

## **PROPOSED ISSUE FOR COMMENT #2: NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS OFFENSES**

**Synopsis:** Section 1423 of the Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, (1) expressed the sense of Congress that the guidelines for offenses involving importing and exporting nuclear, chemical, and biological weapons materials (or related technologies) constitute inadequate punishment for those offenses, and (2) urged (but did not require) the Commission to amend the guidelines to increase the penalties for such offenses that fall under various provisions of the Export Administration Act of 1979, the Arms Export Control Act, the International Economic Powers Act, and the Nuclear Non-Proliferation Act of 1978.

Apart from this sense of Congress, there has been little interest expressed externally to have the Commission examine this area.<sup>1</sup> However, the regulation of nuclear, biological, and chemical weapons continues to be of interest to Congress. Several congressional hearings were held on the issue during the spring and summer of 1998, although none of the hearings has focused much, if any, attention on the sentencing aspect. The Senate Select Committee and the Technology, Terrorism, and Government Information Subcommittee held a joint hearing in April 1998 in order to examine current law enforcement policies and capabilities with respect to biological and chemical weapons. In June 1998, the Senate Labor, Health, and Human Services and Education Subcommittee held a hearing on the growing threat of bioterrorism.

The question of whether the sentencing guidelines are sufficient in this area will require extensive analysis because there are many federal laws and international agreements (into which the United States has entered) governing the regulation of nuclear, biological, and chemical agents. Precursor chemicals, for example, are regulated by the U.S. Customs Service through the use of a "Control List" of chemical and biological agents and technologies that the Department of Commerce currently maintains. This is a list that the Secretary of Commerce is required (under the Export Administration Act) to maintain on chemical and biological agents, the import and export of which the Secretary regulates on the basis of many factors (including their potential use in manufacturing weapons). In addition, outside of importing and exporting, regulating the domestic use and possession of many chemical precursors and biological agents is difficult

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<sup>1</sup>In December 1996, the Commission published an issue for comment on how the Commission might incorporate into the guidelines a number of new offenses related to chemical and biological agents. In response to the request, the Commission received two pieces of public comment (one of which was from the Practitioners' Advisory Group and the other of which was from the Federal Public and Community Defenders). Both groups essentially advised the Commission to take no action with respect to offenses involving chemical and biological agents on the grounds that such offenses would occur infrequently and could, when they did occur, be covered by the most analogous guideline. On the other hand, the President's Commission on Critical Infrastructure Protection has recommended (in its final report to the President) that the Sentencing Commission amend the guidelines to better address the consequences of the use of biological and chemical weapons.

because they have "dual use" application (i.e., legitimate civilian, commercial applications in addition to potential weapons applications). The Attorney General does have the authority, under 18 U.S.C. § 176, to seize biological agents of a type or quantity that appear to serve no prophylactic, protective, or other peaceful purpose, and in a civil action under 18 U.S.C. § 177, to enjoin the acquisition, possession, or development of any such agents that appear to serve no such purpose.

In sum, the area of nuclear, biological, and chemical weapons offenses is a complicated one that continues to be of concern to Congress and other interested groups. If the Commission were to decide to more closely examine sentencing issues in this area, the following proposed issue for comment would preserve the issue for Commission action.

### **Proposed Issue for Comment:**

*Section 1423(a) of the Defense Authorization Act for Fiscal Year 1997 expressed the sense of Congress that the guidelines for offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons materials constitute inadequate punishment for those offenses. Section 1423(b) of that Act urged the Commission to amend the guidelines to increase the penalties for such offenses under (1) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410); (2) sections 38 and 40 of the Arms Export Control Act (22 U.S.C. 2778 and 2780); (3) the International Economic Powers Act (50 U.S.C. 1701 et seq.); and (4) section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 2156a(c)).*

*The Commission invites comment on whether, as Congress suggests, the guidelines, particularly §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) provide inadequate penalties for these offenses. If the guidelines provide inadequate punishment, how should the Commission address that inadequacy? Should the base offense level be increased? Are there specific offense characteristics that should be added to the guidelines to take into account more egregious offense conduct? Alternatively, should encouraged upward departure commentary be added to these guidelines for cases in which more egregious conduct occurs?*

*Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 pertains to biological weapons. It incorporates attempt and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons. It also expands the scope of biological weapons provisions in chapter 10 of title 18 by expanding the meaning of biological agents.*

*Section 521 of that Act creates a new offense at 18 U.S.C. § 2332c. The new offense makes it unlawful for a person, without lawful authority, to use (or attempt or conspire to use) a chemical weapon against a United States national outside the United States, any person within the United States, or any federal property. The penalty is any term of years or life, or if death results, death or any term of years or life.*

*The Commission also invites comment as to how the guidelines should be amended to cover these statutes. One approach could be to amend §2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) to include conduct violative of these statutes. If the Commission were to select this approach, what changes, if any, would be appropriate to accommodate these offenses? For example, should an alternative base offense level be added in the case of biological or chemical materials, weapons, or facilities? Are there specific offense characteristics that should be added to take into account the range of likely offense conduct? Should commentary encouraging an upward (or downward) departure be added for cases in which certain atypical conduct occurs?*

[Note: A vote on this is a vote on whether to publish the issue in the Federal Register.