

**TESTIMONY OF TODD BUSSERT**  
**VICE-CHAIR OF THE PRACTITIONERS' ADVISORY GROUP TO THE**  
**UNITED STATES SENTENCING COMMISSION**  
**BEFORE THE UNITED STATES SENTENCING COMMISSION'S PUBLIC HEARING**  
**ON GUIDELINE AMENDMENTS RELATED TO THE COURT SECURITY ACT OF 2007**  
**MARCH 18, 2009**  
**WASHINGTON D.C.**

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Judge Hinojosa and members of the Commission. My name is Todd Bussert, and I am currently in private practice in New Haven, Connecticut. I have been invited to testify today in my capacity as Vice-Chair of the Practitioners' Advisory Group to the Commission, the PAG. On behalf of Chair David Debold of Gibson, Dunn and Crutcher here in Washington and the other members of that standing advisory group, it is always a pleasure to be invited to share our views on proposed Commission actions. What follows are our group's views concerning the proposed Court Security Act amendments, upon which we will elaborate further in our written comments to this and other proposed amendments before the end of the public comment period.

**INCREASES IN STATUTORY MAXIMUMS**

As part of the Court Security Act of 2007, Congress increased the maximum statutory penalties for several offenses. The Commission has asked whether the current guidelines are adequate. The PAG believes that they are and that increases in applicable base offense levels are unnecessary.

Congress began work on what eventually became this Act in 2005. At that time, bills were introduced in both chambers (H.R. 1751 and S. 1968) that carried mandatory minimum penalties for most of these offenses — penalties that were removed ultimately during the legislative process. PAG believes that with Congress's rejection of statutory mandatory minimums, coupled with an absence of any directive to increase guideline penalties, the Commission should not assume that the increase in maximum penalties signals a need for higher guideline ranges.

The PAG is particularly concerned about any increase in base offense levels that would affect typical offenders, in the name of punishing what are perhaps best characterized as the most egregious of cases. As the Commission is well aware, the Guidelines are intended to address the heartland of criminal misconduct, which, for offense categories such as these, is accomplished

through the establishment of base offense levels suitable to punish the typical low-end offenders and appropriate enhancements. When base offense levels are shifted upward simply because Congress has increased maximum allowable penalties for the most serious offenses and offenders, the result all too often is “Guidelines creep” — the ratcheting up of guideline penalties that has been the subject of so much criticism over the past two decades.

Viewed objectively, that is, absent a political or prosecutorial prism, the guidelines for these offenses, that this Commission has already considered and promulgated, are adequate and do not require changes to accommodate or account for the new statutory maximums.

**SERIOUS ASSAULTS**  
**(18 U.S.C. § 115, U.S.S.G. § 2A2.2)**

**VOLUNTARY MANSLAUGHTER**  
**(18 U.S.C. § 1112, U.S.S.G. § 2A1.3)**

The Act raises the penalty for assaults resulting in serious bodily injury or involving the use of a dangerous weapon from 20 to 30 years and for assaults involving physical contact or intent to commit another felony from eight to ten years. Sentence calculations for these offenses are referred to §2A2.2.

In 2007, the mean sentence for non-sexual assault over all criminal history categories was 39 months, and the median was 30 months. (*2007 Sourcebook of Federal Sentencing Statistics*, Table 14.). Even Criminal History Category VI offenders received sentences at multiples below the former 20-year maximum: approximately 6.3 years, on average. (*Supra.*) Such empirical evidence counsels strongly against any need to increase guideline ranges. Indeed, of the 313 sentences for assault in 2007, fewer than six percent (17) were above the guideline range while approximately 12 percent (39) were non-government sponsored sentences below the range. (*Supra*, Table 28).

Importantly, Section 2A2.2 already recommends ranges at or approaching the new statutory maximum for those who engaged in the most serious of conduct, especially where the victim is a judicial or federal official. For instance, a base offense level of 14 with enhancements for the fact of conviction under Section 115 (+2), more than minimal planning (+2), discharge of a firearm (+5), serious bodily injury (+5), payment (+2) and an official victim (+6) results in an adjusted offense level of 36. This produces a range of 188 to 235 months (15.6 years to 19.5 years) for first offenders and ranges that exceed the statutory maximum for those in Criminal

History Category V or VI. In other words, the Guidelines, as currently written, produce guideline ranges at the statutory maximum. To the extent the guideline range in a given case is not “sufficient” to satisfy the purposes of sentencing, courts remain free to depart upward or impose a non-Guidelines sentence.

The statutory maximum for voluntary manslaughter has also been increased from ten to 15 years. Under the current Section 2A1.3, the base offense level for such a conviction is 29, which increases to 35 when there is an official victim. Without any other adjustments, for a Category I offender this results in a range of 168 to 210 months, that is, a range that exceeds the new statutory maximum. Accordingly, no further changes are needed. In this regard, the PAG notes that the Commission raised the base offense level from 25 to 29 less than five years ago. (U.S.S.G., App. C, Amend. 663 (Nov. 1, 2004)). There is no empirical evidence that establishes or suggests that courts find Level 29 insufficient.

**OFFICIAL VICTIMS  
(U.S.S.G. § 3A1.2)**

Turning attention to official victims, the Commission has requested comment on whether Guideline Section 3A1.2 addresses adequately the circumstances of an official victim. The PAG believes that it does.

In 2004, the Commission increased this adjustment from three to six levels for offenses against the person motivated by the official status of the victim. (*See* USSG, App. C, Amend. 663 (Nov. 1, 2004)). In all other circumstances, it is a three-level enhancement. And, as an appropriate point of comparison, Guideline Section 3A1.1 provides a two-level enhancement for vulnerable victims.

As touched upon during our testimony last March, the PAG believes that any further increase in penalties based solely on the victim’s status suggests, if not actually establishes, a class system within the guidelines, wherein the harm that may befall judges, prosecutors, probation officers and other federal officials is treated as far more serious than that visited upon the average citizen — that their lives and property are somehow more worthy of protection.

An example helps illustrate the disparate treatment. Say you have a former Assistant United States Attorney who, having seen the light, is now toiling diligently as defense counsel. Six months after entering private practice this capable young attorney has a client who, following sentencing, becomes disenchanted not only with the system but also with her — notwithstanding

the consensus view that she did a terrific job securing a favorable disposition for her client. Disgruntled client, who has been permitted to surrender voluntarily, decides to exact revenge before entering custody by committing a federal offense of which counsel is the victim. Under the current system, there is no status-based enhancement for this former prosecutor, nor should there be. But, as things already stand, there would be at least a three-level, and as much as a six-level, enhancement if the defendant's resentment had instead been directed toward someone maintaining an official court or other government position.

This difference in penalties is sufficient to address the status issue and Congressional concern. There is no justification to magnify it further. Indeed, we have not heard or seen anything in the past four years to suggest that courts are dissatisfied with the level of added punishment called for under Section 3A1.1. It is a particularly sensitive matter – and unavoidably so – for a government agency to establish the appropriate sanctions for making a government employee a victim of criminal conduct. Prudence demands that any greater differentiation in punishment due to official status be based on credible, documented evidence tied directly to the need to be addressed.

#### **THREATS OVER THE INTERNET (18 U.S.C. § 115)**

Finally is Section 209 of the Act, which directs the Commission to review threats that occur over the Internet in violation of 18 U.S.C. § 115 to “determine whether and how much that circumstance should aggravate the punishment.” The PAG notes that this language only requires a review, not a change, and that no change appears necessary. Using this offense characteristic to enhance the base offense level for defendants who threaten a current or former federal official or her family member is irrational, both logically and factually.

Threats can be conveyed in any number of ways. Among the most common would seem to be in-person, that is, face-to-face; by phone; by mail; and over the Internet. Of course, “over the Internet” can have any number of meanings, such as via e-mail; in a social exchange group, like Facebook; in the comments section of a blog; or on one's personal Web site — just to name a few. Yet, the most aggravated of these is the in-person threat in terms of its intrusiveness, imminence, and opportunity for escalation. Likewise, anyone who has received a harassing phone call in the middle of the night can attest to how disruptive and disconcerting it can be. And

receipt of a letter informs the recipient that the individual who made the threat knows where he lives.

There are numerous difficulties in seeking to distinguish Internet threats from these types of threats. First, it can be reasonably argued that someone who goes through the deliberate steps of writing a letter, addressing an envelope, finding a stamp and placing the letter in the mail is more determined to communicate a threat than someone who types out an email and clicks 'Send.' Fair to say that all of us either have written emails in the heat of the moment that we later regret, or have surely seen our share of such emails on inter-office exchanges or listserves. A form of communication that engenders immediate, sometimes detached or presumably anonymous responses does not in-and-of-itself require an added level of punishment. To the contrary, it would seem to compel a degree of understanding as to the stressors that were acting upon the individual.

The second problem is perhaps properly labeled a generation gap. Notwithstanding what is becoming the omnipresent existence of electronic communication in our society, there continues to be a lag between the understanding and appreciation for what computers, cell phones and the like mean to those aged 35 and younger, as compared to the rest of us. It is seen in areas ranging from the willingness to abandon privacy by living openly via Facebook or Twitter, to the demise of newspapers for which young people have little use given the width and breadth of information available on-line. In other words, for a growing number of Americans, like the four-year-old girl in the Microsoft commercial uploading a picture from her digital camera and emailing it to her parents, electronic means of communication are simply the norm. Without more, this fundamental change in the way we communicate is clearly not aggravating relative to criminal misconduct.

In this same vein, it is notable that while the Internet fosters an apparent sense of anonymity among many, the reality is that use of electronic means to communicate makes it easier for investigators to identify and locate someone – certainly easier than identifying the sender of a letter with no return address. And, again, without more, someone who attempts to conceal from whence an Internet threat originates should be treated no more severely than someone who does the same using other forms of communication. There is no legitimate basis to distinguish one group of individuals from the other. If anything, by increasing punishment for those who use the Internet to convey threats, the Commission would reward the use of other forms of

communication with greater risks. A clear example of this is the number of Anthrax-related safety precautions taken in mail rooms throughout the country shortly after September 11, 2001.

The Commission has recognized that Congressional directives to amend the Guidelines “make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress.” (Fifteen-Year Assessment at 73). Along these lines, the PAG believes that creating an aggravating factor for use of the Internet in this situation will cause courts to disregard the Guidelines for reasons like those for which they have increasingly rejected the Congressionally-influenced child pornography and drug guidelines. The PAG therefore urges the Commission to take no action in this regard.

Thank you.