kansas
Craig Barry Jacob	New York
Ernest Lee Jennings	Alabama
Carlos Jimenez-Gonzales	Hawaii
Mark Floyd Johnson	Georgia
Carl Kabat	Missouri
Riley Harrington Keller	Georgia Alabama
William Logan Kennedy	Texas
James Llewelyn Knowles, Jr.	Alabama Minnesota
Craig Dee Kunkle	Virginia
Rudolph Lane	Virginia
Nelson LeMoine	Pennsylvania
Jorge Leuro-Rosas	Puerto Rico
Kevin M. Levy	Tennessee
Marcia Marleny Loaiza	Oregon
Philip Longo	New York
Romeo Chavarria Lopez	Texas
Jorge Lorenzo-Perez	Florida

Jerry Don Lingo	Oklahoma
Matthew Lyons	District of Columbia
Azell James Macon	Florida
Jose Arturo Madrid-Lopez	New Mexico
Mohamed Salim Malik	Pennsylvania
Kenneth R. Marshall	California
Jose Emilio Martinez	New Jersey
Abel Martinez-Fuentes	California
Joseph Masserano	Texas
Derrick Antone Maye	Michigan
Peter McRae	Texas
Jackie Lewis McMullen	Texas Arkansas
Pedro Medina-Medina	California
Guillermo Meza-Perez	North Carolina
Gary Wayne Minter	Texas
Vicente Alaniz Mireles	Texas
Leonard Michael Moeller	Texas
Sue Carolyn Monroe, a/k/a Carolyn Demonbruen Hayes	Washington
Francisco Montejo-Cruz	New Mexico
Richard W. Morgan	Arkansas
Jonathan Ray Morris	Oregon
Elvio Munoz-Martinez	Texas
Ronald Najarro	Florida
Eulene Irene Neston	North Carolina
Joseph Orcutt	New York
Felix Oriakhi	Maryland
Fernando Orozco	Texas Oklahoma
Gregory Overton	South Carolina
Troy Anthony Patterson	Ohio
Franklin Paulus	Michigan
Wendell Payne	Ohio
Cresencio Perez, Jr.	Texas
Jose Perez-Lopez	California
Jose Manuel Perez-Rojas	Oregon
Dario Picasso	Texas

Joseph Pitre	New York
Ronald Calvin Powers	Georgia
Martha Marie Preston	Texas
Jerry Radney	Georgia
Charles Roberto Ramirez	Virginia
Nicole Richardson	Alabama
Cirilio Rivas-Rojas	Georgia
Connell Robinson	North Carolina
Eduardo Robinson-Munoz, a/k/a Edgardo Archibold	Puerto Rico
Carlos Rodriguez-Castro	Arizona
Salvador Rodriguez-Sandoval	California
Ruben Rojas-Bojorquez	Arizona
Donald Eric Rolfe	North Carolina
Thomas L. Rolle	Florida
Doretha Beverly Ross, a/k/a Dorthea Beverly Ross	Maryland
Steven Louis Ross	Florida
Julio Ruiz-Sanchez	West Virginia
Theodore Thomas Rybicki	Virginia
Jose Maria Sainz-Landeros	California
Javier Sanchez-Grisales	Florida
Armando Sandoval-Lopez	Texas
Jackie K. Steele	Indiana
Eduan Suaza-Mejia	Florida
Alvin Taylor, Jr., a/k/a Junior Taylor	Alabama
Terri Christine Taylor	Alabama
Michael Jeff Trousdale	Alabama
Doyle Wayne Tudor	California
Kathy D. Turner	Florida
Eduardo Rafael Ulloa	Florida
Gerardo Urrego	Texas
Gregorio Valerio	California
Wilbur Vinson	Maryland
Dicky Webley	Maryland
Pearlie Mae Westcarth, a/k/a Pearlie May Phillips	Ohio
Joseph Dominic White	Pennsylvania
Michael G. Williams	Illinois
Oscar Williams, Jr.	New York

Stapled

William James Wimbush	District of Columbia
Jae Won Yoon	Hawaii
Jose Birruet Zepeda	California

DECISION:

DENY: _____

GRANT: _____

MORE INFORMATION: _____

EXECUTIVE CORRESPONDENCE

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U. S. Department of Justice

Pardon Attorney

Washington, D.C. 20530

September 21, 1998

MEMORANDUM FOR: **The Honorable Charles F.C. Ruff**
Counsel to the President

FROM: **Roger C. Adams** RCA
Pardon Attorney

SUBJECT: **Recommended Denials of Executive Clemency -- Two Petitions for Commutation of Sentence and Remission of Financial Obligations**

Attached are reports signed by the Deputy Attorney General recommending denial of executive clemency in the forms of commutation of sentence and remission of court-imposed financial obligations for the following persons:

98 03 0315	Peter MacDonald, Sr.
98 03 0331	Donald L. Benally

Attachments

cc: Eric H. Holder, Jr.
Deputy Attorney General

EXECUTIVE CORRESPONDENCE

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98 03 0315

REPORT TO THE PRESIDENT

RECOMMENDING DENIAL OF EXECUTIVE CLEMENCY FOR

PETER MACDONALD, SR.

Offenses:	1. Racketeering (one count); racketeering conspiracy (one count); extortion by an Indian tribal official (four counts under Sentencing Guidelines, three counts old law); mail fraud (two counts); wire fraud (two counts); interstate transportation in aid of racketeering (three counts). 2. Conspiracy to commit kidnapping; third degree burglary.
Sentences:	1. 60 months' imprisonment; three years' supervised release; $10,000 fine; $1,500,000 restitution to the Navajo Nation; $800 felony assessments (concurrent with sentences previously imposed by Navajo Nation District Court). 2. 175 months' imprisonment; five years' supervised release; $5,000 fine; $4,431.03 restitution to the Navajo Nation; $100 felony assessments (concurrent with No.1 and sentences of the Navajo Nation District Court).
Date:	1. November 30, 1992. 2. February 16, 1993.
District:	1. & 2. Arizona.
Relief sought:	Commutation of sentence and supervised release; remission of fine, restitution, and statutory assessments.

Summary of essential facts:

Peter MacDonald, Sr. was convicted in separate prosecutions in the United States District Court for the District of Arizona of (1) fraud and racketeering in connection with his involvement in the business affairs of a computer company while serving as the head of the government of the Navajo Nation, and (2) his actions in attempting to regain control of the Navajo Nation government by force following the disclosure of his fraudulent crimes. The pattern of racketeering activity in the first prosecution involved petitioner's development, with others, of schemes to defraud both the computer company and the tribe by, among other things, facilitating the lending of $2.25 million by the tribe to the computer company and engineering the hiring of his son by a consultant working for the computer company as a means of disguising payments to petitioner. He was tried before a jury on 30 criminal counts including racketeering, conspiracy to commit racketeering, conspiracy to commit extortion, and multiple counts of mail fraud, wire fraud, extortion by an Indian tribal official, and interstate transportation in aid of racketeering, and was convicted of a total of 16 counts. He was sentenced in November 1992 to 60 months in prison and three years' supervised release and ordered to pay a $10,000 fine, $1.5 million in restitution to the Navajo Nation, and $800 in felony assessments.[1] The sentence was ordered to run concurrently with sentences he was already serving for other convictions incurred in the Navajo Nation District Court. Thereafter, his conviction for the racketeering-related offenses was affirmed by the United States Court of Appeals for the Ninth Circuit in an unpublished opinion. United States v. MacDonald, No. 92-10717 (9th Cir. Jan. 6, 1994).

Petitioner's second, considerably longer prison sentence arises from his involvement in a conspiracy to regain by force his position as head of the tribal government after he had been placed on administrative leave during the investigation of his fraudulent activities. Through his planning and at his urging, an army of his supporters surrounded and burglarized a Navajo government building, seizing papers and other items belonging to the government, damaging property, and assaulting and injuring several Navajo police officers in the process. During the ensuing riot, two of his supporters were killed by police. Charged in five counts of an 18-count indictment that also charged 31 codefendants with conspiracy and various counts of assault, robbery, kidnapping, and burglary, petitioner was convicted of conspiracy to commit kidnapping and third degree burglary following a jury trial, and was sentenced in February 1993 to serve 175 months in prison and five years' supervised release, and to pay a $5,000 fine, $4,431.03 in restitution to the Navajo Nation, and $100 in felony assessments. The sentence was ordered to run concurrently with the federal and tribal sentences previously imposed. These convictions also were affirmed on appeal. United States v. Begay, 42 F.3d 486 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995).

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[1]His three coconspirators, including his son, pleaded guilty to various charges pursuant to plea bargains, and each was sentenced to three years' probation.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. report	Report to the President Recommending Denial of Executive Clemency for Peter MacDonald, Sr.; RE: Personal [partial] (3 pages)	09/21/	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Petitioner's aggregate prison sentence for these crimes totals 177.5 months.[2] He has finished serving the prison term for the racketeering and fraud case, and is now serving only the 175-month sentence in the riot case. His aggregate term of supervised release on completion of both prison sentences will be five years, and his aggregate fine ($15,000), restitution ($1,504,431.03), and statutory felony assessment ($900) obligations remain outstanding.

Conviction and clemency history:

Petitioner is a prominent political figure in the Navajo Nation, a Native American tribe of approximately 225,000 members located in northeastern Arizona and portions of the neighboring states of New Mexico and Utah. Between 1970 and 1982, he was elected to three successive four-year terms as Chairman of the Navajo Tribal Council of Delegates, the elected governing body of the tribe that is similar in function to the United States Congress. As Council Chairman, petitioner wielded substantial power by both presiding over the Council and serving as the head of the executive branch of the tribal government.[3]

After losing his bid for a fourth term as Council Chairman in 1982, petitioner, an engineer by training, joined a firm that specialized in the "start up" of nuclear power plants and developed close friendships with Michael Morelli and Carlos Pimentel. In 1986, petitioner won reelection as Council Chairman,[4] and after taking office in January 1987, he learned that Pimentel's new engineering firm was interested in doing business with the Navajo Nation. Petitioner thereupon approved a contract for Pimentel's firm on the condition that the firm hire petitioner's son, Peter MacDonald, Jr., as a consultant at a salary (b)(6) Although MacDonald, Jr. did little or no work for Pimentel's firm, he nonetheless received a substantial portion of the proposed salary and used part of it to make payments owed by petitioner. [002]

In the summer of 1987, petitioner hired Morelli as a consultant and later appointed him deputy director of the Navajo Nation's Commission to Accelerate Navajo Development Opportunity (CANDO), a position that afforded Morelli substantial influence over which business development proposals submitted to CANDO would be funded by the tribe's economic

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[2]Although petitioner's sentences were ordered to run concurrently, his prison term of 175 months for conspiracy to commit kidnapping and third degree burglary was imposed two and one-half months after his sentencing in the racketeering and fraud case.

[3]Native American tribes in the United States are "quasi-sovereign entities that may regulate their own affairs except where Congress has modified or abrogated that power by treaty or statute. Courts have . . . recognized, however, that regulation of criminal activity in Indian country is one area where competing federal interests may override tribal interests." United States v. Begay, supra, 42 F.3d at 498 (citations omitted). In an effort to balance the interests of the two sovereigns, Congress has enacted two statutes that delineate their respective jurisdictions over different crimes committed in Indian country. See 18 U.S.C. §§ 1152 and 1153; see generally United States v. Begay, supra, 42 F.3d at 497-500. The Navajo Nation District Court adjudicates crimes that fall within the jurisdiction of the tribe, but may not impose a sentence for any single offense exceeding one year of imprisonment and/or a $5,000 fine. 25 U.S.C. § 1302(7).

[4]Petitioner was charged in March 1991 in the Navajo Nation District Court with multiple counts of violating the Nation's election laws in connection with this campaign, but was acquitted.

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development fund. Soon thereafter, petitioner, Morelli, and Pimentel made plans to take control of Navajo Technologies Incorporated (NTI), a struggling computer business whose request for a $500,000 loan from CANDO had been languishing for some time. Pimentel succeeded in taking control of NTI and its stock and became the firm's president and chief executive officer. Over three million shares of stock were secretly set aside for petitioner, who engaged in a series of meetings intended to obtain new contracts for NTI with both the tribe and other sources, including the Department of Defense. Morelli, in turn, assisted NTI in developing its business plan to secure the tribal loan and convinced the tribe's Economic Development Committee to loan $2.25 million to NTI. Thereafter, Morelli resigned from CANDO to become vice president of NTI.

Shortly after NTI obtained the loan, Pimentel and Morelli began to funnel money to petitioner at his request by making direct payments to him and by hiring third parties who were then persuaded to employ MacDonald, Jr. as a consultant.[5] However, in January 1989, Pimentel, Morelli, and petitioner agreed that the payments to petitioner would have to stop because of ongoing investigations into allegations of fraud and misconduct in the Navajo Nation government.[6] On February 16, 1989, a majority of the Navajo Tribal Council of Delegates passed a resolution placing petitioner on paid administrative leave and removing his legislative and executive authority pending the outcome of an investigation of petitioner and the tribal government by the United States Senate Select Committee on Indian Affairs. The Council also appointed an Interim Council Chairman to serve as the head of the tribal government.

Petitioner refused to accept the validity of the Council's action. Instead, he met almost daily with supporters to engineer his return to power and attempted to govern the Navajo Nation through an advisory committee that purported to pass resolutions counteracting all legislative actions taken by the Tribal Council. In particular, he sought to maintain control over tribal finances and continued to occupy the Chairman's office in violation of a restraining order issued

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[5]Between late 1986 and early 1989, a number of other businessmen besides Pimentel and Morelli, who either held contracts with the Navajo Nation or sought to enter such contracts, also paid thousands of dollars in bribes to petitioner directly or through the guise of hiring MacDonald, Jr. as a consultant. This activity on petitioner's part gave rise to his conviction in October 1990 in the Navajo Nation District Court on charges of conspiracy and multiple counts of bribery and violations of the Ethics in Government Law, for which he received sentences of fines and imprisonment. In addition, in 1986 and 1987, petitioner and another individual engaged in a scheme to sell land to the Navajo Nation at an inflated price and thereafter conspired with petitioner's son in 1988 to present a cover-up of the fraud before the United States Senate Select Committee on Indian Affairs. The fraud scheme resulted in petitioner's conviction in the Navajo Nation District Court in February 1991 on charges of conspiracy, fraud, bribery in official or political matters, and multiple counts of violating the Ethics in Government Law, for which he again received sentences of fines and imprisonment.

[6]At about the same time, NTI's founders sought the assistance of the Navajo Nation in breaking the stock agreement that gave Pimentel a controlling interest in the firm. In response to a threatened lawsuit, Pimentel and Morelli returned their stock to NTI and resigned from the firm in December 1989. By that time, only $750,000 of the $2.25 million tribal loan remained.

by the Navajo Nation District Court.[7] When he learned on April 7, 1989, that supporters of the Council intended to march on the Chairman's office and wanted to speak with him, petitioner instructed his staff to gather a show of force, and fighting broke out between the two factions. Thereafter, at a meeting with some of his followers, petitioner "told those present that their cause needed lawyers who understood violence because there probably would be a violent overthrow of the government." United States v. Begay, supra, 42 F.3d at 492.

In May 1989, Navajo police officers enforced the restraining order evicting petitioner and his supporters from the Chairman's office in the Navajo Nation administration and finance building in Window Rock, Arizona, and petitioner was forced to move his base of operations. By July, he had made plans to retake the administration and finance building. At a pair of rallies held that month, petitioner and his supporters urged those present to take back the government and read to the crowd a fraudulent document that purported to be a letter from the United States Attorney for the District of Arizona exonerating petitioner of all charges in the Senate investigation. On the morning of July 20, petitioner and his followers discussed strategies for retaking government buildings and attempted unsuccessfully to enlist a former Navajo police chief to recruit law enforcement support for petitioner's restoration by falsely representing that the Council was about to reinstate him. In petitioner's presence, members of his inner circle armed 20 to 30 of his supporters with wooden clubs and demonstrated their use so that the men could act as a security force to fight the Navajo police in the planned government takeover. Then, club in hand, petitioner spoke to the group, drawing a map to illustrate his directions to them concerning how the takeover should proceed and ordering them to remove certain papers from the administration and finance building. Petitioner's associates also directed the security force to remove checks for the tribe's bank accounts and the Interim Chairman's signature stamp from the building and to kidnap a Navajo police lieutenant to use as a hostage in negotiating with the Tribal Council.

In the early evening of July 20, petitioner's security force, followed by 200 to 300 other demonstrators, arrived at the Navajo administration and finance building and attempted to enter it. Navajo police officers at the scene were chased and attacked by the crowd, the guns of two officers were stolen, and their vehicles were vandalized. Several officers were clubbed, sprayed with mace, and beaten; one officer's nose was shattered, and another was shot in the leg. Two demonstrators were shot and killed by police during the riot. In the meantime, a portion of the crowd managed to break into the government building and steal the checks, signature stamp, and other papers that petitioner and his coconspirators had directed them to take.

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[7]Petitioner's maneuverings to maintain his authority as Chairman and the ultimate violent outcome of these efforts are described in detail in the appellate decision affirming his conviction and the convictions of nine codefendants for their roles in the riot at the Navajo government building. United States v. Begay, supra, 42 F.3d at 489-497. When petitioner and his supporters were tried on these criminal charges, they contended that there was nothing improper about their formation of a rival government because it was unclear which faction was legally in charge. In support of this claim, they pointed to a purported conflict in rulings from various Navajo courts on this issue. However, as the Ninth Circuit observed, "[t]he facts . . . do not support this view. All rulings issued in favor of MacDonald were done so exclusively by way of MacDonald's improper influence over certain judges and in clear contravention of Navajo law." Id. at 491.

The July 1989 riot and subsequent prosecution of petitioner and his 31 codefendants[8] were matters of great notoriety within the Navajo Nation and among the general public and received considerable media attention in Arizona and New Mexico. A significant number of Navajos took the view that the riot was the result of a tribal political struggle and that the tribe should have been permitted to handle the matter internally.[9] Over 1,000 Navajos signed petitions urging sentencing leniency for the defendants,[10] and many chapters of the Navajo Nation passed resolutions urging that all 32 codefendants be pardoned by Navajo Nation President[11] Peterson Zah, the Navajo Nation Council, and the President of the United States. During the 1994 Navajo presidential election, challenger Albert Hale campaigned on a promise to seek pardons for petitioner from the Navajo Nation Council and from the President of the United States, and received a letter of support from petitioner immediately before the election that is believed to have played a significant role in Hale's victory over Zah, the incumbent. Thereafter, on April 21, 1995, at Hale's urging, a majority of the Council voted to pardon the convictions petitioner had incurred in the Navajo Nation District Court, see note 5, supra, and to request that the President of the United States pardon petitioner's federal convictions.[12] Speaker of the Council Kelsey A. Begaye subsequently certified the resolution, and Hale signed it into law. However, Navajos who wished to speak in opposition to the pardon, including the Navajo police officers who were injured during the 1989 riot, were prevented from addressing the Council.

In February 1996, petitioner applied for a "complete and full presidential pardon . . . for both federal convictions[,] including[] forgiveness of all fines, and restitutions, and court costs," citing his age and ill health and representing that he wished to restore healing and harmony to

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[8]Because of the large number of codefendants named in the indictment, the United States District Court divided them into two groups for trial. Nine codefendants were convicted with petitioner in the first trial and received the following prison sentences for their respective crimes: three months' residence in a community correctional facility as a condition of probation, 41 months, 60 months (two codefendants), 72 months, 87 months, 121 months, 135 months, and 151 months. Two additional codefendants were found incompetent to stand trial, and their charges were dismissed. Charges against another codefendant were dismissed in return for her testimony. Seven other codefendants pleaded guilty to various charges and received sentences ranging from probation to 27 months' imprisonment. Charges against the remaining 12 codefendants were dismissed by the government when a key prosecution witness died before their trial.

[9]The Ninth Circuit rejected the various arguments of petitioner and his coappellants that they could not properly be prosecuted by the Federal Government for these offenses. United States v. Begay, supra, 42 F.3d at 497-501.

[10]Among those who wrote to the sentencing judge requesting leniency for the ten defendants convicted in the first trial were Leonard Haskie, who served as Interim Council Chairman after petitioner was placed on administrative leave, and other members of the Tribal Council.

[11]According to the Department of Justice Office of Tribal Justice, as a result of the abuses that occurred during petitioner's last term as Council Chairman, the Navajo Nation modified its governmental structure to bifurcate and limit the authority that had been vested in that office. In the government's present structure, a Speaker of the Navajo Nation Council serves as the head of the legislative branch, and a President functions as the head of the executive branch. Moreover, the President, whose role is largely ceremonial, no longer has broad control over tribal finances.

[12]The vote in the Navajo Nation Council was 51 in favor, 14 opposed, and 6 abstentions.

himself and the Navajo Nation. Although he was not then eligible to seek pardon because the five-year waiting period after release from incarceration had not elapsed, see 28 C.F.R. § 1.2, the Department of Justice accepted his application and treated the request as seeking commutation and pardon in the alternative.

Petitioner's 1996 clemency request received the support of many members of the Navajo Nation[13] as well as other Native Americans. In October 1996, the General Assembly of the National Congress of American Indians adopted a resolution at its annual convention supporting a presidential pardon for petitioner and recommending that similar relief be considered for his codefendants. Scores of individuals wrote letters to the Department of Justice and the White House requesting that petitioner be pardoned.[14] In addition, former President Jimmy Carter, the late former Senator Barry Goldwater of Arizona, Senator Pete Domenici of New Mexico, and Bill McCartney, the founder of the Promise Keepers, expressed to you their support for a pardon to restore petitioner to a place of respect and promote healing within the Navajo community. Senator Jeff Bingaman of New Mexico wrote to the Attorney General urging that petitioner's sentence be commuted if he were determined to be gravely ill, and then-Congressman Bill Richardson of New Mexico expressed concern about petitioner's situation. Further, then-Navajo President Albert Hale met with the Counsel to the President to urge that a pardon be granted, and approximately 2,200 persons signed petitions supporting pardon. However, petitioner's support was not universal. The Office of the Pardon Attorney received several letters from individuals opposing a pardon for him, and the Board of Directors of the Navajo Dineh Rights Association unanimously passed a resolution in July 1996 opposing pardon, citing the magnitude of petitioner's crimes, his lack of remorse, and the likelihood that a pardon would result in further social and political unrest within the Navajo Nation. By memorandum dated December 19, 1996, the Counsel to the President informed then-Deputy Attorney General Gorelick that you had denied petitioner's application for executive clemency.

Grounds for clemency:

Petitioner filed the present application for commutation of prison sentence and supervised release and remission of all financial obligations on March 13, 1998. Now 69 years old, he is incarcerated at the Federal Medical Center, Fort Worth, Texas, where he has been assigned since November 1995. As of this writing, he has served approximately 69 months of his aggregate federal prison sentence of 177.5 months and is projected for release in October 2005.

Representing that he is "deeply remorseful for all that happened[, e]specially . . . the violence and loss of life that occurred at the Window Rock tragedy," petitioner states that he seeks clemency for "(1) Navajo religious and traditional reasons; (2) health reasons; and (3) prior

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[13]The Department of Justice Office of Tribal Justice estimated at that time that petitioner was supported by approximately 30 percent of the Navajos living on the tribal reservation.

[14]These included many members of the Navajo Nation Council, the Tribal Chairman of the Cheyenne River Sioux Indian Tribe, and the President of the Seneca Nation of Indians. In addition, several New Mexico state legislators, an Arizona state senator, and the incumbent and former mayors of Gallup, New Mexico wrote letters supporting pardon.

public service and time served." He points out that he has already been pardoned by the Navajo Nation for all of his tribal convictions, and states that he wishes to "return to the land of the Navajos" to "finish the healing process" in accordance with the Navajo tradition of forgiveness and reconciliation. Petitioner also represents that he is in ill health and suffers from a number of serious and painful physical infirmities, (b)(6) (b)(6) (b)(6) Finally, he cites his history of public service to the Navajo Nation and the United States, including his service as a Navajo Code Talker in the Marine Corps during World War II.[15] In addition to seeking clemency for himself, petitioner also requests "[c]onsideration for clemency to be given to all co-defendants in the instant offense so that we, as a people, can restore peace and harmony and heal ourselves in the Navajo Way."

Regarding the offenses of which he was convicted in connection with the Window Rock riot,[16] petitioner maintains that he is innocent of any wrongdoing. He contends that his supporters were "upset" by his removal from the Chairmanship of the Tribal Council and wanted to "prevail upon the 'New Government' to 'do the right thing,'" that although he "advised them not to march" (emphasis in original), his supporters "decided to march anyway," and that he was "about two miles away from the incident preparing for traditional prayer" when the riot occurred. Petitioner describes the event as "a tragedy that no one foresaw, planned, contemplated, or anticipated." He also points out that "[p]rior to being put on administrative leave in 1989, [he] had no criminal record except for false charge in 1973 (sic; emphasis in original)."[17]

In connection with his request for remission of his court-imposed financial obligations, petitioner has filed a statement of debtor form which indicates that in addition to restitution, (b)(6) (b)(6) The Bureau of Prisons (BOP) advises that petitioner participates in the Inmate Financial Responsibility

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[15]Although petitioner and his supporters state that he served as a Code Talker during World War II, petitioner's service record (which was obtained by the prosecutor during the racketeering case) indicates that while he enlisted in the Marines in October 1944 and trained for such duty, he never served in combat before the war ended.

[16]Petitioner does not address his racketeering conviction in his application.

[17]There is no record of petitioner having been charged with any offense in 1973. However, in 1976, he was indicted in federal district court for obtaining money by fraudulent means, filing a false income tax return, and six counts of mail fraud. The charges related to expense vouchers petitioner submitted to Tucson Gas and Electric for aerial inspections of possible locations for a power line that was to cross Navajo land. When the jury deliberating the case announced that it was deadlocked, the court granted the defense motion for acquittal.

(b)(6)

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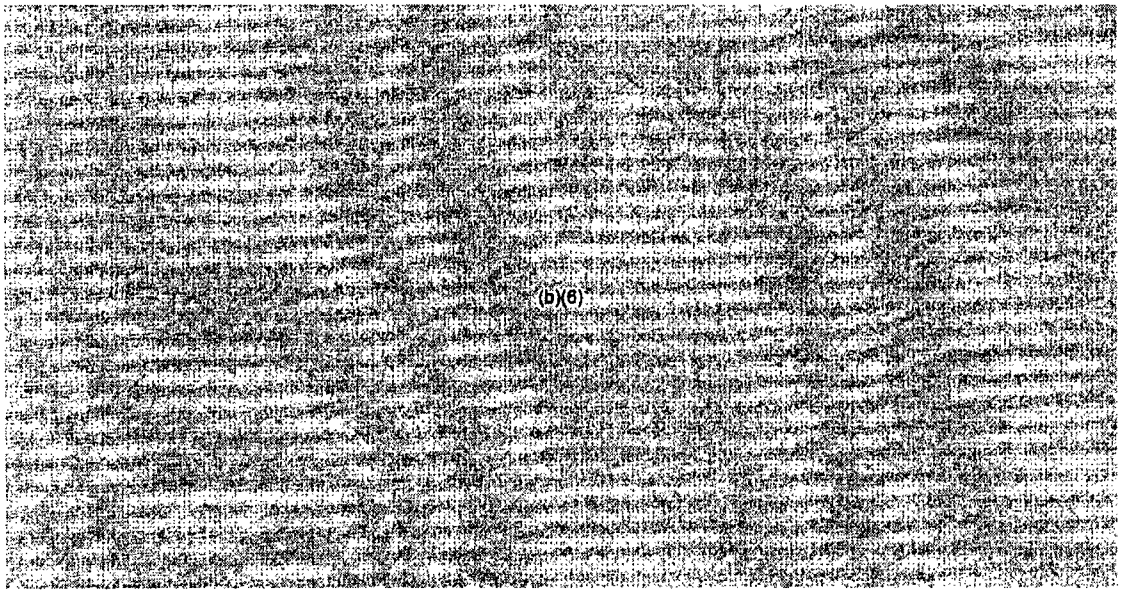
Program by making payments of $25 per month. As of this writing, he has paid approximately $900 toward his court-imposed obligations.

Petitioner was born on the Navajo Reservation (b)(6) As a teenager, he left a Bureau of Indian Affairs boarding school to work on the railroad. Following his Marine Corps service from 1944 to 1946, petitioner completed his high school education and, in 1957, received a Bachelor of Science degree in electrical engineering from the University of Oklahoma at Norman. Thereafter, he was employed by Hughes Aircraft in Los Angeles, California, and apparently was involved in development of the Polaris missile. In June 1963, he returned to the Navajo Reservation to work in the tribal government under Council Chairman Raymond Nakai and became director of the Office of Navajo Economic Opportunity. In 1970, MacDonald was elected to his first term as Council Chairman, and won reelection in 1974 and 1978. By his own report and according to his supporters, petitioner did much to improve education, employment, living conditions, and the overall economy of the Navajo Nation during his tenure as Council Chairman. He also served on such presidential commissions as the 1971 White House Conference on Aging. In addition, he was involved in inter-tribal Indian affairs, serving for many years on the Council of Energy Resource Tribes and being elected Chief of Chiefs -- that is, leader of all North American Indian Tribes.

The BOP reports that since his incarceration, petitioner has demonstrated "average" institutional adjustment and is not considered a management problem. (b)(6) (b)(6) He has participated in several educational programs and is presently assigned to work in the chapel of the Federal Medical Center at Fort Worth, where he is reported to perform his duties "in an outstanding manner." In January 1998, he was recognized by the chaplain for his contributions to the Religious Services Department at the institution. In April 1995, he was commended by the warden of the institution in which he was then incarcerated for his participation in the Inmate Mentor Program.



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In addition to the sponsorship petitioner received in connection with his 1996 petition for pardon, see text at page 7 and note 14, supra, he is strongly supported in his present commutation request by Senator Jeff Bingaman[19] and Congressman Bill Redmond of New Mexico and by the Chairman of the New Mexico State Corporation Commission. Further, in 1997, the New Mexico legislature passed a resolution requesting the President to commute petitioner's sentence to allow him to return to the Navajo Nation. In May 1998, the Intergovernmental Relations Committee of the Navajo Nation Council passed a resolution[20] supporting commutation of petitioner's sentence to promote his reconciliation with the Nation and because of his health problems. During the same month, then-President of the Navajo Nation Thomas E. Atcitty, Speaker of the Council Kelsey A. Begaye, and other members of the Council met with representatives of the Counsel to the President and the Pardon Attorney to urge that petitioner's sentence be commuted on an expedited basis as a "government-to-government" action to promote reconciliation within the Navajo Nation, assist petitioner's physical and spiritual healing, and recognize petitioner's contributions to the Navajo Nation and the United States. Moreover, by letter dated August 12, 1998, Speaker Begaye, the current President of the Nation, Milton Bluehouse, Sr.,[21] and Robert Yazzie, Chief Justice of the Navajo Nation Supreme Court,[22] expressed to the Attorney General their "unequivocal[] support" for petitioner's release in light of his "seriously failing health" to facilitate the restoration of "harmony and balance" to the Nation. The same three Navajo leaders also met with the United States Attorney for the District of Arizona on August 20, 1998, to emphasize the support of all three branches of the Navajo Nation government for petitioner's compassionate release on medical grounds and to request in the alternative that he be transferred

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[19]Senator Bingaman has expressed his support orally and in writing to the Counsel to the President, the Attorney General, and the Pardon Attorney. He recommends commutation of petitioner's sentence because of petitioner's prior service to the Navajo Nation, current medical condition, prison conduct, and remorse; the support of the people of New Mexico as expressed through a resolution of that state's legislature; and the desire of the Navajo Nation for reconciliation.

[20]The committee vote was four in favor, none opposed, and three abstentions.

[21]President Bluehouse is the third person to serve as Navajo Nation President in 1998. He was appointed vice president when Thomas E. Atcitty, the elected vice president, succeeded President Albert Hale, see text at pages 6-7, supra, upon Hale's resignation in February 1998. Hale resigned the presidency in exchange for termination of an investigation into allegations that he had misused tribal funds. Atcitty in turn resigned in July 1998 following an investigation by the Navajo Nation Ethics Committee. Although Council Speaker Kelsey Begaye asserted that he was next in line to serve as president upon Atcitty's resignation and actually assumed the post for one day, it was ultimately determined that then-Vice President Bluehouse was the appropriate successor, and he now holds the chief executive position pending a presidential election scheduled for November of this year. Former President Hale had political ties to petitioner, see text at page 6, supra, and former President Atcitty had personal ties to petitioner through his brother, whom petitioner counts among his closest friends. Neither President Bluehouse nor Speaker Begaye is as closely aligned with petitioner as was former President Atcitty. However, it is widely perceived that petitioner's support will be a significant factor in the upcoming presidential election.

[22]It was Chief Judge Yazzie, then a Navajo District Court Judge, who issued the restraining order and preliminary injunction prohibiting petitioner and his followers from attempting to exercise any official powers as agents of the Navajo Nation prior to the 1989 Window Rock riot. See text at pages 4-5, supra.

to a tribal jail facility within the Navajo Nation boundaries, if his medical condition permits and tribal jail facilities can be upgraded to meet federal standards.

Official comments:

Although the present United States Attorney for the District of Arizona "fully supports the transfer of all currently confined defendants [convicted in the Window Rock riot case] to federal correctional facilities closer to the Navajo Nation [if the transfer could be accomplished consistent with the prisoners' medical needs]," he opposes commutation of petitioner's sentence and remission of his financial obligations,[23] as his predecessor opposed pardon or commutation for petitioner in 1996. Noting that petitioner still fails to accept responsibility for his crimes, the United States Attorney believes that it would be inappropriate to commute his sentence or remit his financial obligations while several of his coconspirators in the 1989 riot case are serving significant sentences for their roles in that offense, of which petitioner was the leader.[24]

Furthermore, in the United States Attorney's view, it is highly questionable whether commutation of petitioner's sentence would serve to heal rifts within the Navajo Nation; instead, he fears, petitioner's return to the Navajo Reservation, especially if unsupervised by the court, as petitioner requests, might well promote further division, particularly in connection with the November 1998 election for the presidency of the Nation. See note 21, supra. According to the United States Attorney's Office, the political situation within the Navajo Nation at present is highly factionalized, and the group that supports petitioner numbers approximately 25,000 and constitutes a substantial block within the voting Navajo population. Given petitioner's history and these circumstances, the United States Attorney notes, there is a significant danger that petitioner would seek to exert influence in the upcoming election and in any administration controlled by his supporters, and so would exacerbate the factionalism that already exists within the Navajo Nation. For the same reasons, the United States Attorney does not believe that petitioner would abide by any condition placed upon a grant of commutation precluding his involvement in Navajo government affairs. Although the United States Attorney acknowledges that relations between his office and the Nation would likely be strained for a time if petitioner were to die while serving his federal prison sentence, he is of the view that any such damage to their working relationship would not be irreparable in the long term. In his opinion, the risk of

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[23]The United States Attorney also opposes the Navajo Nation's proposal that petitioner be transferred to a tribal jail facility to serve the remainder of his sentence. He fears that because it is unlikely such a facility would be able to provide adequately for petitioner's medical needs, Navajo officials would simply release petitioner from custody well before the end of his prison term.

[24]Donald Benally, petitioner's primary lieutenant in the riot case who is serving a prison term of 151 months and is projected for release in March 2004, filed a commutation petition in March 1998 and is the subject of a separate report submitted with the instant recommendation. Benally's prior commutation application was denied in February 1997. Another codefendant from the riot case, Earl Roy Lee, who is serving a term of 121 months and is projected for release in January 2002, was denied commutation of sentence in October 1996. Of the remaining codefendants in the riot case who received prison terms, see note 8, supra, two were released in June and July 1998, respectively, three are projected for release between August and October 1999, and one is projected for release in February 2003. None of these individuals has sought commutation of sentence.

any temporary ill will resulting from such an event does not outweigh the dangers of division and unrest that petitioner's release at this juncture would likely present, and so does not militate in favor of commuting petitioner's sentence.

The Honorable Robert C. Broomfield, who sentenced petitioner in the riot case, opposed petitioner's request for pardon in 1996 and opposes his current application for commutation. As he explains:

> I attempted to sentence all of those 10 defendants [convicted after the riot trial], as well as other lesser involved defendants who had entered pleas before and after the trial, based upon the degree of their culpability. I made a conscious effort at proportionality in each sentence. As the most culpable, Mr. M[a]cDonald received the most serious sentence followed next by Mr. Benally. Other defendants received substantial but lesser sentences . . . . A review of the file will reflect their sentence[s] and, therefore, my view of their individual culpability.
>
> I do not believe that either Mr. M[a]cDonald or Mr. Benally should receive clemency which is not proportionately given to all of the other defendants in the case. The case was euphemistically referred to as the "riot case" and it truly was a riot involving hundreds of people — all included on video tape — and in which two demonstrators were killed. The riot was a conscious outgrowth of an effort to capture control of the Navajo Nation by force.

Through the United States Attorney, the Honorable Earl H. Carroll, who sentenced petitioner in the racketeering case and imposed the larger restitution obligation, has advised the Office of the Pardon Attorney "that he has not changed [the] opinion" he expressed in connection with petitioner's 1996 pardon request. At that time, Judge Carroll indicated that he did "not believe that it [was] appropriate" to pardon petitioner given the "serious nature [of his crimes] having to do with . . . [his] breach of trust to the tribe . . . ." Observing that petitioner "ha[d] never admitted any wrongdoing with respect to his activities as Tribal Chairman," Judge Carroll opined that "it would be inappropriate for him to be pardoned and returned to a status that would allow him to run for public office on the Navajo Reservation if he chose to do that." However, Judge Carroll observed that he "would not oppose any motion by the government to reduce Mr. MacDonald's sentence to some lesser term and to have him on supervised release with conditions . . . that would preclude his living on the Navajo Reservation or running for any office or position of trust with the Navajo Nation."

In 1996, the Department of Justice Office of Tribal Justice (OTJ) "strongly recommend[ed] against" petitioner's prior clemency request based upon its view that petitioner was then "a very divisive influence on the Navajo people" whose "presence on the reservation would likely lead to violent confrontation between factions" there. In this connection, the OTJ

noted at that time that "[p]assions ha[d] not cooled over the amount of theft and corruption" the tribe suffered during petitioner's last administration, and that many Navajos were "quite upset about the fact that they were excluded from presenting any opposing views to the Tribal Council regarding the [1995] tribal pardon." See text at page 6, supra.

However, the OTJ now recommends in connection with the pending clemency application that petitioner's prison sentence be commuted, although it opposes his requests for commutation of supervised release and remission of fine and restitution. Citing the government-to-government working relationship between the United States and the Navajo Nation recognized by Executive Order 13,084, 63 Fed. Reg. 27,655 (1998), as well as the Navajo Council's 1995 resolution pardoning petitioner's tribal offenses and seeking a presidential pardon, the OTJ opines that because the Nation's governing body formally supports petitioner's application, "deference to tribal sovereignty and self-determination militates strongly in favor of acceding to the Nation's request for clemency."[25] In so concluding, the OTJ observes that the crimes arising out of the riot case for which petitioner is now serving his sentence "all relate to breaches of order on the Navajo Indian Reservation that involved only members or employees of the Navajo Nation, or were offenses directed at the integrity of the Navajo Nation government." In this circumstance, according to the OTJ, "the interests of the Navajo Nation take on paramount importance," while the generalized interests of the United States in deterring lawlessness in Indian country and disruptions of tribal government are less compelling because "the tribe's resolution of its internal political dispute involves clemency for [petitioner]." In the OTJ's view, because petitioner's medical condition is "unpredictable," there "can be no assurance that the opportunity for reconciliation that the Navajo seek can be preserved unless his sentence is commuted." The OTJ fears that "allowing [petitioner] to pass away incarcerated would likely be viewed as a serious rebuff to the Nation's government and traditional values and would damage the United States' relationship with the Nation."

Reasons for denial:

Petitioner bases his request for commutation and remission upon his medical condition, his assertion that such clemency would serve to assist the healing and reconciliation of his divided people, and his record of prior public service and institutional adjustment. Although he does not request the restoration of civil liberties that would flow from a pardon, in all other respects he asks for the same sorts of relief he sought in 1996. He offers no new grounds or significant new information in support of his request, however, and the reasons he proffers do not warrant a different result than that reached in 1996.

The nature and duration of petitioner's offenses and the leniency he has already received present compelling reasons to deny executive clemency at this time. Notwithstanding the public service he rendered earlier in his career, the evidence at his various trials established that

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[25]The OTJ thus distinguishes between petitioner's commutation application and that of his codefendant, Donald Benally, see note 24, supra, whose clemency request it does not support because only one community chapter of the Navajo Nation, rather than the Nation Council, has passed a resolution favoring presidential clemency for Benally.

petitioner engaged in an extensive pattern of personally enriching graft and corruption during his final term as Tribal Council Chairman, and that he betrayed the trust of the tribal members who had elected him to that position. Moreover, rather than accept the will of the Council majority that he step aside while his wrongdoing was being investigated, petitioner instead acted as a divisive force within the Navajo Nation by establishing a rival government and inciting his followers to violence. In both federal cases, he received prison sentences that were at the low end or middle of the applicable range of imprisonment under the United States Sentencing Guidelines (60 months for the racketeering case, in a range of 57 to 71 months; 175 months for the riot case, in a range of 151 to 188 months).[26] He was afforded further leniency by virtue of the facts that the lengthy sentence in the riot case was ordered to run concurrently with rather than consecutively to the previously imposed racketeering sentence, and that both federal sentences were made concurrent with the tribal court sentences he was already serving for other serious corrupt conduct. See note 5, supra. At present, petitioner has served less than forty percent of the aggregate sentence he received. However, he could properly have faced an aggregate federal prison term of 259 months for his crimes as head of the Navajo government.

Although somewhat mitigating, petitioner's age, health, and institutional adjustment do not constitute compelling reasons for clemency. While his adjustment to prison has been largely commendable, he has received two incident reports and his conduct has not been so exceptional as to warrant the extraordinary remedy of commutation. Moreover, his age does not present a reasoned basis for such action, for he was not a young man when he committed the crimes for which he is now incarcerated. Indeed, his age may be viewed as an aggravating factor because his long career as a governmental leader of the Navajo Nation makes all the more blameworthy his fraudulent activity at the tribe's expense and his endorsement of violence as a means of restoring his control over the tribal government. Similarly, petitioner's health is not so poor that it militates in favor of commutation. Although he suffers from a serious heart condition and a variety of other ailments common to those of advancing years, his health is reportedly stable at present and the Bureau of Prisons is well able to manage his medical situation. In short, neither petitioner's current medical condition nor his cultural tradition that true healing can be achieved only by returning to his homeland differentiates him from many other elderly, infirm federal prisoners. Like petitioner, these individuals earnestly desire to return to home and family and believe they would function better in that setting. In any event, if his medical condition should deteriorate significantly, the remedy of compassionate release is available through a motion by the Director of the Bureau of Prisons to Judge Broomfield under 18 U.S.C. § 3582(c)(1)(A)(i).

Petitioner's related claim that commuting his sentence and remitting his financial obligations will help restore harmony to the Navajo Nation also is unsound, and the fact that the Nation's government supports his commutation request on this basis, while significant, should not tip the balance in favor of clemency. Although petitioner represents that he feels "profound remorse and grief for [his] people's suffering," he fails to acknowledge the criminality of his own

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[26]Certain counts of conviction were not subject to the Sentencing Guidelines. In the racketeering case, three counts of extortion occurred before the effective date of the Guidelines; in the riot case, the sentence on the burglary count was governed by Arizona law. Petitioner's sentences for these offenses were ordered to be served concurrently with his sentences under the Guidelines.

acts and instead continues to insist -- in the face of compelling evidence of his guilt -- that he did nothing wrong. However, as the United States Attorney has noted and citizen correspondence during the clemency process has demonstrated, a significant number of Navajos are deeply offended by petitioner's conduct and believe that he deserves the punishment he received. This group may well be profoundly disturbed by a reduction of petitioner's sentence or remission of the restitution that is payable to the Navajo Nation, especially if similar relief is not afforded the codefendants who acted at petitioner's behest in the Window Rock riot. It is true that petitioner's many supporters would welcome clemency, some because they believe he is innocent and others because they consider the matter of his conduct in office an issue of tribal sovereignty that should have been handled within the tribe rather than through prosecution by the Federal Government. Commutation and remission undoubtedly would be considered by these factions as vindication of their view that petitioner was the victim of political prosecutions by the Federal Government. Thus, a grant of executive clemency could seriously undermine the legitimate federal law enforcement purposes of deterring corruption and violent political confrontation that were served by prosecuting petitioner, and could well further exacerbate tensions within the Navajo Nation as it again approaches a presidential election.

While the Navajo Nation's official statements supporting commutation weigh heavily in petitioner's favor, the fact that the present government of the Nation has chosen to take this position does not mandate that you commute his sentence. By way of comparison, you have previously denied commutation of sentence in cases in which foreign governments have expressed strong support for the applicant.[27] In evaluating the significance of the Nation's support of petitioner, it cannot be ignored that former Presidents Hale and Atcitty, who served as president and vice president, respectively, when the 1995 Navajo Council pardon resolution was passed, each have ties to petitioner, see text at page 6 and note 21, supra, and that the pardon resolution was passed by a divided vote in the Council, of which Kelsey Begaye was the Speaker, after individuals who wished to address that body in opposition to the measure were prevented from doing so. See text at pages 6, 13 and note 12, supra. That the governmental support petitioner receives is motivated at least in part by the political influence he is capable of wielding in the upcoming presidential election is made more clear by the fact that the Navajo government representatives have not extended their support for clemency to any of the other conspirators presently serving prison sentences for their roles in the Window Rock riot. The governmental leaders' stated rationale that the Nation needs to achieve healing and reconciliation after the disruption of the riot would seem to suggest that all of the conspirators convicted in connection with that offense -- not just petitioner -- should be returned to the reservation in order for that goal to be achieved. However, the official support of the government has been limited to petitioner alone. Finally, although denial of petitioner's commutation request may have some temporary negative effect on relations between the Federal Government and the Navajo Nation, on balance this factor does not outweigh the strong national interest in deterring corruption and violence in Indian governmental affairs. Indeed, the Office of the United States Attorney for the District of Arizona, the Department of Justice component whose working relationship with the Navajo Nation will be most directly affected by a decision to deny commutation, opposes

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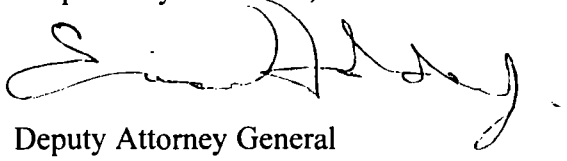
[27]For example, Jonathan Pollard's petitions for commutation of sentence, the last two of which you denied, have consistently received the support of the government of Israel.

petitioner's request and believes that its long-term ability to work effectively with the Nation's government would survive even the worst-case scenario of his dying in prison.

At bottom, it would be extremely difficult, if not impossible, to justify commuting petitioner's sentence and/or remitting his financial obligations without also granting some measure of clemency to his codefendants in the riot case. Some of those individuals, however, who were the least culpable of the group, have already served all or most of their sentences. Granting clemency at this juncture would have the anomalous effect of providing the greatest benefit to the least deserving of the conspirators. Aside from this difficulty, in the absence of a clear indication that granting commutation and remission to petitioner and his codefendants would be a healing factor rather than a divisive one, caution counsels against such action. I therefore recommend that you deny petitioner's request.

Respectfully submitted,



Deputy Attorney General

Date: September 21, 1998

EXECUTIVE CORRESPONDENCE

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REPORT TO THE PRESIDENT

RECOMMENDING DENIAL OF EXECUTIVE CLEMENCY FOR

DONALD L. BENALLY

Offense:	Conspiracy to commit kidnapping; robbery.
Sentence:	151 months' imprisonment; five years' supervised release; $5,000 fine; $4,431.03 restitution to the Navajo Nation.
Date:	February 16, 1993.
District:	Arizona.
Relief sought:	Commutation of sentence and remission of fine and restitution.

Summary of essential facts:

Petitioner is a lawyer and major supporter of Peter MacDonald, Sr., former Chairman of the Navajo Tribal Council of Delegates.[1] The Navajo Nation is a Native American tribe of approximately 225,000 members located in northeastern Arizona and portions of the neighboring states of New Mexico and Utah. Between 1970 and 1982, MacDonald was elected to three successive four-year terms as Chairman of the Navajo Tribal Council of Delegates, the elected governing body of the tribe that is similar in function to the United States Congress. As Council Chairman, MacDonald wielded substantial power because he both presided over the Council and served as the head of the executive branch of the tribal government. Petitioner served three terms as a Navajo Tribal Council delegate from the Shiprock, New Mexico, chapter of the Nation.[2]

MacDonald lost his bid for a fourth term as Chairman in 1982, but won reelection in 1986. Between 1986 and 1989, MacDonald accepted bribes and engaged in fraudulent schemes to enrich himself at the expense of the Navajo Nation. During January and February 1989, the United States Senate Select Committee on Indian Affairs undertook an investigation of allega-

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[1]MacDonald's own petition for commutation of sentence and remission of all court-imposed financial obligations is the subject of a separate report and recommendation submitted in conjunction with this recommendation.

[2]Petitioner has also served in local government and Democratic Party positions in New Mexico over the years.

tions of bribery, fraud, and corruption in the MacDonald government. As a result, on February 16, 1989, a majority of the Tribal Council passed a resolution placing MacDonald on paid administrative leave and removing his legislative and executive authority pending the outcome of the Senate investigation. The Council also appointed an Interim Council Chairman to serve as the head of the tribal government.

MacDonald and his supporters, including petitioner, refused to accept the validity of the Council's action. Instead, MacDonald ordered the appointment of an advisory committee headed by petitioner, and the two men met almost daily to engineer MacDonald's return to power. In particular, they attempted to govern the Navajo Nation by having the advisory committee pass resolutions purporting to counteract all legislative actions taken by the Council. In addition, MacDonald sought to maintain control over tribal finances through resolutions passed by petitioner's advisory committee and continued to occupy the Chairman's office in violation of a restraining order issued by the Navajo Nation District Court.[3] When MacDonald learned on April 7, 1989, that supporters of the Council intended to march on the Chairman's office and wanted to speak with him, he instructed his staff to gather a show of force, and fighting broke out between the two factions. Thereafter, at a meeting with some of his followers, MacDonald "told those present that their cause needed lawyers who understood violence because there probably would be a violent overthrow of the government." United States v. Begay, supra note 3, 42 F.3d at 492.

In May 1989, MacDonald and his supporters resisted efforts by Navajo police officers to enforce the restraining order that required him to vacate the Chairman's office in the Navajo Nation administration and finance building in Window Rock, Arizona. At one point, petitioner ordered the locks changed on the Chairman's office after MacDonald's supporters had temporarily retaken control of the premises. Ultimately, however, MacDonald was evicted and forced to move his base of operations. By July, he and his supporters, including petitioner, had made plans to retake the administration and finance building. As part of the plan, petitioner invited a former Chairman of the Navajo Nation to speak at a pro-MacDonald rally on July 18 and gave the former Chairman a fraudulent document to read to the crowd that purported to be a letter from the United States Attorney for the District of Arizona exonerating petitioner of all charges in the Senate investigation. When the former Chairman questioned the authenticity of the

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[3]The maneuverings of MacDonald and his supporters to maintain his authority as Chairman and the ultimate violent outcome of these efforts are described in detail in the appellate decision affirming his conviction and the convictions of nine codefendants, including petitioner. United States v. Begay, 42 F.3d 486, 489-497 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995). During their trial, petitioner, MacDonald, and their codefendants contended that there was nothing improper about their formation of a rival government because it was unclear which faction was legally in charge. In support of this claim, they pointed to a purported conflict in rulings from various Navajo courts on this issue. However, as the Ninth Circuit observed, "[t]he facts . . . do not support this view. All rulings issued in favor of MacDonald were done so exclusively by way of MacDonald's improper influence over certain judges and in clear contravention of Navajo law." Id. at 491.

document, petitioner lied to him, assuring him that it was legitimate. Relying on this representation, the former Chairman read the letter to the rally audience.

On the morning of July 20, MacDonald and his followers discussed strategies for retaking government buildings and attempted unsuccessfully to enlist a former Navajo police chief to recruit law enforcement support for MacDonald's restoration by falsely representing that the Council was about to reinstate him. Later that day, petitioner, carrying a load of wooden clubs, met with MacDonald and another conspirator to review the takeover plan. Thereafter, members of MacDonald's inner circle distributed wooden clubs to 20 to 30 of his supporters and demonstrated their use so that the men could act as a security force to fight the Navajo police in the planned assault on the government buildings. Then, club in hand, MacDonald spoke to the group, drawing a map to illustrate his directions to them concerning how the takeover should proceed and ordering them to remove certain papers from the administration and finance building. Other MacDonald associates also directed the security force to remove checks for the tribe's bank accounts and the Interim Chairman's signature stamp from the building and to kidnap a Navajo police lieutenant to use as a hostage in negotiating with the Tribal Council.

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Petitioner asserts a variety of grounds in support of his renewed request for clemency. Contending that he has now "served sufficient time," he claims to "accept . . . responsibility" for his actions and to "feel remorse and regret as to the manner and tactics" he used to "[deal] with the Navajo political leadership dispute." However, he also challenges the legitimacy of his conviction and sentencing on several legal grounds, arguing that he was the victim of selective and vindictive prosecution, that the processes used to select the grand and petit juries in his case were constitutionally defective, that he was denied his right to a speedy and public trial, that the prosecutors violated the attorney work product privilege and acted improperly in other ways, and that his sentencing under the United States Sentencing Guidelines violated the ex post facto clause of the Constitution. Finally, he asserts that if Peter MacDonald is granted executive clemency, "it is only fair" that he should likewise be afforded such relief.[8] Senator Jeff Bingaman of New Mexico has expressed interest in petitioner's clemency request, and the Shiprock Chapter of the Navajo Nation has unanimously passed a resolution stating that its members "strongly and honestly believe that [he] clearly deserves" clemency.

The 48-year-old petitioner has a wife and four children ranging in age from seven to 21. He has now served approximately 65 months of his 151-month sentence and is projected for release in March 2004.[9] The Bureau of Prisons reports that his "overall institutional adjustment is considered good" and that he is in good health. Petitioner presently works in the UNICOR brush factory of the Federal Correctional Institution at La Tuna, Texas, and contributes half of his pay toward his court-imposed financial obligations through the Inmate Financial Responsibility Program. As of April 1998, he had paid $725 toward his restitution requirement. In a

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. report	Report to the President Recommending Denial of Executive Clemency for Donald L. Benally.; RE: Personal [partial] (1 page)	09/21/1998	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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[003]

Official comments:

The United States Attorney for the District of Arizona states that he "fully supports the transfer of all currently confined defendants [convicted in the Window Rock riot case] to federal correctional facilities closer to the Navajo Nation." However, he opposes commutation of petitioner's sentence and remission of his fine and restitution. The prosecutor points out that although petitioner claims to accept responsibility for his crimes, his commutation application nonetheless challenges his prosecution and sentencing on a myriad of legal grounds, all of which have been considered and rejected by the district court.[10] The United States Attorney also believes it would be inappropriate to commute petitioner's sentence or remit his financial obligations while several of his less culpable codefendants in the riot case are serving significant sentences for their roles in that offense,[11] of which petitioner was a primary architect along with MacDonald.[12] Finally, the United States Attorney opines that because MacDonald is a highly controversial political figure within the factionalized Navajo Nation, commuting the sentence of petitioner, one of MacDonald's chief supporters, could well promote further division and consequent unrest within the Nation as it prepares for presidential elections in November 1998.

The sentencing judge, the Honorable Robert C. Broomfield, likewise opposes commutation of petitioner's sentence. As he explains:

> I attempted to sentence all of those 10 defendants [convicted after the riot trial], as well as other lesser involved defendants who had entered pleas before and after the trial, based upon the degree of their culpability. I made a conscious effort at proportionality in each sentence. As the most culpable, Mr. M[a]cDonald received the most serious sentence followed next by Mr. Benally. Other

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[10]In its comprehensive order denying petitioner's § 2255 motion, the court considered 14 claims of error. It concluded that the substantive claims now raised in the clemency petition were barred because petitioner failed to raise them on direct appeal. The court also rejected petitioner's argument that his failure to appeal on these grounds was excused because he had received ineffective assistance of counsel. In this regard, the court determined that petitioner had not demonstrated that his counsel's representation was constitutionally defective, and noted that "the failure to raise certain issues does not in and of itself constitute ineffective assistance of counsel. This is especially true where the claims appear to have little, if any, merit."

[11]Another codefendant in the riot case, Earl Roy Lee, who is serving a term of 121 months and is projected for release in January 2002, was denied commutation of sentence in October 1996. Of the remaining codefendants who received prison terms, see note 6, supra, two were released in June and July 1998, respectively, three are projected for release between August and October 1999, and one is projected for release in February 2003. None of these individuals has sought commutation of sentence.

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> defendants received substantial but lesser sentences . . . . A review of the file will reflect their sentence[s] and, therefore, my view of their individual culpability.
>
> I do not believe that either Mr. M[a]cDonald or Mr. Benally should receive clemency which is not proportionately given to all of the other defendants in the case. The case was euphemistically referred to as the "riot case" and it truly was a riot involving hundreds of people — all included on video tape — and in which two demonstrators were killed. The riot was a conscious outgrowth of an effort to capture control of the Navajo Nation by force.

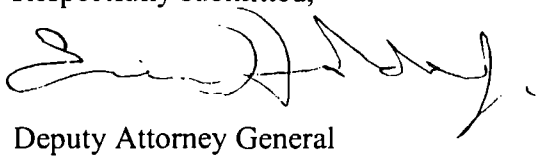
The Department of Justice Office of Tribal Justice (OTJ) also opposes petitioner's application for clemency. The OTJ supports commutation of MacDonald's sentence because governmental leaders of the Navajo Nation have expressed the tribe's official support for his request in meetings with representatives of the Counsel to the President and the Department of Justice and because the Navajo Nation Council in 1995 passed a resolution pardoning MacDonald's tribal convictions and officially requesting a presidential pardon of his federal convictions. Because of these actions, the OTJ opines, "deference to tribal sovereignty and self-determination militates strongly in favor of acceding to the [Navajo] Nation's request for clemency [for MacDonald]. Mr. Benally's request, on the other hand, should not receive favorable treatment at this time since the Nation has made no request on his behalf." In so concluding, the OTJ points out that the resolution of the Shiprock Community Chapter favoring clemency for Benally "does not present a view expressed by the governing body of the whole [Navajo] Nation, with which the [F]ederal [G]overnment operates its government-to-government relationship."

Reasons for denial:

Despite petitioner's assertion that he is remorseful and accepts responsibility for his conduct, his clemency application makes it clear that he continues to view his actions simply as part of an internal political dispute rather than a crime, and his prosecution by the Federal Government for his conduct as unjust. Given his attitude and the political factionalism of the Navajo Nation as reported by the United States Attorney, commutation of petitioner's sentence and remission of his fine and restitution would likely be viewed by certain segments of the Nation as vindication of petitioner's position. Thus, granting petitioner clemency would tend to undermine the legitimacy of his prosecution and could promote further political division and exacerbate tensions and unrest within the Navajo Nation on the eve of a presidential election. Furthermore, as both the United States Attorney and the sentencing judge point out, it would be fundamentally unfair to exercise clemency on behalf of petitioner and/or MacDonald, the two most culpable individuals involved in the events giving rise to the Window Rock riot, without also granting leniency to their imprisoned codefendants. However, granting such relief at this time, when the least culpable codefendants have served most or all of their sentences, would have the anomalous effect of providing the greatest benefit to the least deserving of the conspirators. As of the present time, petitioner has served less than half of his prison term. Given the seriousness of petitioner's crimes, his failure to truly accept responsibility for his actions, and the

potentially divisive effect that commutation of his sentence could have upon the Navajo Nation, I recommend that you deny his petition.

Respectfully submitted,



Deputy Attorney General

Date: September 21, 1998

U. S. Department of Justice

Pardon Attorney

Washington, D.C. 20530

PHOTOCOPY PRESERVATION

September 21, 1998

MEMORANDUM FOR: **The Honorable Charles F.C. Ruff**
Counsel to the President

FROM: **Roger C. Adams** RCA
Pardon Attorney

SUBJECT: **Recommended Denials of Executive Clemency -- Two Petitions for Commutation of Sentence and Remission of Financial Obligations**

Attached are reports signed by the Deputy Attorney General recommending denial of executive clemency in the forms of commutation of sentence and remission of court-imposed financial obligations for the following persons:

98 03 0315	Peter MacDonald, Sr.
98 03 0331	Donald L. Benally

Attachments

cc: Eric H. Holder, Jr.
Deputy Attorney General

REPORT TO THE PRESIDENT

RECOMMENDING DENIAL OF EXECUTIVE CLEMENCY FOR

DONALD L. BENALLY

Offense:	Conspiracy to commit kidnapping; robbery.
Sentence:	151 months' imprisonment; five years' supervised release; $5,000 fine; $4,431.03 restitution to the Navajo Nation.
Date:	February 16, 1993.
District:	Arizona.
Relief sought:	Commutation of sentence and remission of fine and restitution.

Summary of essential facts:

Petitioner is a lawyer and major supporter of Peter MacDonald, Sr., former Chairman of the Navajo Tribal Council of Delegates.[1] The Navajo Nation is a Native American tribe of approximately 225,000 members located in northeastern Arizona and portions of the neighboring states of New Mexico and Utah. Between 1970 and 1982, MacDonald was elected to three successive four-year terms as Chairman of the Navajo Tribal Council of Delegates, the elected governing body of the tribe that is similar in function to the United States Congress. As Council Chairman, MacDonald wielded substantial power because he both presided over the Council and served as the head of the executive branch of the tribal government. Petitioner served three terms as a Navajo Tribal Council delegate from the Shiprock, New Mexico, chapter of the Nation.[2]

MacDonald lost his bid for a fourth term as Chairman in 1982, but won reelection in 1986. Between 1986 and 1989, MacDonald accepted bribes and engaged in fraudulent schemes to enrich himself at the expense of the Navajo Nation. During January and February 1989, the United States Senate Select Committee on Indian Affairs undertook an investigation of allega-

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[1]MacDonald's own petition for commutation of sentence and remission of all court-imposed financial obligations is the subject of a separate report and recommendation submitted in conjunction with this recommendation.

[2]Petitioner has also served in local government and Democratic Party positions in New Mexico over the years.

tions of bribery, fraud, and corruption in the MacDonald government. As a result, on February 16, 1989, a majority of the Tribal Council passed a resolution placing MacDonald on paid administrative leave and removing his legislative and executive authority pending the outcome of the Senate investigation. The Council also appointed an Interim Council Chairman to serve as the head of the tribal government.

MacDonald and his supporters, including petitioner, refused to accept the validity of the Council's action. Instead, MacDonald ordered the appointment of an advisory committee headed by petitioner, and the two men met almost daily to engineer MacDonald's return to power. In particular, they attempted to govern the Navajo Nation by having the advisory committee pass resolutions purporting to counteract all legislative actions taken by the Council. In addition, MacDonald sought to maintain control over tribal finances through resolutions passed by petitioner's advisory committee and continued to occupy the Chairman's office in violation of a restraining order issued by the Navajo Nation District Court.[3] When MacDonald learned on April 7, 1989, that supporters of the Council intended to march on the Chairman's office and wanted to speak with him, he instructed his staff to gather a show of force, and fighting broke out between the two factions. Thereafter, at a meeting with some of his followers, MacDonald "told those present that their cause needed lawyers who understood violence because there probably would be a violent overthrow of the government." United States v. Begay, supra note 3, 42 F.3d at 492.

In May 1989, MacDonald and his supporters resisted efforts by Navajo police officers to enforce the restraining order that required him to vacate the Chairman's office in the Navajo Nation administration and finance building in Window Rock, Arizona. At one point, petitioner ordered the locks changed on the Chairman's office after MacDonald's supporters had temporarily retaken control of the premises. Ultimately, however, MacDonald was evicted and forced to move his base of operations. By July, he and his supporters, including petitioner, had made plans to retake the administration and finance building. As part of the plan, petitioner invited a former Chairman of the Navajo Nation to speak at a pro-MacDonald rally on July 18 and gave the former Chairman a fraudulent document to read to the crowd that purported to be a letter from the United States Attorney for the District of Arizona exonerating petitioner of all charges in the Senate investigation. When the former Chairman questioned the authenticity of the

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[3]The maneuverings of MacDonald and his supporters to maintain his authority as Chairman and the ultimate violent outcome of these efforts are described in detail in the appellate decision affirming his conviction and the convictions of nine codefendants, including petitioner. United States v. Begay, 42 F.3d 486, 489-497 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995). During their trial, petitioner, MacDonald, and their codefendants contended that there was nothing improper about their formation of a rival government because it was unclear which faction was legally in charge. In support of this claim, they pointed to a purported conflict in rulings from various Navajo courts on this issue. However, as the Ninth Circuit observed, "[t]he facts . . . do not support this view. All rulings issued in favor of MacDonald were done so exclusively by way of MacDonald's improper influence over certain judges and in clear contravention of Navajo law." Id. at 491.

document, petitioner lied to him, assuring him that it was legitimate. Relying on this representation, the former Chairman read the letter to the rally audience.

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Counsel Office
Meredith Cabe
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FOLDER TITLE:
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>
> I do not believe that either Mr. M[a]cDonald or Mr. Benally should receive clemency which is not proportionately given to all of the other defendants in the case. The case was euphemistically referred to as the "riot case" and it truly was a riot involving hundreds of people — all included on video tape — and in which two demonstrators were killed. The riot was a conscious outgrowth of an effort to capture control of the Navajo Nation by force.

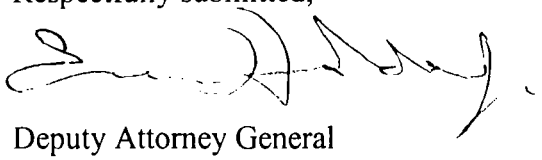
The Department of Justice Office of Tribal Justice (OTJ) also opposes petitioner's application for clemency. The OTJ supports commutation of MacDonald's sentence because governmental leaders of the Navajo Nation have expressed the tribe's official support for his request in meetings with representatives of the Counsel to the President and the Department of Justice and because the Navajo Nation Council in 1995 passed a resolution pardoning MacDonald's tribal convictions and officially requesting a presidential pardon of his federal convictions. Because of these actions, the OTJ opines, "deference to tribal sovereignty and self-determination militates strongly in favor of acceding to the [Navajo] Nation's request for clemency [for MacDonald]. Mr. Benally's request, on the other hand, should not receive favorable treatment at this time since the Nation has made no request on his behalf." In so concluding, the OTJ points out that the resolution of the Shiprock Community Chapter favoring clemency for Benally "does not present a view expressed by the governing body of the whole [Navajo] Nation, with which the [F]ederal [G]overnment operates its government-to-government relationship."

Reasons for denial:

Despite petitioner's assertion that he is remorseful and accepts responsibility for his conduct, his clemency application makes it clear that he continues to view his actions simply as part of an internal political dispute rather than a crime, and his prosecution by the Federal Government for his conduct as unjust. Given his attitude and the political factionalism of the Navajo Nation as reported by the United States Attorney, commutation of petitioner's sentence and remission of his fine and restitution would likely be viewed by certain segments of the Nation as vindication of petitioner's position. Thus, granting petitioner clemency would tend to undermine the legitimacy of his prosecution and could promote further political division and exacerbate tensions and unrest within the Navajo Nation on the eve of a presidential election. Furthermore, as both the United States Attorney and the sentencing judge point out, it would be fundamentally unfair to exercise clemency on behalf of petitioner and/or MacDonald, the two most culpable individuals involved in the events giving rise to the Window Rock riot, without also granting leniency to their imprisoned codefendants. However, granting such relief at this time, when the least culpable codefendants have served most or all of their sentences, would have the anomalous effect of providing the greatest benefit to the least deserving of the conspirators. As of the present time, petitioner has served less than half of his prison term. Given the seriousness of petitioner's crimes, his failure to truly accept responsibility for his actions, and the

potentially divisive effect that commutation of his sentence could have upon the Navajo Nation, I recommend that you deny his petition.

Respectfully submitted,



Deputy Attorney General

Date: September 21, 1998

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REPORT TO THE PRESIDENT

RECOMMENDING DENIAL OF EXECUTIVE CLEMENCY FOR

PETER MACDONALD, SR.

Offenses:	1. Racketeering (one count); racketeering conspiracy (one count); extortion by an Indian tribal official (four counts under Sentencing Guidelines, three counts old law); mail fraud (two counts); wire fraud (two counts); interstate transportation in aid of racketeering (three counts). 2. Conspiracy to commit kidnapping; third degree burglary.
Sentences:	1. 60 months' imprisonment; three years' supervised release; $10,000 fine; $1,500,000 restitution to the Navajo Nation; $800 felony assessments (concurrent with sentences previously imposed by Navajo Nation District Court). 2. 175 months' imprisonment; five years' supervised release; $5,000 fine; $4,431.03 restitution to the Navajo Nation; $100 felony assessments (concurrent with No.1 and sentences of the Navajo Nation District Court).
Date:	1. November 30, 1992. 2. February 16, 1993.
District:	1. & 2. Arizona.
Relief sought:	Commutation of sentence and supervised release; remission of fine, restitution, and statutory assessments.

Summary of essential facts:

Peter MacDonald, Sr. was convicted in separate prosecutions in the United States District Court for the District of Arizona of (1) fraud and racketeering in connection with his involvement in the business affairs of a computer company while serving as the head of the government of the Navajo Nation, and (2) his actions in attempting to regain control of the Navajo Nation government by force following the disclosure of his fraudulent crimes. The pattern of racketeering activity in the first prosecution involved petitioner's development, with others, of schemes to defraud both the computer company and the tribe by, among other things, facilitating the lending of $2.25 million by the tribe to the computer company and engineering the hiring of his son by a consultant working for the computer company as a means of disguising payments to petitioner. He was tried before a jury on 30 criminal counts including racketeering, conspiracy to commit racketeering, conspiracy to commit extortion, and multiple counts of mail fraud, wire fraud, extortion by an Indian tribal official, and interstate transportation in aid of racketeering, and was convicted of a total of 16 counts. He was sentenced in November 1992 to 60 months in prison and three years' supervised release and ordered to pay a $10,000 fine, $1.5 million in restitution to the Navajo Nation, and $800 in felony assessments.[1] The sentence was ordered to run concurrently with sentences he was already serving for other convictions incurred in the Navajo Nation District Court. Thereafter, his conviction for the racketeering-related offenses was affirmed by the United States Court of Appeals for the Ninth Circuit in an unpublished opinion. United States v. MacDonald, No. 92-10717 (9th Cir. Jan. 6, 1994).

Petitioner's second, considerably longer prison sentence arises from his involvement in a conspiracy to regain by force his position as head of the tribal government after he had been placed on administrative leave during the investigation of his fraudulent activities. Through his planning and at his urging, an army of his supporters surrounded and burglarized a Navajo government building, seizing papers and other items belonging to the government, damaging property, and assaulting and injuring several Navajo police officers in the process. During the ensuing riot, two of his supporters were killed by police. Charged in five counts of an 18-count indictment that also charged 31 codefendants with conspiracy and various counts of assault, robbery, kidnapping, and burglary, petitioner was convicted of conspiracy to commit kidnapping and third degree burglary following a jury trial, and was sentenced in February 1993 to serve 175 months in prison and five years' supervised release, and to pay a $5,000 fine, $4,431.03 in restitution to the Navajo Nation, and $100 in felony assessments. The sentence was ordered to run concurrently with the federal and tribal sentences previously imposed. These convictions also were affirmed on appeal. United States v. Begay, 42 F.3d 486 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995).

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[1]His three coconspirators, including his son, pleaded guilty to various charges pursuant to plea bargains, and each was sentenced to three years' probation.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. report	Report to the President Recommending Denial of Executive Clemency for Peter MacDonald, Sr.; RE: Personal [partial] [duplicate of 002] (3 pages)	09/21/1998	b(6)

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FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Petitioner's aggregate prison sentence for these crimes totals 177.5 months.[2] He has finished serving the prison term for the racketeering and fraud case, and is now serving only the 175-month sentence in the riot case. His aggregate term of supervised release on completion of both prison sentences will be five years, and his aggregate fine ($15,000), restitution ($1,504,431.03), and statutory felony assessment ($900) obligations remain outstanding.

Conviction and clemency history:

Petitioner is a prominent political figure in the Navajo Nation, a Native American tribe of approximately 225,000 members located in northeastern Arizona and portions of the neighboring states of New Mexico and Utah. Between 1970 and 1982, he was elected to three successive four-year terms as Chairman of the Navajo Tribal Council of Delegates, the elected governing body of the tribe that is similar in function to the United States Congress. As Council Chairman, petitioner wielded substantial power by both presiding over the Council and serving as the head of the executive branch of the tribal government.[3]

After losing his bid for a fourth term as Council Chairman in 1982, petitioner, an engineer by training, joined a firm that specialized in the "start up" of nuclear power plants and developed close friendships with Michael Morelli and Carlos Pimentel. In 1986, petitioner won reelection as Council Chairman,[4] and after taking office in January 1987, he learned that Pimentel's new engineering firm was interested in doing business with the Navajo Nation. Petitioner thereupon approved a contract for Pimentel's firm on the condition that the firm hire petitioner's son, Peter MacDonald, Jr., as a consultant at a salary (b)(6) Although MacDonald, Jr. did little or no work for Pimentel's firm, he nonetheless received a substantial portion of the proposed salary and used part of it to make payments owed by petitioner. [005]

In the summer of 1987, petitioner hired Morelli as a consultant and later appointed him deputy director of the Navajo Nation's Commission to Accelerate Navajo Development Opportunity (CANDO), a position that afforded Morelli substantial influence over which business development proposals submitted to CANDO would be funded by the tribe's economic

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[2]Although petitioner's sentences were ordered to run concurrently, his prison term of 175 months for conspiracy to commit kidnapping and third degree burglary was imposed two and one-half months after his sentencing in the racketeering and fraud case.

[3]Native American tribes in the United States are "quasi-sovereign entities that may regulate their own affairs except where Congress has modified or abrogated that power by treaty or statute. Courts have . . . recognized, however, that regulation of criminal activity in Indian country is one area where competing federal interests may override tribal interests." United States v. Begay, supra, 42 F.3d at 498 (citations omitted). In an effort to balance the interests of the two sovereigns, Congress has enacted two statutes that delineate their respective jurisdictions over different crimes committed in Indian country. See 18 U.S.C. §§ 1152 and 1153; see generally United States v. Begay, supra, 42 F.3d at 497-500. The Navajo Nation District Court adjudicates crimes that fall within the jurisdiction of the tribe, but may not impose a sentence for any single offense exceeding one year of imprisonment and/or a $5,000 fine. 25 U.S.C. § 1302(7).

[4]Petitioner was charged in March 1991 in the Navajo Nation District Court with multiple counts of violating the Nation's election laws in connection with this campaign, but was acquitted.

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development fund. Soon thereafter, petitioner, Morelli, and Pimentel made plans to take control of Navajo Technologies Incorporated (NTI), a struggling computer business whose request for a $500,000 loan from CANDO had been languishing for some time. Pimentel succeeded in taking control of NTI and its stock and became the firm's president and chief executive officer. Over three million shares of stock were secretly set aside for petitioner, who engaged in a series of meetings intended to obtain new contracts for NTI with both the tribe and other sources, including the Department of Defense. Morelli, in turn, assisted NTI in developing its business plan to secure the tribal loan and convinced the tribe's Economic Development Committee to loan $2.25 million to NTI. Thereafter, Morelli resigned from CANDO to become vice president of NTI.

Shortly after NTI obtained the loan, Pimentel and Morelli began to funnel money to petitioner at his request by making direct payments to him and by hiring third parties who were then persuaded to employ MacDonald, Jr. as a consultant.[5] However, in January 1989, Pimentel, Morelli, and petitioner agreed that the payments to petitioner would have to stop because of ongoing investigations into allegations of fraud and misconduct in the Navajo Nation government.[6] On February 16, 1989, a majority of the Navajo Tribal Council of Delegates passed a resolution placing petitioner on paid administrative leave and removing his legislative and executive authority pending the outcome of an investigation of petitioner and the tribal government by the United States Senate Select Committee on Indian Affairs. The Council also appointed an Interim Council Chairman to serve as the head of the tribal government.

Petitioner refused to accept the validity of the Council's action. Instead, he met almost daily with supporters to engineer his return to power and attempted to govern the Navajo Nation through an advisory committee that purported to pass resolutions counteracting all legislative actions taken by the Tribal Council. In particular, he sought to maintain control over tribal finances and continued to occupy the Chairman's office in violation of a restraining order issued

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[5]Between late 1986 and early 1989, a number of other businessmen besides Pimentel and Morelli, who either held contracts with the Navajo Nation or sought to enter such contracts, also paid thousands of dollars in bribes to petitioner directly or through the guise of hiring MacDonald, Jr. as a consultant. This activity on petitioner's part gave rise to his conviction in October 1990 in the Navajo Nation District Court on charges of conspiracy and multiple counts of bribery and violations of the Ethics in Government Law, for which he received sentences of fines and imprisonment. In addition, in 1986 and 1987, petitioner and another individual engaged in a scheme to sell land to the Navajo Nation at an inflated price and thereafter conspired with petitioner's son in 1988 to present a cover-up of the fraud before the United States Senate Select Committee on Indian Affairs. The fraud scheme resulted in petitioner's conviction in the Navajo Nation District Court in February 1991 on charges of conspiracy, fraud, bribery in official or political matters, and multiple counts of violating the Ethics in Government Law, for which he again received sentences of fines and imprisonment.

[6]At about the same time, NTI's founders sought the assistance of the Navajo Nation in breaking the stock agreement that gave Pimentel a controlling interest in the firm. In response to a threatened lawsuit, Pimentel and Morelli returned their stock to NTI and resigned from the firm in December 1989. By that time, only $750,000 of the $2.25 million tribal loan remained.

by the Navajo Nation District Court.[7] When he learned on April 7, 1989, that supporters of the Council intended to march on the Chairman's office and wanted to speak with him, petitioner instructed his staff to gather a show of force, and fighting broke out between the two factions. Thereafter, at a meeting with some of his followers, petitioner "told those present that their cause needed lawyers who understood violence because there probably would be a violent overthrow of the government." United States v. Begay, supra, 42 F.3d at 492.

In May 1989, Navajo police officers enforced the restraining order evicting petitioner and his supporters from the Chairman's office in the Navajo Nation administration and finance building in Window Rock, Arizona, and petitioner was forced to move his base of operations. By July, he had made plans to retake the administration and finance building. At a pair of rallies held that month, petitioner and his supporters urged those present to take back the government and read to the crowd a fraudulent document that purported to be a letter from the United States Attorney for the District of Arizona exonerating petitioner of all charges in the Senate investigation. On the morning of July 20, petitioner and his followers discussed strategies for retaking government buildings and attempted unsuccessfully to enlist a former Navajo police chief to recruit law enforcement support for petitioner's restoration by falsely representing that the Council was about to reinstate him. In petitioner's presence, members of his inner circle armed 20 to 30 of his supporters with wooden clubs and demonstrated their use so that the men could act as a security force to fight the Navajo police in the planned government takeover. Then, club in hand, petitioner spoke to the group, drawing a map to illustrate his directions to them concerning how the takeover should proceed and ordering them to remove certain papers from the administration and finance building. Petitioner's associates also directed the security force to remove checks for the tribe's bank accounts and the Interim Chairman's signature stamp from the building and to kidnap a Navajo police lieutenant to use as a hostage in negotiating with the Tribal Council.

In the early evening of July 20, petitioner's security force, followed by 200 to 300 other demonstrators, arrived at the Navajo administration and finance building and attempted to enter it. Navajo police officers at the scene were chased and attacked by the crowd, the guns of two officers were stolen, and their vehicles were vandalized. Several officers were clubbed, sprayed with mace, and beaten; one officer's nose was shattered, and another was shot in the leg. Two demonstrators were shot and killed by police during the riot. In the meantime, a portion of the crowd managed to break into the government building and steal the checks, signature stamp, and other papers that petitioner and his coconspirators had directed them to take.

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[7]Petitioner's maneuverings to maintain his authority as Chairman and the ultimate violent outcome of these efforts are described in detail in the appellate decision affirming his conviction and the convictions of nine codefendants for their roles in the riot at the Navajo government building. United States v. Begay, supra, 42 F.3d at 489-497. When petitioner and his supporters were tried on these criminal charges, they contended that there was nothing improper about their formation of a rival government because it was unclear which faction was legally in charge. In support of this claim, they pointed to a purported conflict in rulings from various Navajo courts on this issue. However, as the Ninth Circuit observed, "[t]he facts . . . do not support this view. All rulings issued in favor of MacDonald were done so exclusively by way of MacDonald's improper influence over certain judges and in clear contravention of Navajo law." Id. at 491.

The July 1989 riot and subsequent prosecution of petitioner and his 31 codefendants[8] were matters of great notoriety within the Navajo Nation and among the general public and received considerable media attention in Arizona and New Mexico. A significant number of Navajos took the view that the riot was the result of a tribal political struggle and that the tribe should have been permitted to handle the matter internally.[9] Over 1,000 Navajos signed petitions urging sentencing leniency for the defendants,[10] and many chapters of the Navajo Nation passed resolutions urging that all 32 codefendants be pardoned by Navajo Nation President[11] Peterson Zah, the Navajo Nation Council, and the President of the United States. During the 1994 Navajo presidential election, challenger Albert Hale campaigned on a promise to seek pardons for petitioner from the Navajo Nation Council and from the President of the United States, and received a letter of support from petitioner immediately before the election that is believed to have played a significant role in Hale's victory over Zah, the incumbent. Thereafter, on April 21, 1995, at Hale's urging, a majority of the Council voted to pardon the convictions petitioner had incurred in the Navajo Nation District Court, see note 5, supra, and to request that the President of the United States pardon petitioner's federal convictions.[12] Speaker of the Council Kelsey A. Begaye subsequently certified the resolution, and Hale signed it into law. However, Navajos who wished to speak in opposition to the pardon, including the Navajo police officers who were injured during the 1989 riot, were prevented from addressing the Council.

In February 1996, petitioner applied for a "complete and full presidential pardon . . . for both federal convictions[,] including[] forgiveness of all fines, and restitutions, and court costs," citing his age and ill health and representing that he wished to restore healing and harmony to

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[8]Because of the large number of codefendants named in the indictment, the United States District Court divided them into two groups for trial. Nine codefendants were convicted with petitioner in the first trial and received the following prison sentences for their respective crimes: three months' residence in a community correctional facility as a condition of probation, 41 months, 60 months (two codefendants), 72 months, 87 months, 121 months, 135 months, and 151 months. Two additional codefendants were found incompetent to stand trial, and their charges were dismissed. Charges against another codefendant were dismissed in return for her testimony. Seven other codefendants pleaded guilty to various charges and received sentences ranging from probation to 27 months' imprisonment. Charges against the remaining 12 codefendants were dismissed by the government when a key prosecution witness died before their trial.

[9]The Ninth Circuit rejected the various arguments of petitioner and his coappellants that they could not properly be prosecuted by the Federal Government for these offenses. United States v. Begay, supra, 42 F.3d at 497-501.

[10]Among those who wrote to the sentencing judge requesting leniency for the ten defendants convicted in the first trial were Leonard Haskie, who served as Interim Council Chairman after petitioner was placed on administrative leave, and other members of the Tribal Council.

[11]According to the Department of Justice Office of Tribal Justice, as a result of the abuses that occurred during petitioner's last term as Council Chairman, the Navajo Nation modified its governmental structure to bifurcate and limit the authority that had been vested in that office. In the government's present structure, a Speaker of the Navajo Nation Council serves as the head of the legislative branch, and a President functions as the head of the executive branch. Moreover, the President, whose role is largely ceremonial, no longer has broad control over tribal finances.

[12]The vote in the Navajo Nation Council was 51 in favor, 14 opposed, and 6 abstentions.

himself and the Navajo Nation. Although he was not then eligible to seek pardon because the five-year waiting period after release from incarceration had not elapsed, see 28 C.F.R. § 1.2, the Department of Justice accepted his application and treated the request as seeking commutation and pardon in the alternative.

Petitioner's 1996 clemency request received the support of many members of the Navajo Nation[13] as well as other Native Americans. In October 1996, the General Assembly of the National Congress of American Indians adopted a resolution at its annual convention supporting a presidential pardon for petitioner and recommending that similar relief be considered for his codefendants. Scores of individuals wrote letters to the Department of Justice and the White House requesting that petitioner be pardoned.[14] In addition, former President Jimmy Carter, the late former Senator Barry Goldwater of Arizona, Senator Pete Domenici of New Mexico, and Bill McCartney, the founder of the Promise Keepers, expressed to you their support for a pardon to restore petitioner to a place of respect and promote healing within the Navajo community. Senator Jeff Bingaman of New Mexico wrote to the Attorney General urging that petitioner's sentence be commuted if he were determined to be gravely ill, and then-Congressman Bill Richardson of New Mexico expressed concern about petitioner's situation. Further, then-Navajo President Albert Hale met with the Counsel to the President to urge that a pardon be granted, and approximately 2,200 persons signed petitions supporting pardon. However, petitioner's support was not universal. The Office of the Pardon Attorney received several letters from individuals opposing a pardon for him, and the Board of Directors of the Navajo Dineh Rights Association unanimously passed a resolution in July 1996 opposing pardon, citing the magnitude of petitioner's crimes, his lack of remorse, and the likelihood that a pardon would result in further social and political unrest within the Navajo Nation. By memorandum dated December 19, 1996, the Counsel to the President informed then-Deputy Attorney General Gorelick that you had denied petitioner's application for executive clemency.

Grounds for clemency:

Petitioner filed the present application for commutation of prison sentence and supervised release and remission of all financial obligations on March 13, 1998. Now 69 years old, he is incarcerated at the Federal Medical Center, Fort Worth, Texas, where he has been assigned since November 1995. As of this writing, he has served approximately 69 months of his aggregate federal prison sentence of 177.5 months and is projected for release in October 2005.

Representing that he is "deeply remorseful for all that happened[, e]specially . . . the violence and loss of life that occurred at the Window Rock tragedy," petitioner states that he seeks clemency for "(1) Navajo religious and traditional reasons; (2) health reasons; and (3) prior

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[13]The Department of Justice Office of Tribal Justice estimated at that time that petitioner was supported by approximately 30 percent of the Navajos living on the tribal reservation.

[14]These included many members of the Navajo Nation Council, the Tribal Chairman of the Cheyenne River Sioux Indian Tribe, and the President of the Seneca Nation of Indians. In addition, several New Mexico state legislators, an Arizona state senator, and the incumbent and former mayors of Gallup, New Mexico wrote letters supporting pardon.

public service and time served." He points out that he has already been pardoned by the Navajo Nation for all of his tribal convictions, and states that he wishes to "return to the land of the Navajos" to "finish the healing process" in accordance with the Navajo tradition of forgiveness and reconciliation. Petitioner also represents that he is in ill health and suffers from a number of serious and painful physical infirmities, (b)(6) (b)(6) (b)(6) Finally, he cites his history of public service to the Navajo Nation and the United States, including his service as a Navajo Code Talker in the Marine Corps during World War II.[15] In addition to seeking clemency for himself, petitioner also requests "[c]onsideration for clemency to be given to all co-defendants in the instant offense so that we, as a people, can restore peace and harmony and heal ourselves in the Navajo Way."

Regarding the offenses of which he was convicted in connection with the Window Rock riot,[16] petitioner maintains that he is innocent of any wrongdoing. He contends that his supporters were "upset" by his removal from the Chairmanship of the Tribal Council and wanted to "prevail upon the 'New Government' to 'do the right thing,'" that although he "advised them not to march" (emphasis in original), his supporters "decided to march anyway," and that he was "about two miles away from the incident preparing for traditional prayer" when the riot occurred. Petitioner describes the event as "a tragedy that no one foresaw, planned, contemplated, or anticipated." He also points out that "[p]rior to being put on administrative leave in 1989, [he] had no criminal record except for false charge in 1973 (sic; emphasis in original)."[17]

In connection with his request for remission of his court-imposed financial obligations, petitioner has filed a statement of debtor form which indicates that in addition to restitution, (b)(6) (b)(6) The Bureau of Prisons (BOP) advises that petitioner participates in the Inmate Financial Responsibility

[15]Although petitioner and his supporters state that he served as a Code Talker during World War II, petitioner's service record (which was obtained by the prosecutor during the racketeering case) indicates that while he enlisted in the Marines in October 1944 and trained for such duty, he never served in combat before the war ended.

[16]Petitioner does not address his racketeering conviction in his application.

[17]There is no record of petitioner having been charged with any offense in 1973. However, in 1976, he was indicted in federal district court for obtaining money by fraudulent means, filing a false income tax return, and six counts of mail fraud. The charges related to expense vouchers petitioner submitted to Tucson Gas and Electric for aerial inspections of possible locations for a power line that was to cross Navajo land. When the jury deliberating the case announced that it was deadlocked, the court granted the defense motion for acquittal.

(b)(6)

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Program by making payments of $25 per month. As of this writing, he has paid approximately $900 toward his court-imposed obligations.

Petitioner was born on the Navajo Reservation (b)(6) As a teenager, he left a Bureau of Indian Affairs boarding school to work on the railroad. Following his Marine Corps service from 1944 to 1946, petitioner completed his high school education and, in 1957, received a Bachelor of Science degree in electrical engineering from the University of Oklahoma at Norman. Thereafter, he was employed by Hughes Aircraft in Los Angeles, California, and apparently was involved in development of the Polaris missile. In June 1963, he returned to the Navajo Reservation to work in the tribal government under Council Chairman Raymond Nakai and became director of the Office of Navajo Economic Opportunity. In 1970, MacDonald was elected to his first term as Council Chairman, and won reelection in 1974 and 1978. By his own report and according to his supporters, petitioner did much to improve education, employment, living conditions, and the overall economy of the Navajo Nation during his tenure as Council Chairman. He also served on such presidential commissions as the 1971 White House Conference on Aging. In addition, he was involved in inter-tribal Indian affairs, serving for many years on the Council of Energy Resource Tribes and being elected Chief of Chiefs -- that is, leader of all North American Indian Tribes.

The BOP reports that since his incarceration, petitioner has demonstrated "average" institutional adjustment and is not considered a management problem, (b)(6) He has participated in several educational programs and is presently assigned to work in the chapel of the Federal Medical Center at Fort Worth, where he is reported to perform his duties "in an outstanding manner." In January 1998, he was recognized by the chaplain for his contributions to the Religious Services Department at the institution. In April 1995, he was commended by the warden of the institution in which he was then incarcerated for his participation in the Inmate Mentor Program.

(b)(6)

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In addition to the sponsorship petitioner received in connection with his 1996 petition for pardon, see text at page 7 and note 14, supra, he is strongly supported in his present commutation request by Senator Jeff Bingaman[19] and Congressman Bill Redmond of New Mexico and by the Chairman of the New Mexico State Corporation Commission. Further, in 1997, the New Mexico legislature passed a resolution requesting the President to commute petitioner's sentence to allow him to return to the Navajo Nation. In May 1998, the Intergovernmental Relations Committee of the Navajo Nation Council passed a resolution[20] supporting commutation of petitioner's sentence to promote his reconciliation with the Nation and because of his health problems. During the same month, then-President of the Navajo Nation Thomas E. Atcitty, Speaker of the Council Kelsey A. Begaye, and other members of the Council met with representatives of the Counsel to the President and the Pardon Attorney to urge that petitioner's sentence be commuted on an expedited basis as a "government-to-government" action to promote reconciliation within the Navajo Nation, assist petitioner's physical and spiritual healing, and recognize petitioner's contributions to the Navajo Nation and the United States. Moreover, by letter dated August 12, 1998, Speaker Begaye, the current President of the Nation, Milton Bluehouse, Sr.,[21] and Robert Yazzie, Chief Justice of the Navajo Nation Supreme Court,[22] expressed to the Attorney General their "unequivocal[] support" for petitioner's release in light of his "seriously failing health" to facilitate the restoration of "harmony and balance" to the Nation. The same three Navajo leaders also met with the United States Attorney for the District of Arizona on August 20, 1998, to emphasize the support of all three branches of the Navajo Nation government for petitioner's compassionate release on medical grounds and to request in the alternative that he be transferred

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[19]Senator Bingaman has expressed his support orally and in writing to the Counsel to the President, the Attorney General, and the Pardon Attorney. He recommends commutation of petitioner's sentence because of petitioner's prior service to the Navajo Nation, current medical condition, prison conduct, and remorse; the support of the people of New Mexico as expressed through a resolution of that state's legislature; and the desire of the Navajo Nation for reconciliation.

[20]The committee vote was four in favor, none opposed, and three abstentions.

[21]President Bluehouse is the third person to serve as Navajo Nation President in 1998. He was appointed vice president when Thomas E. Atcitty, the elected vice president, succeeded President Albert Hale, see text at pages 6-7, supra, upon Hale's resignation in February 1998. Hale resigned the presidency in exchange for termination of an investigation into allegations that he had misused tribal funds. Atcitty in turn resigned in July 1998 following an investigation by the Navajo Nation Ethics Committee. Although Council Speaker Kelsey Begaye asserted that he was next in line to serve as president upon Atcitty's resignation and actually assumed the post for one day, it was ultimately determined that then-Vice President Bluehouse was the appropriate successor, and he now holds the chief executive position pending a presidential election scheduled for November of this year. Former President Hale had political ties to petitioner, see text at page 6, supra, and former President Atcitty had personal ties to petitioner through his brother, whom petitioner counts among his closest friends. Neither President Bluehouse nor Speaker Begaye is as closely aligned with petitioner as was former President Atcitty. However, it is widely perceived that petitioner's support will be a significant factor in the upcoming presidential election.

[22]It was Chief Judge Yazzie, then a Navajo District Court Judge, who issued the restraining order and preliminary injunction prohibiting petitioner and his followers from attempting to exercise any official powers as agents of the Navajo Nation prior to the 1989 Window Rock riot. See text at pages 4-5, supra.

to a tribal jail facility within the Navajo Nation boundaries, if his medical condition permits and tribal jail facilities can be upgraded to meet federal standards.

Official comments:

Although the present United States Attorney for the District of Arizona "fully supports the transfer of all currently confined defendants [convicted in the Window Rock riot case] to federal correctional facilities closer to the Navajo Nation [if the transfer could be accomplished consistent with the prisoners' medical needs]," he opposes commutation of petitioner's sentence and remission of his financial obligations,[23] as his predecessor opposed pardon or commutation for petitioner in 1996. Noting that petitioner still fails to accept responsibility for his crimes, the United States Attorney believes that it would be inappropriate to commute his sentence or remit his financial obligations while several of his coconspirators in the 1989 riot case are serving significant sentences for their roles in that offense, of which petitioner was the leader.[24]

Furthermore, in the United States Attorney's view, it is highly questionable whether commutation of petitioner's sentence would serve to heal rifts within the Navajo Nation; instead, he fears, petitioner's return to the Navajo Reservation, especially if unsupervised by the court, as petitioner requests, might well promote further division, particularly in connection with the November 1998 election for the presidency of the Nation. See note 21, supra. According to the United States Attorney's Office, the political situation within the Navajo Nation at present is highly factionalized, and the group that supports petitioner numbers approximately 25,000 and constitutes a substantial block within the voting Navajo population. Given petitioner's history and these circumstances, the United States Attorney notes, there is a significant danger that petitioner would seek to exert influence in the upcoming election and in any administration controlled by his supporters, and so would exacerbate the factionalism that already exists within the Navajo Nation. For the same reasons, the United States Attorney does not believe that petitioner would abide by any condition placed upon a grant of commutation precluding his involvement in Navajo government affairs. Although the United States Attorney acknowledges that relations between his office and the Nation would likely be strained for a time if petitioner were to die while serving his federal prison sentence, he is of the view that any such damage to their working relationship would not be irreparable in the long term. In his opinion, the risk of

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[23]The United States Attorney also opposes the Navajo Nation's proposal that petitioner be transferred to a tribal jail facility to serve the remainder of his sentence. He fears that because it is unlikely such a facility would be able to provide adequately for petitioner's medical needs, Navajo officials would simply release petitioner from custody well before the end of his prison term.

[24]Donald Benally, petitioner's primary lieutenant in the riot case who is serving a prison term of 151 months and is projected for release in March 2004, filed a commutation petition in March 1998 and is the subject of a separate report submitted with the instant recommendation. Benally's prior commutation application was denied in February 1997. Another codefendant from the riot case, Earl Roy Lee, who is serving a term of 121 months and is projected for release in January 2002, was denied commutation of sentence in October 1996. Of the remaining codefendants in the riot case who received prison terms, see note 8, supra, two were released in June and July 1998, respectively, three are projected for release between August and October 1999, and one is projected for release in February 2003. None of these individuals has sought commutation of sentence.

any temporary ill will resulting from such an event does not outweigh the dangers of division and unrest that petitioner's release at this juncture would likely present, and so does not militate in favor of commuting petitioner's sentence.

The Honorable Robert C. Broomfield, who sentenced petitioner in the riot case, opposed petitioner's request for pardon in 1996 and opposes his current application for commutation. As he explains:

> I attempted to sentence all of those 10 defendants [convicted after the riot trial], as well as other lesser involved defendants who had entered pleas before and after the trial, based upon the degree of their culpability. I made a conscious effort at proportionality in each sentence. As the most culpable, Mr. M[a]cDonald received the most serious sentence followed next by Mr. Benally. Other defendants received substantial but lesser sentences . . . . A review of the file will reflect their sentence[s] and, therefore, my view of their individual culpability.
>
> I do not believe that either Mr. M[a]cDonald or Mr. Benally should receive clemency which is not proportionately given to all of the other defendants in the case. The case was euphemistically referred to as the "riot case" and it truly was a riot involving hundreds of people — all included on video tape — and in which two demonstrators were killed. The riot was a conscious outgrowth of an effort to capture control of the Navajo Nation by force.

Through the United States Attorney, the Honorable Earl H. Carroll, who sentenced petitioner in the racketeering case and imposed the larger restitution obligation, has advised the Office of the Pardon Attorney "that he has not changed [the] opinion" he expressed in connection with petitioner's 1996 pardon request. At that time, Judge Carroll indicated that he did "not believe that it [was] appropriate" to pardon petitioner given the "serious nature [of his crimes] having to do with . . . [his] breach of trust to the tribe . . . ." Observing that petitioner "ha[d] never admitted any wrongdoing with respect to his activities as Tribal Chairman," Judge Carroll opined that "it would be inappropriate for him to be pardoned and returned to a status that would allow him to run for public office on the Navajo Reservation if he chose to do that." However, Judge Carroll observed that he "would not oppose any motion by the government to reduce Mr. MacDonald's sentence to some lesser term and to have him on supervised release with conditions . . . that would preclude his living on the Navajo Reservation or running for any office or position of trust with the Navajo Nation."

In 1996, the Department of Justice Office of Tribal Justice (OTJ) "strongly recommend[ed] against" petitioner's prior clemency request based upon its view that petitioner was then "a very divisive influence on the Navajo people" whose "presence on the reservation would likely lead to violent confrontation between factions" there. In this connection, the OTJ

noted at that time that "[p]assions ha[d] not cooled over the amount of theft and corruption" the tribe suffered during petitioner's last administration, and that many Navajos were "quite upset about the fact that they were excluded from presenting any opposing views to the Tribal Council regarding the [1995] tribal pardon." See text at page 6, supra.

However, the OTJ now recommends in connection with the pending clemency application that petitioner's prison sentence be commuted, although it opposes his requests for commutation of supervised release and remission of fine and restitution. Citing the government-to-government working relationship between the United States and the Navajo Nation recognized by Executive Order 13,084, 63 Fed. Reg. 27,655 (1998), as well as the Navajo Council's 1995 resolution pardoning petitioner's tribal offenses and seeking a presidential pardon, the OTJ opines that because the Nation's governing body formally supports petitioner's application, "deference to tribal sovereignty and self-determination militates strongly in favor of acceding to the Nation's request for clemency."[25] In so concluding, the OTJ observes that the crimes arising out of the riot case for which petitioner is now serving his sentence "all relate to breaches of order on the Navajo Indian Reservation that involved only members or employees of the Navajo Nation, or were offenses directed at the integrity of the Navajo Nation government." In this circumstance, according to the OTJ, "the interests of the Navajo Nation take on paramount importance," while the generalized interests of the United States in deterring lawlessness in Indian country and disruptions of tribal government are less compelling because "the tribe's resolution of its internal political dispute involves clemency for [petitioner]." In the OTJ's view, because petitioner's medical condition is "unpredictable," there "can be no assurance that the opportunity for reconciliation that the Navajo seek can be preserved unless his sentence is commuted." The OTJ fears that "allowing [petitioner] to pass away incarcerated would likely be viewed as a serious rebuff to the Nation's government and traditional values and would damage the United States' relationship with the Nation."

Reasons for denial:

Petitioner bases his request for commutation and remission upon his medical condition, his assertion that such clemency would serve to assist the healing and reconciliation of his divided people, and his record of prior public service and institutional adjustment. Although he does not request the restoration of civil liberties that would flow from a pardon, in all other respects he asks for the same sorts of relief he sought in 1996. He offers no new grounds or significant new information in support of his request, however, and the reasons he proffers do not warrant a different result than that reached in 1996.

The nature and duration of petitioner's offenses and the leniency he has already received present compelling reasons to deny executive clemency at this time. Notwithstanding the public service he rendered earlier in his career, the evidence at his various trials established that

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[25]The OTJ thus distinguishes between petitioner's commutation application and that of his codefendant, Donald Benally, see note 24, supra, whose clemency request it does not support because only one community chapter of the Navajo Nation, rather than the Nation Council, has passed a resolution favoring presidential clemency for Benally.

petitioner engaged in an extensive pattern of personally enriching graft and corruption during his final term as Tribal Council Chairman, and that he betrayed the trust of the tribal members who had elected him to that position. Moreover, rather than accept the will of the Council majority that he step aside while his wrongdoing was being investigated, petitioner instead acted as a divisive force within the Navajo Nation by establishing a rival government and inciting his followers to violence. In both federal cases, he received prison sentences that were at the low end or middle of the applicable range of imprisonment under the United States Sentencing Guidelines (60 months for the racketeering case, in a range of 57 to 71 months; 175 months for the riot case, in a range of 151 to 188 months).[26] He was afforded further leniency by virtue of the facts that the lengthy sentence in the riot case was ordered to run concurrently with rather than consecutively to the previously imposed racketeering sentence, and that both federal sentences were made concurrent with the tribal court sentences he was already serving for other serious corrupt conduct. See note 5, supra. At present, petitioner has served less than forty percent of the aggregate sentence he received. However, he could properly have faced an aggregate federal prison term of 259 months for his crimes as head of the Navajo government.

Although somewhat mitigating, petitioner's age, health, and institutional adjustment do not constitute compelling reasons for clemency. While his adjustment to prison has been largely commendable, he has received two incident reports and his conduct has not been so exceptional as to warrant the extraordinary remedy of commutation. Moreover, his age does not present a reasoned basis for such action, for he was not a young man when he committed the crimes for which he is now incarcerated. Indeed, his age may be viewed as an aggravating factor because his long career as a governmental leader of the Navajo Nation makes all the more blameworthy his fraudulent activity at the tribe's expense and his endorsement of violence as a means of restoring his control over the tribal government. Similarly, petitioner's health is not so poor that it militates in favor of commutation. Although he suffers from a serious heart condition and a variety of other ailments common to those of advancing years, his health is reportedly stable at present and the Bureau of Prisons is well able to manage his medical situation. In short, neither petitioner's current medical condition nor his cultural tradition that true healing can be achieved only by returning to his homeland differentiates him from many other elderly, infirm federal prisoners. Like petitioner, these individuals earnestly desire to return to home and family and believe they would function better in that setting. In any event, if his medical condition should deteriorate significantly, the remedy of compassionate release is available through a motion by the Director of the Bureau of Prisons to Judge Broomfield under 18 U.S.C. § 3582(c)(1)(A)(i).

Petitioner's related claim that commuting his sentence and remitting his financial obligations will help restore harmony to the Navajo Nation also is unsound, and the fact that the Nation's government supports his commutation request on this basis, while significant, should not tip the balance in favor of clemency. Although petitioner represents that he feels "profound remorse and grief for [his] people's suffering," he fails to acknowledge the criminality of his own

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[26]Certain counts of conviction were not subject to the Sentencing Guidelines. In the racketeering case, three counts of extortion occurred before the effective date of the Guidelines; in the riot case, the sentence on the burglary count was governed by Arizona law. Petitioner's sentences for these offenses were ordered to be served concurrently with his sentences under the Guidelines.

acts and instead continues to insist -- in the face of compelling evidence of his guilt -- that he did nothing wrong. However, as the United States Attorney has noted and citizen correspondence during the clemency process has demonstrated, a significant number of Navajos are deeply offended by petitioner's conduct and believe that he deserves the punishment he received. This group may well be profoundly disturbed by a reduction of petitioner's sentence or remission of the restitution that is payable to the Navajo Nation, especially if similar relief is not afforded the codefendants who acted at petitioner's behest in the Window Rock riot. It is true that petitioner's many supporters would welcome clemency, some because they believe he is innocent and others because they consider the matter of his conduct in office an issue of tribal sovereignty that should have been handled within the tribe rather than through prosecution by the Federal Government. Commutation and remission undoubtedly would be considered by these factions as vindication of their view that petitioner was the victim of political prosecutions by the Federal Government. Thus, a grant of executive clemency could seriously undermine the legitimate federal law enforcement purposes of deterring corruption and violent political confrontation that were served by prosecuting petitioner, and could well further exacerbate tensions within the Navajo Nation as it again approaches a presidential election.

While the Navajo Nation's official statements supporting commutation weigh heavily in petitioner's favor, the fact that the present government of the Nation has chosen to take this position does not mandate that you commute his sentence. By way of comparison, you have previously denied commutation of sentence in cases in which foreign governments have expressed strong support for the applicant.[27] In evaluating the significance of the Nation's support of petitioner, it cannot be ignored that former Presidents Hale and Atcitty, who served as president and vice president, respectively, when the 1995 Navajo Council pardon resolution was passed, each have ties to petitioner, see text at page 6 and note 21, supra, and that the pardon resolution was passed by a divided vote in the Council, of which Kelsey Begaye was the Speaker, after individuals who wished to address that body in opposition to the measure were prevented from doing so. See text at pages 6, 13 and note 12, supra. That the governmental support petitioner receives is motivated at least in part by the political influence he is capable of wielding in the upcoming presidential election is made more clear by the fact that the Navajo government representatives have not extended their support for clemency to any of the other conspirators presently serving prison sentences for their roles in the Window Rock riot. The governmental leaders' stated rationale that the Nation needs to achieve healing and reconciliation after the disruption of the riot would seem to suggest that all of the conspirators convicted in connection with that offense -- not just petitioner -- should be returned to the reservation in order for that goal to be achieved. However, the official support of the government has been limited to petitioner alone. Finally, although denial of petitioner's commutation request may have some temporary negative effect on relations between the Federal Government and the Navajo Nation, on balance this factor does not outweigh the strong national interest in deterring corruption and violence in Indian governmental affairs. Indeed, the Office of the United States Attorney for the District of Arizona, the Department of Justice component whose working relationship with the Navajo Nation will be most directly affected by a decision to deny commutation, opposes

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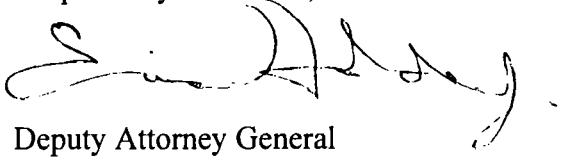
[27]For example, Jonathan Pollard's petitions for commutation of sentence, the last two of which you denied, have consistently received the support of the government of Israel.

petitioner's request and believes that its long-term ability to work effectively with the Nation's government would survive even the worst-case scenario of his dying in prison.

At bottom, it would be extremely difficult, if not impossible, to justify commuting petitioner's sentence and/or remitting his financial obligations without also granting some measure of clemency to his codefendants in the riot case. Some of those individuals, however, who were the least culpable of the group, have already served all or most of their sentences. Granting clemency at this juncture would have the anomalous effect of providing the greatest benefit to the least deserving of the conspirators. Aside from this difficulty, in the absence of a clear indication that granting commutation and remission to petitioner and his codefendants would be a healing factor rather than a divisive one, caution counsels against such action. I therefore recommend that you deny petitioner's request.

Respectfully submitted,



Deputy Attorney General

Date: September 21, 1998

2ND CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN NEZ BEGAY, DONALD BENALLY, PAUL KINLICHEENIE, EARL ROY LEE, PETER MACDONALD, SR., NED M. MCKENSLEY, ALFRED SCOTT, SR., ANNA SORRELL, EVANGELINE BEGAY WAUNEKA, KEE IKE YAZZIE, Defendants-Appellants.

No. 93-10165, 93-10167, 93-10168, 93-10169, 93-10170, 93-10171, 93-10172, 93-10173, 93-10174, 93-10175

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1994 U.S. App. LEXIS 31510

October 4, 1994, Argued, Submitted, San Francisco, California
November 7, 1994, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

PRIOR HISTORY: Appeal from the United States District Court for the District of Arizona. D.C. No. CR-91-00273-RC. Robert C. Broomfield, District Judge Presiding

DISPOSITION: AFFIRMED.

JUDGES: Before: SNEED, PREGERSON and WIGGINS, Circuit Judges.

OPINION: MEMORANDUM *

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

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BACKGROUND

Appellants are among thirty-two individuals charged with various criminal offenses arising from events that led to and included a civil disturbance that occurred on July 20th, 1989, at the Navajo Nation Administration and Finance Building in Window Rock, Arizona. On that day, supporters of the former Chairman of the Navajo Tribal Council of Delegates, Appellant Peter MacDonald, Sr., engaged in a violent confrontation with tribal police. During the confrontation, several tribal police [*2] officers were assaulted and injured, their police vehicles vandalized, the Navajo Nation Administration and Finance Building was entered and damaged, and various documents were removed from that Building. Two demonstrators were killed.

On July 30, 1991, Appellants were indicted on numerous offenses arising from the July 20th incident. The charges included conspiracy and various counts of assault, robbery, kidnapping, and burglary. The trial, which lasted nearly four months, began on July 9, 1992. At trial, the Appellants contended that the

events at issue were the result of a tribal political dispute, and that none of the actions taken by MacDonald or any of the other Appellants was illegal because MacDonald had been improperly removed from the office of Chairman. After deliberating for twenty-one days, the jury reached its verdict on November 12, 1992. The jury returned guilty verdicts against all defendants, although it did not reach verdicts on some counts. The District Court granted the Government's motions to dismiss the counts on which the jury was unable to reach verdicts. We have jurisdiction pursuant to 28 U.S.C. @ 1291. We affirm.

ANALYSIS [*3]

Appellants raise numerous issues on appeal, both individually and collectively. n1 Although we address each issue raised, where more than one Appellant raises the same issue, or where two or more issues raised are substantially similar, those issues are considered together.

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n1 In a separately filed opinion, we address the issues concerning subject matter jurisdiction and the admissibility of the narration that accompanied the jury's viewing of Exhibit 105. The admissibility of Exhibit 105 is not challenged on appeal.

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1. Jurisdictional Issues

The first issue raised, which is joined by all Appellants except Begay, is whether the United States District Court had subject matter jurisdiction over Count 1 of the indictment, the charge of conspiracy to commit assault, kidnapping, and burglary. As we held in the companion opinion to the present case, United States v. Begay, F.3d , (9th Cir. 1994), the District Court had jurisdiction over the conspiracy charge. Likewise, based on our finding of jurisdiction, [*4] we rejected Appellants' related contentions regarding jurisdiction.

2. Denial of Motion to Strike the Jury Panel

Appellant Wauneka alleges that the District Court erred in denying her motion to strike the jury panel because non-English-speaking jurors were excluded from the panel, thus making the panel constitutionally defective. Whether a particular jury satisfies the "representative jury" standard of Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), is a question of law reviewed de novo. United States v. Bishop, 959 F.2d 820, 827 (9th Cir. 1992).

At a pretrial conference on the day before jury selection began, Wauneka filed a motion to strike the panel on the grounds that the requirement in 28 U.S.C. @ 1865(b)(2) and (3) that persons who do not read, speak, and understand English are barred from federal jury service, violated her constitutional rights. The District Court denied the motion because it lacked either a factual or legal basis.

Reported cases which have considered this issue have uniformly rejected Wauneka's argument. [*5] See, United States v. Marcano, 508 F. Supp. 462

(D.P.R. 1980); United States v. Ramos-Colon, 415 F. Supp. 459 (D.P.R. 1976); United States v. Armsbury, 408 F. Supp. 1130 (D. Or. 1976). The Sixth Amendment requirement of an impartial jury assures "not a representative jury (which the Constitution does not demand), but an impartial one . . . ." United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992) (quoting Holland v. Illinois, 493 U.S. 474, 480, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990) (emphasis in original).

The Supreme Court has stated the criteria needed to establish a violation of the fair cross-section requirement. The defendant must show that (1) the allegedly excluded group is a "distinctive" group in the community; (2) the group's members are unfairly or unreasonably represented in jury venires in relation to the number of such persons in the community; and (3) this underrepresentation is due to the systematic exclusion of the group's members in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979). [*6] Moreover, in Walker v. Goldsmith, 902 F.2d 16, 17 (9th Cir. 1990) (citation omitted), we held that a defendant who challenges jury selection must first show that a "recognizable, distinct class" has been "singled out for different treatment . . . ." Such a distinct class is one which, "'in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the . . . jury panel.'" Id. (quoting United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977)).

On appeal, Wauneka claims that the requirement denied her a fair trial because exclusive Navajo and Spanish language speakers were ineligible to serve on the panel. We reject Wauneka's argument because she has failed to establish any of the three prongs as set forth in Duren. Other than the fact that all group members are not sufficiently proficient in English to understand the proceedings in which they would participate, Wauneka has offered no evidence that group members are otherwise significantly unique -- or similar to each other -- such that their interests cannot adequately [*7] be represented by other community members.

3. Prejudicial Admission of Evidence at Trial

Appellant Lee contends that the District Court erroneously admitted certain evidence at trial that was unduly prejudicial under Fed. R. Evid. 403. We review questions concerning the admissibility of evidence which involve factual determinations for an abuse of discretion. United States v. Wood, 943 F.2d 1048, 1055 (9th Cir. 1991). Fed. R. Evid. 403 excludes otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. We review the district court's decisions balancing the probative value of evidence against its prejudicial effect under Fed. R. Evid. 403 for an abuse of discretion. United States v. Kessi, 868 F.2d 1097, 1107 (9th Cir. 1989).

Lee first contends that the District Court's admission of testimony at trial that Jimmy Dixon and Arnold Begay died during the July 20th incident was unfairly prejudicial and irrelevant because Appellants were not charged with conspiracy to commit murder. We disagree. The circumstances surrounding the fatal injuries to Jimmy [*8] Dixon and Arnold Begay as testified to by Sgt. Lee and Officer Smith were relevant to establish the assaults on the various police officers.

Lee next contends that the District Court erred in admitting Exhibit 61, an 11" x 14" color photograph. The photograph depicts Sgt. Lee lying on the ground in pain with a gunshot wound to his leg, which had been inflicted by Jimmy Dixon, and Officer Greymountain partially sitting on Sgt. Lee's chest with his gun drawn, protecting Sgt. Lee from the crowd as they throw rocks at the officers. There is no visible flesh or bone around the wound. Lee argues that, because Jimmy Dixon was not on trial, the photograph was unfairly prejudicial. We find this argument to be meritless.

The photograph was more probative than prejudicial for several reasons. First, the photograph is direct evidence of the assault which was charged in the conspiracy, as well as direct evidence of the officers' conduct during the incident. Second, the photograph is evidence of the circumstances under which the officers were operating. Further, the photograph refuted Lee's self-defense theory that the officers were the first aggressors.

Next, Lee argues that the District Court [*9] prejudicially erred in allowing Government witness Caroline Yazzie, an ambulance assistant, to testify about a knife attack she suffered on the evening of the demonstration. Caroline Yazzie tentatively identified Appellant Kinlicheenie from a photograph as the person who swung a knife at her while she attempted to treat the injured at the Administration and Finance Building.

We find no prejudicial harm to Lee based on this testimony. The District Court specifically limited consideration of this testimony to Appellant Kinlicheenie. The jury is presumed to have followed the court's instructions. Richardson v. Marsh, 481 U.S. 200, 206-07, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987).

Lee also claims that the District Court erred in admitting the testimony of Lauda Miles, an accountant doing auditing work for the Navajo Nation at the Administration and Finance Building on July 20th. Miles testified that, at approximately 6:00 p.m., she saw that the parking lot was completely filled with vehicles for as far as she could see and she saw a large crowd, some of whom were carrying clubs, outside the building. Miles further testified [*10] that this sight so frightened her that she wrote a "good-bye" letter to her mother. Before she could finish the letter, however, she was safely escorted from the building by police.

Lee contends that this testimony was offered only to inflame the jury. We disagree. Miles' testimony was more probative than prejudicial because it was offered to refute Lee's self-defense theory that the demonstrators came to the building for a peaceful demonstration and that the police were the first aggressors. Miles' testimony corroborates evidence presented by the Government that the situation was sufficiently dangerous that Miles was initially not allowed to leave the building. Further, the fact that the demonstrators arrived at the building armed corroborates the Government's theory that the demonstrators intended violence.

4. Erroneous Admission of Co-Conspirator Statements

Appellant Lee also argues that the District Court erred in admitting the statement of indicted co-conspirator Willie Keeto, Jr. n2 to reporter Mark Trahant regarding the purpose of the conspiracy. We review the district court's decision to admit evidence under exceptions to the hearsay rule for an abuse

of discretion. United States v. Bland, 961 F.2d 123, 126 [*11] (9th Cir.), cert. denied, U.S. , 113 S. Ct. 170 (1992).

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n2 Willie Keeto, Jr. was originally indicted with the other defendants but the District Court later dismissed the charges against him on the Government's motion after this trial.

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Keeto's statement was made approximately three hours after the demonstration at the Administration and Finance Building to Trahant, a reporter for the Arizona Republic who was previously the editor and publisher of the Navajo Times newspaper. Keeto told Trahant that "in order to prove that [the interim government] was an illegal government operating on the reservation, they wanted to arrest a tribal official to make a test case . . . ."; that they had placed a tribal police officer under arrest, and that he had "resisted arrest." Keeto also gave Trahant a copy of the "arrest warrant." Written on Navajo Nation stationary listing MacDonald as Chairman, the warrant read, "I place you under citizen's arrest as provided for in Navajo Tribal [*12] law for criminal conspiracy to allegedly overthrow the Navajo Tribal government." n3

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n3 Former Navajo Department of Justice attorney Pam Williams testified that there was no provision in the Navajo Tribal Code for a citizen's arrest.

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Lee contends that this hearsay statement was erroneously admitted as a co-conspirator statement under Fed. R. Evid. 801(d)(2)(E). Under this rule, only statements made by co-conspirators in furtherance of the conspiracy are admissible. Statements are not considered made in furtherance of the conspiracy if they are made after the chief objective of the conspiracy has ended. Krulewitch v. United States, 336 U.S. 440, 443-44, 93 L. Ed. 790, 69 S. Ct. 716 (1949).

Lee's argument must fail because the District Court did not admit the evidence under Fed. R. Evid. 801(d)(2)(E). The Government offered, and the District Court admitted, the evidence under Fed. R. Evid. 804(b)(3), n4 the statement against interest exception to the hearsay [*13] rule. We find no error in the District Court's decision.

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n4 Fed. R. Evid. 804(b)(3) states in pertinent part:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable

person in the declarant's position would not have made the statement unless believing it to be true. . . .

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As an indicted defendant, Keeto was unavailable to testify, which meets the availability requirement of Rule 804(b)(3). Further, Keeto's statement subjected him to criminal liability, a requirement which also must be met.

In response to Lee's additional assertion that the statement was unfairly prejudicial, we find the statement's relevance outweighs any potential prejudicial [*14] effect. The portion of the statement concerning the "citizen's arrest" corroborates other evidence offered to show the kidnapping and assault of Officer Hawkins.

5. Exclusion of Portions of Tape-Recorded Statements

Appellant Kinlicheenie claims that, under Fed. R. Evid. 106 (the "rule of completeness"), the District Court erred by not allowing the defense to admit certain portions of tape-recorded interviews after the Government had already introduced other portions of the tapes into evidence. We review the district court's application of the "rule of completeness" for an abuse of discretion. United States v. Dorrell, 758 F.2d 427, 434 (9th Cir. 1985).

Under Fed. R. Evid. 106, when one part of a statement is introduced into evidence by a party, the opposing party may require the introduction of other parts of the statement "to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." Beech Aircraft v. Rainey, 488 U.S. 153, 171, 102 L. Ed. 2d 445, 109 S. Ct. 439 (1988). However, while Rule 106 seeks to avoid the inherent unfairness created when matters [*15] are taken out of context, the Rule does not preclude a judge from excluding portions of a statement that are irrelevant. United States v. Dorrell, 758 F.2d 427, 434 (9th Cir. 1985). We find no abuse of discretion where the record establishes that the trial court carefully considered the entire statement, admitted certain portions that the court felt placed other admitted portions in proper context, but chose not to admit the irrelevant portions. United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir.), cert. denied, 454 U.S. 847, 70 L. Ed. 2d 135, 102 S. Ct. 165 (1981).

The tapes at issue were recorded by Mehl Tafoya, a licensed private investigator, who interviewed sixty-four witnesses to the events of July 20th. MacDonald and Benally requested Tafoya to conduct the interviews.

The Government introduced at trial certain portions of the tape-recorded statements of seven Appellants as party admissions under Fed. R. Evid. 801(d)(2)(A). The Government also introduced portions of interview statements of co-conspirators Charlene Dee and Willie Keeto, Jr. as statements [*16] against interest under Fed. R. Evid. 804(3). In the portions submitted by the Government, Appellants admitted they carried "sticks" at the demonstration, and admitted that the "plan" for the demonstration was to make a citizen's arrest of Lt. Hawkins.

In response to the Government's introduction of the interview evidence, Appellants sought to introduce other portions of the interviews, including evidence that Lt. Hawkins pulled his gun and pointed it at some demonstrators,

and that another police officer fired shots at the demonstrators. The District Court admitted these portions of the defense request, but declined to admit the other portions as irrelevant.

Kinlicheenie contends that the District Court erred in not admitting the remaining portions, because the remaining portions would have shown that the demonstrators behaved aggressively only in self-defense. n5 We reject Kinlicheenie's contention as meritless.

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n5 Kinlicheenie asserts that the excluded portions included statements to the effect that the demonstrators did not make a "citizen's arrest" on Lt. Hawkins until Hawkins had first pulled his gun on the demonstrators, and that the demonstrators brought their clubs to the demonstration only for purposes of self-defense.

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[*17]

The facts indicate that the District Court carefully considered the defense objections, and admitted certain portions which the defense requested to clarify the portions already offered by the Government. Further, our examination of the trial record confirms that the portions of the statements that the District Court excluded were, as the District Court found, irrelevant.

In sum, the District Court admitted sufficient portions of the tapes so that the jury could have found that Appellants acted in self-defense, had the jury so believed, based on the District Court's admission of the requested defense statements regarding the actions of Lt. Hawkins and the other officer firing a gun at the demonstrators. We therefore reject Kinlicheenie's arguments on this issue.

6. Impeachment of Government Witness Nakai

Kinlicheenie also argues that the District Court erred in allowing the Government to call witness Raymond Nakai specifically for the purpose of impeachment with inadmissible hearsay. We review whether the trial court properly allowed a party to impeach its own witness for abuse of discretion. United States v. Petsas, 592 F.2d 525, 527 (9th Cir.), [*18] cert. denied, 442 U.S. 910, 61 L. Ed. 2d 276, 99 S. Ct. 2824 (1979).

Fed. R. Evid. 607 provides that "the credibility of a witness may be attacked by any party, including the party calling the witness." We recognize, however, that impeachment is not permitted where its primary purpose is for submitting to the jury substantive evidence that would otherwise be inadmissible. United States v. Gomez-Gallardo, 915 F.2d 553, 555 (9th Cir. 1990).

Kinlicheenie claims that the Government's sole purpose in calling witness Nakai, former Chairman of the Navajo Nation, was to impeach his testimony. On July 18th, Nakai gave a speech at the Shiprock Chapter House where he read an announcement that MacDonald had been cleared of all charges by the U.S. Attorney's Office in Phoenix. Nakai also announced that there would be a meeting at the Keeto camp on July 20th for MacDonald's supporters.

At trial, the Government called Nakai to explain the circumstances leading to the events depicted in a videotape of the Shiprock Chapter House meeting, as well as to narrate the videotape. Nakai testified that he had made [*19] the two announcements, and testified about other aspects of the events related to the videotape. The Government did not impeach Nakai about his two announcements or much of his other testimony.

The Government, however, did impeach Nakai, who had been declared a hostile witness, on three occasions during his direct testimony. Specifically, Nakai was impeached twice with his grand jury testimony--which is otherwise inadmissible hearsay--and once with a statement he gave to David Nez, a criminal investigator. The topics about which Nakai was impeached were: whether, during his Shiprock speech, MacDonald waved a piece of paper allegedly from the U.S. Attorney's office claiming that all charges against MacDonald had been dismissed; whether MacDonald told the crowd that it was time to reunite and get back their government; and whether MacDonald spoke to his supporters at the Keeto camp on July 20th immediately before the demonstration.

Defendants objected to this testimony as improper impeachment. The District Court overruled the objection because the Government's sole purpose in calling Nakai was not impeachment. We find no error in this ruling. As the District Court noted, Nakai testified [*20] about a variety of subjects beyond those three which were the basis of the impeachment. And, not all of Nakai's testimony was impeached. We therefore reject Kinlicheenie's argument as meritless.

7. Impeachment of Defense Witness Retasket

MacDonald, Wauneka, Yazzie, and Lee assert, for various reasons, that the District Court erred in not granting their motion for mistrial based on the Government's alleged improper impeachment of MacDonald's defense witness Carol Retasket. On cross-examination, the Government asked Retasket about two incidents of possible misconduct by her. First, the Government asked Retasket whether she had parked her vehicle next to a grand jury witness's vehicle on July 16, 1991, for the purpose of intimidating the witness. Second, the Government asked Retasket whether she knew that Seymour Tso n6 had paid Mehl Tafoya $ 100 before Tafoya testified before the grand jury. Appellants contend that these questions implied that Retasket, and by inference Appellants, had engaged in grand jury intimidation and bribery. We review the District Court's denial of a motion for mistrial based on prosecutorial misconduct for clear error. United States v. Chu, 5 F.3d 1244, 1250 (9th Cir. 1993). [*21]

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n6 Seymour Tso was a co-defendant scheduled for trial in the second trial group.

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In United States v. Davenport, 753 F.2d 1460, 1463 (9th Cir. 1985), we stated that the government must have a good faith belief in the misconduct of the witness which is the subject of the question. Moreover, this good faith must be established to the court's satisfaction outside the presence of the jury before the question is asked. That standard has been satisfied in the present case.

In a side bar conference, the Government made a proffer of evidence to the court that indicated there was a good faith basis, i.e., sufficient evidence to indicate Retasket's possible involvement in the grand jury witness intimidation and with Seymour Tso, for asking Retasket the two questions. Based on our examination of the significant portions of the trial transcript, we find no error in the District Court's determination that the Government's questioning of Retasket was proper.

Moreover, even if the District Court's admission [*22] of these questions to Retasket was error, we would find the error to be harmless. See United States v. Flake, 746 F.2d 535, 541 (9th Cir. 1984). In light of the other evidence presented at trial which indicated MacDonald's involvement in events which led up to and included the July 20th incident, and the lack of evidence to support MacDonald's withdrawal defense, we find that any discrediting of Retasket's testimony for MacDonald did not more probably than not affect the jury's verdict as to MacDonald.

Regarding Appellants Wauneka and Lee, we reject their contentions that the Government's questioning of Retasket in some way harmed their cases. As noted above, Retasket was called as a witness by MacDonald. Retasket offered no testimony regarding Wauneka or Lee, nor was she questioned by counsel for either Appellant. The only connection between Retasket, MacDonald, and these Appellants is their overall involvement in the events leading up to and following the July 20th incident. We therefore fail to see how any alleged error as to Retasket's testimony directly prejudiced Wauneka or Lee.

Finally, Yazzie contends that he was prejudiced by the Government's [*23] cross-examination of Retasket because the implication of improper conduct created by the Government's questioning "chilled" him from calling Retasket as a witness in his own case. Yazzie claims that he would have called Retasket to verify his version of the events that occurred in the July 20th incident and his lack of participation in the Keeto camp meetings. Regarding Yazzie's attendance at Keeto camp meetings, we fail to see how this testimony would have helped Yazzie. The jury failed to reach a verdict on the conspiracy charge as to Yazzie; thus, further testimony to indicate that Yazzie was not a member of the conspiracy could not have helped his defense. Regarding Retasket's testimony verifying Yazzie's version of the events of July 20th, Yazzie had two other witnesses, Deswood Tome and Evelyn Tazbah McCullah, testify to this information. Because Retasket would not have supplied any new information, Retasket's testimony at most would have been cumulative. We therefore reject Yazzie's claim of prejudice as well.

8. MacDonald's Alleged "No March" Speech

MacDonald argues that the District Court erred in limiting the introduction of evidence regarding co-conspirators' responses [*24] to MacDonald's alleged "no march" speech. MacDonald contends that evidence of his supporters' responses to the speech was relevant to show his withdrawal from the conspiracy, a defense MacDonald offered at trial. We review district court decisions to admit evidence under an exception to the hearsay rule for an abuse of discretion. United States v. Bland, 961 F.2d 123, 126 (9th Cir.), cert. denied, U.S. , 113 S. Ct. 170 (1992).

MacDonald sought to introduce evidence that he allegedly made a speech on July 20th, just before going to the Administration and Finance Building, in

which he instructed his supporters not to march that day. The evidence that he sought to introduce included reactions and statements by his supporters to the speech, including evidence of MacDonald's express concern for their welfare.

In response to the Government's objections to this testimony as inadmissible hearsay, the District Court decided to admit the evidence under Fed. R. Evid. 803(3), the state of mind exception. The District Court limited the scope of this evidence, however, "to those alleged statements Mr. MacDonald allegedly [*25] made evidencing his state of mind and not evidence of what others interpreted them to be, or what others did or did not do as a result of them." The District Court then stated that it would give the following instruction to the jury: n7

You may consider this or these statements allegedly attributed to Mr. MacDonald only as they relate to his state of mind at the time they were made, that is his intention, plan or motive with respect to any of the charges against him. You may not consider them as proof of the facts allegedly asserted in the statements or for any other purpose.

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n7 MacDonald contends that he objected at trial to the limiting instruction on the grounds that it precluded use of the "no march" speech as a means of establishing a withdrawal defense to the conspiracy charge. This contention is not supported by the record. MacDonald's counsel stated at trial that he was "concerned" that the instruction might not include a renunciation defense. The District Court did not find the instruction to preclude the defense, but invited alternate language. Counsel for MacDonald responded:

I don't have a conceptual problem with what the court has done by the instruction. [My concern] is that we could use that [evidence] not only to show his state of mind, but to show whether he did not act . . . consistent with that statement, meaning that he decided not to go as well.

Thus, contrary to his current assertions, MacDonald did not object to the limiting instruction at trial on the same ground which he now raises on appeal.

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We have established three requirements for the admission of hearsay statements under Fed. R. Evid. 803(3): (1) the statement must be contemporaneous with the later event sought to be proven; (2) there must be evidence that the declarant had no chance to reflect before making the statement; and (3) the statement must be relevant. United States v. Miller, 874 F.2d 1255, 1264 (9th Cir. 1989). The District Court found that the statements attributed to MacDonald were sufficiently relevant, contemporaneous, and lacked opportunity for fabrication. The District Court stated, however, that "the jury can on the face of the evidence at least presently in the record conclude otherwise based upon a plethora of other evidence with respect to what the defendant's intentions were when he made the statements allegedly attributed to him."

MacDonald argues that the District Court erred in limiting the admissibility of his supporters' reactions to the speech because evidence of their reactions

was relevant to the reasonableness of MacDonald's efforts to withdraw from the conspiracy. This argument misses the point. Although the fact that MacDonald made such a speech [*27] would be relevant, what others did in reaction to the speech would not be relevant. In considering a withdrawal defense, the jury must determine the reasonableness of the defendant's efforts to communicate his withdrawal to his co-conspirators; their response is of no consequence. n8 Thus, under Fed. R. Evid. 803(3), the District Court correctly determined that the reaction of MacDonald's supporters was not relevant and thus was inadmissible.

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n8 The District Court instructed the jury as to MacDonald's withdrawal defense as follows.

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal. The government has the burden of proving that the defendant did not withdraw.

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9. Alleged Government Vouching for Witnesses

MacDonald also argues that the Government impermissibly vouched for several of its witnesses during trial. We review only for plain error when defense counsel fails to object to prosecutorial vouching at trial. United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991). We review for harmless error, however, when the issue has been preserved for appeal. United States v. Browne, 829 F.2d 760, 762 (9th Cir. 1987), cert. denied, 485 U.S. 991, 99 L. Ed. 2d 508, 108 S. Ct. 1298 (1988). No Appellant raised the objection that the Government's questions at trial constituted vouching for witnesses Oliver Arviso, Lucretia Lee, or Lucy Gorman. n9

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n9 Benally raised a vouching objection in his motion for mistrial after Darryl Bedonie testified. Scott raised a vouching objection regarding Paula Martin during her direct examination which the District Court sustained, and ordered that the answer be stricken and the jury disregard it. On Paula Martin's redirect, Benally raised a vouching objection regarding Martin's plea agreement after Martin's credibility had been challenged on cross-examination.

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[*29]

MacDonald claims that the Government vouched for (1) witness Darryl Bedonie, by asking on redirect whether the Government had asked Bedonie to lie on the stand; (2) witnesses Oliver Arviso, Lucretia Lee, Lucy Gorman, and Paula Martin, by asking them about the cooperation provisions of their plea agreements; and (3) witness Assistant United States Attorney Roger Dokken, because calling him as a witness vouched for the Government's theory of the case.

Vouching can occur in two ways. First, the prosecutor can place the prestige of the Government behind the witness. This type involves the Government's personal assurance of the witness's veracity. Second, the Government can indicate that information not presented to the jury supports the witness's testimony. This type involves bolstering the witness's credibility by reference to matters outside the record. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

Regarding Darryl Bedonie, we find that no vouching occurred. On cross-examination, Appellant Wauneka and defendant Bahe implied that Bedonie had been coached by the Government. In response, on redirect, the Government questioned Bedonie in detail [*30] about each conversation he had had with either the prosecutor or government investigator. We have found no vouching present where the prosecutor is merely responding to defense suggestions that the government improperly influenced a witness. See United States v. Milner, 962 F.2d 908, 913 (9th Cir.), cert. denied, U.S. ; 113 S. Ct. 614 (1992).

Regarding witnesses Lucretia Lee and Lucy Gorman, we also find no improper vouching by the Government. On direct examination, the Government asked both witnesses whether their plea agreements contained a "cooperation part." Each stated that the agreement required her to testify in court about the events she had witnessed. We have stated previously that eliciting testimony on direct examination regarding the truthfulness provision of a plea agreement by asking if the agreement included the provision that the witness testify truthfully and cooperate is not vouching. United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993). The question does not imply a guarantee of truthfulness, refer to extra-record facts, or reflect a personal opinion. [*31] Id. Thus, the Government's questioning of these witnesses regarding their plea agreements was also permissible.

Regarding witness Oliver Arviso, on direct examination the Government questioned him about the terms of his plea agreement. The Government also, however, asked Arviso whether he had testified truthfully. As stated above, the Government may elicit testimony on direct examination concerning the truthfulness provision of a plea agreement. United States v. Necoechea, 986 F.2d at 1278. This does not mean, however, that the Government may ask also about truthfulness absent a challenge to the witness's credibility. It is regarding this question to Arviso by the Government that MacDonald argues that the Government's impermissible vouching for Arviso caused harmful error.

In United States v. Monroe, 943 F.2d 1007 (9th Cir. 1991), we rejected the notion that there is a "bright line" rule which controls when prosecutorial vouching harmfully affects a trial. Id. at 1013-14. Further, in Necoechea, we enumerated various factors which we balance to determine when prosecutorial vouching [*32] requires reversal. 986 F.2d at 1278. Those factors include: (1) the form of the vouching; (2) to what degree it implies extra-record knowledge of, or the capacity of the prosecutor to monitor, the witness's truthfulness; (3) any inference that the court is monitoring the witness's veracity; (4) the degree of personal opinion asserted; (5) when the vouching occurred; (6) the extent to which the witness's credibility is attacked; (7) the specificity and timing of the vouching; and (8) the importance of the witness's testimony and the vouching to the overall case. Id.

Although the Government in the present case improperly questioned Arviso on direct examination before Arviso's credibility had been attacked, we find this

error to be harmless. MacDonald has given no facts nor suggested how Arviso's improperly elicited testimony was particularly important or harmful to Appellants' case. Moreover, defense counsel eventually did challenge Arviso's credibility; thus, the Government would have been permitted to elicit the testimony that it prematurely elicited on direct concerning Arviso's truthfulness.

Next, we address MacDonald's claim that the Government improperly [*33] vouched for witness Paula Martin, who testified that she attended the July 20th Keeto camp meeting, witnessed Benally instruct how to make a "citizen's arrest" on Lt. Hawkins, and that the purpose of the take-over was to get blank checks and the signature stamp from the Administration and Finance Building. Martin also admitted that she had entered the building. On direct, the Government asked Martin, "What are the terms of your plea agreement?" Martin answered, "That I testify truthfully in all court matters." Appellant Scott immediately objected to improper vouching; the District Court ordered her answer stricken and instructed the jury to disregard it. Thereafter, Martin testified, without objection, that her plea agreement contained a cooperation clause which required her to testify, if asked to do so. Martin also stated that, pursuant to her plea agreement, the Government dismissed the conspiracy charge against her and that she was required to pay restitution.

We find no improper vouching in this situation. The District Court cured any potential error committed during Martin's direct examination by striking Martin's inappropriate answer and instructing the jury to disregard it. [*34] Further, on cross-examination, Appellant Benally attacked Martin's credibility for truthfulness several times. n10 As noted above, the Government may admit the terms of the plea agreement and statements regarding truthful testimony when the witness's credibility has been attacked. United States v. Monroe, 943 F.2d at 1014.

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n10 Following cross-examination, Benally objected to the admission of Martin's plea agreement based on vouching. The District Court overruled the objection:

Now, with respect to the vouching issue, which I think is the key issue here, it was clearly covered in cross-examination. Indeed, I wrote down on at least three occasions, it happened considerably more, you asked, "That wasn't the truth, was it? That was only half the truth, wasn't it?" And there's some other quotes. Clearly her credibility, truthfulness was attacked.

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Finally, regarding the testimony of Assistant United States Attorney Roger Dokken, we find no improper Government vouching. The Government [*35] called Dokken to testify that, contrary to what Nakai, Sorrell, and Benally told the crowd before the demonstration, the U.S. Attorney's Office did not send a letter in July 1989 clearing MacDonald of all charges. MacDonald appears to claim that it was improper for the Government to have Dokken testify solely because of his occupation.

The fact that Dokken testified as a witness is not improper. United States v. West, 680 F.2d 652, 654 (9th Cir. 1982) (citing United States v.

Armedo-Sarmiento, 545 F.2d 785, 793 (2d Cir. 1976)) (although not encouraged, AUSA not disqualified as witness in cases where he is not otherwise involved), cert. denied, 430 U.S. 917 (1977). Further, the scope of Dokken's testimony was limited to the subject of the fake letter. At no time did Dokken testify about his belief in the truth of the Government's position or in any other way vouch for the Government's theory of the case. We therefore see no error in the District Court's admission of Dokken's testimony.

10. Government's Closing Argument

Appellants MacDonald and Wauneka contend that certain comments made [*36] in closing argument by the Government were improper. We allow attorneys reasonably wide latitude in their closing argument comments. United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984). Further, "courts must allow the prosecution to strike 'hard blows' based on the evidence presented and all reasonable inferences therefrom." United States v. Baker, 10 F.3d 1374, 1415 (9th Cir. 1993) (citations omitted).

First, MacDonald claims that the Government's comment regarding Exhibit 61, a photograph depicting Officer Kent Greymountain sitting with Sgt. Daniel Lee after he was shot, was impermissible because the comment was intended to "inflame the passions of the jury." Because no objection was made to this comment during trial, we review for plain error. United States v. Endicott, 803 F.2d 506, 513 (9th Cir. 1986).

Our focus is whether the comment, considered in the context of the entire trial, affected the jury's ability to judge the evidence fairly. United States v. McKoy, 771 F.2d 1207, 1212 (9th Cir. 1985). In closing argument, the defense characterized the [*37] various defendants as the "victims" in this case. In closing argument rebuttal, the Government stated, "The victims are people like Daniel Lee, who gets shot in the leg and his leg is distorted. Look at picture 61 when you get back there."

We find nothing inflammatory in this single remark by the Government about a properly admitted piece of evidence. Moreover, the District Court properly instructed the jury that closing argument by the parties was not evidence. We therefore reject MacDonald's claim as meritless.

Second, Appellant Wauneka contends that the District Court erred in denying Wauneka's motions for mistrial because of the Government's alleged criticism of Benally's defense counsel.

A prosecutor may not imply or assert that a defense counsel's conduct or actions are improper. United States v. Sanchez-Robles, 927 F.2d 1070, 1077 (9th Cir. 1991). We consider the effect of such remarks in relation to what would constitute a fair response to opposing counsel's remarks. United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir.), cert. denied, U.S. ; 113 S. Ct. 504 (1992). [*38]

During closing argument, the Government indicated that Benally's defense counsel used selective questioning of a witness, and that defense counsel's closing argument ignored the facts of the case, the evidence of Benally's involvement, and the legal elements of the crimes charged in an effort to distract the jury's attention from the issues at trial. In response to Wauneka's objection and motion for mistrial based on these comments, the District Court

indicated that, although it did not recall the Government specifically referring improperly to Benally's counsel, any such reference was harmless error.

We agree. As noted above, the District Court made clear to the jury that closing argument remarks are not evidence. As we recently stated in United States v. Baker, "Improprieties in counsel's closing arguments to the jury do not constitute reversible error unless they prejudice the defendant and that prejudice has not been remedied by the trial court." 10 F.3d at 1416 (citation omitted).

Next, Wauneka asserts that the District Court erred in denying Wauneka's motions for mistrial because of the Government's alleged improper comments on Wauneka's exercise [*39] of her constitutional right to remain silent. We reject this assertion as well.

Throughout Appellants' closing arguments, defense counsel challenged the accuracy, thoroughness, and credibility of the Government's investigation, and suggested that this case involved Government cover-up and political persecution. In response during rebuttal closing argument, the Government stated:

Let me clear up some of [defense counsel] Mr. Griffen's misrepresentations. You've heard testimony in this three-plus month trial that there were 4,000 pages of documents submitted to the United States Attorney's Office for this case. Hundreds and hundreds of interviews were conducted. Hundreds more were attempted by criminal investigators only to have the door shut in their face.

On appeal, Wauneka claims that the last sentence concerning having "the door shut in their face" amounts to an improper reference by the Government to Wauneka's decision not to testify at trial. For the reasons enunciated by the District Court, we disagree. The Government made no mention of any particular defendant, or any defendant's conduct at trial. Thus, the remark was not a comment on any Appellant's right to remain silent. [*40] Moreover, as the Government points out, seven of the Appellants spoke with investigators, including Wauneka, whose statements from this interview were offered at trial.

Finally, MacDonald argues that the cumulative effect of the alleged prosecutorial misconduct as outlined above requires reversal. Based on the facts in the record before us, we have found no error caused by prosecutorial misconduct. We therefore reject this contention as well.

11. Jury Instructions

Appellants Begay, Lee, Kinlicheenie, Scott, Sorrell, and Wauneka contend that the District Court erroneously instructed the jury on aiding and abetting, conspiracy liability, and burden of proof. A district court's formulation of jury instructions is reviewed for an abuse of discretion. United States v. Johnson, 956 F.2d 197, 199 (9th Cir. 1992). We review a supplemental jury instruction given in response to a jury's question under the same standard. United States v. Castillo, 866 F.2d 1071, 1085 (9th Cir. 1989) (citation omitted). "Our inquiry is whether the jury instructions as a whole are misleading or inadequate to guide the jury's deliberation." United States v. Joetzki, 952 F.2d 1090, 1095 (9th Cir. 1991). [*41] The trial judge has substantial latitude to tailor jury instructions so long as they fairly and adequately cover the issues presented. United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992).

Appellants Lee and Begay claim that the District Court erroneously modified the Ninth Circuit Model Criminal Jury Instruction 5.01 and violated Fed. R. Crim. P. 30 when it gave a supplemental jury instruction on aiding and abetting which indicated that the Government did not need to prove the identity of the principal offender to convict the accused as an aider and abettor.

The first instruction on aiding and abetting given by the District Court stated in pertinent part: "The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted." n11 One week into its deliberation the jury sent the following note: "In reference to aiding and abetting: are we to consider aiding and abetting of a crime committed by someone other than one of the defendants?" After discussion with defense counsel, n12 the District Court gave a supplemental instruction which stated in pertinent part:

The answer to your [*42] question is "yes." It is not necessary that the identity of the principal, as distinguished from the person aiding and abetting, be established . . . . To the extent that there may appear to be an inconsistency in these instructions, the instruction on page 27, lines 9 through 11, is amended as follows. The government is not required to prove precisely which person actually committed the crime and which defendant aided and abetted.

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n11 This portion of the instruction given by the District Court directly quotes the last paragraph of Ninth Circuit Model Criminal Jury Instruction 5.01 on aiding and abetting.

n12 The District Court offered each defendant the opportunity to propose additional or different language to eliminate any confusion between the original and supplemental instructions. None of the defendants made any such proposals, and Begay's counsel expressly took no position.

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It is settled law in this Circuit that the principal need not be identified, charged, or convicted, for a person to be convicted [*43] for aiding and abetting. United States v. Powell, 806 F.2d 1421, 1423-24 (9th Cir. 1986); United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1982). "All that the prosecution need prove is that the offense has been committed." Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir.), cert. denied., 400 U.S. 920, 27 L. Ed. 2d 159, 91 S. Ct. 174 (1970).

Lee and Begay contend that the District Court erred in clarifying for the jury the Ninth Circuit's position on this issue by substituting the word "person" for "defendant." We find this argument to be meritless. The Ninth Circuit's model instruction on this issue likely refers to "defendant" because in most cases where a person is charged as an aider and abettor the principal is also charged in the same indictment. This wording does not, however, affect the law in this Circuit as it stands. Nor does it conflict with the Comment to the Ninth Circuit's model instruction 5.01 for aiding and abetting, which reiterates the instruction given by the District Court:

The Supreme Court [*44] has recently reaffirmed the well-established principle that a person may be convicted for aiding and abetting despite the prior acquittal of the principal. Standefer v. United States, 447 U.S. 10, 20, 64 L. Ed. 2d 689, 100 S. Ct. 1999 (1980). Moreover, the principal need not be named or identified; it is necessary only that the offense was committed by somebody and that the defendant intentionally did an act to help in its commission. (Emphasis added; citations omitted.)

We reject Lee's argument under Fed. R. Crim. P. 30 as well. Lee contends' that, had he known the District Court would substitute the word "person" for "defendant" in the jury instruction, Lee would have made different remarks in closing argument. Fed. R. Crim. P. 30 states in pertinent part:

At the close of the evidence or at such earlier time as during the trial as the court reasonably directs, any party may file written requests [for jury instructions] . . . . The court shall inform counsel of its proposed action . . . prior to their arguments to the jury.

We note first that Rule 30 does not apply to supplemental instructions given in response [*45] to jury questions unless such an instruction "introduces a new theory to the case." United States v. Fontenot, 14 F.3d 1364, 1368 (9th Cir. 1994) (citations omitted). In light of the fact that the supplemental instruction only clarified the status of the law on this issue, n13 we cannot see how the supplemental instruction affected Lee's theory of the case. Further, following the District Court's giving of the supplemental instruction, Lee did not request leave to reopen argument.

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n13 Neither Lee nor Begay disputes that the instruction properly reflected current law in our Circuit.

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In sum, the District Court gave a clear and concise statement of law on the question posed by the jury. We therefore find no error in the District Court's supplemental jury instruction on aiding and abetting.

Next, Appellant Wauneka contends that the District Court erroneously denied Appellant Kinlicheenie's request to include a definition of "willfully" in the jury instruction on conspiracy. n14 The District [*46] Court declined to give the additional instruction because the conspiracy statute under which Appellants were charged, 18 U.S.C. @ 371, does not include willfulness as an element. Thus, the District Court determined that the standard Ninth Circuit model instruction on conspiracy adequately addressed the requisite mental state.

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n14 Wauneka asserts that we should review this issue de novo because we review jury instructions that interpret the elements of a statute de novo. This principle applies only when the statute itself provides the element. See United States v. Spillone, 879 F.2d 514, 527 (9th Cir. 1989), cert. denied, 498 U.S. 878, 112 L. Ed. 2d 170, 111 S. Ct. 210 (1990). The conspiracy statute under which Appellants were convicted, 18 U.S.C. @ 371, does not require proof of willfulness as an element. Therefore, we review the District Court's

formulation of the conspiracy jury instruction only for an abuse of discretion, as noted above.

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[*47]

We agree. The Comment to section 5.05, the Ninth Circuit Model Criminal Jury Instructions, states that "no instruction defining 'willfully' [should] be given unless the word is in the statute defining the offense being tried." Adopting this suggestion, the District Court declined to define "willfully" as a separate term.

The District Court did, however, adequately define the required mental state for commission of the charged conspiracy. In its instruction to the jury, the District Court stated that to convict a defendant of conspiracy the jury must find beyond a reasonable doubt that the defendant "willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy . . . ." Further, the District Court stated that the jury "could not convict unless the evidence proved beyond a reasonable doubt that the defendant intended to further the commission of one or more crimes as alleged in the indictment."

We find no error in the District Court's instruction, which adequately explained the required mental state necessary to commit conspiracy. Wauneka looks for support to cases where we reversed because the trial court erred in not giving [*48] a specific intent instruction where one was required. See, e.g., United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976). We find this authority to be inapposite. There is no requirement that a specific intent instruction be given where the defendant is charged with participating in a general conspiracy that lists as its objectives crimes such as robbery, burglary, and kidnapping. We therefore reject Wauneka's contention.

Next, Appellant Sorrell contends that the District Court erred in refusing to give a special interrogatory to the jury regarding whether kidnapping was one of the objects of the conspiracy unanimously agreed to by the jury regarding Sorrell. Sorrell thus contends that the jury instructions and verdict forms for the conspiracy count given by the District Court to the jury inaccurately set forth the law and denied her a unanimous verdict.

Specifically, Sorrell states that the District Court "instructed [the jury] upon both single and multiple conspiracies." Sorrell's statement is incorrect and reflects a misunderstanding of the difference between a single conspiracy with multiple objects versus multiple conspiracies.

The District [*49] Court stated in its instruction to the jury that to convict a defendant of conspiracy the jury "must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy, with all of you agreeing unanimously as to the crime or crimes agreed upon." The single-page verdict form listed each defendant charged in the conspiracy, and supplied next to each defendant's name a space to indicate guilty or not guilty. n15 Further, the bottom of the form indicated: "If guilty, check the object crime or crimes of the conspiracy which all of you agree unanimously apply." This included space for the jury to indicate any or all of the three alleged object crimes, plus the lesser-included offense of simple assault.

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n15 The verdict form also included the option of not guilty by reason of insanity for Appellant Kinlicheenie.

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Our review of the above facts leads us to the conclusion that the verdict form and District Court's instructions on the charged conspiracy and object offenses [*50] made clear all of the possible findings that the jury could make and that a unanimous verdict was required for a finding of guilt as to each separate defendant.

Finally, regarding the District Court's instruction to the jury on the charged conspiracy, Appellant Scott argues that the District Court erred in giving a "Pinkerton" instruction on accomplice liability because the District Court lacked subject matter jurisdiction over the conspiracy charge. We reject this suggestion for two reasons. First, although Scott was indicted for conspiracy, he was not convicted of conspiracy. Thus, we fail to see how he was prejudiced by the instruction. Moreover, as we noted above, the District Court had subject matter jurisdiction over the conspiracy charge. We therefore reject Scott's argument as meritless.

The last argument concerning erroneous jury instructions is raised by Kinlicheenie. He contends that the District Court's jury instructions on reasonable doubt and Kinlicheenie's insanity defense erroneously confused the two burdens of proof. Consequently, Kinlicheenie asserts that the jury likely evaluated his insanity defense under a higher standard than that required by law.

The District [*51] Court proposed to give the standard instructions on reasonable doubt and insanity. Kinlicheenie objected to the reasonable doubt instruction on the ground that it would unduly confuse the jury when taken together with the insanity instruction. Specifically, Kinlicheenie contended that the phrase "firmly convinced" in the reasonable doubt instruction was so similar to the phrase "clear and convincing" in the insanity instruction that the jury would be unable to distinguish between the two standards. To remedy this, Kinlicheenie requested that an additional instruction be given describing reasonable doubt as "the kind of doubt that would make a reasonable person hesitate to act." The District Court denied Kinlicheenie's request, and gave the standard instructions on both issues. Regarding the reasonable doubt standard, the District Court stated:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty . . . . If, after a careful and impartial consideration with your fellow jurors of all the evidence, you are convinced beyond a reasonable doubt that a defendant is guilty of a count, it is your duty to find that defendant guilty of that [*52] count.

Regarding Kinlicheenie's insanity defense, the District Court stated:

The defendant must prove insanity at the time by clear and convincing evidence. That is, that it is highly probable that the defendant was insane. Clear and convincing means something less than proof beyond a reasonable doubt.

First, we note that the jury is presumed to have followed the instruction given by the trial court. United States v. Castro, 887 F.2d 988, 998 (9th Cir. 1989). Moreover, we find no reason why the jury would have confused the two standard instructions. Although there is some commonality of language in the words "convinced" and "convincing," we do not find any confusion when considered in the context of each individual instruction.

Moreover, the cases cited by Kinlicheenie are inapposite. See De Groot v. United States, 78 F.2d 244, 253 (9th Cir. 1935); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966). Neither presents a situation where a trial court was reversed for giving two correct standard instructions which happen to have some common words. We therefore find no error in the [*53] District Court's jury instructions for reasonable doubt and the insanity defense.

12. Jury Note

Appellant Wauneka contends that her rights to due process and effective assistance of counsel were violated when the District Court erroneously sealed the contents of a jury communication to the court. We review a district court's responses to jury communications for an abuse of discretion. United States v. Warren, 984 F.2d 325, 329 (9th Cir. 1993).

On November 4, 1992, during jury deliberations, the District Court received a note from the jury. n16 The judge's law clerk opened the note, started to read it, but stopped when it appeared that the jury might have violated the jury instruction on jury communications, which directed the jury not to reveal to anyone, including the judge, the position taken by the jurors on an issue in the case during trial. n17 The law clerk immediately informed the judge of the situation, who in turn telephoned the parties in a conference call to inform them about the note. The judge indicated to counsel that he had not read the note, nor had his law clerk completely read the note. Further, he told counsel that he told his [*54] law clerk to tell the jury "to be sure that any note they gave [the judge] does not violate the terms of the [jury instruction]."

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n16 The first note stated:

We are confused.

1. Whenever we cannot agree on the charge of Assault with a Dangerous Weapon - (in other words, some of us have decided that there is no Assault with a Dangerous Weapon/and some of us cannot agree) -- then, are we required to consider the Simple Assault Charge?

Can we refuse to consider the Simple Assault because one of us may have the conviction that an Assault with a Dangerous weapon did occur?

2. Does the defendant have to know what crime he is aiding or abetting, in order to be found Guilty?

In other words -- can a defendant be found guilty for helping a crime to occur, but not knowing what crime he is helping? (Could you clarify Paragraph 3 on page 9?)

3. Could you define intent?

n17 The District Court's instruction stated:

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing or orally here in open court. Remember that you are not to tell anyone--including me--how the jury stands, numerically or otherwise, on the question of the guilt of any defendant on any count until after you have reached a unanimous verdict or have been discharged.

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[*55]

Later that same day, the jury sent a second note to the judge. n18 The judge disclosed the contents of this note, which contained no improper communications, to the parties. The District Court responded to the jury regarding the inquiries in both notes as follows:

I believe that the instructions which I have given answer the questions which you have asked. If, after further consideration, you believe that either of these questions remain unanswered, please send a more explicit note indicating precisely what your concern is.

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n18 The second note stated:

Reference page 26, paragraph beginning "second, the defendant knowingly and . . . "

1. Does a defendant have to know what particular crime he or she is aiding and abetting?
2. Could you define intent?

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In discussing the two jury notes with counsel, the judge stated that he was inclined to keep the contents of the first note sealed "unless counsel believe that somehow we should . . . open the note and read it and then proceed with the questions [*56] on the [second] note that I have given to all of you. First, I'd like counsel's position concerning the first unopened note . . . ." Counsel for both sides were given an opportunity to speak; all agreed with the court that the first note should remain sealed.

Later, but before the jury returned its verdicts, Wauneka moved to unseal the first note. The District Court declined Wauneka's request at the time it was made, but later revealed the note's contents to all parties after the jury had rendered its verdicts.

On appeal, Wauneka contends that the District Court erred in keeping the note sealed on the grounds that it denied her a fair trial and effective assistance of counsel. Specifically, Wauneka claims that the District Court erred in allowing the law clerk's opinion regarding the first note to guide the court's decision. Further, Wauneka contends that the District Court erroneously sealed the note based on the law clerk's suggestion because the sealed note did not in fact violate the jury instruction on jury communications. Thus, according to Wauneka, the jury was denied important guidance by the court and counsel on its inquiries contained in the first note.

We find no error [*57] in the District Court's actions regarding the sealed note for several reasons. First, the District Court did not leave the important decision of whether or not to seal the note to a law clerk. Rather, the District Court made a decision which was well within its discretion as to how to handle the potentially problematic communication. Second, although the District Court sealed the first note, it still responded to the jury's inquiry to give the jury the necessary guidance for its deliberations. Moreover, the District Court revealed to defense counsel all that the court knew regarding the communication, and gave counsel the opportunity to address whether the note's contents should be revealed on the day the note was delivered by the jury. Thus, defense counsel had ample opportunity to consider whether the note's contents should be revealed because they might contain an important communication.

In addition, we reject Wauneka's latter contention because we find that the jury's communication did violate the jury instruction on jury communication. Based on the law clerk's partial reading of the note, the District Court acted properly and promptly to protect the sanctity of the jury's role [*58] by sealing the note.

More importantly, however, Wauneka fails to indicate how she was prejudiced by the District Court's action, or what her counsel might have done to aid her defense had the contents of the note been revealed. And, Wauneka fails to bring to our attention any relevant case law to support either of her arguments on this issue.

We therefore reject Wauneka's contentions concerning the District Court's failure to unseal the jury note as meritless.

13. Sufficiency of the Evidence to Support Conviction

Appellants Begay, Benally, MacDonald, McKensley, Sorrell, and Yazzie challenge the sufficiency of the evidence supporting their convictions on various counts. There is sufficient evidence to support a conviction if, "'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Bishop, 959 F.2d 820, 829 (9th Cir. 1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). Further, circumstantial evidence and [*59] inferences drawn from it may be sufficient to sustain a conviction. United States v. Reyes-Alvarado, 963 F.2d 1184, 1187 (9th Cir.), cert. denied, U.S. , 113 S. Ct. 258 (1992).

We first address the contentions of Appellants Benally, McKensley, and Begay that the Government failed to produce sufficient evidence to sustain their convictions for aiding and abetting the robbery of Lt. Daniel Hawkins of his

mace or gun. To convict a defendant of aiding and abetting, a jury must find beyond a reasonable doubt that the defendant "willingly associated himself with a criminal venture and participated therein as something he wished to bring about." United States v. Cloud, 872 F.2d 846, 850 (9th Cir.), cert. denied, 493 U.S. 1002, 107 L. Ed. 2d 556, 110 S. Ct. 561 (1989) (citation omitted). The prosecution need only prove that the accused aider and abettor intended to assist the perpetrator of the crime, and the defendant's criminal intent for aiding and abetting may be inferred from circumstantial evidence. United States v. Castro, 887 F.2d 988, 995-95 (9th Cir. 1989). [*60]

Benally argues specifically that he lacked the requisite knowledge for aiding and abetting because he lacked knowledge of the identity of the persons who actually stole the gun and mace and knowledge of the exact time the offense was committed. We reject these contentions.

Regarding Benally's first contention, as stated above in the section discussing the jury instruction on this charge, it is well established in this Circuit that the government need not prove the identity of the principal to maintain a conviction against an aider and abettor. The Government was required to prove only that Benally intended to assist the perpetrator of the crime. Regarding Benally's second contention, we do not find that the cases cited by Benally require that he knew the exact time when the robbery occurred. Benally need only have had the requisite intent for the substantive crime and have assisted or participated in the crime. United States v. Gaskins, 849 F.2d 454 (9th Cir. 1988).

Moreover, our review of the record reveals ample evidence on which the jury could have relied to determine that Benally had the requisite intent and knowledge for aiding and abetting. Benally [*61] actively encouraged the "citizen's arrest" of Lt. Hawkins by passing out clubs to the demonstrators before the incident and demonstrating to the crowd how the clubs should be used to effectuate the "citizen's arrest." Certainly we find it foreseeable that Lt. Hawkins would have been armed, and that the "citizen's arrest" would require the taking of his gun and mace. We therefore find no merit to Benally's contention of insufficient evidence on the aiding and abetting charge.

Appellants McKensley and Begay assert that there was insufficient evidence to support the aiding and abetting charges against both of them because the Government failed to prove that they knew Lt. Hawkins' gun was to be taken or that they encouraged or intended to assist other demonstrators in the robbery. At most, McKensley and Begay argue, the Government proved only their "mere presence" in the vicinity of the robbery. We reject these contentions as well.

Ample evidence was presented at trial indicating that McKensley was an organizer of the July 20th demonstration and was well aware of the plan to make the "citizen's arrest" of Lt. Hawkins. In addition, McKensley was among those identified as being in the crowd [*62] that chased Lt. Hawkins back into his police car, battered his car with clubs, and prevented him from driving away by poking him with clubs and grabbing at his arms and legs through the broken windows. Further, McKensley was identified as assisting Kinlicheenie in dragging Hawkins from the car, holding Hawkins down as others tied him up, and thereafter grabbing Hawkins' legs and dragging him across the concrete.

Likewise, there was sufficient evidence to support Begay's conviction of aiding and abetting in the robbery of Lt. Hawkins. The Government presented

evidence from which the jury could reasonably conclude that Begay was a member of the "security force" which participated in the arrest of Lt. Hawkins. And Begay even admitted to private investigator Mehl Tafoya that he had been one of the first to arrive at the Administration and Finance Building and that he had participated in the assault on Hawkins, stating: "The people I was with rushed and grabbed and tied up Hawkins," and "we attacked this one [Hawkins]." Further, Exhibit 105, which depicted the riot, shows Begay leaning into Hawkins' police car while others grabbed and clubbed Hawkins. And, as noted previously, Begay is [*63] the only person in the video seen with a rope similar to that used to tie up Hawkins.

In sum, we find that the jury reasonably could have concluded that Benally, McKensley, and Begay were guilty of aiding and abetting the robbery of Lt. Hawkins.

Next, Appellant Sorrell challenges the sufficiency of the evidence supporting her conviction for conspiracy. "Once the existence of a conspiracy is shown, evidence establishing beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight, is sufficient to convict him of participation in the conspiracy." United States v. Hernandez, 952 F.2d 1110, 1113 (9th Cir. 1991), cert. denied, U.S. ; 113 S. Ct. 334 (1992).

Our review of the evidence presented against Sorrell at trial indicates that the jury could have reasonably found Sorrell guilty of participating in the conspiracy. The evidence demonstrated that Sorrell: knew about the plan to take over the Navajo Tribal government; participated in sit-ins at the Administration and Finance Building; gave a speech at the Keeto camp on July 20th urging the crowd to [*64] take back the government; recorded the names of the July 20th "security force" in her notebook; indicated to the crowd at Keeto camp that Kinlicheenie was leader of the security force; called a locksmith just before leaving for the demonstration in anticipation of changing the locks after the take-over; helped to incite others by chanting pro-MacDonald slogans while they broke into the Administration and Finance Building; entered the building during the demonstration; and was among those who attacked Officer Calvin Begay. Moreover, Sorrell admitted to private investigator Mehl Tafoya that she knew of the plan to make the citizen's arrest on Hawkins.

Sorrell attempts to discredit as "incredible or unsubstantial" the testimony of witness Lucy Yellowhair Gorman, who testified to Sorrell's participation in the events of July 20th. Sorrell, however, fails to present any specific reason why Gorman's testimony was faulty. Further, even if Gorman's testimony was somehow untrustworthy, there was adequate testimony presented in the videotape and through other witnesses such as Mehl Tafoya from which the jury could have reasonably found Sorrell's participation in the conspiracy.

Sorrell also [*65] argues that there was insufficient evidence to support her conviction of burglary in the third degree for burglarizing the Administration and Finance Building. The Government need only show that Sorrell entered a "non-residential structure with the intent to commit theft." Ariz. Rev. Stat. @ 13-1506. Intent may be shown by circumstantial evidence, and evidence of an unauthorized and forcible entry may establish the requisite intent. State v. Calvery, 117 Ariz. 154, 571 P.2d 300, 303 (1977).

The record establishes that the Government presented sufficient evidence of Sorrell's intent to enter, and actual entry into, the building. In addition to the eyewitness testimony offered to show her presence in the building, evidence was offered that Sorrell was seen in the check-processing room, and that she instructed other demonstrators which papers to get from certain offices within the building. Thus, we reject this argument as well.

Appellant Yazzie also argues that the Government failed to prove his participation in the burglary. Specifically, although Yazzie concedes that he entered the Administration and Finance Building during the event on [*66] July 20th, he claims that he lacked the requisite intent to commit a theft or other felony inside the building. We disagree.

The record provides ample direct and circumstantial evidence of Yazzie's intent. Outside the building, Yazzie watched as one woman used a rock to break the glass in the door and another cleared away the shards of glass with a club. Yazzie then entered, and headed for the personnel office, where he remained for approximately thirty minutes. He made telephone calls and rifled desk drawers, pulling out papers. Further, before entering the building, Yazzie was among the crowd who attacked Sgt. Daniel Lee and Officer Calvin Begay as they attempted to rescue Lt. Hawkins. Shortly after Sgt. Lee was shot, Yazzie was heard to say, "Let's continue on with our cause. We're going to take our government back."

In his defense, Yazzie presented evidence of his lack of intent through the testimony of Deswood Tome, an unindicted participant in the demonstration, who testified that Yazzie's only purpose in entering the Administration and Finance Building was to telephone the local media about the incident. The jury, however, determined that the evidence presented by the Government [*67] outweighed Yazzie's defense evidence. And our own review indicates that there was ample support for the jury's decision.

We therefore reject Appellants' contentions that there was insufficient evidence to support Sorrell's and Yazzie's jury verdicts for burglary.

Next, Yazzie contends that the Government presented insufficient evidence to support his conviction for simple assault. To support a conviction against Yazzie for simple assault under 18 U.S.C. @@ 1153, 2 and 113(e), the Government must have shown that Yazzie: (1) willfully attempted to inflict or threatened to inflict injury upon a person; (2) had the present ability to do so; and (3) caused the person to be in reasonable apprehension of immediate bodily harm, or aided and abetted the same.

We reject Yazzie's contention as meritless. Yazzie concedes that he, while swinging a club, was in a group that chased Sgt. Lee. Yazzie was also among the demonstrators who surrounded Lt. Hawkins' police car. As Sgt. Lee attempted to rescue Lt. Hawkins, Sgt. Lee was attacked by the group that included Yazzie. Sgt. Lee testified that he was "afraid for [his] life" while being attacked by the group. [*68]

Although Yazzie attempts to downplay his participation by reminding this court that he did not actually hit Sgt. Lee, and that others in the crowd were closer to Sgt. Lee than he, these facts do not negate his guilt of simple assault. We believe there was sufficient evidence for the jury to find that Yazzie's conduct met the standard set forth in 18 U.S.C. @@ 1153, 2 and 113(e).

Finally, MacDonald argues that the District Court erred in denying his motion for acquittal because the Government presented insufficient evidence to support his conspiracy conviction. We review a denial of a motion for acquittal based on insufficient evidence under a sufficiency of the evidence standard. United States v. Lim, 984 F.2d 331, 337 (9th Cir. 1993). Specifically, MacDonald asserts that the Government's case was insufficient because it failed to present rebuttal evidence to MacDonald's alleged conspiracy withdrawal through his "no march" speech. Once a defendant introduces evidence to make a prima facie case of withdrawal, the government must prove beyond a reasonable doubt that the defendant did not withdraw. United States v. Lothian, 976 F.2d 1257, 1261 (9th Cir. 1992). [*69]

In his brief, MacDonald recites the testimony which he offered in his case-in-chief to show that he made the "no march" speech which, he maintains (absent authority), "establishes a prima facie case of withdrawal." MacDonald then states:

During its rebuttal presentation, the government called Stewart Calnimptewa, Alexander Don, and Darrell Boye. [Citations to the transcript omitted.] Not one of the government's rebuttal witnesses presented evidence to rebut MacDonald's withdrawal defense. Period.

This comprises the full text of MacDonald's argument on appeal that there was insufficient evidence presented to the jury to support his conspiracy conviction.

We find absolutely no merit to this argument. There is no requirement in this or any other Circuit that the government must present evidence during rebuttal to defeat a defendant's withdrawal defense. The question is whether, "'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Bishop, 959 F.2d 820, 829 (9th Cir. 1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). [*70]

Our review of the record reveals that the Government presented in its case-in-chief more than adequate evidence on which the jury could have relied to find MacDonald guilty of conspiracy and to reject his withdrawal defense. For example, MacDonald's claim that he made the "no march" speech directly conflicts with the testimony presented by numerous Government witnesses who placed MacDonald behind the pink house at the Keeto camp, addressing men with clubs while himself holding a club. Further, the witnesses testified that MacDonald was seen drawing a map on the ground indicating the location of the target buildings in the take-over, describing which papers should be taken, and telling the men in the "security force" to lead the demonstration. This evidence is of course corroborated by the events that actually occurred. We therefore do not find it unreasonable that the jury rejected MacDonald's withdrawal defense evidence. The jury could reasonably have rejected it because it completely conflicted with MacDonald's actions up until late in the afternoon on July 20th.

And because we find no reason to disturb the jury's findings, we therefore find no error in the District Court's denial [*71] of MacDonald's motion for acquittal.

14. Alleged Sentencing Errors

Lastly, we consider Appellants' allegations of error in sentencing. We review the legality of a sentence de novo. United States v. Fine, 975 F.2d 596, 599 (9th Cir. 1993) (en banc). We also review the district court's interpretation of the Sentencing Guidelines de novo. United States v. Blaize, 959 F.2d 850, 851 (9th Cir.), cert. denied, U.S. , 112 S. Ct. 2954 (1992).

Appellant Kinlicheenie contends that the District Court erred by not grouping together for sentencing purposes his convictions for conspiracy and robbery. Kinlicheenie claims that, pursuant to U.S.S.G. @ 3D1.2(b), the two separate convictions should have been grouped together because the two offenses involved the same victim and the same course of conduct.

Section 3D1.2(b) states in pertinent part:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

* * *

(b) When counts involve the same victim and two or more acts or [*72] transactions connected by a common criminal objective or constituting part of a common scheme or plan.

In his sentencing hearing, Kinlicheenie relied on United States v. Sneezer, 983 F.2d 920 (9th Cir. 1992), cert. denied, U.S. , 114 S. Ct. 113 (1993), as an example of where this court remanded for resentencing because the two separate sexual offenses at issue involved "substantially the same harm." Id. at 925.

We agree with the District Court's finding that Sneezer is inapposite. In Sneezer, the defendant committed similar sexual offenses against the same victim within a very short period of time. In the present case, the offenses of conspiracy and robbery involved different harms and were committed against different victims. Contrary to Kinlicheenie's suggestion that Lt. Hawkins was the single victim in both offenses, we believe the District Court correctly determined that the victim of the conspiracy was the Navajo Nation, whereas the victim of the robbery was Lt. Hawkins.

The District Court's finding that conspiracy harms society rather than the victim of the underlying [*73] object offense is supported by the Supreme Court's ruling in United States v. Feola, 420 U.S. 671, 693-94, 43 L. Ed. 2d 541, 95 S. Ct. 1255 (1974):

It is well settled that the law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense . . . . Our decisions have identified two independent values served by the law of conspiracy. The first is protection of society from the dangers of concerted criminal activity . . . . The second aspect is that conspiracy is an inchoate crime . . . . The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is

committed.

Moreover, acceptance of Kinlicheenie's argument concerning the application of U.S.S.G. @ 3D1.2(b) would lead to results inconsistent with the intent underlying the conspiracy statute. Taken to its logical conclusion, whenever a defendant is found guilty of both the conspiracy [*74] and the object offense, under Kinlicheenie's "substantially the same harm" rationale the defendant could never be sentenced separately on the conspiracy conviction. It is beyond reasonable dispute that conspiracy is a separately charged and separately sentenced offense throughout the Circuits.

We therefore find that the District Court correctly sentenced Kinlicheenie.

Next we address MacDonald's contention that the District Court erred when it failed to grant him a two-point offense level reduction in his sentence for acceptance of responsibility under U.S.S.G. @ 3E1.1(a). We review the District Court's finding that a defendant did not accept responsibility for clear error. United States v. Martinez-Gonzalez, 962 F.2d 874, 878 (9th Cir. 1992).

Section 3E1.1(a) directs the sentencing court: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." Application Notes, 1.(b) to @ 3E1.1(a) further elaborates:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

* * *

(b) voluntary termination [*75] or withdrawal from criminal conduct or associations . . . . .

Specifically, MacDonald maintains that he was eligible for the two-point reduction because he withdrew from the conspiracy. MacDonald argues that the District Court erred in using an incorrect burden of proof to find that MacDonald had not withdrawn from the conspiracy. n19

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n19 MacDonald contends that, although the jury was unable to find beyond a reasonable doubt that he withdrew from the conspiracy, the evidence regarding his alleged withdrawal which he presented at trial met the requisite burden by a preponderance of the evidence for proving his withdrawal for purposes of sentencing determinations by the court.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

We find no merit to these claims. First, MacDonald has provided no support beyond his bare contention that the District Court applied an incorrect burden of proof standard at sentencing when it considered his request for a sentencing reduction based on acceptance of responsibility. Thus, we must reject this argument as lacking any foundation. [*76]

Further, we believe that the District Court did not clearly err when it held that although MacDonald offered evidence "that MacDonald did not encourage the crowd to take their government back and that he expressly told the persons in

attendance not to march, the court finds to the contrary." As indicated above, the Government presented more than ample evidence to contradict MacDonald's withdrawal defense based on his alleged "no march" speech.

We therefore find that the District Court applied the proper burden of proof when it considered MacDonald's request, and that the District Court's denial of a two-point reduction for MacDonald's alleged acceptance of responsibility was not clearly erroneous.

Appellant Wauneka asserts that the District Court erred in refusing to consider as grounds for departure the basis submitted in her objections to her presentence report. In her written objections, Wauneka urged the District Court to depart downward because of her status as a reservation Indian and other factors that indicated she had led an otherwise virtually crime-free life.

As Wauneka correctly notes, U.S.S.G. @ 5K2.0 allows the sentencing court to

impose a sentence outside the range [*77] established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

In addressing Wauneka's claim, we must first consider whether we have jurisdiction to review the District Court's failure to depart downward beyond that which Wauneka requested. We do not have jurisdiction to review a district court's discretionary refusal to depart downward from a prescribed guideline range unless (1) the court incorrectly determined there was no legal basis to depart, and (2) the court indicated that it would otherwise have departed. United States v. Brown, 985 F.2d 478, 480 (9th Cir. 1993); United States v. Belden, 957 F.2d 671, 676 (9th Cir. 1992). This holds true even where the defendant is challenging only the extent of a downward departure. United States v. Vizcarra-Angulo, 904 F.2d 22, 23 (9th Cir. 1990). Further, a court's silence regarding whether it had [*78] the authority to depart is insufficient to show that it believed it lacked discretion to depart. Brown, 985 F.2d at 480 (citing United States v. Garcia-Garcia, 927 F.2d 489, 491 (9th Cir. 1991)).

Our review of the transcript of Wauneka's sentencing hearing leads us to the conclusion that we lack jurisdiction to consider this issue. The District Court listened to the arguments offered by Wauneka concerning her upbringing and lifestyle. Further, the District Court agreed with Wauneka's assertion that her behavior in this case was aberrant. The District Court then acknowledged that @ 5K2.0 applied, and stated that, pursuant to that section, it would "give some departure." But the District Court clearly did not believe that the grounds offered by Wauneka completely counterbalanced her conduct in the present case.

Ms. Wauneka, you were one of the ones that went to get the checks and the signature stamp, which was at the heart of what this was all about. . . . Aside from the violence of the burglary itself, I don't find any evidence of violence on your part in connection with the case . . . but you did go to the heart of what [*79] everyone was after. . . . You were there getting the very things that the whole conspiracy was all about. In other words, if it had succeeded, Mr. MacDonald would have gotten what he was after.

In sum, applying the standard set forth above in Brown, the District Court

recognized that it had the discretion to depart further but declined to do so. We therefore lack jurisdiction to consider Wauneka's claimed error.

Lastly, we consider Appellant Sorrell's contentions that the District Court erroneously (1) imposed a two-point offense level enhancement under U.S.S.G. @ 3C1.1 for willful obstruction of justice, and (2) denied her constitutional right to due process when it denied her an evidentiary hearing to put the Government to its proof on the obstruction issue. We review the district court's finding that a defendant obstructed justice for clear error. United States v. Morales, 977 F.2d 1330, 1330-31 (9th Cir. 1992) (per curiam), cert. denied, U.S., , 113 S. Ct. 1399 (1993). We review for an abuse of discretion the district court's decision to sentence a defendant without granting an evidentiary hearing. [*80] United States v. Baker, 894 F.2d 1083, 1085 (9th Cir. 1990).

On the day the jury returned its verdicts, the District Court ordered all defendants to have no contact except through counsel with any witness who was called by the Government or who otherwise testified in the proceedings. Sometime before January 4, 1993, Assistant United States Attorney (AUSA) Joseph Lodge notified the Presentence Report writer that Sorrell had had contact with government witness Lucy Yellowhair Gorman, who testified against Sorrell, on two occasions.

First, on November 29, 1992, Sorrell approached Gorman at a Texaco gas station in Gallup, New Mexico, and asked Gorman if she was Lucy Gorman. Upon confirmation that Sorrell had correctly identified Gorman, Sorrell accused Gorman of lying and told Gorman that God would hold her responsible. Specifically, Gorman reported that Sorrell told her, "I hope you die with it."

The second incident occurred the following day at the Window Rock Post Office. Gorman reported that Sorrell spoke very loudly, apparently for Gorman's benefit, and essentially repeated what she had said about Gorman the day before. Gorman claimed that Sorrell's [*81] conduct frightened her and that she immediately left the Post Office.

Based on these incidents, which Gorman reported to AUSA Lodge, the Presentence Report writer recommended that Sorrell receive a two-point offense level enhancement for obstruction of justice pursuant to U.S.S.G. @ 3C1.1. This section directs the sentencing court as follows:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Further, Application Note 3.(a) provides:

The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so . . . .

Sorrell filed with the District Court written objections before the sentencing hearing to the suggested enhancement, claiming that her conduct did

not meet the criteria set forth in @ 3C1.1. Further, Sorrell claimed that the proposed enhancement violated her right to due process because it was based [*82] on hearsay and a lack of confrontation through cross-examination. At the sentencing hearing, Sorrell elaborated on these arguments.

Sorrell's counsel, Mr. Ray, first argued that, "If we accept as true, the allegations that Ms. Sorrell approached and accosted or otherwise had communication with Lucy Yellowhair Gorman, [he did not see how this] would constitute an obstruction of justice." Mr. Ray went on to argue that no obstruction occurred because (1) the events occurred post-trial, (2) the Government had presented no evidence that it intended to call Gorman as a witness for purposes of sentencing, (3) the Government did not contend that Sorrell threatened physical harm if Gorman continued to act as a witness for the Government, and (4) the Government presented no evidence that Sorrell would do "anything of a violent nature" if Gorman continued to be a witness for purposes of sentencing or at the upcoming trial of the second group of defendants.

Further, Mr. Ray argued on behalf of Sorrell that it was improper for the District Court to increase Sorrell's sentence absent an evidentiary hearing where the Government was required to prove either beyond a reasonable doubt or at least by [*83] the standard of clear and convincing evidence that Sorrell's actions amounted to an obstruction of justice.

In response, the District Court first reminded Mr. Ray that the standard of proof required at such an evidentiary hearing was only a preponderance of the evidence. Mr. Ray conceded this point, but maintained that the threshold should, in his opinion, be higher to protect a defendant's right to due process. Further, Sorrell's counsel asserted that:

So, my position on it, one, is I do not believe that although these accusations are made and my client faces additional punishment for it, I have no burden of proving the negative, which is virtually a logical impossibility to do, proving something didn't occur.

Counsel then abruptly attempted to direct the court's focus to a different issue in the Presentence Report.

The District Court, in consideration of counsel's previous request for an evidentiary hearing, stated: "Well, before we leave, do you wish to offer any evidence on that point [regarding Sorrell's innocence on the obstruction charge]?" Mr. Ray responded, "In other words, do you want me to pick up the gauntlet and prove the negative?" The District Court stated, [*84] "Please use my words, not your recharacterization of it. Do you wish to present any evidence on the issue?" The discussion between Mr. Ray and the District Court continued along this line. Ultimately Mr. Ray rejected the opportunity offered by the District Court to either deny directly or offer evidence to rebut the reported statements in the Presentence Report.

Based on this record, we find no clear error in the District Court's imposition of the enhancement. We believe that, in light of Sorrell's two harrassing contacts with Gorman in violation of the District Court's specific order against it, Sorrell's conduct meets the "willful" standard enunciated in @ 3C1.1. Further, threatening a witness serves as a basis for enhancement under @ 3C1.1, regardless of whether it resulted in a material hinderance to an investigation, prosecution, or sentencing. United States v. Snider, 976 F.2d

1249, 1251-52 (9th Cir. 1992).

And, we find that the District Court did not abuse its discretion when it declined to hold a separate evidentiary hearing on the obstruction allegation in the Presentence Report. As we stated in United States v. Baker, 894 F.2d 1083, 1084-85 (9th Cir. 1990): [*85]

It is not an abuse of discretion to sentence a defendant without an evidentiary hearing if the trial court gives the defendant an opportunity to rebut allegations in the presentence report "by allowing [the] defendant and his counsel to comment on the report or to submit affidavits or other documents."

As noted above, Sorrell was aware of the obstruction allegations in the Presentence Report and filed objections to it with the District Court. The District Court gave Sorrell ample opportunity at the sentencing hearing to deny outright that the alleged contacts with Gorman occurred or offer evidence to show that the incidents did not amount to obstruction under @ 3C1.1. Thus, the standard we enunciated in Baker is satisfied.

In sum, we consider the information contained in a presentence report accurate unless the defendant raises a reasonable factual dispute to the contrary. United States v. Jones, 907 F.2d 929, 931 (9th Cir. 1990) (per curiam). Sorrell declined to refute the factual claims in the Presentence Report or present any evidence on the issue at the sentencing hearing. Because Sorrell has offered no reasonable factual basis for [*86] contesting her obstruction of justice allegation, we find the District Court's imposition of the two-point offense level enhancement proper.

CONCLUSION

For the foregoing reasons, we reject Appellants' arguments as meritless and affirm all judgments of conviction and sentences as imposed by the District Court.

AFFIRMED.

THE WHITE HOUSE

WASHINGTON

August 9, 1999

Dear Representative Udall:

Thank you for your letter to the President concerning your constituent, Mr. Peter MacDonald, former Chairman of the Navajo Nation.

The President has been advised of your concerns, and you will receive a response in the near future. In the meantime, if I can be of assistance to you, please do not hesitate to contact my office.

Best wishes.

Sincerely,

Janet Murguia

Janet Murguia
Deputy Assistant to the President
and Deputy Director for Legislative
Affairs

The Honorable Tom Udall
House of Representatives
Washington, D.C. 20515

TOM UDALL
3D DISTRICT, NEW MEXICO

312739

Congress of the United States
House of Representatives
Washington, DC 20515–3103

July 27

Dear President Clinton,

As we have discussed previously, I believe former Chairman Pilen MacDavid, Sr. should be granted a compassionate release or commutation of his sentence.

I hope you will reconsider this matter promptly.

Yours

Enclosure

PRINTED ON RECYCLED PAPER

TOM UDALL
3D DISTRICT, NEW MEXICO

NEW MEMBER WHIP

COMMITTEES:
RESOURCES
SUBCOMMITTEE ON
FOREST AND FOREST HEALTH
SUBCOMMITTEE ON
NATIONAL PARKS AND PUBLIC LANDS

SMALL BUSINESS
SUBCOMMITTEE ON EMPOWERMENT
SUBCOMMITTEE ON RURAL ENTERPRISES,
BUSINESS OPPORTUNITIES AND SPECIAL
SMALL BUSINESS PROBLEMS

Congress of the United States
House of Representatives
Washington, DC 20515–3103

502 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-6190

DISTRICT OFFICES:
JOSEPH M. MONTOYA FEDERAL BUILDING
120 SOUTH FEDERAL PLACE
ROOM 100
SANTA FE, NM 87501
(505) 984-8950

RIO RANCHO CITY HALL
3900 SOUTHERN BOULEVARD, SE
RIO RANCHO, NM 87124
P.O. BOX 15787
RIO RANCHO, NM 87124-0787
(505) 994-0499

July 2, 1999

The Honorable Janet Reno
Attorney General of the United States
US Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Reno:

As the Congressman for the Third Congressional District of New Mexico, which includes a considerable portion of the Navajo Nation, I am particularly concerned about the case of Mr. Peter MacDonald, former Chairman of the Navajo Nation.

As you may know, seven years ago Mr. MacDonald was sentenced to serve fourteen years for his crimes against the Navajo Nation while he was Chairman. Since that time, however, Mr. MacDonald has suffered serious heart problems and his health continues to deteriorate. Because of the severity of his medical problems, Mr. MacDonald is now being held at the Federal Medical Facility in Fort Worth, Texas.

In light of Mr. MacDonald's poor health and his public apology for his crimes, the Navajo Nation Tribal Council has officially pardoned him for his offenses and supports a compassionate release or commutation of his sentence. This request is also supported by many other members and officials of the Navajo Nation, including Navajo Nation President Kelsey Begaye, who believe that a compassionate release would promote the reconciliation of the Navajo people.

Due to Mr. MacDonald's poor health and the unique healing process now underway between him and the Navajo people, I believe that a decision that would allow Mr. MacDonald to return to the Navajo Nation would be extremely beneficial to all persons involved. As such, I would greatly appreciate your careful consideration as appropriate under the law of a compassionate release for Mr. MacDonald or the commutation of his sentence.

Very truly yours,

Tom Udall
Member of Congress

PRINTED ON RECYCLED PAPER

THE WHITE HOUSE

WASHINGTON

August 9, 1999

MEMORANDUM FOR CHARLES RUFF
COUNSEL TO THE PRESIDENT

FROM: JANET MURGUIA
LEGISLATIVE AFFAIRS

SUBJECT: PRESIDENTIAL CORRESPONDENCE

Attached please find a copy of a letter sent to the President from Rep. Tom Udall (D-NM).

I do not believe this letter requires a Presidential response at this time. Please review the attached letter and respond directly to the Member(s) of Congress. Please forward a copy of the response to the Office of Records Management, Room 74 Old Executive Office Building.

Thank you very much for your assistance in this matter. If you have any questions, please feel free to call Courtney Crouch, Office of Legislative Affairs, at 456-7500.

Enclosure

U.S. Department of Justice

Pardon Attorney

500 First Street, N.W.
Suite 400
Washington, D.C. 20530

MAY 19 2000

MEMORANDUM FOR MEREDITH CABE
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: Roger C. Adams RCA
Pardon Attorney

SUBJECT: Additional expressions of support for clemency for Peter MacDonald, Sr., and Donald Benally

Attached is a copy of a resolution of the Navajo Nation Council supporting executive clemency for Donald Benally, Earl Roy Lee, Ned McKensley, and Peter MacDonald, Sr., that my office received this week from Mr. Benally, whose application for commutation of sentence and remission of fine and restitution is pending decision. The certification accompanying the resolution indicates that it was passed by the Council on April 20, 2000, by a vote of 45 in favor to 23 opposed, with six abstentions. The four individuals named in the resolution are the last remaining defendants still incarcerated for their convictions for various offenses committed in connection with the July 1989 riot sparked by Mr. MacDonald's attempt to gain control of the Navajo Nation government.

As you are aware, in separate reports to the President both dated September 21, 1998, the Deputy Attorney General recommended that the clemency petitions of Mr. MacDonald and Mr. Benally for commutation of sentence and remission of court-ordered financial obligations be denied. While the position of the Department of Justice on these matters remains unaltered, I wanted to bring this additional expression of support for them to your attention.

For your further information, Ned McKensley filed a petition for commutation of sentence on February 24, 2000. We are currently awaiting reports on his case from the Bureau of Prisons. He is serving a prison term of 135 months and is projected for release in February 2003. Earl Roy Lee, who is serving a term of 121 months and is projected for release in January 2002, was denied commutation of sentence in October 1996 and has not reapplied for clemency.

Attachment

cc: Eric H. Holder, Jr.
Deputy Attorney General

CAP-36-00

RESOLUTION OF THE
NAVAJO NATION COUNCIL

Supporting the Petition to the United States President William J. Clinton to Grant Executive Clemency for Reduction of Sentence to Time Served for Donald Benally, Earl Roy Lee, Ned McKensley and Peter MacDonald, Sr.

WHEREAS:

1. Pursuant to 2 N.N.C. §102 (A), the Navajo Nation Council is the governing body of the Navajo Nation; and

2. The Navajo Nation Chapters are the foundation of the Navajo government; and

3. The Navajo People strive to retain traditional harmony, cultural respect, protection of personal liberty and the pursuit of happiness; and

The Navajo Nation Council granted certain authority to the Navajo Nation Chapters and its officials pursuant to the Navajo Nation Council Resolution CAP-34-98; and

4. The Shiprock Agency Council and the Teec Nos Pos Chapter have initiated and adopted a resolution that the Navajo Nation Council support a petition to the President of the United States in granting reprieve to the four (Donald Benally, Earl Roy Lee, Ned McKensley and Peter MacDonald, Sr.) prisoners; and

5. The majority of the Navajo People of the Navajo Nation and their respective communities understand and feel that the prolonged confinement only deteriorates a man's health; and

These four (Donald Benally, Earl Roy Lee, Ned McKensley and Peter MacDonald, Sr.) federal prisoners have served and suffered long enough.

6. The Navajo Nation is a sovereign Nation who has signed a treaty with the United States Government.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Nation Council accepts the local government request and honors the agency council's request.

2. The Navajo Nation Council adopts this resolution to do all things necessary to effectuate the intent of this resolution.

3. The Navajo Nation hereby petitions the President of the United States to use his presidential powers to grant reprieve to the four, Donald Benally, Earl Roy Lee, Ned McKensley and Peter MacDonald, Sr.

4. The Navajo Nation Council hereby directs a delegation be created for the purpose of effectuating the intent of this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that same was passed by a vote of 45 in favor, 23 opposed and 6 abstained, this 20th day of April 2000.

Edward T. Begay, Speaker
Navajo Nation Council
April 24, 2000
Date Signed

Motion: Alfred L. Yazzie
Second: Edison Wauneka

U.S.M.C.

NAVAJO CODE TALKERS ASSOCIATION

Dr. Sam Billison
P.O. Box 1182
• Telephone: (520) 871 - 6380,6412 • Window Rock, Arizona 86515

File?

not really
anything else
to say!??
or To Council's Office FYI

NAVAJO CODE TALKER ASSOCIATION, INC.

BOX 1182
WINDOW ROCK, ARIZONA 87515

rec'd 4/28
APR 28 2000
mi km
94

THE NAVAJO NATION

OFFICERS
Dr. Samuel Billison
President

Wilfred Billy
Vice-President

Jean Whitehorse
Secretary

Keith M. Little
Treasure

U.S. MARINE CORPS
DIVISION
REPRESENTATIVES

1st Marine Division
Harry Benally

2nd Marine Division
Frank Thompson

3rd Marine Division
Johnny Kinsel

4th Marine Division
Samuel J. Smith

5th Marine Division
Teddy Draper

6th Marine Division
Alfred Peaches

April 17, 2000

Honorable William Clinton
President of the United States
The White House Office
1600 Pennsylvania Ave. NW 3169 Watson NW
Washington, D.C.

Dear Mr. President:

This is a follow-up of our letter of December 16, 1999 and your reply by Mr. Daniel W. Burkhardt. The letter states that you would be considering our request to either pardon Mr. Peter MacDonald, our former Chairman and member of the Navajo Code Talkers, or help get him transferred closer to his home.

The Code Talkers, his family and the Navajo people would be forever thankful to you for the greatest and positive action you have taken, which would add to your great work as one of our outstanding Presidents.

Please help us before you leave office.

Sincerely,

Samuel Billison
President

Navajo Code Talkers Assn.
P. O. Box 1182
Window Rock, AZ 86515

Honorable William Clinton
President of the United States
The White House Office
1600 Pennsylvania Avenue
Washington D. C. 20500

U.S. Department of Justice

Pardon Attorney

500 First Street, N.W.
Suite 400
Washington, D.C. 20530

APR - 1 1999

MEMORANDUM FOR MEREDITH CABE
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: Roger C. Adams RCA
Pardon Attorney

SUBJECT: Correspondence from Senator Domenici concerning Peter MacDonald, Sr.

Attached is a copy of a letter to the Attorney General from Senator Pete V. Domenici of New Mexico expressing support on compassionate grounds for the release from federal prison of Peter MacDonald, Sr. As you are aware, in a report to the President dated September 21, 1998, the Deputy Attorney General recommended that Mr. MacDonald's petition for commutation of sentence and remission of court-ordered financial obligations be denied.

To my knowledge, the Department of Justice has not received any prior correspondence from Senator Domenici regarding Mr. MacDonald during the pendency of the present commutation petition, although as the report to the President notes, the Senator previously expressed support for Mr. MacDonald's 1996 pardon request. See Report at p. 7. While the position of the Department of Justice on this matter remains unaltered, I wanted to bring Senator Domenici's views to your attention.

Attachment

Bureau of Prisons issue - this is on p 42

PETE V. DOMENICI
NEW MEXICO

COMMITTEES:
BUDGET
APPROPRIATIONS
ENERGY AND NATURAL RESOURCES
INDIAN AFFAIRS
GOVERNMENTAL AFFAIRS

United States Senate

WASHINGTON, DC 20510-3101

March 16, 1999

The Honorable Janet Reno
Attorney General
U. S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D. C. 20530

Dear Attorney General Reno:

Former Navajo Nation Chairman Peter MacDonald is serving his sentence at the Federal Medical Center in Fort Worth, Texas. A compassionate release request has been prepared by the Navajo Nation. Given the circumstances of Mr. MacDonald's deteriorating health and my earlier (1996) support for commutation of his sentence, I would like you to know that I support this latest request for his release.

He has served about seven years of his 14 year sentence. His health has taken a serious downturn, and I believe it would be beneficial for his family and friends at the Navajo Nation to have him home again. I also believe his own health might stabilize somewhat if he is surrounded by family and friends. This type of release would not imply a pardon for his crimes, but would show that we are convinced he will do not further harm to anyone and should be allowed to spend his last years with his own people, who have formally forgiven him.

Thank you for your attention to this request. With kind regards, I am

Sincerely yours,

Pete V. Domenici
United States Senator

PVD:jwt

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U.S. Department of Justice

Pardon Attorney

500 FIRST STREET, N.W.
FOURTH FLOOR

Washington, D.C 20530

TELECOPIER COVER SHEET
(202) 616-6070
FAX: (202) 616-6069

4-1-99
DATE

2:55 pm
TIME

TO: Meredith Cabe
White House Counsel's office

FROM: Susan Kuzma

PHONE NO.: 456-7984

FAX NO.: 456-1647

SUBJECT: A recap, now that I familiarized myself with the materials on MacDonald that you asked me about this morning.

NUMBER OF PAGES, INCLUDING THIS COVER SHEET 2

THE ORIGINAL OF THIS DOCUMENT WILL ____ WILL NOT ✓ FOLLOW.

Meredith:

I took a look at the materials on Peter MacDonald that Roger sent you today and spoke with Helen about it.

(1) There is a statutory release mechanism called "compassionate release" that is initiated by the Bureau of Prisons and is separate from commutation of sentence. Despite the statement in Senator Domenici's letter, however, there is no pending request for compassionate release for MacDonald, to our knowledge.

(2) We understand that the Bureau of Prisons' policy is not to move for compassionate release unless the prisoner's illness is imminently terminal.

(3) Roger interpreted Senator Domenici's letter as indicating general support for MacDonald's release by whatever means, compassionate release or clemency. Roger therefore was supplementing the record before the President, by sending you a copy of the Senator's letter. (The Senator's previous support for clemency for MacDonald is described in p. 7 of our denial report submitted on September 21, 1998.)

THE WHITE HOUSE

WASHINGTON

January 4, 1999

The Honorable Jeff Bingaman
United States Senator
703 Hart Senate Office Building
Washington, DC 20510-3102

Dear Senator Bingaman:

Thank you for your recent letters to the President and to me regarding executive clemency for Peter MacDonald. I appreciate your continuing communication with the Department of Justice and with the White House on this important issue.

As I am sure you are aware, Mr. MacDonald's first petition for executive clemency came before the President in 1996. Based upon all the information before him at the time, the President made the decision to deny the petition. A petition for reconsideration of that 1996 decision is currently pending. As with any application for clemency, the petition will come before the President after the Department of Justice has completed an extensive review of its merits and has made a recommendation to the President as to whether clemency should be granted. Please know that, when the petition comes before the President, our office will ensure the President is aware of your views.

Thank you again for your thoughtful letter and for your offer of assistance.

Sincerely,

Charles Ruff

Charles F.C. Ruff
Counsel to the President

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. letter	Jeff Bingaman to Charles Ruff; RE: Peter MacDonald [partial] (1 page)	12/18/1998	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
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RR. Document will be reviewed upon request.

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b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

JEFF BINGAMAN
NEW MEXICO

703 HART SENATE OFFICE BLDG.
WASHINGTON, DC 20510-3102
(202) 224-5521
IN NEW MEXICO--1-800-443-8658
TDD (202) 224-1792
senator_bingaman@bingaman.senate.gov

United States Senate

December 18, 1998

Charles F. Ruff
Office of General Counsel
The White House
Washington, DC 20502

Dear Mr. Ruff:

Former Navajo Nation President, Peter MacDonald, presently is serving a 14-year federal prison sentence and has applied for Executive Clemency. I again am writing to strongly support Mr. MacDonald's application and to urge the President during this holiday season to commute his sentence. Please refer to my letter enclosed of June 17, 1998, to Attorney General Janet Reno, in which I explain the many reasons why releasing Mr. MacDonald to his people is the right thing to do.

Significantly, Mr. MacDonald has apologized publicly, which in the Navajo way is essential for forgiveness. Additionally, Mr. MacDonald has been suffering from numerous ailments while in prison, (b)(6) [006]

Because of Mr. MacDonald's leadership and contributions during his many years of service, because clemency is in keeping with Navajo traditions of forgiveness, and because his release would bring long-delayed healing to the Navajo people, the Navajo Tribal Council, passed a resolution in full support. Similarly, the New Mexico Legislature, also recognizing his leadership and the important Navajo traditions of forgiveness and respect, passed a joint memorial in support

The Navajo people have endured three adverse changes in leadership during the last year. However, they now look forward to a newly elected leader, Kelsey Begay, taking office on January 11, 1999. This holiday season and period of renewed Navajo leadership makes commutation of Mr. MacDonald's sentence by January 11 all the more appropriate. I urge you to help bring harmony back to the Dine'.

ALBUQUERQUE (505) 766-3636 | LAS CRUCES (505) 523-6561 | LAS VEGAS (505) 454-8824 | ROSWELL (505) 622-7113 | SANTA FE (505) 988-6647

Clinton Library Photocopy

I and the Navajo people thank you for all your consideration, and if I can assist in this matter, do not hesitate to contact me.

Sincerely,

Jeff Bingaman
United States Senator

JB/kg
enclosure

JEFF BINGAMAN
NEW MEXICO

709 HART SENATE OFFICE BLDG.
WASHINGTON, DC 20510-3102
(202) 224-5521
IN NEW MEXICO—1-800-443-8658
TDD (202) 224-1792
senator_bingaman@bingaman.senate.gov

United States Senate

June 17, 1998

Honorable Janet Reno
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Reno:

As you know, former Navajo Nation President, Peter MacDonald, is serving a 175-month sentence for various federal offenses, and earliest possible release is scheduled for October 14, 2005. After having been denied executive clemency in 1996, Mr. MacDonald has reapplied and is requesting specifically a commutation of sentence. I am writing in support of Mr. MacDonald's application.

Based on my meeting on April 29, 1998, with Roger C. Adams, the Pardon Attorney, on Mr. MacDonald's case, there are a variety of criteria considered in determining the merits of this type of request, including conduct while in prison, medical condition, remorse, potential opposition and support, and comments from sentencing judge and prosecutor.

It is my understanding that Mr. MacDonald has been a model prisoner, and I am certain the Bureau of Prisons will corroborate that fact. As you know from when I first contacted you about Mr. MacDonald's case in December 1996, he has been in very poor health. Since then, however, Mr. MacDonald's health has deteriorated even further, having been treated for heart and other physical ailments very recently.

Mr. MacDonald has apologized publicly for any wrongdoing. Indeed, his admission and remorse is very significant within the Navajo culture, and it should be a significant consideration in your determination as well.

Because of Mr. MacDonald's meaningful leadership while Navajo President, his current medical condition, and his remorse, many people in New Mexico support a commutation of sentence. The Navajo Tribal Council has passed a resolution in strong support, and the New Mexico Legislature has passed a joint memorial also in strong support. On September 1997, at the request of the State Legislature, I forwarded to the President the joint memorial, and I am enclosing a copy for your review.

In order to monitor the progress of Mr. MacDonald's application, I have maintained close communication with both Roger Adams and the White House Counsel's office. My staff participated in a conference call with White House Counsel on May 8, and reported to me that comments from the Bureau of Prisons, the sentencing judge, and the prosecuting attorney have been solicited.

Significantly, commutation, release and early return of Mr. MacDonald to his homeland promises to begin a long-delayed healing process for more than 180,000 Navajo people. Thus, I genuinely appreciate your efforts to complete your review of the application and forward a recommendation to the White House to commute Mr. MacDonald's sentence.

Thank you for your prompt consideration of this request, and if there is anything I might do to facilitate this process, please do not hesitate to contact me.

Sincerely,

Jeff Bingaman
United States Senator

cc: Charles F. Ruff, Counsel to the President
Roger C. Adams, Pardon Attorney

JB/kg

U. S. Department of Justice

Pardon Attorney

Washington, D.C. 20530

FEB - 1 [redacted]

MEMORANDUM FOR MEREDITH CABE
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: Roger C. Adams RCA
Pardon Attorney

SUBJECT: Correspondence from Senator Bingaman concerning Peter MacDonald, Sr.

We discussed last week the question of who should reply to Senator Bingaman's December 18, 1998 letter to the President concerning Mr. MacDonald, and you read to me a letter from Mr. Ruff responding to the Senator's letter of about the same date to him. I have not heard form anyone else in the White House about whether I should respond to the Senator's letter. Nevertheless, I have proceeded to draft a response that I can sign, although I continue to believe the Senator will not be pleased that his letter to the President was "bucked" to me. He met with me personally last spring and has written to the Attorney General on this matter in July 1998. I responded to that letter.

Please let me know if I should now send my response to the Senator's letter to the President. Because of the Department's very strict rules on responses to Congressional correspondence, I need to do something with the Senator's letter by Thursday, February 4.

For your information, I have attached a copy of the Senator's letter, a copy of the White House's referral to the Department on January 13, and a copy of my proposed response.

Attachments

2.2.99
told Roger
NTRN

Withdrawal/Redaction Marker
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. letter	Jeff Bingaman to Charles Ruff; RE: Peter MacDonald [partial] [duplicate of 006] (1 page)	12/18/1998	b(6)

COLLECTION:
Clinton Presidential Records
Counsel Office
Meredith Cabe
OA/Box Number: 24950

FOLDER TITLE:
Peter MacDonald: [Loose Materials] [Folder 1] [2]

2006-1704-F
db3743

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

JEFF BINGAMAN
NEW MEXICO

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WASHINGTON, DC 20510-3102
(202) 224-5521
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TDD (202) 224-1792
senator_bingaman@bingaman.senate.gov

United States Senate

December 18, 1998

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Former Navajo Nation President, Peter MacDonald, presently is serving a 14-year federal prison sentence and has applied for Executive Clemency. I again am writing to strongly support Mr. MacDonald's application and to urge you during this holiday season to commute his sentence. Please refer to my letter enclosed of June 17, 1998, to Attorney General Janet Reno, in which I explain the many reasons why releasing Mr. MacDonald to his people is the right thing to do.

Significantly, Mr. MacDonald has apologized publicly, which in the Navajo way is essential for forgiveness. Additionally, Mr. MacDonald has been suffering from numerous ailments while in prison, (b)(6)

[007]

Because of Mr. MacDonald's leadership and contributions during his many years of service, because clemency is in keeping with Navajo traditions of forgiveness, and because his release would bring long-delayed healing to the Navajo people, the Navajo Tribal Council, passed a resolution in full support. Similarly, the New Mexico Legislature, also recognizing his leadership and the important Navajo traditions of forgiveness and respect, passed a joint memorial in support

The Navajo people have endured three adverse changes in leadership during the last year. However, they now look forward to a newly elected leader, Kelsey Begay, taking office on January 11, 1999. This holiday season and period of renewed Navajo leadership makes commutation of Mr. MacDonald's sentence by January 11 all the more appropriate. I urge you to help bring harmony back to the Dine'.

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Clinton Library Photocopy

I and the Navajo people thank you for all your consideration, and if I can assist in this matter, do not hesitate to contact me.

Sincerely,

Jeff Bingaman
United States Senator

JB/kg
enclosure

Rec'd from C.R.
683182

THE WHITE HOUSE

WASHINGTON

January 13, 1999

MEMORANDUM FOR ANTHONY SUTIN
DEPARTMENT OF JUSTICE

FROM: JANET MURGUIA JM
LEGISLATIVE AFFAIRS

SUBJECT: PRESIDENTIAL CORRESPONDENCE

Enclosed please find a copy of a letter sent to the President from Sen. Jeff Bingaman (D-NM).

I do not believe that this letter requires a Presidential response at this time. Please review the attached letter and have the Attorney General respond directly to the Member(s) of Congress. Please forward a copy of the response to Eli Joseph, Office of Legislative Affairs.

Thank you very much for your assistance in this matter. If you have any questions, please feel free to call Eli at 456-7500.

Enclosure

U. S. Department of Justice

Pardon Attorney

Washington, D.C. 20530

The Honorable Jeff Bingaman
United States Senate
Washington, DC 20510

DRAFT

Dear Senator Bingaman:

Your letter of December 18, 1998, to the President expressing your support of the petition for commutation of sentence filed by Peter MacDonald, Sr. was received in this office on January 25, 1999, for response. I apologize for the delay in replying.

Mr. MacDonald's petition remains under consideration at this time, and your letter and its enclosure have been made part of his clemency file. Please be assured that the President will be informed of your continued support for reduction of Mr. MacDonald's sentence. As you are aware, the processing time for an executive clemency application can be lengthy, and we can give no assurance that final action will be taken by the President within a particular time frame. However, as Helen Bollwerk of my staff advised your legislative assistant, Kenneth Gonzales, by telephone on December 8, 1998, we will notify your office promptly when final action has been taken on Mr. MacDonald's request.

Thank you for writing to the President and for your continued interest in this matter.

Sincerely,

Roger C. Adams
Pardon Attorney

DRAFT

JEFF BINGAMAN
NEW MEXICO

703 HART SENATE OFFICE BLDG.
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senator_bingaman@bingaman.senate.gov

United States Senate

June 17, 1998

Honorable Janet Reno
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Reno:

As you know, former Navajo Nation President, Peter MacDonald, is serving a 175-month sentence for various federal offenses, and earliest possible release is scheduled for October 14, 2005. After having been denied executive clemency in 1996, Mr. MacDonald has reapplied and is requesting specifically a commutation of sentence. I am writing in support of Mr. MacDonald's application.

Based on my meeting on April 29, 1998, with Roger C. Adams, the Pardon Attorney, on Mr. MacDonald's case, there are a variety of criteria considered in determining the merits of this type of request, including conduct while in prison, medical condition, remorse, potential opposition and support, and comments from sentencing judge and prosecutor.

It is my understanding that Mr. MacDonald has been a model prisoner, and I am certain the Bureau of Prisons will corroborate that fact. As you know from when I first contacted you about Mr. MacDonald's case in December 1996, he has been in very poor health. Since then, however, Mr. MacDonald's health has deteriorated even further, having been treated for heart and other physical ailments very recently.

Mr. MacDonald has apologized publicly for any wrongdoing. Indeed, his admission and remorse is very significant within the Navajo culture, and it should be a significant consideration in your determination as well.

Because of Mr. MacDonald's meaningful leadership while Navajo President, his current medical condition, and his remorse, many people in New Mexico support a commutation of sentence. The Navajo Tribal Council has passed a resolution in strong support, and the New Mexico Legislature has passed a joint memorial also in strong support. On September 1997, at the request of the State Legislature, I forwarded to the President the joint memorial, and I am enclosing a copy for your review.

ALBUQUERQUE
(505) 346-6601

LAS CRUCES
(505) 523-6561

ROSWELL
(505) 622-7113

SANTA FE
(505) 988-6647

In order to monitor the progress of Mr. MacDonald's application, I have maintained close communication with both Roger Adams and the White House Counsel's office. My staff participated in a conference call with White House Counsel on May 8, and reported to me that comments from the Bureau of Prisons, the sentencing judge, and the prosecuting attorney have been solicited.

Significantly, commutation, release and early return of Mr. MacDonald to his homeland promises to begin a long-delayed healing process for more than 180,000 Navajo people. Thus, I genuinely appreciate your efforts to complete your review of the application and forward a recommendation to the White House to commute Mr. MacDonald's sentence.

Thank you for your prompt consideration of this request, and if there is anything I might do to facilitate this process, please do not hesitate to contact me.

Sincerely,

Jeff Bingaman
United States Senator

cc: Charles F. Ruff, Counsel to the President
Roger C. Adams, Pardon Attorney

JB/kg

The Legislature of the State of New Mexico

FORTY-THIRD LEGISLATURE
FIRST SESSION, 1997

SENATE JOINT MEMORIAL 19

INTRODUCED BY

SENATORS ROMAN M. MAES, III,
ROD ADAIR, BEN D. ALTAMIRANO,
MANNY M. ARAGON, PETE CAMPOS,
CARLOS R. CISNEROS, DIANNA J. DURAN,
PAULINE B. EISENSTADT, JOSEPH A. FIDEL,
MARY JANE M. GARCIA, RAMSAY L. GORHAM,
PHIL A. GRIEGO, GLORIA HOWES,
TIMOTHY Z. JENNINGS, RAYMOND L. KYSAR,
LINDA M. LOPEZ, FERNANDO R. MACIAS,
PHILLIP J. MALOOF, CYNTHIA NAVA, JOHN PINTO,
SHANNON ROBINSON, ARTHUR H. RODARTE,
NANCY RODRIGUEZ, RICHARD M. ROMERO,
AND MICHAEL S. SANCHEZ

A JOINT MEMORIAL.

IN SUPPORT OF
A PRESIDENTIAL COMMUTATION OF THE SENTENCE
OF PETER MCDONALD OF THE NAVAJO NATION.

WHEREAS, Peter McDonald, former Chairman of the Navajo Nation, is now in the fifth year of serving a fourteen-year Federal Sentence; and

WHEREAS, Mr. McDonald was sentenced pursuant to his convictions for instigating a riot, accepting bribes, fraud and racketeering; and

WHEREAS, while in prison, Mr. McDonald has suffered a heart attack and a broken wrist and due to these problems has been housed at the Federal Medical Center at Fort Worth; and

WHEREAS, the People of the Navajo Nation have a Tradition of Forgiveness and Respect for their leaders and are in agreement that Mr. McDonald should be allowed to return to his home in the Arizona portion of the Navajo Nation; and

WHEREAS, the People of the Navajo Nation remember that Mr. McDonald was a Code Talker during World War II and that he was an Electrical Engineer by profession before returning home to enter into Positions of Leadership of the Navajo Nation; and

WHEREAS, the Navajo Nation Council, the Legislative Branch of the Navajo Nation, has adopted a Resolution forgiving Mr. McDonald for his crimes; and

WHEREAS, the President of the Navajo Nation is in support of obtaining an early release for Mr. McDonald; and

WHEREAS, the People of the Navajo Nation are concerned for his health and believe that his Absence from his Homeland will cause Mr. McDonald to wither, causing his health to fail; and

WHEREAS, through Petitions and Letters, Navajo Nation Members, National Political Figures and many others have requested that the President of the United States provide an early release for Mr. McDonald;

NOW, THEREFORE, BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO that it express its Support for an early release for Peter McDonald, former Chairman of the Navajo Nation; and

BE IT FURTHER RESOLVED that the President of the United States is hereby requested to Commute the Sentence of Peter McDonald and the New Mexico Congressional Delegation is hereby requested to support the Commutation of Peter McDonald's Sentence so that he can return home to the Navajo Nation; and

BE IT FURTHER RESOLVED that copies of this Memorial be transmitted to the President of the United States, the New Mexico Congressional Delegation, the President of the Navajo Nation and the Speaker of the Navajo Nation Council.

Signed and Sealed at The Capitol, in the City of Santa Fe.

Walter D. Bradley, President
New Mexico State Senate

Raymond G. Sanchez, Speaker
House of Representatives

Margaret Larragoite, Chief Clerk
New Mexico State Senate

Stephen R. Arias, Chief Clerk
House of Representatives

WHEREAS, the People of the Navajo Nation have a Tradition of Forgiveness and Respect for their leaders and are in agreement that Mr. McDonald should be allowed to return to his home in the Arizona portion of the Navajo Nation; and

WHEREAS, the People of the Navajo Nation remember that Mr. McDonald was a Code Talker during World War II and that he was an Electrical Engineer by profession before returning home to enter into Positions of Leadership of the Navajo Nation; and

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WHEREAS, through Petitions and Letters, Navajo Nation Members, National Political Figures and many others have requested that the President of the United States provide an early release for Mr. McDonald;

NOW, THEREFORE, BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO that it express its Support for an early release for Peter McDonald, former Chairman of the Navajo Nation; and

BE IT FURTHER RESOLVED that the President of the United States is hereby requested to Commute the Sentence of Peter McDonald and the New Mexico Congressional Delegation is hereby requested to support the Commutation of Peter McDonald's Sentence so that he can return home to the Navajo Nation; and

BE IT FURTHER RESOLVED that copies of this Memorial be transmitted to the President of the United States, the New Mexico Congressional Delegation, the President of the Navajo Nation and the Speaker of the Navajo Nation Council.

Signed and Sealed at The Capitol, in the City of Santa Fe.

Walter D. Bradley, President
New Mexico State Senate

Raymond G. Sanchez, Speaker
House of Representatives

Margaret Larragoite, Chief Clerk
New Mexico State Senate

Stephen R. Arias, Chief Clerk
House of Representatives

THE WHITE HOUSE

WASHINGTON

March 19, 1998

Mr. Roger C. Adams
Acting Pardon Attorney
500 First Street, NW
Fourth Floor
Washington, DC 20530

Dear Mr. Adams:

Please find enclosed correspondence our office received concerning executive clemency. I am forwarding them to your office for response, or other appropriate action. Note that one of the letters requests that a document be added to a commutation application currently under review in your office.

Thank you in advance for your attention to this matter. Please let me know if you need any additional information; I can be reached at 456-7984.

Sincerely,

Meredith Cabe
Associate Counsel to the President

BILL REDMOND
THIRD DISTRICT, NEW MEXICO

COMMITTEE ON BANKING AND FINANCIAL SERVICES
COMMITTEE ON NATIONAL SECURITY
COMMITTEE ON VETERANS' AFFAIRS

2268 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-6190

Congress of the United States
House of Representatives
Washington, DC

DISTRICT OFFICES:

1494 S. ST. FRANCIS DRIVE
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(505) 988-7230

321 CONNELLY, P.O. BOX 1108
CLOVIS, NM 88102
(505) 769-1223

800 MUNICIPAL DRIVE
FARMINGTON, NM 87401
(505) 599-1460

3900 SOUTHERN BLVD. #101-C
RIO RANCHO, NM 87124
(505) 892-0901

March 18, 1998

The Honorable William J. Clinton
The White House
Washington, DC 20500

Dear Mr. President:

Enclosed is the original signature letter from Peter MacDonald to complete his request for reconsideration of this petition for Executive Clemency. The package hand delivered to the White House by my staff last week included a faxed copy of this letter along with supporting documentation. This original signature letter should be added to his file.

I appreciate your staff working together with us on this matter. If I can be of any further assistance, please feel free to call.

Sincerely,

Bill Redmond
Member of Congress

PRINTED ON RECYCLED PAPER

FMC, FTO Unit
3150 Horton Road
Ft. Worth, TX 76119

February 12, 1998

Honorable William J. Clinton
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

Please accept this letter of penitence and the enclosed Petition for Commutation of my sentence and consideration of clemency. I am asking reconsideration for Executive Clemency due to several important changes since December of 1996.

My health has deteriorated substantially and is in continuing decline (see Attachment II-B for details). On December 1, 1997 I have completed my sentence of 60 months on federal corruption charges; also, the Navajo Nation has pardoned me for all tribal convictions. The Navajo Nation council has again petitioned by resolution to you, Mr. President, requesting my release for reconciliation and healing.

I have seven and half (7½) years left on my 14½ years "Conspiracy to Commit Kidnapping" conviction. Mr. President, I am deeply remorseful for all that happened. Especially is this remorse for the violence and loss of life that occurred at the Window Rock tragedy. My sorrow is great for this disruption to my nation. My heart hurts for all the pain that my people, particularly my family, have suffered and must endure the rest of their lives.

Lastly, there is a real need to finish the healing process--the Navajo Way. My people and my land are not at peace. As my people and leaders are requesting and pleading, the healing ways of the Navajo cannot occur until I return to the land of the Navajos and the four sacred mountains to complete the circle.

Please, it is in your power to allow the healing ceremony to occur for a proud nation--to complete the sacred circle of the nation while I am still alive.

Respectfully,

Peter MacDonald, Sr.
26215-008

To: Dawn Chirwa -
Please handle as you think best. Copy me on any correspondence.
Mickey
3/2/98

FMC, FTO Unit
3150 Horton Road
Ft. Worth, TX 76119

February 18, 1998

Honorable Mickey Ibarra
Assistant to the President
The White House
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

cc: Janet Reno

Dear Mr. Ibarra:

Enclosed is a copy of my petition to the President of the United States, Mr. Clinton, for an executive clemency.

I trust that you'll review it with a favorable recommendation to the President. There are many more letters, resolutions, and statements of support, the enclosed is just a sample. Should you need more or additional information I'll be glad to furnish same.

May the Great Spirit be with you always.

Respectfully,

Peter MacDonald, Sr.
26215-008

cc: Honorable Bill Redmond
U.S. House of Representative.

forwarded to OPA

THE WHITE HOUSE

WASHINGTON

March 9, 1998

Roger Adams, Acting Pardon Attorney
Susan Kuzma, Deputy Pardon Attorney
Department of Justice
500 First Street, NW
Fourth Floor
Washington, DC 20534

Dear Mr. Adams and Ms. Kuzma:

Please find enclosed a copy of a reapplication for commutation of sentence for Mr. Peter MacDonald. This copy was sent to our office, and I am forwarding it to your office for filing, response, and/or any other appropriate action.

Thank you in advance for your attention to this matter.

Sincerely,

Meredith Cabe

Meredith Cabe
Associate Counsel to the President