Public Comment

Proposed Amendments

2002

Public Comment Summaries
2002 Amendments
February Submissions

Amendment 3 - Career Offenders and Convictions under 18 U.S.C. §§ 924(c) and 929(a).

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ believes the definitions for the career offender guideline should be amended so that the career offender provision is more fully consistent with the statutory directive in the Commission's organic statute. In the spring of 2000, however, the Commission promulgated Amendment 600 (effective November 1, 2000), which amended the career offender definitional guideline, §4B1.2, to exclude violations of 18 U.S.C. § 924(c) from the application of the career offender provision (although it did include such violations for purposes of prior convictions). That guideline amendment was a response to amendments in the 105th Congress to 18 U.S.C. § 924(c) that, among other things, transformed mandatory fixed sentences into mandatory minimum sentences carrying a maximum of life imprisonment. Pub. L. No. 105-386. In the view of DOJ, a violation of 18 U.S.C. § 924(c) (with underlying violent offense (as opposed to drugs)) is a crime of violence and should be subject to the career offender statute. The gravamen of the offense consists of using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such a crime. DOJ sees no reason to exclude the offense from the application of the career offender provision, especially given the fact that it is already explicitly included for purposes of prior offenses.

Further, although DOJ supports the gist of this amendment as currently drafted, it believes it has identified an anomaly in the application of the amendment. Under the amendment, a small number of career offenders would actually receive lower sentences than they would if they had little or no criminal history.

As a possible solution to this anomaly, DOJ recommends the creation of a schedule of additional consecutive time (beyond the minimum) for someone who is a career offender with a section 924(c) conviction rather than a default offense level for § 924(c) career offenders (e.g., the proposed offense level of 37). The guideline could require that for those career offenders convicted of violating section 924(c), the sentence would be computed as otherwise applicable with a specific number of years added on for the 924(c) violation (the mandatory consecutive portion). The add-on could be the same for every career offender, or it could vary depending on certain offense or offender characteristics. This would ensure that every career offender receives a higher sentence than if he were not a career offender.

Practitioners Advisory Group (PAG)
Washington, DC 20009

PAG opposes this amendment because it would work an unreasoned, uncalled for change to the current rules under §4B1.1 (Career Offender) for classifying 18 U.S.C. § 924(c) or § 929(a) convictions, allowing them to count as the present (or third) conviction needed to make a defendant a career offender for sentencing purposes. PAG believes that the amendment should be rejected because it is not based on any empirical study or call for action by Congress or any of the players in the federal criminal justice system, and the only identifiable reasoning behind it is flawed.

According to PAG, the amendment is, at its core, grounded in the criminal history section of the Guidelines and deals with the interaction between a current offense and past convictions and how they mix (and how a certain group of defendants should be treated) at sentencing. PAG believes the amendment is premature at best and should be deferred in light of the ongoing recidivism study by the Commission staff which is to be completed in fall 2002.

Further, PAG believes that neither 28 U.S.C. § 994(h), nor its construction in LaBonte, require or support the amendment. PAG believes that the total disconnect between LaBonte/28 U.S.C. § 994(h) and the heart of the amendment is of major significance in evaluating the amendment, because this is the only posited basis for the enactment. PAG argues that if the amendment is to stand or fall on what is required by LaBonte, then it must fall, because the drastic redefinition of 18 U.S.C. § 924(c) or § 929(a) offenses neither flows from or is suggested by LaBonte. Without the need for reclassification, the myriad new rules (the second part of Amendment 3) are rendered unnecessary.

In opposing Amendment 3, PAG also finds it significant that there has not been any call for the changes made in the amendment, and it could locate no court opinion, position paper or other monograph lamenting the current treatment of these convictions or calling for the changes outlined in the amendment. In addition, there has been no congressional directive or legislation requiring such a change, and PAG believes this is especially significant given that the Commission's last review of the treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions was just over one year ago, when it promulgated Amendment 600.

Finally, PAG states that if not rejected, then the amendment should at least be held for consideration in a future amendment cycle in light of the recidivism study because the format of the study, the data relied on, and its conclusions will guide not only future amendment proposals, but will shape the debate regarding those amendments and, possibly, the entire structure of Chapter Four of the Guidelines. It is PAG's understanding that consideration of the structure of Chapter Four and the general rules for scoring prior convictions, found at §§4A.1.1, 4A1.2 and 4A1.3, has been deferred until after the study is finalized.

Federal Public Defenders
Jon Sands, Chair, Sentencing Guidelines Subcommittee
Phoenix, Arizona 85004

The FPD recommends that the Commission defer action on this amendment to study the issues further.

The FPD states that the proposed amendment to make the career offender enhancement applicable to persons convicted of §924(c) offenses is too complicated to be workable, indicating that this difficulty stems from the fact that §924(c) is itself an enhancement provision that not only requires imposition of a mandatory minimum sentence but requires the sentence to be consecutive to any other sentences.

In addition, because §924(c) already stacks punishment atop the predicate crime, the FPD requests that the Commission not to stack even more punishment absent a clear statement from Congress requiring the additional punishment. The FPD does not believe that 28 U.S.C. § 994(h), the statutory directive for career offenders, clearly requires the broad amendment that the Commission has proposed.

Proposed Guideline Is Not Required by 28 U.S.C. § 994(h)

The FPD suggests that if the Commission chooses to define 924(c) as a "drug offense" for purposes of the career offender guideline, the Commission is doing so based on its own discretionary authority to promulgate guidelines and not because it is required to do so by the congressional mandate in 994(h). The FPD states that, rather than avoid unwarranted disparities, the proposed amendment will result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. Thus, the FPD does not believe that there are sound policy reasons for the Commission to extend the 994(h) definitions of felony drug and violent offenses beyond the statutory mandate.

The FPD believes the current definition of "crime of violence" in the career offender guideline has worked well, whereas the current proposal to expand it will not because not all §924(c) offenses are crimes of violence under the current definition. The FPD states that, in fact, a significant number of §924(c) offenses involve no violence or threat of violence by the defendant, particularly as the elements of §924(c) were amended by Congress in 1998, interpreted by the courts and in light of coconspirator liability.

The FPD states that because §924(c) is not – as a categorical matter – a crime that involves actual violence or the serious threat of violence, the statutory directive does not require the Commission to expand the definitions in the career offender guideline. The FPD suggests that the proposed expanded definition goes beyond what §994(h) requires and ignores the reality of vicarious liability. Further, the career offender designation generates extremely severe penalties because the statutory maximum for 924(c) cases is life, which generates a career

offender sentencing range, before acceptance, of 360 months to life with a consecutive term for the 924(c) offense. Whereas a career offender designation triggered by felony drug offenses would generate sentencing ranges of 210 to 262 months (for drug offenses with statutory maximum of 20 years) and 262 to 327 months (for drug offenses with statutory maximum of 40 years). The FPD requests that, in light of the very severe penalties that will come into play for persons whose 924(c) convictions trigger the career offender designation, the Commission not go beyond the congressional directive. Instead, the FPD suggests that the Commission provide for a case-by-case analysis to determine whether the defendant's conduct involved "the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a).

The FPD also suggests that the Commission require a case-by-case, individualized analysis by the sentencing court to determine whether the §924(c) offense is a crime of violence. They state that a case-by-case analysis is not unduly burdensome because it would involve consideration of the very conduct for which the defendant is being convicted and sentenced. Further, this approach is consistent with the approach that the Commission has already established in career offender cases.

The FPD suggests that if the Commission designates §924(c) as a trigger offense for the career offender guideline, it should, at a minimum, provide a mechanism for district judges to review the charge and the actual conduct to determine if the offense involved actual violence or a serious threat of violence before the offense would be deemed a crime of violence for career offender purposes.

LaBonte Does Not Mandate the Current Proposal

The FPD states that the Supreme Court's opinion in LaBonte is inapposite to the issue before the Commission. United States v. LaBonte, 520 U.S. 751 (1997). LaBonte involved application of the career offender guideline where the instant offenses were controlled substance offenses. Noting that Congress has delegated "significant discretion" to the Commission to formulate sentencing guidelines, the Supreme Court held that the Commission's discretion had "to bow to specific directives of Congress." LaBonte, 520 U.S. at 757. Because 28 U.S.C. § 994(h) directs the Commission to prescribe a sentence "at or near the maximum term authorized," the Commission could not disregard the recidivist enhancements that increase the statutory maximum in drug trafficking offenses when designating the statutory maximum penalties under the career offender guideline. Id. at 757-58.

The FPD also asserts that there are no "specific directives" in § 994(h) that circumscribe the Commission's discretion to define a crime of violence or that require the Commission to expand the definition of felony drug offense beyond that included in § 994(h), and there are also no "specific directives" that address whether § 924(c) offenses should trigger designation as a career offender.

The FPD states that neither LaBonte nor § 994(h) offer the Commission guidance on how to write a workable guideline that can incorporate the consecutive, mandatory enhancement penalties required by §924(c), with a guideline scheme that is inconsistent with mandatory minimum penalties, and with the fact that not all §924(c) offenses are crimes of violence.

Bailey-fix Legislation

The FPD argues that the current definitions in the career offender guideline are appropriate and that the Commission should not adopt the proposal changes. Because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others, the proposed changes are likely to result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. If the Commission adopts all or part of the proposed amendment it should, at a minimum, add commentary to exclude from the career offender designation those §924(c) offenses that do not involve actual violence or a serious threat of violence. The FPD also recommends that the proposal should be revised to be more workable and user-friendly.

Amendment to U.S.S.G. § 2K2.4, note 1(B)

The FPD argues that the proposal to insert language that an upward departure may be warranted is unnecessary. As proposed, an upward departure is indicated in all cases where the defendant is not a career offender, even presumably in a case where a defendant is not a career offender because he has a single prior. The FPD sees no need to encourage upward departures for criminal history beyond those identified in U.S.S.G. § 4A1.3. To encourage an upward departure in a guideline that already stacks additional punishment on the predicate offense without identifying any guiding principles is an invitation for an unwarranted triple-counting of criminal history, when it already is accorded weight beyond its verified value. Additionally, the FPD argues that it is balanced to propose upward departure language without also proposing that similar language be inserted in U.S.S.G. § §2K2.4, comment. (n.1(C)) noting that a downward departure may be warranted where a career offender designation for a defendant convicted of a §924(c) violation overrepresents the seriousness of the defendant's criminal history.

Public Comment Summaries
2002 Amendments
February Submissions

Amendment 5 - Acceptance of Responsibility

Department of Justice (DOJ)
Criminal Division
John Elwood, Ex-Officio Commissioner

DOJ supports the proposed amendment. In its opinion, there is no benefit from timely disclosure of the defendant's involvement in the offense that merits the additional adjustment when the court must continue to have hearings and conferences and the government must continue to prepare for trial. Furthermore, the amendment would add a level of clarity to what the defendant must do to earn the additional adjustment that, ultimately, should benefit the plea negotiation process.

Further, with respect to the circuit conflict the amendment purports to resolve, DOJ agrees with the majority view and therefore supports the amendment. It also thinks the bracketed application note, which proposes an exception for an "extraordinary case," should be deleted as superfluous, because the proposed amendment explicitly speaks only to the "ordinar[y]" case. DOJ states it has difficulty conceiving of any "extraordinary case" that would warrant the reduction despite the commission of another offense while pending trial or sentencing on the instant offense because the commission of an additional crime casts doubt on the sincerity of contrition for another offense.

Practitioners Advisory Group (PAG)
1615 New Hampshire Avenue, NW
Washington, DC 20009

PAG opposes the proposed revision to U.S.S.G. §3E1.1 that would limit a judge's discretion to award a third level reduction for acceptance of responsibility, believing the Commission should not so revise Chapter Three at this time.

PAG argues that denying judges the discretion to award defendants a third offense level reduction in select cases would add unnecessary further rigidity to the guidelines. Moreover, this unwelcome change would be attempting to solve a problem that has been described only anecdotally; PAG is not aware of any statistical analysis or detailed study that supports the proposition that judges have too much discretion in awarding the third level for acceptance of responsibility.

According to PAG, this rule seems to recognize the unfairness in penalizing a defendant who has good reasons for the delay in pleading guilty, violate the well-settled proposition that judges stand in the best position to evaluate those reasons. Further, the proposed revision would

eliminate that discretion and require the sentencing court to deny defendants the third level reduction, regardless of what delayed their guilty plea, and despite their being forthcoming about their involvement.
PAG questions how widespread the purported problem is, and how many cases there are nationally in which a defendant "waits until the eve of trial" to plead guilty. PAG also questions in how many of those cases delays in guilty pleas are the defendant's fault and in how many the lateness is attributable to the government (or to no one in particular). PAG believes it would be unfair to penalize defendants whose guilty plea decision is delayed because they cannot get timely discovery or other information from the government (which is probably not an uncommon occurrence).

PAG states that defendants already face myriad pressures to plead guilty as soon as possible. These pressures are almost entirely exerted by the government, in conjunction with its utilization of both charge-bargaining and the provisions of U.S.S.G. §5K1.1.

However, if the Commission wishes to pursue DOJ's concern, PAG proposes that a statistical and economic analysis of the problem first be conducted. A working group could be formed to study and prepare a report (similar to the comprehensive 1991 Acceptance of Responsibility Working Group Report). Once the scope -- and even existence -- of the problem mentioned by DOJ is confirmed, then the proposed revision can be properly considered and weighed against its potential impact on defendants and courts.

Additionally, PAG opposes the second part of the proposed amendment that seeks to resolve a circuit split regarding whether a defendant must be denied the downward adjustment for acceptance of responsibility when he or she engages in any new criminal conduct before sentencing. Sentencing judges are best equipped to determine whether in a particular case new criminal conduct justifies depriving a defendant of a reduction for acceptance of responsibility.

New York Council of Defense Lawyers
Victor J. Rocco, President
120 West 45th Street
New York, New York 10036

The New York Council of Defense Lawyers (NYCDL) objects to the proposed amendment to §3E1.1 which would eliminate subsection (b)(1), explaining that the Commission's argument that subsection (b)(1) undermines the incentive to plead guilty ignores the language of the guideline itself. The NYCDL believes a defendant complying with subsection (b)(1) may often save the Government more time and money than a defendant complying with subsection (b)(2), because the Government will naturally seek to have all information regarding the crime at the time of sentencing; therefore it will be better served by a defendant who comes in early and reveals all factual information than by a defendant who states he wants to plead guilty but waits until the sentencing to provide information.

The NYCDL also argues that by eliminating the extra level reduction for a defendant who seeks a constitutional challenge or seeks to argue the inapplicability of the statute to his conduct, the proposed amendment goes against Application Note 2 and will make it less likely that these defendants will cooperate fully at an early stage with respect to the conduct at issue. This result, it argues, is inconsistent with the goals of the guideline.

Further, the NYCDL argues that eliminating subsection (b)(1) will not only penalize the defendant who comes in early, saving the Government time and money, but will also unnecessarily force a defendant to give notice of his intention to plead guilty before his attorney has exhausted all avenues to prevent him from being unjustly convicted.

With respect to the circuit conflict the amendment purports to resolve, the NYCDL states that the rationale in the minority circuit is both reasonable and supported by the text of the guideline itself. Therefore, the Commission should conclude that criminal conduct which occurs pending trial or sentencing and which is wholly distinct from the offense of conviction may not be considered in assessing whether a defendant has accepted responsibility for the offense of conviction. However, should the Commission decline to follow the minority circuit, the NYCDL argues it should still not adopt the proposed amendment because it goes far beyond merely adopting the majority position which holds that subsequent criminal conduct may be considered. Instead, the proposed amendment creates a presumption that, barring extraordinary circumstances, the reduction should ordinarily be denied when the defendant has committed an additional offense. According to the NYCDL, such an amendment would unnecessarily curtail the discretion usually afforded the sentencing court in deciding whether to award the initial two-level adjustment.

Alternatively, the NYCDL recommends the Commission should allow the courts to fashion appropriate sentences in light of all the relevant factors so that, at most, any amendment should make clear that a subsequent offense is one factor that may be considered in evaluating whether a defendant is entitled to credit for acceptance. According to the NYCDL, because it is both reasonable and supported by the text and commentary of the guidelines, the Commission should adopt the position of the minority circuit and conclude that a defendant's criminal conduct that occurs pending trial or sentencing which is wholly distinct from the offense of conviction may not be considered by the district court in deciding whether the defendant should receive a sentencing reduction. However, should the Commission believe that the commission of subsequent dissimilar offenses is relevant, it should not impose a presumption that, absent extraordinary circumstances, a defendant should be denied the downward adjustment if he engages in criminal conduct that occurs subsequent to the offense.

Federal Public Defender
Jon Sands, Chair, Sentencing Guidelines Subcommittee
Phoenix, Arizona 85004

The FPD opposes the proposed amendment because it limits the flexibility of district court judges and makes the guideline less fair and more subject to challenge. The FPD argues that by

eliminating the court's discretion to consider the defendant's timely confession, the proposal shifts the focus from rewarding acceptance of responsibility and remorse to penalizing the exercise of constitutional rights to due process, assistance of counsel, and the other protections guaranteed by the 4th, 5th and 6th amendments to the U.S. Constitution.

In addition, the FPD believes the Commission should not make changes to a guideline that was applied in 90% of cases last year in this piecemeal fashion. According to the FPD, the guideline should be amended, if at all, only after adequate study of Commission data including consideration of the various defense requests for adjustments that have been submitted over the years. Therefore, the FPD recommends that the Commission defer modifications and convene an ad hoc working group, with participation by the defense bar, to study whether disparity or unfairness affects application of the guideline and to recommend changes where appropriate.

The FPD believes that under the proposed amendment, judges will no longer be able to award an additional one-level reduction to defendants who confess at the time of arrest but who, for sound legal reasons, do not immediately plead guilty. These situations frequently occur because counsel is reviewing or waiting for discovery, conducting an investigation or otherwise studying the client's legal options or because the defendant is waiting for the court to rule on a motion that asserts a violation of a legal or constitutional right. The FPD states that when viewed against the backdrop of the realities of federal sentencing, the proposal elevates the conservation of resources above the exercise of constitutional rights.

It is the FPD's view that a system in which fewer than 5% of defendants go to trial is not in urgent need of yet more and earlier guilty pleas. It states that at the same time it penalizes defendants, the proposed amendment will give freer rein to prosecutors even in cases where their inactivity in producing discovery and Brady materials or insistence on admissions to crimes not committed may be the primary cause holding up the accused's decision to plead, and even where the prosecutor's conduct may impinge on the due process and 6th Amendment rights of the accused.

Furthermore, the FPD believes substantial judicial and prosecutorial resources are already conserved under a guideline scheme that relies on relevant conduct applied on the basis of hearsay evidence without the benefit of confrontation. Therefore, the FPD recommends that the proposed amendment should clarify that delays relating to pretrial motions, and the production of discovery and Brady material should not be used to deprive a defendant of the additional one-level reduction under §3E1.1(b)(2).
Additionally, the FPD opposes the proposed circuit conflict fix because it goes well beyond the findings of the majority of circuits, raises significant policy concerns and sets the stage for a new conflict on this same issue. In its view, by directing that acceptance be awarded only in rare cases, the amendment has the substantial potential to reduce the number of cases that will be resolved by plea. As with the first part of this amendment, the FPD recommends the Commission put off this amendment until it can fully review this guideline based on data and the input of an ad hoc working group, including members of the defense bar.

The FPD also agrees with the Sixth Circuit that whether a defendant has committed or been accused of committing an offense, distinct from the offense of conviction, after he enters a plea of guilty, should not determine whether the defendant has accepted responsibility for the offense of conviction, particularly where the alleged wrongful conduct is a failed drug test. In the view of the FPD, such post-plea offenses are better treated as an aspect of criminal history and are addressed in Chapter 4 of the guidelines; a conviction that has become final whether it arises out of conduct committed before or after the defendant pleaded guilty counts as criminal history, and if the defendant has been convicted but not yet sentenced, he will receive one criminal history point for that conviction. At a subsequent sentencing for the new conduct, the court may consider the fact that the defendant committed a new offense while awaiting trial or sentencing as a basis for an upward departure.

The FPD argues that the Commission ought not adopt an option that may run afoul of the Fifth Amendment or that places a burden on the defendant's assertion of that right particularly where the criminal history guideline already accounts for such conduct. Therefore, it recommends that the Commission adopt commentary providing that allegations of new wrongful conduct not related to the offense of conviction be addressed as part of criminal history rather than as part of the determination of whether the defendant is eligible for a downward adjustment under §3E1.1.

In addition, the FPD disagrees with the addition of the language to Application Note 4, which functionally equates the commission of a new offense while on pretrial release with obstruction of justice, except in extraordinary circumstances. None of the majority opinions relied on application note four or equated new criminal conduct (such as a positive drug test while on pretrial release) with obstruction of justice. Nor have any courts held that it should be rare for such a defendant to receive the reduction for acceptance of responsibility. To the contrary, the circuit courts have held that the sentencing court is in the best position to determine whether the new conduct should preclude the reduction. The FPD argues that several of the majority circuits explicitly stated that such conduct does not necessarily preclude a reduction for acceptance, it is merely a factor for the court's consideration.

Instead, the FPD argues the Commission can better adopt the reasoning of the majority of circuit courts by adding clarifying language to application note 1(b) indicating that the sentencing court may consider new criminal conduct unrelated to the offense of conviction when assessing whether the defendant accepted responsibility but only as one of the several factors to be considered.
Additionally, the FPD argues the Commission should insert language in the commentary similar to that in the probation and supervised release statutes which provide that the court must consider substance abuse treatment programs before it takes action against one who fails a drug test.

PUBLIC COMMENT SUMMARIES
2002 AMENDMENTS
March Submissions

Amendment 7 - Terrorism

Department of Justice
Criminal Division
John Elwood, Commissioner, Ex-Officio

DOJ generally supports the Commission's amendment proposals but responds to the issues for comment and suggests specific changes as follows:

Part A: New Predicate Offenses to Federal Crimes of Terrorism

§2A5.2: DOJ supports the addition of a cross reference to the homicide guidelines if death results from the offense. DOJ also supports a special instruction (similar to those in §§2M6.1, 2N1.1 and 2G1.1) or specific offense characteristic (providing a five-level increase) if the offense endangered or harmed multiple victims. DOJ believes that a specific offense characteristic should be included to take into account aggravating conduct under 49 U.S.C. § 46503.

DOJ supports the enhancement for endangering an airport facility, but suggests two changes. DOJ would delete the language "with the intent to endanger the safety of an aircraft, a mass transportation vehicle, or a ferry during the course of its operation" from §2A5.2(a)(1)(C) and add the phrase "or an airport facility" to §2A5.2(a)(1)(A). DOJ believes this subsection should encompass conduct involving the intentional endangerment of the safety of an airport facility, as well as the safety of an individual in, upon, or near the mass transportation mode, without reference to any additional intent requirement regarding the endangerment of the safety of the transportation mode itself. DOJ would make the same changes to §2A5.2(a)(2)(C) and (A), respectively, to deal with reckless endangerment.

DOJ believes that, with the above modifications, the base offense levels in §2A5.2 are adequate with the exception of reckless endangerment. DOJ would increase the base offense level from 18 to 24, the level applied to reckless endangerment in §2K1.5(b)(1). DOJ adds that the proposed definition of "mass transportation" should track the language in 18 U.S.C. §1 993(c)(5).

Conveying of false information and threats: DOJ believes that threats of a terrorist nature are fundamentally different from other threats and merit different treatment under the sentencing guidelines. DOJ recommends modifying §2A6.1 to include new specific offense characteristics that address the aggravating factors that are typical of terrorist threats and contribute to their seriousness. These might include enhancements for the following: 1) the offense involved an express or implied threat of death or bodily injury; 2) the threat involved multiple victims; 3) the offense involved conduct evidencing an intent or apparent ability to carry out the threat; 4) the offense resulted in substantial disruption of public, government, or business functions or

services; 5) the offense involved or was intended to injure the United States; and 6) the offense resulted in a substantial expenditure of funds to respond to the offense.

DOJ believes that this approach would adequately differentiate between terrorist and non-terrorist threats even though they would be prosecuted under the same statute. DOJ would treat the conveying of false information and hoaxes in §2A6.1 with the inclusion of the specific offense characteristics. They would also treat offenses under 18 U.S.C. § 1993(a)(7) and (8) and under 49 U.S.C. § 46507 in the same manner.

§2M6.1: DOJ believes that the specific offense characteristics in §2M6.1(b)(1) and (b)(3) should be applicable to §§175(b) and 175b offenses. DOJ recommends a base offense level of 22 for §§175(b) and 175b offenses to reflect the extremely dangerous nature of such conduct. DOJ suggests that, depending on the resolution of these issues, proposed subsection (a)(4)(A) may have no practical effect and may be a candidate for deletion.

Appendix A - Statutory Index: DOJ agrees that the new harboring statute, 18 U.S.C. § 2339, should be referenced to §2X2.1. DOJ has difficulty with applying §2X3.1 (Accessory After the Fact) to 18 U.S.C. § 2339 because §2X3.1 provides for a base offense level of not more than 20. DOJ suggests amending §2X3.1 to include an enhancement to reflect the higher maximum sentence prescribed by Congress.

Part B: Pre-existing Predicate Offenses to Federal Crimes of Terrorism Not Covered by the Guidelines

18 U.S.C. § 2332b(a)(2): DOJ does not support equalizing the offense level for threat offenses with the offense level if the threat had been carried out. However, DOJ does believe that §2A6.1 is inadequate generally and should be modified as explained above.

18 U.S.C. §§ 2339A and 2339B: DOJ would treat these two offenses separately. For § 2339A cases which involve the provision of material support or resources prior to or during the commission of the predicate offense, DOJ would apply §2X2.1. For § 2339A cases which involve the provision of material support or resources after the commission of the predicate offense, DOJ would apply §2X3.1.

Because § 2339B is not statutorily linked to the commission of any particular offense, DOJ does not think that it should be treated in the manner suggested above. Although existing §2M5.1(a)(1) is sufficiently analogous to warrant application to §2339B offenses, there are certain specific offense characteristics that ought to be applicable in §2339B cases that are not part of §2M5.1. Therefore, DOJ supports the creation of a new guideline for § 2339B offenses that would assign a base offense level of 26. DOJ also recommends an enhancement for offenses involving the provision of weapons, explosives, or lethal substances and an enhancement for offenses resulting in the death of any person.

Appendix A - Statutory Index: With regard to § 2332b(a)(1), DOJ believes that the statutory index should reference §§2A4.1 and 2A2.1. With respect to § 2340A, DOJ suggests referencing §2A2.1. DOJ supports referencing 49 U.S.C. § 60123(b) offenses to §§2B1.1 and 2K1.4, with two changes. DOJ would provide a far greater increase in offense level than §2B1.1 provides when the offense involves an infrastructure facility. DOJ would add a specific subsection to §2K1.4(a)(1) assigning the highest offense level available to offenses involving infrastructure facilities.

Part C: Increases to Statutory Maximum Penalties for Predicate Offenses Covered by the Guidelines

USA PATRIOT Act and Statutory Maximums: DOJ supports increasing guideline penalties to reflect the enhanced penalty provisions provided for in § 810 of the USA PATRIOT Act. Specifically DOJ recommends that:

- *18 U.S.C. § 81:* currently referenced to §2K1.4. DOJ beleives that the offense level in §2K1.4(a)(1) should be increased to 26 to reflect the increased statutory penalties provided in the USA PATRIOT Act for 18 U.S.C. § 81 cases.
- *18 U.S.C. § 1366:* should be referenced to §2K1.4 instead of §2B1.1.
- *18 U.S.C. § 2339A and B:* (see comments in Part A, above).
- *18 U.S.C. § 2155(a):* currently referenced to §2M2.3. DOJ thinks the base offense level for § 2155(a) offenses should be increased to 32 as these offenses are more akin to offenses referenced to §2M2.1. The Commission may also wish to consider at some future time whether the base offense level for violations of 18 U.S.C. §§ 2153 and 2154 should be increased to reflect the higher statutory maximum penalties (30 years) and circumstances surrounding the violation of these statutes.
- *18 U.S.C. § 2284:* currently referenced to §§2M2.1 and 2M2.3. DOJ believes that the more appropriate reference is §2M6.1, which already includes offenses involving nuclear facilities and nuclear material and which is consistent with the enhanced penalties provided by Congress in the USA PATRIOT Act.
- *18 U.S.C. § 46505:* currently referenced to §2K1.5. DOJ believes that the current specific offense characteristic in §2K1.5(b)(1) should be increased from 15 to 17 to reflect the enhanced penalty Congress provided in the USA PATRIOT Act for violations of § 46505(c). A specific offense characteristic or a cross reference to the homicide guideline should be provided when death results from an offense.
- *18 U.S.C. § 60123:* currently referenced to §2B1.1. As explained in Part B, above, DOJ believes this statute should also be referenced to §2K1.4 with some modification.

Part D: Penalties for Terrorist Conspiracies

§2X1.1: DOJ strongly supports some modification that results in the same penalties for conspiring to commit terrorist offenses and committing the substantive offenses to the extent provided by statute. DOJ also believes that the same rule should apply to attempts. DOJ has one technical concern with the mechanism outlined in the proposed amendment. DOJ's concern is that many statutes reference the same guideline but some of them treat conspiracy differently for the substantive offense and some do not.

Part E: Terrorism Adjustment in §3A1.4

DOJ supports the proposed amendment to §3A1.4. DOJ strongly supports an invited upward departure for offenses that involve domestic or international terrorism, as defined by Congress, but do not otherwise qualify for this adjustment provision. DOJ has some questions about sentencing terrorist offenses at or near the statutory maximum because it would effectively make some downward adjustments (*e.g.*, §3E1.1) inapplicable. These adjustments can be very useful for the courts and for law enforcement.

DOJ believes that the upward departure in proposed Application Note 3 is the appropriate way to deal with terrorism offenses which are not currently covered by §3A1.4. If the Commission does use the enhancement approach, DOJ argues that it should be identical to the existing enhancement.

DOJ thinks that it is highly desirable to amend §3A1.4 to clarify that it applies in cases where the offense was intended to conceal a federal crime of terrorism or obstruct the investigation of such a crime. DOJ proposes the following language:

> "This adjustment is applicable to all offenses that involve or are intended to promote a federal crime of terrorism, including offenses that are committed after the federal crime of terrorism has been completed. Thus, any offense that is designed to conceal a federal crime of terrorism, or to obstruct its investigation or prosecution, would qualify for the adjustment under this section."

DOJ is concerned that proposed Application Note 1 confuses the underlying federal crime of terrorism with the offense that involved or was intended to promote it. DOJ suggests that the second sentence be rewritten as follows:

> "Accordingly, in order for the adjustment under this guideline to apply, (A) the offense must be a felony that involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); and (B) pursuant to 18 U.S.C. §2332b(g)(5)(A), the enumerated offense must have been calculated to influence or affect the conduct of government be intimidation or coercion, or to retaliate against government conduct."

Similar language should be added to Application Note 3 as well.

Part F: Money Laundering Offenses

DOJ believes that the new money laundering offenses created under 31 U.S.C. § 5332 and 18 U.S.C. § 1960 should be referenced to §2S1.1 instead of §2S1.3, as proposed by the Commission. DOJ believes that §2S1.3 would treat the offenses as merely regulatory and that §2S1.1 would more accurately reflect the intent of Congress and the seriousness of the offenses.

Part G: Currency and Counterfeiting Offenses

DOJ believes that the terrorism enhancement in §3A1.4 adequately addresses instances under §2B5.1(b)(5) that were intended to promote terrorism.

Part H: Miscellaneous Amendments

18 U.S.C. § 2332b(g)(5)(B): DOJ believes that the guidelines should provide a range for the term of supervised release (similar to §§5D1.2(a)(1) and (2)) rather than a fixed number. The range should be a minimum of 5 years and a maximum of life to reflect Congress's intent in the USA PATRIOT Act.

18 U.S.C. § 2332d: DOJ agrees with the proposal to reference § 2332d offenses to §2M5.1 and to provide for a base offense level of 26.
18 U.S.C. § 1036: DOJ thinks it is acceptable to reference §1036 to §2B2.3, but would add a 16-level enhancement to reflect the penalty for aggravated conduct.

Department of the Treasury
Jimmy Gurulé
Under Secretary (Enforcement)

Money Laundering

§2S1.3(b): Treasury supports the proposed amendment to §2S1.3(b). Treasury would also support a higher, four-level enhancement in these cases, especially if the Commission keeps the bracketed text which makes it clear the enhancement would apply only to the more serious offenses. Treasury also recommends that the Commission adopt the second set of bracketed text: "unlawful activity involving a total amount of more than $100,000 in a 12-month period."

Treasury suggests limiting the new definition of "value of funds" in §2S1.3 to subsection (A). They would keep the proposed paragraph (A) and strike the phrase, "Except as provided in subsection (B)." In lieu of this approach, Treasury suggests establishing a separate enhancement as part of §2S1.3(b) for the use of these accounts in connection with the offense. Treasury also suggests replacing the phrase "and other account holders" at the end of the proposed Background note with "and other types of transactions and types of accounts."

Treasury supports an enhancement under §2S1.3 for bulk cash smuggling. The enhancement should be tied to the value of the cash or monetary instruments involved.

Treasury also proposes an additional six-level enhancement in §2S1.3(b) if the defendant "knew or believed that the funds were proceeds from a terrorist entity or were intended to promote terrorist activity."

§2S1.1: Treasury supports listing public corruption as one of the offenses qualifying for the six-level enhancement in subsection (b)(1).

Counterfeiting

Raising guideline penalties for counterfeiting domestic currency: Treasury recommends that the base offense level for offenses covered by §2B5.1 (Counterfeiting) be increased to 11 to better reflect the heightened statutory penalty. Treasury reiterates their position from the last amendment cycle that the current base offense level of nine in §2B1.1 does not adequately reflect the seriousness of this conduct.

Foreign currency counterfeiting: Treasury recommends that the guideline sentences for counterfeiting foreign obligations mirror those of domestic obligations. Both domestic and foreign counterfeiting offenses would be included in §2B5.1.

Counterfeiting linked to terrorism: Treasury recommends that all counterfeiting offenses be subject to §2B5.1 rather than §2B1.1 in order to provide consistent penalties regardless of the type of currency counterfeited and to better reflect the newly-enhanced maximum penalties provided by statute.

Instead of amending the existing two-level enhancement in §2B5.1 which applies when part of the offense was committed outside the United States, Treasury recommends creating a separate four-level enhancement to apply when the offense was intended to promote terrorism. Counterfeiting in aid of terrorism presents a distinct and very serious threat and should be sentenced accordingly.

Computer Crimes

Treasury asks that the Commission consider an enhancement for those individuals convicted of violating 18 U.S.C. § 1030(a)(4) and (a)(5). Computer crimes may not always produce financial losses as contemplated by §2B1.1, but they can disrupt systems vital to the daily activities of the country. Treasury proposes:

- a two-level enhancement for conduct that produces a significant disruption of operations of a private entity or government agency;
- a four-level enhancement for conduct that disables information systems that directly support critical infrastructure such as utility companies, financial institutions, or telecommunications service providers; and
- a six-level enhancement for conduct that disables information systems that directly affect public safety, public health, national defense, the administration of justice or national security (such as 9-1-1 systems), medical facilities, court dockets, military records or air traffic control systems.

Each of these adjustments would apply in conjunction with the additional offense level for measurable pecuniary loss. Additionally, Treasury supports the application of the §3B1.3 (Abuse of Position of Trust) enhancement when the attack is perpetrated for a current or former systems administrator.

National Association of Criminal Defense Lawyers (NACDL)

NACDL states that the amendments do not comply with Apprendi v. New Jersey, 530 U.S. 466 (2000), because in its view, Apprendi requires that the key factual elements which determine the guidelines sentence must be charged in the indictment and found by the jury beyond a reasonable doubt. NACDL says federal courts of appeal have held that Apprendi does not apply to determinations under the sentencing guidelines as long as the sentence falls within the statutory maximum, and disagrees with this analysis. In their view, from the perspective of a trial judge imposing sentence and a defendant receiving it, the guidelines cannot be distinguished from statutes in that way.

Part A - New Predicate Offenses to Federal Crimes of Terrorism

NACDL takes no position on the majority of the specific issues on which the Commission requests comment. With respect to hoaxes, NACDL suggests that the attempt guideline (§2X1.1) be applied, rather than the guideline for the underlying substantive offense, because this will reflect the generally less culpable nature of hoaxes.

Part B - Pre-existing Predicate Offenses to Federal Crimes of Terrorism Not Covered by the Guidelines

NACDL agrees in principle with the Commission's proposal to create Chapter Two guidelines for offenses that are enumerated in 18 U.S.C. § 2332b(g)(5) as "federal crimes of terrorism."

NACDL believes that §2M6.3 does not adequately take into account the wide variety of conduct that may be covered by the underlying statutes, 18 U.S.C. §§ 2339A and 2332B. The proposed offense level for §2M6.3 – 26 or 32 – is far too high for persons at the low end of the culpability scale. NACDL suggests that the material support guideline have a relatively low base offense level – perhaps 16 or 18 – with specific offense characteristics to account for more culpable behavior.

Further, NACDL does not believe that the §3A1.4 adjustment should apply to offenses directed specifically at terrorism-related offenses, because the Chapter Two guideline and associated SOCs should take into account the "terrorism" aspect of the defendant's conduct. To apply both the Chapter Two guideline and the Chapter Three adjustment would amount to double-counting.

Part C - Increases to Statutory Maximum Penalties for Predicate Offenses Covered by the Guideline

NACDL believes the current guideline adequately, and in some instances, more than adequately, punishes the conduct at issue.

Part D - Penalties for Terrorist Conspiracies

In the view of the NACDL, Congress did not mandate in Section 811 that conspiracies to commit the enumerated offenses must receive the same guideline sentence as the underlying substantive offense, and nothing in the statute requires the Commission to deviate from its usual approach, set forth in §2X1.1, in the sentencing of conspiracy offenses.

Part E - Terrorism Adjustment in §3A1.4

According to NACDL, the adjustment dictates a statutory maximum sentence for almost all offenses connected to terrorism, and suggests the Commission abandon §3A1.4 and instead address those aspects of the defendant's conduct that cause it to be labeled "terrorism" through SOCs attached to Chapter Two. In the alternative, the Commission could refine §3A1.4 to provide a range of adjustments depending on the culpability of the conduct. At a minimum, NACDL believes the Commission should confine the adjustment to an increase of a fixed number of levels and eliminate the level 32 floor and the requirement that the criminal history category be set at VI.

Further, the NACDL opposes application of the adjustment to offenses that are "intended to promote" a federal crime of terrorism, but do not involve such an offense. Instead, the adjustment should apply (if at all) only when the defendant has been convicted of a "federal crime of terrorism," as listed in 18 U.S.C. § 2332b(g)(5)(B). In the view of the NACDL, Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996 and the legislative history establish that Congress intended §3A1.4 to apply only when the defendant is convicted of an offense as listed in Section 2332b(g)(5)(B). The NACDL opposes the guideline both in its present form and as amended, because the guideline appears to apply even when the defendant is convicted of a non-listed offense, as long as the court determines that the non-listed offense was intended to promote a listed offense.

Additionally, NACDL believes §3A1.4 should expressly include the limitation that Congress mandated in Pub. L. No. 103-322, in which Congress directed the Commission to "provide an appropriate enhancement for any felony . . . that involves or is intended to promote international terrorism unless such involvement or intent is itself an element of the crime," stating that the Commission has omitted the underscored language from the guideline and its application notes.

NACDL also argues that the Apprendi principles require the elements of the adjustment be found by the jury beyond a reasonable doubt. Finally, they argue that as the adjustment stands now, it exceeds the statutory authority under the Violent Crime Control and Law Enforcement Act of 1994 and the Antiterrorism and Effective Death Penalty Act of 1996, imposing a severe

adjustment on many defendants whose conduct may be labeled terrorism. Because the adjustment is already more sweeping than it should be, NACDL opposes the proposal to permit an upward departure for offenses that do not "technically" fall within §3A1.4.

Part F - Money Laundering Offenses

NACDL agrees that terrorism should be defined in Application Note 1 of §2S1.1, but opposes the definition of "domestic terrorism" in 18 U.S.C. § 2331(5) because of its potential for punishing civil disobedience with undue severity. Therefore, NACDL suggests a new application note be added to the guideline making clear that where the terrorism SOC in §2S1.1(b)(1) applies, the court should also not apply the §3A1.4 adjustment, as applying both would be double-counting.

Part G - Currency and Counterfeiting Offenses

NACDL believes the SOC provided in §2B1.1(b)(8)(B) would be appropriate, with two caveats; a six-level increase would be appropriate, consistent with §2S1.1(b)(1), and the Commission should adopt a terrorism SOC for §§2B1.1 and 2B1.5, making clear that the court cannot also apply the terrorism adjustment in §3A1.4.

Part H - Miscellaneous Amendments

NACDL suggests that Section 1001 offenses continue to be sentenced under §2B1.1 or another Chapter Two guideline if applicable, with an SOC for offenses that relate to terrorism, making clear again that courts cannot apply both that enhancement and the §3A1.4 adjustment.

Washington Legal Foundation
Daniel Popeo, General Counsel
Paul D. Kamenar, Senior Executive Counsel and Clinical Professor of Law
Djuana Parmley, Law Student, George Mason University

WLF urges the Commission to adopt the proposed changes to the guidelines that would allow a court to impose the maximum punishment allowed by law for those who commit terrorist acts or for those who aid and conspire with them. The Commission should also be careful not to structure the new guidelines in such a way as to limit the potential for upward departures under §5K2.0. WLF generally expresses its support for the positions presented by the FBI and DOJ.

WLF supports an enhancement for offenses against mass transportation and air piracy that result in death and a specific offense characteristic for multiple victims.

WLF agrees with DOJ that offenses involving the conveying of false information, and threats and hoaxes of a terrorist nature should be treated the same since they have essentially the same effect. A threat by a person with the capability and means to carry out the threat should be punished as if

the threat were in fact carried out. An idle threat or hoax is still a serious crime and should be punished severely, but to a lesser extent than if the threat had been carried out.

WLF also agrees with DOJ that §2A6.1 is inadequate in the terrorism context. WLF suggests adding specific offense characteristics with substantial enhancements to reflect the serious nature of the threats and the disruption caused by the threat or hoax.

WLF also endorses DOJ's position with respect to 18 U.S.C. §§ 2339A and 2339B. WLF generally recommends the highest level available for any additional enhancements.

Gwen Alexis, Esq.
Chester, NJ

Ms. Alexis urges the Commission to apply any changes to the guidelines retroactively.

Amendment 8 - Drugs

Department of Justice (DOJ)
Criminal Division
John Elwood, Commissioner, Ex-Officio

A summary of DOJ's comment regarding Amendment 8 has not been prepared. An executive summary was included in its submission "Federal Cocaine Offenses: An Analysis of Crack And Powder Penalties" dated March 17, 2002.

Probation Officers Advisory Group (POAG)
Ellen S. Moore, Chair
Cathy Battistelli, Chair Elect
Macon, Georgia

POAG strongly supports the Commission's attempt to improve the drug guidelines and decrease the reliance on drug quantity to calculate the penalty. It strongly supports a change to the crack ratio but does not propose a specific ratio. Further, POAG is concerned with the impact if the amendment is passed without a corresponding decrease in the crack/powder ratio.

POAG has concerns regarding the mitigating role enhancement, as it suggests it is normally considered a Chapter Three adjustment. Additionally, POAG is concerned about the problematic application of mitigating role as an adjustment under Section 3B1.2(a) and (b) and is of the opinion that application of the adjustment is too nebulous to warrant level reductions exceeding the normal two to four levels. POAG would prefer that the Commission address the circuit conflict relating to mitigating role.

POAG supports the enhancement regarding protected locations, and underage or pregnant individuals but noted an application problem in that 21 U.S.C. § 846 is not included and may result in attempts and conspiracies being excluded.

POAG supports the enhancement relating to violence if there is a corresponding change in the crack/powder ratio. It does note that the language in the weapon enhancement concerning if the offense is "defendant specific" or "offense related" may be confusing and that an application note may be helpful to explain the two concepts and the dissimilarity with USSG §1B1.3

POAG opposes the proposed amendment that provides a floor offense level at USSG §2D1.1(b)(3) and supports the two-level increase for a prior conviction for a crime of violence or controlled substance offense. Finally, it does not support the enhanced safety valve reduction but rather encourages the Commission to look at this proposal in connection with Chapter Four during the next amendment cycle.

Practitioners' Advisory Group (PAG)
Jim Felman and Barry Boss
Washington, DC

PAG believes that designing a new system in which quantity is not the fundamental organizing principle is consistent with, and indeed required by, the congressional mandate that the Commission continue to evaluate the federal guidelines to ensure that punishment is proportionate, non-disparate, and race and gender neutral. PAG believes that the Commission's proposal to give greater weight to aggravating and mitigating aspects of drug offenders and offenses, while reducing the influence of quantity, is the right approach to correcting the myriad of problems generated by the current guidelines.

Crack/Powder

PAG believes that a serious assault on the concept of neutral drug sentencing occurred when Congress rejected the Commission's 1 to 1 crack-to-powder ratio proposal in 1995. PAG states there is no disagreement that the 100 to 1 ratio creates the most significant post-guidelines sentencing disparity. This disparity is arbitrary because there exists no scientific justification for the differential. The disparity is also arbitrary because powder cocaine is sold to street dealers who then turn it into crack. Finally, the fact that most of the street crack dealers are black has resulted in racially disparate sentencing.

PAG states that one of the oft-stated reasons for the severe crack penalties was the perception that crack cocaine trafficking was marked by greater violence, sufficient to warrant the extreme penalties, even for its personal use possession. PAG states that, in fact, crack defendants of late possess fewer weapons, commit less violent crimes, and engage in less aggravating conduct than was the case in the early 1990s.

According to PAG, lowering the crack penalty while targeting aggravating conduct for increased punishment is a much sounder course than lowering the powder trigger, either alone or in combination with raising the trigger for crack. PAG disfavors any increase in the penalty for powder cocaine. Increasing the severity of powder cocaine sentences simply to help ease the correction of the crack mistake does not solve the problem and is unwarranted by the evidence.

PAG believes that while the Commission is precluded from proposing the equalization of penalties for crack and powder cocaine based on Congress's rejection of the Commission's proposed amendment in Public Law 104-38, there are sound reasons for doing as the PAG asks: make the ratio as close to one to one as is supportable.

Aggravating and Mitigating Factors and Quantity

PAG applauds the Commission's efforts to reduce the influence of quantity in the drug sentence calculus by establishing neutral aggravating and mitigating sentencing factors, and therefore

agrees that these SOCs should be applied across the drug guidelines. Therefore, PAG endorses the establishment of universal SOCs, but believes that, at a minimum, the entire drug table must be reduced proportionately by two levels below current levels. PAG believes that lowering the guidelines by two levels will provide headroom in which to apply the aggravating role enhancements, as well as any weapons and violence enhancements presently contemplated. And, such a change would give greater effect to the Safety Valve by giving sentences somewhere to go when a defendant qualifies. While PAG does not necessarily oppose the simultaneous adoption of SOCs designed to de-emphasize the role of quantity in determining the relative culpability of a drug offender, PAG remains concerned that the proposed aggravating SOCs are applicable to all drug types; thus, only a table reduction of two levels can prevent the new SOCs from inappropriately increasing drug sentences for many drug offenders.

Examination of the Proposed SOCs

PAG believes the SOCs for violence, weapons possession and use all should apply to only those defendants who actually possess or injure, or to those who directly order such possession and/or injury. The Commission should reject broad-based concepts of vicarious liability of conspiracy participants for injury of weapons based solely on the notion that violence and weapons are tools of the drug trade and thus reasonably foreseeable. The statistics developed by the Commission have conclusively established that guns and violence are not so inherent in the drug trade as to be reasonably foreseeable.

PAG finds no need to establish minimum offense levels for those traffickers who possess weapons or administer violence. PAG strongly believes that an SOC for prior drug convictions is unnecessary and would result in double counting, unless the enhancement conviction is excluded from criminal history. Therefore, PAG urges that the guideline not be amended in this fashion. Should the Commission nonetheless adopt this factor, it should limit its application only to similar offenses.

PAG supports an additional two-level reduction for true first offenders, raising the question of tying this reduction to the safety valve criteria, especially if prior trafficking convictions will also result in an increase in offense level absent other aggravating factors.

PAG also does not oppose incorporating the factors of §2D1.2 as SOCs in §2D1.1 so long as a defendant must still be convicted under 21 U.S.C. § 860 for that factor to apply.

Finally, PAG believes that a cap for those who qualify for mitigating role adjustment is a welcome change, stating that the numbers selected for the offense level cap will ultimately depend on what other choices the Commission makes in adjusting drug sentencing. However, PAG believes that minor and minimal participants should never be incarcerated for more than ten years, regardless of their prior history.

Circuit Conflicts

PAG favors role in offense mitigating factor comparisons which relate to other actual offense participants, favors using the relevant conduct which calculates the base offense level to determine role, does not support "expanded relevant conduct" and favors the analogous approach to departure for role.

Ecstasy

PAG urges the Commission not to again increase the penalty for ecstasy in the form of changing the typical dosage unit weight. In its view, the Commission should amend Application Note 11 to explicitly include MDMA, MDEA, and PMA in the "Typical Weight Per Unit (Dose, Pill, or Capsule) Table" to the same extent and with the same typical weight as MDA is currently listed, namely 100 mg. This would treat each of these substances in the same manner to conform to the amendment the Commission promulgated last year which treated all of these substances identically.

New York Council of Defense Lawyers (NYCDL)
Brian E. Moss
New York, New York

NYCDL writes in response to the Sixth Issue for Comment regarding the three circuit conflicts the amendment to §3B1.2 (Mitigating Role) failed to address.

(A) Whether, in determining if the defendant is substantially less culpable than the "average participant" the court should assess the defendant's conduct in relation not only to conduct of co-conspirators, but also to the conduct of a hypothetical defendant who performs similar functions in similar offenses involving multiple participants.

With regard to the meaning of "average participant" in the circuit split, NYCDL states the problem with the rigid and artificial requirement of comparing a defendant's conduct to that of a hypothetical role or crime is that it necessarily leads to differing results from court to court. Hence, an approach which looks to a "typical" or "hypothetical" defendant in a crime similar to the charged crime becomes dependant on a particular court's subjective notion of the typical defendant or similar crime. According to NYCDL, such a disparity is inconsistent with the goals of the guidelines and is best avoided by determining the relative importance of the defendant's being sentenced to the actual scheme in which he/she participated.

Further, although the NYCDL believes that drug couriers or mules should generally receive a minimal role adjustment, they are concerned that an effort to apply the "hypothetical" approach to couriers or other categories of lesser participants, will require the Commission to analyze every category of participants in every offense to provide guidance whether that particular activity in a "typical" case may receive role adjustment status. Therefore, NYCDL urges the Commission to reject the more rigid approach and determine mitigating role in a manner similar to that in which

aggravating role status is determined - by examining the defendant's conduct in comparison to that of his co-participants in the charged activity.

(B) Whether in determining if a mitigating role adjustment is warranted, the court should consider only the relevant conduct for which the defendant is held accountable at sentencing, or whether it may also consider "expanded" relevant conduct (conduct that would appear to be properly included under 1B1.3 but was not considered in determining the defendant's offense level).

NYCDL urges the Commission to clarify the guidelines by providing that a defendant's mitigating role status should be determined based on the relativity of the defendant's conduct to the total relevant conduct. According to NYCDL, considering all relevant conduct in assessing a defendant's eligibility for a role adjustment is consistent with the fundamental premise underlying the guidelines that a defendant should be sentenced for who he or she actually is and for what he or she has actually done, *i.e.*, determining a defendant's final offense level should take into account everything that the guidelines deem "relevant" which the Commission itself defined for sentencing purposes in §1B1.3. This would afford sentencing judges broader discretion to look at the entire relevant picture.

According to NYCDL, the narrow approach presently required by the majority of circuits - refusal to consider relevant conduct beyond that for which the defendant was convicted - provides district court judges with less discretion and is inconsistent with the general purpose of the mitigating role adjustment.

NYCDL states that it is important to note that the guideline clarification it urges the Commission to adopt would not require sentencing courts to award mitigating role adjustments based on all relevant conduct, but merely require them to examine all relevant conduct in determining whether to do so. The clarification is therefore desirable both because it will promote uniformity by ensuring that all sentencing courts are considering the same scope of conduct in determining the propriety of a §3B1.2 adjustment and because it will insure that the mitigating role adjustment is available to those less culpable for whom it was intended.

(C) Whether the Guidelines should be amended to permit the Court to depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2.

NYCDL urges the Commission to amend the guidelines to provide that the court may depart downward from the applicable guidelines offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2. NYCDL agrees that if a district court would have decreased the defendant's offense level under section §3B1.2 had the other person involved in the offense been criminally responsible, it should likewise have the discretion to depart downward between two and four levels, based on the defendant's relative to that of the Government agent.

NYCDL recommends that the Commission amend §3B1.2 to provide that the Court may depart downward from the applicable guideline offense level for defendants who, but for the law enforcement status of other participants, would have received a mitigating role adjustment under §3B1.2.

Families Against Mandatory Minimum (FAMM)
Julie Stewart President
Mary Price General Counsel
Washington, DC

FAMM supports the Commission in its efforts to revise the penalties for crack which it describes as unconscionable. FAMM believes that the Commission as the expert agency is best situated to bring an amendment but suggests that how the Commission arrives at the penalty is as important, if not more important, than the actual number arrived upon. FAMM recommends relying on drug briefing charts and expert and scientific testimony, not a better sounding ratio, to develop new crack penalties based on a consistent organizing principle.

The Commission should identify mid- and high- level dealers

FAMM asks the Commission to amend the crack guidelines by applying the same organizing principal to crack that is applied to other drugs by punishing a mid-level dealer with a 5-year mandatory minimum and a high level dealer with 10-year mandatory minimum. The Commission should de-emphasize weight as the primary sentencing factor and focus on role and culpability.

FAMM notes that Congress always intended that the 10-year mandatory would apply to major distributors and the 5 year would apply to serious distributors. FAMM points out that the Commission's own data reveal that 66.5% of crack offenders are street-level dealers whose averages weight was 52 grams, receiving a average sentence of 120 months.

FAMM believes that the Commission has the data from which it can extract the average quantity of crack handled by mid and high level dealers (weighted for trends) to determine what should be the role based trigger amounts.

The Commission should not change the powder cocaine penalty

FAMM opposes increasing powder cocain penalties. FAMM notes that the problem is not powder cocaine penalties but crack cocaine which is punished more severely than methamphetamine. FAMM notes that any increase in powder would send those offenders to prison longer for no discernible reason, 50% of whom are Hispanic and 80% of whom are minorities.

The Commission should act absent a change in the mandatory minimums

The Commission has delinked the guidelines from the mandatory minimum with both LSD and marijuana plants and Congress did not oppose this action. Further, from FAMM's conversations with Judiciary staff members on the House and Senate sides, it is eagerly awaiting an amendment from the Commission and has expressed no reservations about the Commission submitting a amendment instead of a recommendation.

The amended guideline should be retroactive

According to FAMM, retroactivity is only just, in light of the Commission's recognition since the early 1990s that the sentencing structure for crack was unjust and overstating culpability.

Mitigating Role Cap

FAMM supports the mitigating role cap of at least 24 and calls for it to be extended so that only those offenders who are determined to be organizers, manager or leaders of drug enterprises, receive the higher minimum sentences. FAMM does not support limiting the cap to only defendants who receive the minimal role adjustment or excluding the cap where there is serious bodily injury or a weapon is involved unless it is established that the defendant was directly responsible for the bodily injury or used the weapon in connection with the drug offense.

FAMM joins PAG with respect to the circuit conflict and notes that any attempt to define the hypothetical average participant is likely to result in disparate application of the mitigating role adjustment and further litigation.

Enhancements

While FAMM does support using the role in the sentence, it opposes the proposed enhancements without adjusting the drug guidelines downward. Further, any enhancement should be offender specific and not applied through vicarious liability. FAMM opposes any floor noting that judges have ample authority to depart upward if the sentence is not adequately severe.

FAMM urges the Commission to reject the 2-4 level enhancement if the instant offense was committed following a prior felony conviction for a drug crime or crime of violence, noting that this prior conduct is already counted in Chapter Four and amounts to counting these convictions twice only for drug defendants. The court presently has the authority under Chapter Four to depart if the criminal history is inadequate.

Mexican American Legal Defense and Education Fund (MALDEF)
Marisa J. Demeo, Regional Counsel
Marie Watteau, Public Affairs/Policy Analyst
Washington, DC

Since 1968, MALDEF has challenged inequality for Latinos and other minorities. MALDEF has offices in Washington, Los Angeles, Chicago, San Antonio, San Francisco, Sacramento, Albuquerque, Houston, Phoenix, and Atlanta and combines advocacy, education outreach and litigation strategies to achieve macroeconomic social change. In recent years MALDEF has focused more resources and monitoring on criminal justice issues. MALDEF has been instrumental in educating law makers regarding racial profiling, and bringing legal action on behalf of profiled Latinos.

MALDEF believes that the disparity between crack cocaine and powder cocaine has a discriminatory effect on minorities, including Latinos. In the comments submitted, MALDEF has provided the Commission with nine pages of statistics and background concerning the racial profiling and other discrimination of Hispanics within the criminal justice system. MALDEF has chosen to focus on the front-end issue that brings Latinos into the criminal justice system, but realizes that it must address racial implications of all stages of the decisions that lead to incarceration, including the sentencing guidelines and practices.

MALDEF believes that to the extent the drug quantity table takes into account aggravating conduct, the penalties should be reduced as they are based solely on quantity, and enhancements should be added to account for aggravating factors, noting that the original reasons for the increased sentences - violence and weapons - are not always present.

MALDEF supports assigning a 5-year penalty for serious drug offenders and a 10-year penalty for a major drug trafficker but suggests that this currently is not the sentencing structure for crack.

MALDEF recommends that the Commission raise the crack threshold and maintain the powder threshold. MALDEF noted that while five grams of crack results in a 5-year sentence, simple possession of powder cocaine by a first time offender is considered a misdemeanor punishable by no more than one year in prison. Further, in support of this position, MALDEF notes that the DEA's own statistics show that 500 grams of powder is worth $20,000 and five grams of crack is worth a few hundred dollars. An individual who deals in $30,000 or more is considered a serious drug dealer.

MALDEF urges the Commission to resist proposals that would lower the powder threshold because this would simply exacerbate racial disparity further and have a negative impact on the Latino community.

MALDEF also urges the Commission to find alternatives for first time non-violent offenders, noting that the medical community recognizes that powder cocaine is not more harmful than crack cocaine. Further, they note that imprisoning low-level dealers for long periods of time drains valuable prison resources.

International Association of Chiefs of Police
William B. Berger, President
Alexandria, Virginia

Chief Berger has served as a law enforcement officer, executive and police chief in the Metropolitan Miami area for over thirty years. He believes that both crack and powder cocaine are closely associated with crime, violence, death and destruction and therefore, individuals who participate in the sale or use of these drugs should be punished to the fullest extent of the law. Chief Berger does not believe that the Commission should take any steps that would weaken the existing penalties for possession and sale of crack cocaine. Rather, he believes that the current threshold limits for powder cocaine should be reduced so that they more closely track those for crack cocaine. In this fashion, the Commission would achieve the goal of reducing or eliminating any disparity between crack and powder cocaine, while at the same time ensuring that those who participate in the sale and use of these illegal narcotics are penalized in a manner appropriate to the crime they commit.

NAACP Legal Defense and Educational Fund, Inc. (LDF)
Elaine R. Jones, President and Director-Counsel
New York, New York

LDF states that the current sentencing scheme for crack cocaine is irrational because it treats every crack offender disproportionately harshly rather than distinguishing crack offenders who engage in aggravating or violent conduct. It recommends that the Guidelines be reformed to depend less on the type or quantity of drugs and more on aggravating or mitigating conduct. LDF believes that the crack sentencing scheme has a disproportionate impact on African Americans, many of whom are serving excessively long sentences for minor, non-violent offenses. LDF states that the injustice of the current scheme promotes a mistrust of the government and exacts enormous costs on the families and communities of those incarcerated. Because many people incarcerated for crack offenses have children, and children of prisoners run a higher risk of becoming prisoners themselves, LDF believes that the guidelines may contribute to higher crime rates in minority communities instead of deterring crime.

LDF recommends that the Commission close the ratio between crack and powder cocaine sentencing without lowering powder thresholds. According to LDF, lowering powder cocaine thresholds is unjustified and would add to the racial disparity in sentencing by increasing the number of non-violent Hispanic and African Americans sentenced to prison. Stating that the climate in Congress and the country has changed, LDF urges the Commission to resubmit its 1995 recommendation along with a complete analysis of "the economic and human costs" of the

current regime. In support of its position, LDF discusses the high cost of incarceration and cites studies showing that drug treatment is more cost-effective than incarceration. If Congress rejects the Commission's recommendation, LDF suggests that the Commission ask Congress to issue a report with justifications for retaining the current system. LDF also recommends that Congress and the guidelines offer more alternative sentencing for first-time, non-violent, low level crack offenders and other offenders modeled on established programs that work. In addition, LDF urges the repeal of mandatory minimum sentences.

Judicial Committee on Criminal Law (CLC)
Sim Lake, Chair
Sentencing Guideline Subcommittee
Greenville, South Carolina

Mitigating Role Adjustment

CLC believes that the maximum base offense level for minimal participants who do not receive the enhancement for aggravating conduct such as weapons involvement of bodily injury should be 26, and that the maximum base offense level for minor participants who do not receive an enhancement for aggravated conduct such as weapons involvement or bodily injury should be 32.

With respect to the three circuit conflicts on the Commission invited comment, CLC does not believes the Commission should attempt to resolve either of these conflicts, but should instead adopt a comment noting the conflicts, stating no hard and fast rule should be applied and that the district court must make its assessment based on all the facts before it.

Prior Criminal Conduct

CLC argues that an amendment to 2D1.1(b) providing a two or four-level increase if a defendant had a prior conviction of a crime of violence of a drug offense is unnecessary because most prior convictions are already counted in the defendant's criminal history category. CLC does not believe that for even those cases where prior convictions are not counted because of their age, which are few in number, warrant adding Chapter Four criteria into Chapter Two.

Reduction for No Prior Convictions

CLC is opposed to amending the guidelines to provide a two-level reduction in the offense level for a defendant who has no prior criminal convictions.

Simple Possession of Crack Cocaine

CLC supports the deletion of the cross reference in 2D2.1(b) for simple possession of crack cocaine.

Crack Cocaine Sentences

CLC strongly endorses dramatically lowering the current 100-to-1 crack-to-powder cocaine ratio without increasing the guideline for cocaine. However, CLC is concerned that without legislation reducing the minimum sentences for crack cocaine, any proposed amendment would drastically reduce proportionality and significantly increase disparity.

Citizen Letters

The Commission has received numerous letters from citizens expressing their opinions on the proposed amendment, regarding the crack-to-powder ratio. Those opinions will be summarized at the next meeting in April, 2002.

Amendment 9 - Alternatives to Imprisonment

Department of Justice (DOJ)
Criminal Division
John Elwood, Commissioner, Ex-Officio

DOJ believes that any expansion of sentencing alternatives "will undermine significant enforcement programs" and will impede the "goal of general deterrence" for many white collar offenders, "the most likely beneficiaries of this amendment." DOJ's concern is concentrated in five (5) enforcement areas: tax (echoing concerns raised by the Department of the Treasury), antitrust, environmental, white collar fraud, and civil rights offenses. DOJ believes that "certainty of punishment" is vital in these areas and that the proposed amendment "would undercut that certainty."

Department of Treasury
Mark E. Matthews, Chief
Criminal Investigation
Washington, DC

Treasury believes that any proposed expansion of sentencing alternatives at offense levels 11 and 12 will send a message that tax crimes are not being taken seriously by the Commission. Treasury states that the expansion of sentencing alternatives as currently proposed is ill-timed inasmuch as IRS polling indicates a trend toward greater public acceptance of some amount of tax cheating. Because the great majority of tax offenders have been sentenced at or near the bottom of the guideline range, Treasury fears that tax offenders with offense levels of 11 or 12 will routinely escape service of any prison time under the current proposals. This, Treasury believes, will impede its efforts to promote maximum tax compliance.

Probation Officers Advisory Group (POAG)
Ellen S. Moore, Chair
Cathy Battistelli, Chair Elect
Macon, Georgia

POAG supports Option 1. Option 2 is seen as unsatisfactory both because it is confusing and because it calls for lengthy commitments in community correctional centers which, according to POAG, are simply unavailable in many districts. Option 3 is seen as unsatisfactory because it limits the expansion of sentencing alternatives to Criminal History Category I. POAG states that many defendants who fall into Criminal History Category II based on minor misdemeanors or petty offenses actually have not committed offenses as significant or violent as some individuals who fall within Criminal History Category I. Finally, it notes that Community Correction Centers are not widely available and many identified are local jails that may not have programs that are effective in re-integrating offenders back into the community.

Practitioners' Advisory Group (PAG)
Jim Felman and Barry Boss
Washington, DC

PAG believes Option 1 of the proposed amendment is "a reasoned first step in increasing the discretion available to district judges in sentencing offenders whose relatively low offense level places them within current Zones B or C of the sentencing table." PAG also believes Option 1 relieves undue complexity in the determination of sentencing options. Because Zone B and Zone C sentencings in Fiscal Year 2000 resulted in prison-only sentences in 44.1% and 50.3% of such cases respectively, PAG opines that "flexibility does not mean leniency." Moreover, PAG sees adoption of Option 1 as a first step toward compliance with Congress's direction at 28 U.S.C. § 994(j) regarding the availability of non-incarceration sentences for first-time, non-violent offenders.

Judicial Committee on Criminal Law (CLC)
Sim Lake, Chair
Sentencing Guideline Subcommittee
Greenville, South Carolina

The CLC favors promulgation of Option 1. Option 1 is favored for eliminating undue complexity while affording sentencing judges adequate discretion to pronounce appropriate sentences for those who fall within expanded Zone B.

New York Council of Defense Lawyers (NYCDL)
Brian E. Moss
New York, New York

The NYCDL believes that any of the three proposals to expand sentencing options would be an improvement over the current framework. The NYCDL states that Option 1 is the "most sensible" because it "transfers the final decision whether Zone C defendants should be incarcerated from prosecutors to judges." Another positive result of Option 1, according to NYCDL, is that first offenders who are gainfully employed will not necessarily lose their jobs and throw dependents on the public dole "with no corresponding systemic benefit." NYCDL expresses confidence that the courts will continue to impose incarceration sentences when warranted.

Amendment 10 - Discharged Terms of Imprisonment

Department of Justice
Criminal Division
John Elwood, Commissioner, Ex-Officio

DOJ supports the general principle that a federal defendant should receive credit in his federal sentence for time already served (whether as part of an undischarged term or a completed sentence) as a result of the same conduct for which he is now being sentenced in federal court. It notes that pursuant to 18 U.S.C. § 3585(b), the Bureau of Prisons generally will not credit a defendant for time already served pursuant to a conviction for conduct that now is the basis of a federal term of imprisonment, and suggests this is generally an incorrect result.

DOJ emphasizes, however, that crediting should only take place if the conduct underlying the earlier term of imprisonment is "fully taken into account" in the determination of the offense level for the current offense. It expresses concern with respect to the application of this principle in guidelines that include enhancements for a "pattern" of specified activity (such as the 5-level enhancement in §2G2.2 for participation in a pattern of activity involving the sexual abuse or exploitation of a minor). DOJ is of the view that when prior conduct for which the defendant has already served time is used to demonstrate a "pattern" of activity for enhancement purposes, the defendant should not be credited for time served in the related case. It claims that allowing a credit in this circumstance would undermine the Commission's intent in creating these types of "pattern" enhancements.

DOJ suggests that the best way to implement the crediting principle, both with respect to undischarged and discharged terms, is to create a new guideline provision. DOJ states that the current system causes confusion for BOP. Apparently, BOP now finds it difficult to ascertain from criminal judgments whether courts have applied §5G1.3(b) and/or Application Note 2, or instead have improperly attempted to direct BOP to credit the defendant for time served in another case.

DOJ is also of the view that creating a new guideline would avoid the "illogical placement" of a provision relating to the crediting of discharged terms of imprisonment in a guideline dealing with concurrent and consecutive sentences, noting that a new sentence can never be either concurrent or consecutive to an already discharged term.

In the alternative to its suggestion to promulgate a new guideline, DOJ makes suggestions regarding changes to Application Note 2. First, DOJ proposes additional language that could be used as part of the crediting example in the application note to demonstrate how criminal judgments could be written to avoid confusion on the part of BOP. DOJ also suggests that the application note be amended to advise parties that a reduction of sentence based on the aforementioned crediting principles might later be used by BOP to deny credit for prior custody under 18 U.S.C. § 3583(b), on the grounds that credit was already given by the court in the form of a sentence reduction.

Probation Officers Advisory Group (POAG)
Ellen S. Moore, Chair
Cathy Battistelli, Chair Elect
Macon, Georgia

POAG prefers Option One.

POAG raises the issue of whether crediting will work when a defendant is subject to a mandatory minimum term of imprisonment. It points out that a court may not be able to credit time served on a related undischarged or discharged term if the defendant is facing a mandatory minimum term.

Finally, POAG notes that the phrase "fully taken into account" has caused difficulties, particularly when the conduct at issue was only "partially considered," and it recommends that an explanation of the phrase and its intent be developed.

Practitioners' Advisory Group (PAG)
Barry Boss, James Felman, Co-Chairs
Washington, DC

Separate and apart from the crediting issue, PAG objects to the language in current §5G1.3(a) that sets forth situations in which "the instant offense shall be imposed to run consecutively," such as for an offense that was committed either while the defendant was serving another term of imprisonment or after the defendant was sentenced on another term of imprisonment, but before he commenced that term. PAG asserts that the underlying statutes, 18 U.S.C. § 3584(a) and 28 U.S.C. § 994(l), do not require the mandate currently found in the guideline and states that it is inconsistent with the Commission's stance against mandatory minimums. PAG believes that §5G1.3(a) should be softened to afford judges greater discretion. It suggests that the wording be amended and has included specific proposed language. PAG also suggests that sections (a) and (b) could be eliminated and replaced by a revised (c).

With respect to §5G1.3(c), PAG recommends either eliminating §5G1.3(c)'s designation as a policy statement or giving all three sections, (a), (b) and (c), policy statement status. PAG feels that relegating (c) to a policy statement has the effect of making the requirements of (a) and (b) even more mandatory. It prefers the approach of making all three sections policy statements, believing that this approach would afford judges the greatest discretion.

PAG makes a similar recommendation with respect to §7B1.3(f) (policy statement that revocation of probation terms should be served consecutively to any other terms being served by the defendant), which is referenced in Application Note 6 to §5G1.3. PAG suggests that §7B1.3(f) be amended to make it a presumption, rather than a mandate, that revocation terms be consecutive.

To complement these proposals, PAG suggests that the Commission might want to add a guideline clarifying that certain consecutive sentences are mandated by statute.

Finally, PAG proposes a new guideline that would permit downward departures in circumstances where a court has reason to believe that an order to run a sentence concurrently will not be honored by BOP. The proposed language for this guideline is:

> If the sentencing court believes that the timing of either the nature of the defendant's detention or the initiation of a federal case renders some or all of a concurrent sentence (which would otherwise be warranted) impossible or unlikely to be enforced, the court may grant a downward departure. The extent of any such departure should be equal to the time that would otherwise have been ordered to run concurrent.

According to PAG, this guideline would address situations in which (a) the court intends for a federal sentence to run concurrently with an undischarged state term but, because the defendant is in federal jail on a writ from state custody, BOP considers the defendant a state prisoner and will not begin running the federal sentence until the defendant is in true federal custody (*e.g.* when the state sentence is completed); and (b) the defendant is charged in federal court only after completing a sentence for the new criminal conduct that forms the basis of the new federal charge or revocation petition, thereby eliminating the possibility of a concurrent sentence.

Judicial Committee on Criminal Law (CLC)
Sim Lake, Chair
Sentencing Guideline Subcommittee
Greenville, South Carolina

CLC supports amending 5G1.3 to provide, to the extent practicable, that a defendant should be given credit for time served, even if his prior sentence has been discharged. CLC would prefer merely amending the commentary to the guideline to state that in the case of a discharged term of imprisonment that arose from conduct involved in the instant offense, a sentencing judge may consider a downward departure limited to the increment in the guideline sentence that resulted from including in the offense level conduct for which the defendant has already served time. According to CLC, the limited number of cases in which such a departure would be necessary militates against requiring a more complex structure for departure that would have to be mastered by probation officers and sentencing judges.

INDEX TO PUBLIC COMMENT
2002 AMENDMENTS
March Submissions

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, DC 20530-0001*

March 19, 2002

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 17, 2002. We very much look forward to working with you and the other commissioners during the remainder of this amendment year on all of the published amendment proposals.

PROPOSED AMENDMENT 7 – TERRORISM

This proposed amendment would make a variety of changes to the sentencing guidelines in response to the USA PATRIOT Act of 2001. We appreciate all of the Commission's efforts to respond quickly to the passage of the Act and to make appropriate changes to federal sentencing policy for terrorism related offenses. We also want to specifically acknowledge the hard work of the Commission staff on these matters.

We generally support the Commission's direction in this area as expressed in the published amendment proposals. Nonetheless, there are several parts of the proposals that we believe should be changed. We address these areas and the many issues for comment below.

PART A. New Predicate Offenses To Federal Crimes of Terrorism

1. §2A5.2 - Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry

a. Issue for Comment: Should §2A5.2 be amended to provide an enhancement or a cross-reference to the homicide guidelines if death results?

We believe that §2A5.2 should provide a cross-reference to the homicide guidelines if death results from the offense. As with similar cross-references elsewhere in the guidelines, it would apply only when the homicide guidelines provide for a higher penalty. Such a cross-reference would reflect the congressional statement in 18 U.S.C. § 1993(b)(2) that an offense under that statute is subject to a greater penalty if death results. We believe a cross-reference would be preferable to a uniform enhancement when death results, because a cross-reference would provide varying sentences depending on the degree of the defendant's culpability.

b. Issue for Comment: Should a specific offense characteristic be added if the offense endangered or harmed multiple victims?

In our view, it is appropriate to include a specific instruction or a specific offense characteristic if the offense endangered or harmed multiple victims. A large number of cases sentenced pursuant to this guideline will involve a single statutory violation, yet many individuals may be victimized. A special instruction, similar to those contained in §2M6.1, §2N1.1 and §2G1.1, would treat each victimization as though in a separate count for purposes of sentencing. In the alternative, a specific offense characteristic might provide for a five-level increase in the offense level (the maximum increase provided under Chapter Three, Part D – Multiple Counts) when more than one victim is endangered or harmed.

c. Issues for Comment: In order to take into account aggravating conduct under 49 U.S.C. § 46503, should §2A5.2 provide an enhancement for assaulting airport security personnel? Alternatively, should there be a more general enhancement in that guideline for jeopardizing the security of an airport facility, mass transportation vehicle, or ferry? Should the Commission limit application of such an enhancement so that it does not apply to assaults that do not jeopardize the overall safety or security of an airplane, mass transportation vehicle, or ferry?

The enhanced statutory penalties under 49 U.S.C. § 46503 apply when a dangerous weapon is used in the offense. In our view, a specific offense characteristic should be included in this guideline to take into account this congressionally delineated aggravating factor.[1]

---

[1]A similar provision exists in 49 U.S.C. § 46504, another statute covered by this guideline.

As for an enhancement for endangering an airport facility, mass transportation vehicle, or ferry, we support the approach taken in the proposed guideline, with the following modification. In §2A5.2(a)(1)(C), we suggest deletion of "with the intent to endanger the safety of an aircraft, a mass transportation vehicle, or a ferry, during the course of its operation." Also, we would suggest adding "or airport facility" to §2A5.2(a)(1)(A). We believe this subsection should encompass conduct involving the intentional endangerment of the safety of an airport facility, as well as the safety of an individual in, upon, or near the mass transportation mode without reference to any additional intent requirement regarding endangerment of the safety of the transportation mode itself. We note that a case involving a simple assault between airport employees in an airport parking lot would not, in our view, fall within the provisions of subparagraphs (a)(1) or (2), because that conduct would not involve intentional or reckless endangerment and, further, would not be considered to have occurred "in, upon, or near an aircraft, a mass transportation vehicle, or a ferry."

Similarly, we suggest the deletion in §2A5.2(a)(2)(C) of "with the intent to endanger the safety of an aircraft, a mass transportation vehicle, or a ferry," since this alternative base offense level addresses reckless, not intentional, endangerment. We also suggest the inclusion of "or airport facility" in §2A5.2(a)(2)(A). With these changes, the base offense levels would appear to take sufficient account of conduct which jeopardizes the overall safety of an airport, aircraft or mass transportation mode.

> d. Issue for Comment: How should the guidelines treat offenses involving the conveying of false information and threats under 18 U.S.C. § 1993(a)(7) and (8) and under 49 U.S.C. § 46507? Should the offense levels for such cases be the same as the offense levels that would pertain if the threatened offense (or the offense about which false information had been conveyed) had actually been committed, or should the guidelines provide a reduction in offense level for such cases?

As a general matter, we believe threats of a terrorist nature are fundamentally different from other threats and, for that reason, merit different treatment under the sentencing guidelines. Currently, the guidelines treat most threat offenses under §2A6.1. That provision applies to "a particularly wide range of conduct" (see Application Note 1), and its base offense levels reflect that wide range. In our view, the base offense level of 12 set forth in §2A6.1 does not adequately reflect the seriousness of threatened terrorism offenses. In addition, most of the specific offense characteristics of §2A6.1 are not germane to terrorism cases (e.g., violation of court order, number of threats). Unlike some offenses treated under §2A6.1, such as harassing telephone calls or threats to injure property or reputation, terrorist threats typically involve a threat of death or serious physical injury and unique psychological harm to victims. In addition, a terrorist threat will usually be directed at a large number of individuals, government buildings or operations, or infrastructure. Unless a terrorist threat is immediately dismissed as not credible, it may also result in significant disruption and response costs. Our general view is that the guidelines should

account for these unique aspects of terrorist threats and provide for punishment commensurate with the greater harm they cause.

On the other hand, we do not believe that threatened offenses arising under statutes applicable to terrorist acts should have the same offense level that would pertain if the threatened offense had actually been committed. Some distinction should exist between a threatened offense and a completed offense. For these reasons, we believe it highly desirable to modify §2A6.1 to address the unique characteristics of terrorist threats. New specific offense characteristics should be developed to address aggravating factors that are typical of terrorist threats and that cause them to be more serious. Such specific offense characteristics might include enhancements for the following: 1) if the offense involved an express or implied threat of death or bodily injury, (see, e.g., §2B3.2(a) and (b)(1)); 2) if the offense involved multiple victims; 3) if the offense involved conduct evidencing an intent or apparent ability to carry out the threat (amending the current specific offense characteristic of §2A6.1(b)(1)); 4) if the offense resulted in substantial disruption of public, governmental, or business functions or services; 5) if the offense involved or was intended to injure the United States; and 6) if the offense resulted in a substantial expenditure of funds to respond to the offense (similar to the specific offense characteristics in §2M6.1).

We think a significant benefit to this approach is that it differentiates between threat offenses of a non-terrorist nature and genuine terrorist threats, even if they are prosecuted under the same statute. Sentences would be enhanced to reflect only those aspects of a particular case that generated greater harm or danger to the community.

As for offenses involving the conveying of false information and hoaxes, we believe that the guidelines should treat those offenses in the same manner as threat offenses, i.e., by reference to §2A6.1 and with the inclusion of the proposed specific offense characteristics noted above. In general, these offenses are similar to threats (and we consider conveying false information and hoaxes as essentially the same) in that they involve conduct or information which by its nature serves to elicit the same response – by victims, the government, first responders – as would occur in response to an actual terrorist act. As with terrorism threats, terrorist hoaxes and conveying false information offenses have unique aspects and serious effects which need to be adequately reflected in the sentencing guidelines.

As for the specific question of how the guidelines should treat offenses involving the conveying of false information and threats under 18 U.S.C. § 1993(a)(7) and (8) and under 49 U.S.C. § 46507, we believe that those offenses should be referenced to §2A6.1 with the additional specific offense characteristics suggested above.

e. Issue for Comment: Whether any of the base offense levels in §2A5.2 should be increased to cover offenses under 18 U.S.C. § 1993 and 49 U.S.C. § 46503?

With inclusion of the suggestions noted above (cross reference to homicide guidelines, enhancements for multiple victims and use of a dangerous weapon), we think the base offense levels are appropriate, with the exception of that applicable to reckless endangerment. In reckless endangerment cases, we think a base offense level of 18 is inadequate to capture the seriousness of the conduct and note that an offense level of 24 applies to conduct amounting to reckless endangerment under §2K1.5(b)(1).

f. Additional Comments on §2A5.2

We believe the proposed definition of "mass transportation" should track the statute verbatim. Section 1993(c)(5) provides that "the term 'mass transportation' has the meaning given to that term in section 5302(a)(7) of title 49, United States Code, except that the term shall include schoolbus, charter, and sightseeing transportation."

g. Issue for Comment: General comments on how the guidelines should treat hoaxes concerning attempts to commit any act of terrorism. Should a hoax be treated the same as the underlying offense which was the object of the hoax?

See comments above.

2. § 2M6.1 - Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

a. Issue for Comment: Whether the specific offense characteristics in §2M6.1(b)(1) and (b)(3) should be applicable to offenses under 18 U.S.C. §§ 175(b) and 175b?

In our view, the specific offense characteristics in §2M6.1(b)(1) and (b)(3) should be made applicable to §§ 175(b) and 175b offenses. When a § 175(b) offense involves select biological agents – identified by the Secretary of Health and Human Services as having the potential to pose a severe threat to public health and safety – an enhancement reflecting the increased gravity of the conduct and potential harm, we believe, is appropriate. Furthermore, § 175b offenses always involve such agents, a factor that warrants increased punishment for that offense. Thus, we think the application of §2M6.1(b)(1) is appropriate in such cases.

We think it important to note that section 175(b) and 175b offenses may well result in substantial disruption of services or functions, or in the substantial expenditure of funds to

respond to the offense. It is, therefore, appropriate to make the specific offense characteristic in §2M6.1(b)(3) applicable to these offenses.

b. Issue for Comment: What base offense level, within the 14-22 range, is appropriate for 175(b) and 175b offenses?

We think the appropriate base offense level for violations of 18 U.S.C. §§ 175(b) and 175b is 22. In our view, a base offense level of 22 appropriately reflects the extremely dangerous nature of these offenses. The possession of biological substances in quantities or of a type not reasonably justified by a peaceful purpose is threatening to society at large, even absent direct proof of specific intent to use the substance in a malicious manner. As for possession by restricted persons, Congress has determined that the risks associated with possession of dangerous biological materials by these individuals is unacceptable and poses grave potential risks to society. In our view, a base offense level of 22 for section 175(b) and 175b offenses reflects the risks to the community when the defendant has the means to cause significant – and sometimes overwhelming – harm. These offenses are potentially even more dangerous than the types of threat cases covered by (a)(3), where there is no showing of intent or ability to carry out the threat. As such, we believe that it is appropriate to treat such offenses more seriously than the (a)(3) threat offenses.

Finally, depending on the resolution of other issues, proposed subsection (a)(4)(A) may have no practical effect and may therefore be a candidate for deletion.

3. Appendix A – Statutory Index

We agree that the new harboring statute, 18 U.S.C. § 2339, should be referenced to §2X2.1, which would presumably apply when an individual harbors a terrorist before commission of the predicate offense. We have some difficulty, however, with applying §2X3.1 (accessory after the fact) to 18 U.S.C. § 2339, since §2X3.1 provides for a base offense level of not greater than 20. Section 2339 harboring cases apply in relation to assistance provided an individual who has committed an offense relating to weapons of mass destruction and other serious offenses. Because the harboring relates to such serious crimes, the statute provides twice the penalty of the general harboring statute, 18 U.S.C. § 1071 (five years). It, therefore, appears inappropriate to apply the same offense level to § 2339 offenses as § 1071 offenses, and we suggest that §2X3.1 include an enhancement for harboring in relation to § 2339 offenses.

PART B. Pre-existing Predicate Offenses To Federal Crimes of Terrorism Not Covered By The Guidelines

1. Amendments Relating to 18 U.S.C. § 2332b

a. Issues for Comment: What is the appropriate treatment for threat cases under 18 U.S.C. § 2332b(a)(2)? Should the offense levels for such threat cases be the same as the offense levels that would pertain if the threatened offense had actually been committed, or should the guidelines provide a reduction in offense levels for such cases? Would a reference to §2A6.1 (Threatening or Harassing Communications) be appropriate? If so, how should that guideline be amended in order to account for the seriousness of threats under 18 U.S.C. § 2332b (e.g., should the base offense level be increased for such offenses)?

We do not believe that the offense levels for threat offenses under § 2332b should be the same as the offense levels applicable if the threatened offense had actually been committed, given the lower statutory penalty for threat cases and our general view, as stated above, that there should be some distinction between threatened and completed offenses reflected in base offense levels. At the same, time, however, we hold strong views that §2A6.1 is inadequate generally for threatened terrorism offenses and should be modified as explained more fully above.

2. §2M6.3 - Providing Material Support or Resources to Terrorists or Designated Foreign Terrorist Organizations

a. Issues for Comment: Should a new guideline address conduct encompassed by the offenses at 18 U.S.C. §§ 2339A and 2339B? What is the appropriate offense level, 26 or 32, for such a guideline? Are there sufficiently analogous guidelines for these offenses? If so, should 18 U.S.C. §§ 2339A and 2339B offenses be referenced to the same or different guidelines?

We would treat section 2339A and section 2339B offenses under different guidelines. We think § 2339A cases are akin to aiding and abetting and to accessory after the fact. The commission of a section 2339A offense is statutorily linked to the commission of a specified predicate offenses. Conceptually, we view the provision of material support or resources in advance of or during the commission of the predicate offense as similar to aiding and abetting. For that reason, section 2339A offenses which involve such provision of material support or resources prior to or during the commission of the predicate offense should be referenced to §2X2.1, which provides that the offense level is the same as that for the underlying offense (including specific offense characteristics).[2] As for section 2339A cases involving the provision

[2]For example, if a scientist provides another individual with the know-how to construct a biological weapon that is subsequently developed and employed, it is appropriate that the scientist's sentence for the § 2339A offense include the application of the unique specific offense

of material support or resources subsequent to the commission of the predicate offense, i.e. in connection with concealment or escape, those cases, in our view, should be referenced to §2X3.1 (accessory after the fact).

Unlike section 2339A offenses, section 2339B offenses are not statutorily linked to the commission of any particular offense and, therefore, we do not think they should be treated in the manner suggested above. Rather, we agree with the Commission that a new guideline for such offenses is appropriate. Although existing §2M5.1(a)(1) (evasion of national security export controls) is sufficiently analogous to warrant application to § 2339B offenses in the absence of a specific guideline assigned to § 2339B, there are certain specific offense characteristics that ought to be applicable in § 2339B cases and that are not part of §2M5.1.

As for the base offense level for § 2339B offenses, we believe that 26 is an appropriate offense level that reflects both the serious nature of the offense and the statutory penalty provided by Congress -- which expressly found that any material support provided to a designated foreign terrorist organization facilitates its terrorist activity. A base offense level of 26, applicable regardless of the particular nature of the material support, appropriately reflects this congressional finding and the serious nature of all section 2339B offenses.

We believe that it is generally inappropriate to fashion adjustments to the base offense level based on the type of support provided. Providing false identification or lodging may or may not be indispensable to the terrorist organization or the commission of a terrorist act by it depending on the particular circumstances. That said, we do suggest that the Commission consider a specific offense characteristic in a new guideline applicable to § 2339B offenses which would increase the offense level for offenses involving the provision of weapons, explosives or lethal substances. It is possible to conclude that any case involving the provision of this type of material support to a terrorist organization is particularly pernicious, because such materials are inherently dangerous and facilitate the recipient organization's terrorist activity in a direct and substantial way. We would also suggest a specific offense characteristic that would increase the offense level for offenses resulting in the death of any person. This enhancement would comport with the USA PATRIOT Act, which provides for a penalty of up to life imprisonment if death results from a § 2339B offense.

> b. Issue for Comment: Should there be alternative base offense levels and/or specific offense characteristics in the new guideline to provide enhanced punishment for the most serious cases covered by the guideline (e.g. should be there be a cross reference to Chapter Two, Part A guidelines if death results from the offense)?

See comments above.

---

characteristics set forth in §2M6.1, the guideline applicable to the predicate offense he assisted.

3. Appendix A – Statutory Index

With regard to § 2332b(a)(1), the guideline references in the statutory index appear to be incomplete. In particular, §2A4.1 (kidnaping) should be referenced – see § 2332b(a)(1)(A) – and it may be advisable to reference §2A2.1 (assault with intent to commit murder), as well as an appropriate guideline relating to property damage (e.g., §2K1.4) – see § 2332b(a)(1)(B).[3] With respect to § 2340A (torture), we suggest referencing §2A2.1 (assault with intent to commit murder).

The Commission has also proposed certain guideline references for offenses involving the violation of 49 U.S.C. § 60123(b) (damaging or destroying an interstate gas or hazardous liquid pipeline facility). Infrastructure facilities of this kind are attractive targets for terrorists, primarily because acts against such inherently hazardous facilities could result in extensive casualties, damage and disruption. It is, therefore, important to ensure that the guidelines reflect the seriousness of these offenses.

For the most part, the guidelines reference offenses involving infrastructure facilities to §2B1.1 and §2K1.4, as the Commission is suggesting for 49 U.S.C. § 60123(b) offenses. We have two concerns. First, §2K1.4, which would apply where the offense involved arson or explosives, has different base offense levels, and lacks specific guidance for offenses against infrastructure facilities. In our view, intentional acts involving explosives or arson against infrastructure facilities should in all cases be referenced to the highest offense level under §2K1.4. We suggest that a specific subparagraph be added to (a)(1) which would refer to offenses involving infrastructure facilities. Thus, in all cases, the defendant would receive the highest base offense level possible, under either (a)(1) or (a)(3).

Our second concern relates to §2B1.1, a guideline which would apply to offenses involving infrastructure facilities, in general, when §2K1.4 does not. That guideline, in essence, provides for a two-level increase in the offense level of 6 and a floor of 14 where the offense involved a conscious or reckless risk of death or serious bodily injury. We have substantial concerns as to whether that increase in the offense level adequately reflects the gravity of offenses that involve infrastructure facilities and pose a risk of serious bodily injury or death. We suggest that there be a far greater increase in the offense level where the offense involves an infrastructure facility.

---

[3]For § 2332b(a)(2) offenses, there appears to be a clerical error in the reference to §2M6.3 in the Statutory Index.

PART C: Increases To Statutory Maximum Penalties For Predicate Offenses Covered By The Guidelines

1. Issue for Comment: Whether guideline penalties should be increased for offenses for which statutory maximum terms of imprisonment were increased by section 810 of the USA PATRIOT Act?

We believe that guideline penalties should be increased to reflect the enhanced penalty provisions provided by Congress in section 810 of the USA PATRIOT Act. Set forth below are our suggestions with respect to each statute amended by Congress

a. 18 U.S.C. § 81 (arson of a dwelling) – currently referenced to §2K1.4. We believe that the offense level in §2K1.4(a)(1) should be increased to 26 to reflect the increased statutory penalties provided in the USA PATRIOT Act for 18 U.S.C. § 81 cases.

b. 18 U.S.C. § 1366 (destruction of an energy facility) – currently referenced to §2B1.1. We think this statute should also be referenced to §2K1.4.

c. 18 U.S.C. § 2339A (material support or resources for the commission of terrorist offenses). See comments above.

d. 18 U.S.C. § 2339B (material support or resources to a designated foreign terrorist organization). See comments above.

e. 18 U.S.C. § 2155(a) (destruction of national defense materials) – currently referenced to §2M2.3. We think the base offense level for § 2155(a) offenses should be increased to 32 as these offenses are more akin to offenses referenced to §2M2.1 (destruction of, or production of defective, war materials, premises, or utilities). The Commission may also wish to consider at some future time whether the base offense level for violations of 18 U.S.C. §§ 2153 and 2154 should be increased to reflect the higher statutory maximum penalties (30 years) and circumstances surrounding the violation of these statutes.

f. 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel) – currently referenced to §§2M2.1 and 2M2.3. We suggest changing the referenced guidelines for these statutes. In our view, the more appropriate reference for this statute is §2M6.1, which already includes offenses involving nuclear facilities and nuclear material and which is consistent with the enhanced penalties provided by Congress in the USA PATRIOT Act.

g. 49 U.S.C. § 46505 (carrying a weapon or explosive on an aircraft) – currently referenced to §2K1.5. We believe that the current specific offense characteristic

in §2K1.5(b)(1) should be increased from 15 to 17 to reflect the enhanced penalty Congress provided in the USA PATRIOT Act for violations of § 46505(c). Further, an additional specific offense characteristic or a cross-reference to the homicide guidelines (if the penalty would be greater) should apply, we believe, when death results from such an offense.

h. 49 U.S.C. § 60123 (damaging or destroying an interstate gas or hazardous liquid pipeline facility), currently referenced to §2B1.1. As stated above, we believe that this statute should also be referenced to §2K1.4.

PART D. Penalties For Terrorist Conspiracies

1. Issue for Comment: Should the Commission amend §2X1.1 (Attempt, Solicitation, or Conspiracy) and the heading of each applicable Chapter Two Offense guideline to provide that conspiracies to commit any of these offenses are expressly covered by the applicable Chapter Two offense guideline? Should there be a special instruction in §2X1.1 to treat these offenses the same as the substantive offense which was the object of the conspiracy if the offense involved terrorism?

With the exception of a technical concern, which we address below, we strongly support some modification which results in the same penalties for both conspiracies to commit terrorist offenses and the substantive offenses to the extent the statutes so provide. Such an amendment would, in our view, appropriately reflect the expressed will of Congress in amending the applicable statutes to provide for a penalty greater than that which would otherwise apply under 18 U.S.C. § 371. In addition, we strongly believe that, because of the serious nature of the conduct outlawed by these statutes, conspiracies to commit these offenses, regardless of whether they are committed with terrorist motives, should be punished in the same manner as the commission of the substantive offense. As the Tenth Circuit Court of Appeals stated in United States v. Nichols, 169 F.3d 1255, 1273-74 (10th Cir. 1999) (citation omitted): "Congress did not create different punishments for the conspiracy or underlying substantive offense, leading to the inference it viewed the two as equivalent in consequence and severity. This is especially so because Congress normally treats conspiracy as a crime punished by no more than five years imprisonment. The legislature's special treatment strongly suggests we should not distinguish between using an explosive weapon of mass destruction or conspiring to do so in determining the proper punishment in this case."

Similarly, although the issue for comment does not address attempts, we believe that the same rule should apply to attempts: if a terrorism statute treats an attempt the same as the substantive offense, then so should the guidelines. We note that §2X1.1 recognizes this general principle with respect to solicitation offenses. Subsection (b)(3)(B) of that provision states that if the statute treats solicitation of the substantive offense identically with the substantive offense, the offense level for solicitation is the same as that for the substantive offense.

We do have one technical problem with the amendment option. The mechanism outlined in the published material may not be appropriate. In some cases, many statutes are assigned to one guideline, with some of these statutes treating conspiracies differently from their substantive counterparts, while other statutes referenced to the same guideline treat the conspiracy and substantive offense the same. We will gladly work with the Commission to address this matter and find a more appropriate mechanism in such situations.

PART E. Terrorism Adjustment in §3A1.4

1. Issue for Comment: Whether the current terrorism enhancement at §3A1.4 addresses the sentencing of terrorists appropriately?

In our view the current terrorism enhancement at §3A1.4 is significantly improved by the Commission's proposed amendment. We strongly support an invited upward departure for offenses that involve domestic or international terrorism, as defined by Congress, but which do not otherwise qualify as offenses that involved or were intended to promote "federal crimes of terrorism" for purposes of this adjustment provision.

2. Issue for Comment: Whether terrorist offenses should be sentenced at or near the statutory maximum for the offense of conviction?

We believe the approach of the current terrorism enhancement adequately addresses terrorist offenses. As we understand this proposal, downward adjustments, such as for acceptance of responsibility, would effectively be inapplicable to offenders subject to the terrorism enhancement. We have some questions as to the advantage of this approach, considering that this adjustment can be beneficial to the courts and to law enforcement.

3. Issues for Comment: As an alternative to the upward departure provision in proposed Application Note 3 of §3A1.4, should the Commission provide an additional enhancement for terrorism offenses to which the current adjustment does not apply? If so, should this additional enhancement be the same as, or less severe than the current adjustment at §3A1.4?

We believe that the more appropriate approach is to provide an upward departure provision to address cases that do not technically fit the definition of "federal crime of terrorism" set forth in 18 U.S.C. § 2332b(g)(5), but which do meet other statutory definitions of "terrorism." In our view, the alternative of providing an additional enhancement for terrorism offenses to which the current adjustment does not apply would only be appropriate if such an enhancement were identical to the existing enhancement. Under no circumstances do we believe that it is appropriate to treat more leniently offenders who do not technically fall within existing §3A1.4, but who would meet an enhancement explicitly tied to the definitions of domestic terrorism or international terrorism.

4. Issue for Comment: Should the Commission amend §3A1.4 to clarify that the adjustment may apply in the case of offenses that occurred after the commission of the federal crime of terrorism, e.g. a case in which the defendant, in violation of 18 U.S.C. § 2339A, concealed an individual who had committed a federal crime of terrorism?

We think that it would be highly desirable for the Commission to make clear that §3A1.4 applies in cases where the offense was intended to conceal a federal crime of terrorism or to obstruct an investigation into such crime. We propose consideration of the following language:

> This adjustment is applicable to all offenses that involve or are intended to promote a federal crime of terrorism, including offenses that are committed after the federal crime of terrorism has been completed. Thus, any offense that is designed to conceal a federal crime of terrorism, or to obstruct its investigation or prosecution, would qualify for the adjustment under this section.

\- - -

Finally, we note that Application Note 1 appears to confuse the underlying federal crime of terrorism with the offense that involved or was intended to promote it. Under the statutory definition, a "federal crime of terrorism" is a violation of an enumerated statute that was calculated to influence or affect the conduct of government, or to retaliate against government conduct. The application note incorrectly takes the motive requirement away from the federal crime of terrorism and transfers it to the offense that involved or was intended to promote it. (The latter offense may be identical to the federal crime of terrorism, but it also may be a separate, though related, offense.) We suggest that the second sentence of Application Note 1 be rewritten, as follows:

> "Accordingly, in order for the adjustment under this guideline to apply, (A) the offense must be a felony that involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); and (B) pursuant to 18 U.S.C. § 2332b(g)(5)(A), the enumerated offense must have been calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."

The same reasoning may require a small adjustment in the first half of the third sentence of Application Note 3, to read as follows: "For example, there may be cases in which (A) the criterion relating to terrorist motive set forth in § 2332b(g)(5)(A) is satisfied, but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B);".

PART F. Money Laundering Offenses

The Act created a new federal money laundering offense – 31 U.S.C. § 5332: Bulk Cash Smuggling – and substantially modified an existing federal offense – 18 U.S.C. § 1960: Unlicenced Money Transmitting Businesses – for which there has not been a designated sentencing guideline. We believe the sentencing guidelines should be amended to address both these offenses. The Commission has proposed an amendment that would include these offenses under §2S1.3 (Structuring Cash Transactions to Evade Reporting Requirements). We believe that the offense of bulk cash smuggling and the amended version of § 1960 are substantially different from the offenses presently included under §2S1.3, and that the new offenses should be referenced to §2S1.1 to more appropriately address the seriousness of these two offenses.

1. Unlicenced Money Transmitting Businesses – 18 U.S.C. § 1960

Prior to the Act, § 1960 was primarily a regulatory offense. A person violated § 1960 by operating a money transmitting business affecting interstate or foreign commerce (1) without a state license (if the state required such a license); or (2) without complying with the federal registration requirements. The PATRIOT Act added a third subsection to § 1960 (§ 1960(b)(1)(C)) that makes it unlawful if someone operates a money transmitting business that:

> "otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity."

This new subsection is substantially different from a regulatory violation. It requires that a defendant know that he is transmitting funds that are derived from a criminal offense or are intended to be used to promote unlawful activity. This offense is actually akin to a money laundering offense under § 1956(a)(2)(A) or § 1957. Section 1956(a)(2)(A) makes it unlawful to transport or transmit funds into or out of the United States with the intent to promote specified unlawful activity. Section 1957 makes it illegal to engage in a monetary transaction with criminally derived funds in excess or $10,000. The new subsection of § 1960 warrants an offense level closer to the offense levels for § 1956(a)(2)(A) or § 1957, which are covered by the new guideline in §2S1.1, where the offense levels are substantially higher than the offense levels in §2S1.3.

The current guidelines do not specifically address violations of § 1960. The Commission and the Department have looked to §2S1.3 as the most applicable existing guideline in the past. However, as indicated above, §2S1.3, even as amended by the Commission's draft, does not reflect, we believe, the seriousness of violations of the new subsection of § 1960. We think the more appropriate guideline is §2S1.1.

2. Bulk Cash Smuggling (31 U.S.C. § 5332)

Section 371 of the PATRIOT Act created the new offense of "Bulk Cash Smuggling Into or Out of the United States." This new offense was created, in part, to address the issues raised by the Supreme Court in the case of United States v. Bajakajian, 524 U.S. 321 (1998), concerning the proportionality of forfeiture in currency reporting cases. In Bajakajian, the Supreme Court held that forfeiture of the entire amount of the unreported currency ($357,144 in that case) would be "grossly disproportionate to the gravity of the offense," unless the currency was involved in some other criminal activity. In so holding, the Court ruled that a currency reporting offense, such as those set forth in 31 U.S.C. § 5316, is not a serious offense and that the unreported currency is not the corpus delicti of the crime. This contrasts, the Court said, with the various anti-smuggling statutes which authorize the forfeiture of 100 percent of the items concealed from the U.S. Customs Service or imported in violation of the Customs laws.

In order to address the issues raised by the Supreme Court, Congress created the new offense of Bulk Cash Smuggling. In creating this new offense, Congress stated that the purposes of this new provision are:

(1) to make the act of smuggling bulk cash itself a criminal offense;
(2) to authorize forfeiture of any cash or instruments of the smuggling offense; and
(3) to emphasize the seriousness of the act of bulk cash smuggling.

To substantiate the third purpose and to address the concerns expressed by the Supreme Court in Bajakajian, Congress listed in the PATRIOT Act several findings about the seriousness of bulk cash smuggling. Congress noted, for example, that "[t]he transportation and smuggling of cash in bulk form may now be the most common form of money laundering, and the movement of large sums of cash is one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes." Similarly, Congress noted that:

> "The current penalties for violations of the currency reporting requirements are insufficient to provide a deterrent to the laundering of criminal proceeds."

In addition, the House Report accompanying the PATRIOT Act states that "[t]he Committee believes, however, that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report." See H. Rep. 107-250 (Part 1).

The sentencing guidelines for violations of § 5316 and for structuring offenses to evade the reporting requirements of § 5316 are in §2S1.3. However, since Congress has clearly stated that violations of the new Bulk Currency Smuggling statute are more serious than currency reporting violations, we believe that referencing the statute to §2S1.1 is most appropriate.

PART G. Currency and Counterfeiting Offenses

1. Issues for Comment: Should the enhancement in §2B5.1(b)(5)(offenses involving counterfeit bearer obligations of the United States) be amended to provide an alternative prong if the offense was intended to promote terrorism? Should an additional enhancement be provided if the offense was intended to promote terrorism, and if so, what should be the extent of the enhancement?

In our view, the terrorism enhancement provided in §3A1.4 should adequately address such cases.

PART H. Miscellaneous Amendments

1. Issue for Comment: Should the length of the term of supervised release for any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person, be 1) not less than three years, or 2) life?

In our view, the guidelines should delineate a range for the term of supervised release for these offenses (similar to the approach of §5D1.2(a)(1) and (2)), rather than a fixed number of years applicable to all such cases. In our view, the upper end of that range should be life since Congress in the USA PATRIOT Act provided for that maximum term of supervised release for these offenses. As for the appropriate minimum term of supervised release, we believe that five years, the maximum term for other offenses, is an appropriate minimum in light of the serious nature of these offenses. Although the resulting range is wide, it should be noted that offenses falling within this provision may or may not meet the element set forth in § 2332b(g)(5)(A). It is also worth noting that if a court were initially to impose a lengthy term of supervised release, pursuant to 18 U.S.C. § 3583(e), the court could subsequently modify or terminate the term of supervised release, if appropriate.

2. Issue for Comment: The Commission proposes to amend §2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. § 2332d, which prohibits financial transactions with governments of states designated under the Export Administration Act as supporting terrorism. In addition, the Commission proposes to provide for application of the base offense level of 26 for such offenses.

We agree with the Commission's proposal to reference § 2332d offenses to §2M5.1 and to provide for application of the base offense level of 26.

3. Issues for Comment: How should the Commission treat an offense under 18 U.S.C. § 1036 (prohibiting, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport)? Should such offenses be referenced to §2B2.3 (Trespass)? If so, how should that guideline be amended to take into account the seriousness of these offenses (e.g. should the enhancement at §2B2.3(b)(1) be amended to cover trespasses occurring with respect to a vessel or aircraft of the United States, a secure area of an airport, and/or a secure area of a mass transportation system)?

We think it acceptable to reference § 1036 cases to §2B2.3. Furthermore, although we do not see a significant need to amend §2B2.3 with regard to § 1036 offenses that are statutorily punishable by a maximum of six months, see § 1036(b)(2), we do believe that a specific enhancement should be provided to reflect the penalty for aggravated conduct, i.e. up to five years' imprisonment where the offense is committed with intent to commit a felony. In such cases, a specific offense characteristic should provide for a 16 level enhancement to the base offense level of 4. The total offense level of 20 will then adequately reflect the penalty for aggravated conduct.

4. Issue for Comment: How should the guidelines more appropriately treat offenses under 18 U.S.C. § 1001, particularly such offenses that are committed in connection with acts of terrorism?

With the suggested clarification regarding the application of the terrorism enhancement in §3A1.4 to statutory offenses occurring after the commission of the terrorist offense itself, we do not believe any further amendment is necessary to address § 1001 cases.

PROPOSED AMENDMENT 8 – DRUGS

The Department's views of Proposed Amendment 8 are contained in the written testimony of Deputy Attorney General Larry D. Thompson, which will be presented to the Commission today.

PROPOSED AMENDMENT 9 - ALTERNATIVES TO IMPRISONMENT

Proposed Amendment 9 (Alternatives to Imprisonment) provides three options to increase sentencing alternatives for those offenders whose guideline range is in Zone C of the Sentencing Table (Chapter Five, Part A). Option One amends the Sentencing Table by combining Zones B and C, thereby providing offenders at offense levels 11 and 12 with the sentencing options currently available in Zone B – either (A) a probation sentence with a condition of confinement sufficient to satisfy the minimum of the applicable guideline range or (B) one-month imprisonment followed by a term of supervised release with a condition of confinement sufficient to satisfy the remainder of the minimum of the applicable guideline range (a "split sentence"). This option reduces the amount of imprisonment required for the "split-sentence"

option from four or five months (at offense levels 11 and 12, respectively) to one month (and allows for no imprisonment pursuant to the "probation' option for Zone B offenders).

Option Two also increases sentencing alternatives in Zone C of the Sentencing Table by combining Zones B and C, thereby providing offenders at levels 11 and 12 with additional sentencing options similar to Option One. This option differs from Option One in that it limits the use of home detention for defendants for whom the minimum of the guideline range is at least eight months (*i.e.*, current Zone C). In such cases, the defendant must satisfy the minimum of the applicable guideline range by some form of confinement, but, unlike Option One, the defendant must serve at least half of that minimum in a form of confinement other than home detention. This option ensures that the more serious offenders will serve at least eight or ten (at offense levels 11 and 12, respectively) months in some form of confinement, of which at least four or five (at offense levels 11 and 12, respectively) months shall be served in some form of confinement other than home detention.

Option Three also increases sentencing alternatives in Zone C of the Sentencing Table. However, it differs from Option One and Option Two in that it limits the expansion of the sentencing options available in Zone B to offenders in criminal history Category I of Zone C of the Sentencing Table. This option provides these less serious offenders with the same sentencing options available to offenders in Zone B. Under this option, offenders in Categories II through VI will not benefit from additional sentencing alternatives.

A. <u>We Oppose This Amendment Because It Undermines The Goals Of General Deterrence and Just Punishment</u>

For many years, the Commission has been in a tug of war with itself over the punishment for serious criminal conduct – often white-collar offenses – that has nonetheless historically received modest (and oftentimes probationary) sentences. On the one hand, the Commission has regularly recognized the need to deter white-collar and other similar offenses and to provide a just sentence for those who commit such offenses. It was for this reason that the Commission explicitly excluded white collar offenses and civil rights offenses from its early focus on past sentencing practice and deliberately raised penalties for such offenses from low historical levels. It was for this reason that the Commission deliberately changed sentencing policy and increased penalties for tax offenses on several occasions to insure just punishment for such offenders (see below). And it was for this reason that the Commission considered and rejected penalty decreases for civil rights offenses in the mid-1990s and that the Commission considered and increased penalties for antitrust offenses (see below). On the other hand, the Commission has considered many proposals over the years to increase flexibility for judges in sentencing these offenders by expanding the availability of sentences other than incarceration. Such increased flexibility would in the aggregate return sentencing for these offenders back towards probationary levels.

We oppose this amendment for two principal reasons. First, we believe the amendment is ill-suited to address the issue of judicial discretion in federal sentencing. We recognize the Commission is genuinely interested in exploring the issue of judicial discretion and the role of such discretion in federal sentencing. We think, however, judicial discretion ought to be addressed by the Commission at an appropriate time in a more comprehensive manner; examining the guidelines system as a whole – the guidelines themselves, departures, judicial review, and more – and the allocation of discretion by the system to the various parties. The incremental approach represented by this amendment only causes those concerned about certainty of punishment and the significantly positive effects of such certainty on public safety (through appropriate levels of general deterrence) to properly express vigorous opposition. There may be legitimate concerns about judicial discretion and its role in sentencing under the guidelines. But this amendment, we believe, is an inappropriate way to address them.

Moreover, we believe the amendment will undermine significant enforcement programs of the federal government. We also oppose Amendment 9 because we believe that sentences for many cases will simply be inappropriate if the amendment is adopted, and because we believe it will undermine the goal of general deterrence for many serious offenders. This will particularly be true of white-collar offenders, who, because their crimes are nonviolent, are the most likely beneficiaries of this amendment. White-collar offenders are generally better educated and more sophisticated than most criminals. Accordingly, they are the most rational offenders, and are more likely than most to weigh the risks of possible courses of action against the rewards of criminal behavior. Because this amendment will correctly be seen as reducing the likelihood that they will face prison time, we believe it will undermine the goal of general deterrence. Moreover, we think the Commission ought to wait and see the impact of the most recent amendments on fraud, theft, and other white-collar offenses before proceeding with this proposal. Last year's guideline amendments reduced penalties for low-level white-collar offenders, and before proceeding with further reductions, we think the Commission should know the real impact of those actions.

Below we examine the specific effects of Amendment 9 on enforcement programs in two areas. The effects of the program in these areas illustrate why the government opposes adoption of this amendment.

B. The Effects of the Amendment: Examples in Two Specific Enforcement Programs

1. Tax Enforcement

During the 2001 guideline amendment cycle, the Commission adopted a far-reaching "Economic Crime" package, aimed, in part, at substantially increasing the penalties for moderate and higher loss amounts for fraud, theft and tax offenses. While sentencing at the low end of the combined fraud and theft table was reduced, such reduction specifically was not incorporated into the revised tax table in order to avoid unintended decreases that would otherwise occur and to maintain the long standing treatment of tax offenses relative to theft and fraud offenses.

Adoption of the Commission's current proposal to expand the zones would represent a dramatic course reversal and threaten a devastating adverse effect on tax enforcement. Under the Commission's Options One and Two, given the existing tax loss table, a probationary sentence (Zone B) would be available to a defendant with a tax loss up to $30,000. (See §2T4.1(D) & (E).) A $30,000 tax loss represents an unreported gross income of $107,143 ($30,000 ÷ 28%). (See §2T1.1(c)(1)(n.A).) Thus, a taxpayer who fails to report up to $107,143 in gross income will be eligible under Options One and Two for a purely probationary sentence, without any imprisonment time whatsoever.

The picture becomes worse when the likelihood of a reduction for acceptance of responsibility is considered. In fiscal year 2000, approximately 89% of the defendants in tax cases received an acceptance of responsibility adjustment (64.4% received a two-level reduction and 24.4% received a three-level reduction). See United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, Table 19 (Offenders Receiving Acceptance of Responsibility Reductions Sentencing Options in Each Primary Offense Category (Fiscal Year 2000)). This means that a number of defendants responsible for a "tax loss" between $30,001 and $80,000, which translates to a level 14 in the Sentencing Table, will receive a reduction for acceptance of responsibility and end up with an adjusted offense level of 12, thus bringing them within Zone B under Options One and Two. The end result will be that defendants who willfully fail to report as much as $285,714 in gross income ($80,000 tax loss / .28) (see §2T1.1(C)(1)(n.A)) will not face any mandatory prison time, but can escape with a probationary sentence only. According to the most recently available statistics, almost 90% of the taxpayers who filed returns in tax year 1999 had an adjusted gross income of $95,000 or less. Internal Revenue Service, Statistics of Income (SOI) Bulletin, Fall 2001 (Table 1, Individual Income Tax Returns, 1999). This means that nearly 90% of the taxpaying public would be eligible for a probationary sentence under these proposals if they willfully failed to report any of their income for three consecutive years ($95,000 gross income per year x 3 years = $285,000).

The Commission's proposed Option Three would make probationary sentences available to Zone C defendants with a criminal history category I. Thus, under this proposal also, defendants who willfully fail to report gross income of at least $107,143 would qualify for probationary sentences. (As is the case with Options One and Two, the problem similarly would be magnified by reductions for acceptance of responsibility.) But, according to the Commission's own statistics, approximately 80% of all criminal tax offenders fall within Criminal History Category I. Thus, these zone flexibility proposals will reduce the perception that tax offenses are, as the Guidelines' background commentary acknowledges (§2T1.1, comment. (backg'd.)), "serious offenses."

These proposals are flatly inconsistent with the view the Commission has taken from the beginning as to the critical importance of deterrence in enforcing the criminal tax laws:

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax

> prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

USSG Ch.2, Pt.T(1), intro. comment.

The deterrence message is substantially undercut by proposals that reduce the likelihood that tax violators will spend some time in prison for their crimes. Common sense tells us that the realistic probability of imprisonment acts as a powerful deterrent to one contemplating noncompliance with the internal revenue laws. In criminal tax cases, however, a large number of violators do not face that risk. In fiscal year 2000, 46.2% of tax defendants received some form of probation, and half of that number (23.1%) received a sentence of straight probation. See United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, Table 12 (Offenders Receiving Sentencing Options in Each Primary Offense Category (Fiscal Year 2000)). While we acknowledge that the percentage of probationary sentences in criminal tax cases has been decreasing since 1995,[4] we are very concerned that the adoption of any one of the Commission's alternatives to incarceration options would increase the pool of tax violators eligible for a probationary sentence and send the message that conviction for a tax violation is not likely to result in any prison time.

Obviously, the Commission's zone expansion proposals do not require probationary sentences in the expanded Zone B. Nevertheless, they do increase the number of defendants eligible for probationary sentences and give sentencing judges discretion to impose such sentences in a wider array of cases. Our experience as prosecutors – and the Commission's own data (see Tables 1 and 2) – make clear that, as former Deputy Attorney General Robert Mueller testified before the Commission last year, "if white collar defendants are eligible for probation, they likely will receive probation."

The Tax Division has long opposed efforts to expand the zones as such proposals undermine any notion of meaningful deterrence in criminal tax cases. Since 1995, when the initial impacts of the 1993 tax guideline amendments began to be felt, prison sentences in tax cases have risen every year from 36.1% to 53.8%. Now is not the time to institute changes that will reverse this positive trend.

---

[4]The 46.2% of criminal tax defendants receiving probationary sentences in Fiscal Year 2000 marks the first time since the Guidelines' inception that probationary sentences were less than 50%.

The "tax gap" (the difference between what taxpayers owe and what they do not voluntarily pay) has increased significantly from that first estimated by IRS in 1973. The estimated amount of taxes not voluntarily paid in 1973 was estimated to be about $28 billion to $32 billion. That amount rose to approximately $110 billion to $127 billion in 1992. See GAO Reports On The IRS, June 2, 1995 (Report No. GGD-95-157). It is widely accepted that this figure has continued to grow steadily over the years and it is now estimated to be approximately $195 billion. In light of this history, it is perhaps not surprising that a poll conducted by the Roper polling organization for the IRS Oversight Board recently revealed that approximately 24% of the taxpayers surveyed believed that some level of cheating on taxes was all right, with about five percent saying people should cheat "as much as possible." When taxpayers were asked the same questions by the IRS in 1999, approximately 13% believed that some level of cheating was acceptable. See Curt Anderson, Cheating IRS More Accepted; Poll Finds Change in Attitudes as Tax Enforcement Declines, Washington Post, Jan. 20, 2002, at H2. This growth in the tax gap figure and the number of people who believe that cheating on taxes is acceptable strongly counsels against the Commission's proposals which would reduce the number of convicted tax violators who are required to serve some term of imprisonment. Making probationary sentences more likely for tax offenders waters down the deterrence message sent by a successful criminal prosecution and increases the likelihood that a taxpayer might be willing to take a chance and cheat on his taxes.

2. Antitrust Enforcement

We believe Amendment 9, if adopted, would also have a seriously negative impact on the Antitrust Division's criminal enforcement program. We are very concerned over the negative impact that permitting antitrust defendants to avoid prison would have on general deterrence of antitrust offenses. Virtually all criminal antitrust cases involve intentional agreements among competitors to increase prices by means such as covert price fixing, bid rigging and market allocation. Only intentional conduct that is clearly harmful to consumers and clearly illegal under established precedent is prosecuted criminally. There can be no doubt that criminal antitrust violations are serious crimes. They cannot be inadvertently committed, they cause substantial social harm and they create no redeeming social benefits.

From passage of the Sherman Act in 1890 until 1974, antitrust offenses had been misdemeanors. At that point, Congress recognized the need to deal more aggressively with persons who violated the antitrust laws and so passed the Antitrust Procedures and Penalties Act of 1974, which made antitrust crimes felonies. The Antitrust Division set about attempting to have courts impose significant prison terms on antitrust defendants, without much success. For example, in Fiscal Years 1984 and 1985, 126 individual defendants were sentenced in criminal antitrust cases. The Division recommended incarceration for 107 of these defendants (approximately 85 percent), but only 40 (about 32 percent) actually were sentenced to even a single day in prison and the average prison term, averaged over all 126 individual defendants, was only about 30 days. Criminal fines also remained relatively modest, averaging less than $16,000 over all 126 individuals. The average fine for the 180 organizations sentenced in FY

1984 and 1985 was about $133,000.

The Department began working with the Sentencing Commission shortly after the passage of the Sentencing Reform Act of 1984 to develop a penalty scheme that would be relatively straightforward to apply and at the same time provide strong deterrence for antitrust violations. We determined that – as is true in virtually all cases involving fraudulent conduct – fines alone – which often are viewed as just a "cost of doing business" – are insufficient to deter individuals. Companies can and will find ways to "reimburse" employees for any fines imposed with bonuses, salary increases, or other means of indemnification. Furthermore, in most instances the potential gain to be derived from price fixing, bid rigging or market allocation far exceeds the maximum antitrust fine penalty. Therefore, some period of incarceration, we believe, is necessary to deter antitrust offenses. Given the type of individual likely to be involved in an antitrust felony – an executive in a large organization or an owner or manager of a smaller company – even a modest prison sentence is likely to have a significant adverse effect on his or her reputation, social status and future earning power. Thus, we concluded that a certain jail sentence would be a strong deterrent to potential antitrust violators. Probation with alternative methods of confinement simply does not carry the same social stigma or deterrent value as imprisonment. And given the general absence of recidivism among antitrust defendants, imposing probation on first-time offenders is equivalent to eliminating entirely effective penalties and general deterrence. Relatively short, but certain, prison sentences are simply essential to providing adequate general deterrence for felony antitrust violations.

This line of reasoning was, in large measure, adopted by the Sentencing Commission when it promulgated §2R1.1. In the Background to the antitrust guideline the Commission stated that "[t]he controlling consideration underlying this guideline is general deterrence." It went on to say that "[u]nder the guidelines prison terms for these offenses should be much more common, and usually somewhat longer, than currently is typical. . . . The guideline imprisonment terms represent a substantial change from present practice. Currently, approximately 39 percent of all individuals convicted of antitrust violations are imprisoned. Considering all defendants sentenced, the average time served recently was only forty-five days . . . . The fines specified in the guideline represent substantial increases over existing practice." And, most importantly for present purposes, in Application Note 5 to §2R1.1 the Commission said that "[i]t is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders."

The Commission initially established fines in the range of 4 to 10 percent of the affected volume of commerce for individuals and 20 to 50 percent for organizations, and set offense levels with the expectation that most antitrust defendants would be sentenced at an offense level of 9 or 10, Zone B offense levels that permitted probation. Clearly, based on the Background comments and Application Note 5 to §2R1.1, the Commission intended that antitrust defendants actually serve their minimum 4 or 6 month sentences in prison. Courts nonetheless continued to sentence antitrust defendants to probation, a practice that was ultimately approved in United States v. Pippin, 903 F.2d 1478 (11th Cir. 1990) (Background and Application Note 5 to §2R1.1

did not restrict judges' discretion to sentence Zone B antitrust defendants to probation). The Sentencing Commission responded in 1991 by raising offense levels for antitrust offenses and lowering the fine range for individual defendants to 1 to 5 percent of the affected volume of commerce. (Separately, organizational fines for antitrust violations under Chapter 8 were established at 15 to 80 percent of the affected volume of commerce.) According to the Commission, the amendment "increases the offense levels for antitrust violations to make them more comparable to the offense levels for fraud with similar amounts of loss. . . . This amendment also reduces the minimum guideline fine level based on the volume of commerce to reflect a marginal shift from fines to imprisonment as the more effective means to deter antitrust offenses."

Given the difficulty of detecting antitrust conspiracies, the November 1991 Guidelines changes adopted to increase prison sentences in antitrust cases became fully implemented only towards the end of the five-year criminal statute of limitations period, or approximately the beginning of Fiscal Year 1997. During FY 1997 through FY 2001 there were 158 individuals sentenced in cases prosecuted by the Antitrust Division. Of those, 65 (approximately 41 percent) were sentenced to a total of 19,136 days of imprisonment and 76 (approximately 48 percent) were sentenced to 10,061 days of some other form of confinement. Thus, the average prison sentence for all 158 persons sentenced was 121 days. Again, these numbers compare favorably to approximately 32 percent of defendants sentenced to prison for an average of 30 days in pre-Guidelines Fiscal Years 1984 and 1985.

The current antitrust guideline has clearly had a positive impact on the certainty (an approximately 28 percent increase) and duration (an approximately 300 percent increase) of prison sentences for antitrust felons compared to pre-Guidelines sentences. We believe that these increases are both appropriate and necessary to provide adequate levels of deterrence for antitrust crimes and we strongly oppose changing the Guidelines in any manner that would permit judges to substitute alternative confinement for imprisonment for Zone C defendants. Any such change would reverse the heretofore unwavering support of the Sentencing Commission for short but certain prison sentences for antitrust felons, directly contradict Application Note 5 to §2R1.1, and weaken general deterrence of antitrust crimes. Option Two would have a less deleterious impact on antitrust deterrence than Option One (or Option Three) to the extent that community confinement is a more onerous condition of confinement than home detention, but a sentence of probation with community confinement does not come close to carrying the stigma or deterrent value of a sentence of imprisonment.

C. Conclusion

The circumstances surrounding federal tax and antitrust enforcement programs – and our concerns about the impact of Amendment 9 on such enforcement programs – are similarly present for environmental, white collar fraud, and civil rights crime enforcement. We think that in all of these areas, certainty of punishment is vitally important, and that this proposal would undercut that certainty. As set forth in the attached tables, during FY2000, a majority of white-

collar offenders eligible for alternatives to prison received alternatives to prison; the percentage receiving alternatives to prison increased further still if the pool was limited to offenders in Criminal History Category I.

We reiterate what then-Deputy Attorney General Mueller said in his testimony to the Commission last year:

> At a time when vigorous white collar crime prosecution is needed, these flexibility options and changes to the sentencing zones send entirely the wrong message. After all, many white collar defendants have generally benefitted from society, have strong educational backgrounds and are often successful professionals. When these individuals break the law, they should not be excused from serving a prison sentence simply because they did not commit crimes of violence. The public has a right to expect that people with privileged backgrounds who commit crimes will not be exempt from the full force of the law and will not be treated with inappropriate leniency. Accordingly, the Department strongly opposes these amendments.

For all of the reasons stated above, we strongly oppose Amendment 9.

PROPOSED AMENDMENT 10 - DISCHARGED TERMS OF IMPRISONMENT

This proposal seeks comment on whether subsections (b) and (c) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) should be expanded to apply to discharged terms of imprisonment.

A. Policy Regarding Credit

We believe this area of federal sentencing policy should be guided by the principle that generally, a defendant should be given credit toward the service of a term of imprisonment for any time he has spent in official detention as a result of the offense for which the sentence was imposed. Under 18 U.S.C. § 3585(b)(1), the Bureau of Prisons provides credit to defendants for prior custody only insofar as such custody was never separately applied to a state or other federal imprisonment term. Generally, if a defendant has been convicted and sentenced and served a term for conduct that now forms the basis of a new federal imprisonment term, the earlier period of incarceration is not credited. We think this is generally an incorrect result.

However, it is important to recognize that in reaching an appropriate sentencing range under the guidelines, both offense conduct as well as criminal history are determining factors. It would undermine the whole purpose of considering criminal history if the marginal sentence attributable to such history were offset by virtue of a credit rule like §5G1.3. This is precisely why adjustments under §5G1.3 should be made only for terms of imprisonment that have been

fully taken into account in the determination of the offense level. However, with increasing frequency, aspects of criminal history are being made a part of the Chapter Two offense level determination. For example, §2G2.2 provides a specific offense characteristic for offenders who engage in a "pattern of activity." We think an exception to the general rule of a downward sentence adjustment for prior related terms of incarceration should be incorporated into §5G1.3 if the offense level for the instant offense is increased for a pattern of conduct similar to the instant offense. Such an increase, we believe, should not then be offset by a downward adjustment because the conduct formed the basis of an earlier offense. Such an offset would clearly undermine the Commission's underlying intent in creating such a pattern adjustment.

B. Implementation of the Policy

We recommend that a separate provision be added to the guidelines to facilitate a sentencing court's downward adjustment in the defendant's final sentence in consideration of prior custody credit not permitted by the Bureau's administration of 18 U.S.C. § 3585(b). Such a formal provision could apply whether the other sentence was undischarged or discharged at the time of federal sentencing.

Currently, §5G1.3 addresses whether a federal sentence should be imposed concurrent or consecutive to an existing, undischarged term of imprisonment. It is only Application Note 2 which authorizes the sentencing court to reduce the term of imprisonment imposed in consideration of prior custody credit which cannot be awarded. This method of sentence reduction has proven problematic for the Bureau of Prisons when performing its sentence calculation functions. The Bureau frequently encounters criminal judgments which are ambiguous or misleading as to whether the sentencing court is making a lawful sentence reduction pursuant to §5G1.3(b), Application Note 2, or is inappropriately attempting to direct the Bureau to award prior custody credit pursuant to § 3585(b). Clarification and resolution of these cases is often disruptive and resource-consuming to the inmate, the Bureau, and the sentencing court. The Bureau believes these operational difficulties would be alleviated by performing these types of sentence reductions pursuant to a separate, formal, guideline provision.

Additionally, creating a separate guidelines provision for sentence reductions when the prior term of imprisonment is already discharged avoids the illogical placement of such a provision in a guideline addressing concurrent and consecutive sentences. The federal sentence being imposed could never, by definition, be imposed concurrent with or consecutive to an already discharged term of imprisonment. Should the Commission opt not to promulgate a separate guideline, we alternatively makes two recommendations. First, in an effort to minimize the frequency of ambiguous or confusing sentences, the Bureau recommends that Application Note 2 be amended to include the following sample wording for the example currently discussed in that section:

> Seven months term of imprisonment, concurrent to undischarged state sentence, which includes a sentence reduction pursuant to

U.S.S.G. §5G1.3(b), App. Note 2, for prior period of imprisonment which will not be credited by the Bureau of Prisons.

Sample wording applicable to a discharged sentence would also be helpful, as follows:

> Seven months term of imprisonment, which includes a sentence reduction pursuant to U.S.S.G. §5G1.3(b), App. Note 2, for an already discharged, prior period of imprisonment, which will not be credited by the Bureau of Prisons.

Second, we suggest that language also be included in the note which informs all concerned parties that the sentencing court's reduction of the term under this provision might later be cited as the Bureau's reason for denying prior custody credit under § 3585(b), insofar as the Court will have already awarded such time in the form of a sentence reduction.

* * * * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the Sentencing Guidelines.

Sincerely,

John P. Elwood
Counselor to the
Assistant Attorney General

TABLE 1

DEFENDANTS SENTENCED BY SELECTED OFFENSE, ZONE AND TYPE OF SENTENCE IMPOSED - FY 2000

		A		B		C	
		Count	%	Count	%	Count	%
Larceny	Fine Only	38	4.1%	4	.7%	2	.6%
	Prison Only	100	10.9%	165	29.9%	114	34.5%
	Prison/Cont.	4	.4%	23	4.2%	123	37.3%
	Prob.+Cont.	54	5.9%	275	49.8%	53	16.1%
	Probation Only	723	78.7%	85	15.4%	38	11.5%
	Total	919	100.0%	552	100.0%	330	100.0%
Fraud	Fine Only	18	1.8%	11	1.0%	10	1.0%
	Prison Only	289	28.6%	300	27.1%	363	34.5%
	Prison/Cont.	17	1.7%	149	13.5%	387	36.8%
	Prob.+Cont.	58	5.7%	473	42.7%	169	16.1%
	Probation Only	629	62.2%	174	15.7%	122	11.6%
	Total	1011	100.0%	1107	100.0%	1051	100.0%
Embezzlement	Fine Only	10	2.9%	3	1.4%	3	1.9%
	Prison Only	99	28.9%	33	15.1%	31	19.5%
	Prison/Cont.	10	2.9%	79	36.1%	90	56.6%
	Prob.+Cont.	14	4.1%	77	35.2%	19	11.9%
	Probation Only	210	61.2%	27	12.3%	16	10.1%
	Total	343	100.0%	219	100.0%	159	100.0%
Forgery/Counterfeiting	Fine Only	3	1.1%	1	.3%		
	Prison Only	44	15.6%	104	35.4%	88	53.7%
	Prison/Cont.	3	1.1%	17	5.8%	50	30.5%
	Prob.+Cont.	22	7.8%	134	45.6%	13	7.9%
	Probation Only	210	74.5%	38	12.9%	13	7.9%
	Total	282	100.0%	294	100.0%	164	100.0%
Bribery	Fine Only	1	2.9%	1	1.6%		
	Prison Only	3	8.8%	10	15.9%	11	27.5%
	Prison/Cont.	1	2.9%	6	9.5%	14	35.0%
	Prob.+Cont.	1	2.9%	23	36.5%	7	17.5%
	Probation Only	28	82.4%	23	36.5%	8	20.0%
	Total	34	100.0%	63	100.0%	40	100.0%
Tax Offenses	Fine Only	1	.8%				
	Prison Only	19	15.0%	14	9.6%	27	17.1%
	Prison/Cont.			8	5.5%	64	40.5%
	Prob.+Cont.	6	4.7%	102	69.9%	39	24.7%
	Probation Only	101	79.5%	22	15.1%	28	17.7%
	Total	127	100.0%	146	100.0%	158	100.0%
Immigration	Fine Only	38	2.0%	2	.2%	3	.5%
	Prison Only	1586	82.2%	1016	86.6%	571	90.1%
	Prison/Cont.	1	.1%	12	1.0%	33	5.2%
	Prob.+Cont.	8	.4%	81	6.9%	15	2.4%
	Probation Only	297	15.4%	62	5.3%	12	1.9%
	Total	1930	100.0%	1173	100.0%	634	100.0%

Source: Table prepared by the Office of Policy and Legislation, Criminal Division, from data provided by the U.S. Sentencing Commission.

TABLE 2

DEFENDANTS SENTENCED BY SELECTED OFFENSE, CRIMINAL HISTORY I, SENTENCING ZONE AND TYPE OF SENTENCE IMPOSED - FY 2000

		A		B		C	
		Count	%	Count	%	Count	%
Larceny	Fine Only	19	2.5%	4	1.3%	2	.9%
	Prison Only	57	7.5%	29	9.7%	47	22.0%
	Prison+Cont	2	.3%	11	3.7%	92	43.0%
	Probation+Cont	44	5.8%	190	63.5%	44	20.6%
	Probation Only	640	84.0%	65	21.7%	29	13.6%
	Total	762	100.0%	299	100.0%	214	100.0%
Fraud	Fine Only	13	1.4%	9	1.1%	10	1.3%
	Prison Only	248	26.9%	154	19.3%	215	27.8%
	Prison+Cont	15	1.6%	108	13.6%	292	37.8%
	Probation+Cont	54	5.9%	378	47.4%	142	18.4%
	Probation Only	591	64.2%	148	18.6%	113	14.6%
	Total	921	100.0%	797	100.0%	772	100.0%
Embezzlement	Fine Only	9	2.8%	3	1.6%	2	1.5%
	Prison Only	98	30.9%	27	14.1%	23	16.9%
	Prison+Cont	10	3.2%	73	38.0%	79	58.1%
	Probation+Cont	11	3.5%	67	34.9%	17	12.5%
	Probation Only	189	59.6%	22	11.5%	15	11.0%
	Total	317	100.0%	192	100.0%	136	100.0%
Forgery/Counterfeiting	Fine Only	3	1.1%				
	Prison Only	39	14.9%	27	20.9%	30	41.7%
	Prison+Cont	2	.8%	9	7.0%	25	34.7%
	Probation+Cont	21	8.0%	73	56.6%	10	13.9%
	Probation Only	197	75.2%	20	15.5%	7	9.7%
	Total	262	100.0%	129	100.0%	72	100.0%
Bribery	Fine Only	1	3.0%	1	1.8%		
	Prison Only	3	9.1%	8	14.5%	8	23.5%
	Prison+Cont	1	3.0%	6	10.9%	12	35.3%
	Probation+Cont	1	3.0%	19	34.5%	6	17.6%
	Probation Only	27	81.8%	21	38.2%	8	23.5%
	Total	33	100.0%	55	100.0%	34	100.0%
Tax Offenses	Fine Only	1	.9%				
	Prison Only	13	11.4%	10	7.4%	23	15.9%
	Prison+Cont			8	5.9%	57	39.3%
	Probation+Cont	6	5.3%	97	71.3%	38	26.2%
	Probation Only	94	82.5%	21	15.4%	27	18.6%
	Total	114	100.0%	136	100.0%	145	100.0%
Immigration	Fine Only	9	.7%	1	.3%		
	Prison Only	1056	79.7%	278	71.1%	128	75.3%
	Prison+Cont	1	.1%	10	2.6%	20	11.8%
	Probation+Cont	8	.6%	67	17.1%	11	6.5%
	Probation Only	251	18.9%	35	9.0%	11	6.5%
	Total	1325	100.0%	391	100.0%	170	100.0%

Source: Table prepared by the Office of Policy and Legislation, Criminal Division, from data provided by the U.S. Sentencing Commission.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

UNDER SECRETARY

The Honorable Diane E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South
Washington, DC 20002-8002

Re: Proposed Changes to Sentencing Guidelines

Dear Judge Murphy:

On behalf of the Department of the Treasury, I would like to note our thanks for the efforts of the Commission and its staff to address the range of important sentencing guideline proposals prompted by the USA PATRIOT Act, Pub. L. 107-56. This letter addresses the most recent proposed amendments published by the Commission, 67 Fed. Reg. 2456 (Jan. 17, 2002), in particular those treating money laundering, counterfeiting, and certain computer crimes.

Money Laundering

We appreciate the Commission's proposing amendments to §2S1.3 to incorporate the important new money laundering provisions in the USA PATRIOT Act. Money laundering not only facilitates drug trafficking, organized crime, international terrorism, and other crimes, but it also poses a threat in and of itself, by tainting our financial institutions and undermining confidence in parts of the international financial system. Money laundering also facilitates foreign corruption. The fight against money laundering allows the U.S. government to pursue those who commit the underlying crimes that produce dirty money and those who ensure that the money is available for criminal misuse.

Pattern of Unlawful Activity

We support the proposed amendment to §2S1.3(b), adding a 2-level enhancement if the defendant committed the offense "as part of a pattern of unlawful activity [involving more than $100,000 in a 12-month period]." Although the Commission did not propose it, we would support an even higher, 4-level enhancement in these cases, particularly if the Commission keeps the bracketed text, which would clearly apply it to more serious offenses.

Concerning the "Enhancement for Pattern of Unlawful Activity" in proposed Application Note 2 in §2S1.3, the Commission used bracketed language to propose alternatives for a definition of "pattern of unlawful activity." We recommend that the Commission adopt the second proposal, using the second text in brackets: "unlawful activity involving a total amount of more than $100,000 in a 12-month period." This would also be consistent with our recommendation for the language of the relevant guideline.

Defining "Value of Funds"

The Commission also proposed a change to definition of "value of funds" in Application Note 1 to §2S1.3. We believe that the Application Note should be limited to the language in subparagraph (A) of the proposal that "the 'value of the funds' ... means the amount of the funds involved in the structuring or reporting conduct." Thus, we suggest keeping proposed paragraph (A) while striking the beginning phrase, "Except as provided in subsection (B), ...".

In lieu of addressing shell and correspondent banks and correspondent or payable-through accounts in proposed paragraph (B), as part of the definition of "value of funds" in the Application Notes to §2S1.3(b), we recommend establishing a separate enhancement as part of §2S1.3(b) itself for use of these accounts in connection with the offense. The enhancement should be separate from the definition of "value of funds" to recognize that it may not be fair in all cases to base a penalty on the value of every dollar that transited through the type of correspondent or payable-through account. Nevertheless, the USA PATRIOT Act requires special due diligence for corespondent accounts and private banking accounts, and prohibits U.S. corespondent accounts with foreign shell banks, and the guidelines should recognize these special situations.

We also suggest a change to the proposed addition to the "Background" section of the Commentary to §2S1.3. We suggest replacing the phrase "and other account holders" at the end of the proposed paragraph with "and other types of transactions and types of accounts." This will include more completely the broad variety of situations envisioned by the relevant statutes and guidelines.

Bulk Cash Smuggling

The Commission sought comment on whether an amendment should be added to §2S1.3 if the offense involved bulk cash smuggling, based on section 371 of the USA PATRIOT Act which prohibited concealing on one's person or any conveyance more that $10,000 in currency or other monetary instruments in order to evade currency reporting requirements. Although the Commission did not suggest specific text, we would support such an enhancement under §2S1.3. The enhancement level should be tied to the value of the cash or monetary instruments involved.

Public Corruption

The Commission also requested comment regarding whether the money laundering guideline §2S1.1 should be amended to add all forms of public corruption offenses to the list of offense that qualify for the 6-level enhancement in subsection (b)(1) because of the seriousness of these offenses. We strongly support listing public corruption as one of the offenses leading to such a 6-level enhancement. Congress recently reiterated the link between public corruption and

money laundering by enacting section 315 of the USA PATRIOT Act, which adds foreign corruption offenses to the list of money laundering predicate crimes. The sentencing guidelines should also reflect that foreign corruption undermines U.S. efforts to promote democratic political institutions and stable, vibrant economies abroad.

Terrorism

We also propose an additional enhancement to §2S1.3(b), adding at least a 6-level enhancement for structuring/reporting violations if the defendant "knew or believed that the funds were proceeds from a terrorist entity or were intended to promote terrorist activity." This enhancement would further highlight the importance of filing accurate Bank Secrecy Act reports, and heighten the penalties if a person in a position to file a Suspicious Activity Report ("SAR") about the financing of a terrorist entity or terrorist act chooses not to file a SAR or files a misleading SAR.

Counterfeiting

The USA PATRIOT Act provided new statutory maximum penalties for certain counterfeit currency offenses. The Commission has sought comment on four specific issues regarding these offenses. Each of these proposed changes is of interest to the Secret Service and the Department, and we appreciate the opportunity to respond to each.

Raising guideline penalties for counterfeiting domestic currency

As the Department and the Secret Service advised the Commission when counterfeiting guidelines were under review in the last amendment cycle, we believe the current base offense level of 9 does not adequately reflect the seriousness of this conduct. The exponential rise in counterfeiting digitally-based notes has resulted in a proliferation of guideline sentences that we believe to be insufficient and potentially inconsistent with the significant statutory maximum sentences set forth in Sections 374 and 375 of the USA PATRIOT Act.

As you know, analog, digital and electronic counterfeiting methods afford manufacturers the opportunity to create a passable product with much less effort than traditional offset methods. Counterfeiters are more easily able to produce and then pass small quantities virtually "on demand." This new ability has resulted in smaller seizure amounts for law enforcement that often do not reflect the scope of the counterfeiter's illegal activity, as it is difficult for law enforcement to link passed computer-generated counterfeit to a specific individual or to a specific computer, printer or copier.

Secret Service records indicate that the majority of domestic counterfeit arrests involve seizures of less than $2,000. Therefore, these offenders are not subject to the one-level

enhancement provided in §2B1.1(b)(1). Thus, individuals in this group who are not linked to manufacturing incur an offense level of 9 for an offense that now carries a twenty-year statutory maximum penalty. Accordingly, we recommend that the base offense level for offenses covered by §2B5.1 be raised to 11 to better reflect the heightened statutory penalty.

Foreign currency counterfeiting

The Commission sought comment as to whether foreign currency counterfeiting offenses should be referenced to §2B5.1, and whether that guideline should be reworked in order to cover the counterfeiting of foreign obligations. The recent amendments to 18 U.S.C. §§ 478, 479, 480, 481, 482 and 483 (offenses involving foreign obligations) creating uniform statutory maximum penalties for offenses involving U.S. and foreign obligations reflect a commitment to assisting all countries in efforts to suppress counterfeit. Accordingly, we recommend that the guideline sentences for counterfeiting foreign obligations mirror those of domestic foreign obligations and that both domestic and foreign counterfeiting offenses be included in §2B5.1.

The Secret Service currently operates 17 foreign offices throughout the world to work with foreign law enforcement in suppressing counterfeit U.S. currency. This work is of critical importance as over $55 million in counterfeit U.S. currency was passed or seized abroad in 2001. As part of this effort, the Secret Service actively encourages foreign countries to pass legislation making the counterfeiting of U.S. dollars a significant crime. In Colombia, for example, the legislature elevated the counterfeiting of U.S. dollars from a series of low-level offenses that carried only small fines to a statutory scheme that results in incarceration for many counterfeiting offenses. In order to credibly ask other countries to penalize the counterfeiting of U.S. dollars as they would the counterfeiting of their own currency, we believe that the guideline sentences in our country should provide that same consistent treatment.

Additionally, it is quite foreseeable that the new Euro will gain in popularity and be used worldwide. Counterfeiting of the Euro may well lead to distribution and passage in the United States. Consistent penalties for counterfeit foreign obligations should be in place in anticipation of these cases. Counterfeiting of U.S. currency continues to rise, and it is quite likely that counterfeiting of the Euro will follow a similar path.

Counterfeiting Linked to Terrorism

The Commission asked whether the two-level enhancement in §2B1.1(b)(8)(B), with a minimum offense level of 12, in cases where a substantial portion of a fraudulent scheme was committed from outside the United States, should be amended to provide an alternative prong if the offense was intended to promote terrorism. As set forth above, we recommend that *all* counterfeiting offenses be subject to §2B5.1 rather than §2B1.1 in order to provide consistent

penalties regardless of the type of currency counterfeited, and to better reflect the newly-enhanced maximum penalties provided by statute.

The Commission also asked whether the two-level enhancement in §2B5.1, which applies when any part of the offense was committed outside the United States, should be amended to provide an alternative prong if the offense was intended to promote terrorism or should an additional enhancement be provided if the offense was intended to promote terrorism. The current two-level enhancement is a recognition of the threat posed to the integrity of our currency in the international market when counterfeit is produced abroad. To address terrorist activity specifically, and to reflect the serious nature of terrorist activity, we would recommend the creation of a separate four-level enhancement.

The production of counterfeit U.S. obligations abroad threatens the stability of our currency in the international market and warrants the current two-level enhancement. Of the $608 billion in U.S. currency currently in circulation, an estimated $395 billion of that total circulates overseas. Additionally, the United States earned $35 billion in 2001 from seignorage. Doubts as to the authenticity of U.S. obligations abroad could, therefore, affect our ability to market our currency overseas. Furthermore, as more countries adopt the dollar as their official currency, the production of even small amounts of counterfeit U.S. currency abroad could adversely impact these developing economies.

We believe that the production and use of counterfeit currency to promote terrorism presents a distinct and very serious threat. The international acceptance of the dollar makes counterfeiting an attractive option for terrorist groups either as a means of financing other activities or as an economic weapon on its own. During the course of its investigations, the Secret Service has identified individuals with alleged ties to terrorist organizations as distributors of highly deceptive counterfeit U.S. currency. Accordingly, we encourage the inclusion of an additional four-level enhancement for terrorist activity as an appropriate penalty in this context.

Computer Crimes

The Commission proposed amending §2B1.1 to delete the special instruction pertaining to the imposition of not less than six months imprisonment for a defendant convicted under section 18 U.S.C. § 1030, pursuant to a directive included in the Section 814(f) of the USA PATRIOT Act. The Act tasks the Commission with amending the guidelines "to ensure that any individual convicted of a violation of section 1030 of title 18, United Stated Code, can be subjected to appropriate penalties without regard to any mandatory minimum term of imprisonment." In order to provide appropriate penalties in the absence of a mandatory minimum, we ask that the Commission consider an enhancement structure for those individuals convicted of violating 18 U.S.C. § 1030(a)(4) and(a)(5).

As an initial matter, computer crime may not always produce financial losses as contemplated by the loss tables in §2B1.1, but it can disrupt critical systems vital to the daily activities of this nation. Many computer network attacks are crimes of retribution committed by a former employee to wreak havoc on an employer, political statements regarding the activities of the attacked entity, or crimes of glory-seeking, where the intruder wants merely to demonstrate that he or she can disable the network. These intrusions are often not motivated by the economic incentives present in other fraud and theft offenses covered by §2B1.1. System disruptions, which may have far-reaching and even fatal consequences, are not adequately punished with a base offense level of 6 and an enhancement structure that relies on pecuniary loss.

Computer attacks on government or private systems that deny service for even a short period of time, without financial gain to the perpetrators, can produce ripple effects throughout the economy, often undermining public confidence and producing losses that are not easily measured. For example, in May, 2000, a federal banking regulatory agency reported that someone had replaced that agency's web page with a web page associated with a hacking group. Tracing the route of the Internet communications related to the unauthorized access, Secret Service agents were able to identify the physical location from which the Internet traffic originated and refer the case for prosecution. As is often the case with hackers, the illegal activity provided no financial gain to the perpetrators and produced no measurable pecuniary loss to the agency. Yet government business was disrupted as the public was unable to access the agency via the Internet while the system was down.

Computer-based attacks on our nation's critical infrastructure also produce losses that are difficult to measure fully. For example, the Secret Service has investigated cases in which hackers have obtained virtually unlimited access to telecommunications providers and, thus have had the potential to shut down telephone service over large geographic areas. Other section 1030 cases have included attacks on the information systems of financial services providers. In one instance, on-line trading was disrupted for a period of several days. In another case, a financial institution's automated teller network was rendered inoperable. Both of these attacks were perpetrated by former system administrators. Although the victims did attempt to quantify their losses under §2B1.1 in these cases, it is often difficult to adequately assess lost opportunity costs or to measure the time spent by employees to recreate or retrieve lost information. Moreover, we believe that attempts to undermine critical systems such as banking, utilities and telecommunications merit heightened penalties regardless of financial loss incurred.

Finally, computer-based attacks on information systems that support public safety, public health, national defense, the administration of justice or national security pose a particularly significant danger. For example, in March 2001, the Secret Service received information that a hospital had suffered a catastrophic shut-down of its computer network and information system. The hospital reported that, as a result, it was unable to access physician schedules, diagnostic images, patient information and other essential hospital records. A Secret Service agent was able

to regain control of the network by coordinating with the facility's system administrator to temporarily shut down and reconfigure the computer system and then "hack" into the compromised system himself to lock out the attacker. The perpetrator in this instance was a former hospital employee who had recently been terminated from his position as system administrator. As in the previous examples, there was no financial gain to the perpetrator, and the monetary loss suffered by the hospital is difficult to ascertain. However, the actual operational impact upon the institution was nonetheless profound.

Accordingly, we ask that the Commission consider an enhancement structure for violations of 18 U.S.C. § 1030(a)(4) and (a)(5) that does not measure the breadth of the damage incurred solely in financial terms. Instead, we would propose:

- a two-level enhancement for conduct that produces a significant disruption of operations of a private entity or government agency;
- a four-level enhancement for conduct that disables information systems that directly support critical infrastructure such as utility companies, financial institutions, or telecommunications service providers; and
- a six-level enhancement for conduct that disables information systems that directly affect public safety, public health, national defense, the administration of justice or national security such as 9-1-1 systems, medical facilities, court dockets, military records or air traffic control systems.

Each of these three enhancements should apply in conjunction with whatever additional offense levels for measurable pecuniary loss are assigned. Additionally, we support the imposition of the two-level enhancement set forth in §3B1.1 (Abuse of Position of Trust or Use of Special Skill) in cases where an entity's current or former system administrator perpetrated the attack. We believe that the addition of these enhancements will afford the sentencing judge the opportunity to exercise his or her discretion without the stricture of a minimum mandatory while assuring a fair penalty given the serious nature of these offenses.

On behalf of the Department of the Treasury, I thank the Commission and its staff for considering our comments on the proposed changes to the Sentencing Guidelines.

Sincerely,

Jimmy Gurulé/gm

Jimmy Gurulé
Under Secretary (Enforcement)

COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE UNITED STATES SENTENCING COMMISSION'S PROPOSED TERRORISM-RELATED AMENDMENTS

The National Association of Criminal Defense Lawyers (NACDL) respectfully submits these comments on the Sentencing Commission's proposed terrorism-related amendments, set out at 67 Fed. Reg. 2456 (Jan. 17, 2002). Those amendments address issues raised in the so-called USA PATRIOT Act, Pub L. No. 107-56 ("the Act"). Although NACDL opposes the proposed amendments in a number of respects--as discussed in more detail below--we appreciate the Commission's effort to clarify the sentencing of terrorism offenses.

I. THE APPRENDI PROBLEM.

The terrorism amendments, like other aspects of the guidelines, do not comply with Apprendi v. New Jersey, 530 U.S. 466 (2000). In our view, Apprendi requires that the key factual elements which determine the guidelines sentence must be charged in the indictment and found by the jury beyond a reasonable doubt.

Before Apprendi, the Supreme Court appeared to recognize a distinction between elements of an offense--which, under the Fifth Amendment Due Process Clause and the Sixth Amendment right to trial by jury had to be found by the jury beyond a reasonable doubt--and so-called "sentencing factors," which could be found by the judge post-verdict by a preponderance of the evidence. See, e.g., Almendarez-Torres v. United States,

523 U.S. 224, 228-29 (1998); McMillan v. Pennsylvania, 477 U.S. 79, 84-91 (1986). In Apprendi, however, the Court rejected the proposition, central to Almendarez-Torres, that the label attached to the statute at issue had decisive significance. The Court declared that "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains"--that is, the right to a jury determination beyond a reasonable doubt--"should apply equally to the two acts"--the underlying weapons possession offense for which the jury found him guilty and the hate crime statute that the court used to enhance his sentence--"that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." 530 U.S. at 476. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

To date, the federal courts of appeals have held that Apprendi does not apply to determinations under the sentencing guidelines as long the sentence falls within the statutory maximum. We respectfully disagree with this analysis. Apprendi itself rejected a similar formalism--reliance on the purported distinction between "sentencing factors" and elements of the

offense. 530 U.S. at 477-79. It is contrary to the entire thrust of Apprendi to create a new formalism that finds a difference of constitutional dimension between a statutory maximum and a guidelines maximum. The distinction implies that if Congress had enacted the guidelines as statutes--instead of directing the Sentencing Commission to propose them, 28 U.S.C. § 994(a), with a provision for Congress to disapprove the Commission's proposals, id. § 994(p)--then Apprendi would apply. Such a distinction elevates form over substance and ignores Apprendi's central point--that, under the Fifth and Sixth Amendments, specific facts that, as a matter of law (rather than solely as a matter of judicial discretion), significantly affect the defendant's sentence must be found by the jury beyond a reasonable doubt.

The guidelines "have the force and effect of laws, prescribing the sentences criminal defendants are to receive." Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); cf. United States v. R.L.C., 503 U.S. 291 (1992) (holding that the phrase "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B) refers to the maximum sentence under the sentencing guidelines, rather than to the statutory maximum). By statute, courts "shall impose a sentence of a kind, and within the range, [prescribed by the guidelines],

unless 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." 18 U.S.C. § 3553(b) (emphasis added). If the trial court incorrectly applies the guidelines or unreasonably departs from them, the court of appeals "shall" set aside the sentence, remand for further sentencing proceedings, or both. 18 U.S.C. § 3742(f) (emphasis added).

As these provisions make clear, from the perspective of a trial judge imposing sentence and a defendant receiving it, the guidelines cannot be distinguished from statutes. The sentencing range produced by the base offense level, criminal history category, and sentencing table under the guidelines is precisely analogous to the unenhanced sentencing range for weapons possession in Apprendi, and for carjacking in Jones v. United States, 526 U.S. 227, 232-33 (1999). The specific offense characteristics and Chapter Three adjustments under the guidelines--including, for example, an adjustment such as § 3A1.4 and a specific offense characteristic such as whether, under proposed § 2A5.2(a), the defendant acted "intentionally" or "recklessly"--are precisely analogous to the hate crime enhancement provision in Apprendi and the serious bodily harm enhancement in Jones. Just as the enhancements in those cases

required a jury finding beyond a reasonable doubt, so should the guideline adjustments and specific offense characteristics in the terrorism package and elsewhere in the guidelines.

We submit the following specific comments on the proposed terrorism amendments subject to this broad objection to a sentencing regime that leaves critical factual determinations to the judge rather than the jury and permits those determinations to be made by a preponderance of the evidence rather than beyond a reasonable doubt.

II. PART A--NEW PREDICATE OFFENSES TO FEDERAL CRIMES OF TERRORISM.

Part A of the proposed terrorism amendments proposes revisions to certain existing guidelines. We take no position on the majority of the specific issues on which the Commission requests comment. With respect to hoaxes, we suggest that the attempt guideline (§ 2X1.1) be applied, rather than the guideline for the underlying substantive offense. This will reflect the generally less culpable nature of hoaxes.

III. PART B--PRE-EXISTING PREDICATE OFFENSES TO FEDERAL CRIMES OF TERRORISM NOT COVERED BY THE GUIDELINES.

We agree in principle with the Commission's proposal to create Chapter Two guidelines for offenses that are enumerated in 18 U.S.C. § 2332b(g)(5) as "federal crimes of terrorism." We address below several issues of concern to us with respect to those proposed amendments.

1. The proposed new guideline for material support offenses--§ 2M6.3--does not adequately take into account the wide variety of conduct that may be covered by the underlying statutes (18 U.S.C. §§ 2339A, 2339B). That conduct may range from providing what the donor intends to be a charitable contribution, see, e.g., Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), to the purchase of explosives for a suicide bombing. The charitable donor and the explosives purchaser obviously should not be treated alike. The proposed offense level for § 2M6.3--26 or 32--is, in our view, far too high for persons at the low end of the culpability scale. We suggest that the material support guideline have a relatively low base offense level--perhaps 16 or 18--with specific offense characteristics to account for more culpable behavior.

2. The commentary to the proposed material support guideline states that "[a]n offense covered by this guideline is not precluded from" application of the § 3A1.4 adjustment or, if § 3A1.4 does not apply, from an upward departure under application note 3 to the proposed § 3A1.4. We do not believe that the § 3A1.4 adjustment should apply to offenses directed specifically at terrorism-related offenses, because the Chapter Two guideline and associated specific offense characteristics should take into account the "terrorism" aspect of the

defendant's conduct. To apply both the Chapter Two guideline and the Chapter Three adjustment would amount to double-counting.

IV. PART C--INCREASES TO STATUTORY MAXIMUM PENALTIES FOR PREDICATE OFFENSES COVERED BY THE GUIDELINES.

The Commission requests comment in Part C of the proposed terrorism amendments on whether guideline penalties should be increased for certain offenses in light of increased statutory maximum penalties for those offenses. In each case, we believe that the current guideline adequately (or, in some instances, more than adequately) punishes the conduct at issue.

V. PART D--PENALTIES FOR TERRORIST CONSPIRACIES.

The Commission requests comment in Part D of the proposed terrorism amendments on the proper means of implementing the provisions of § 811 of the Act relating to conspiracies to commit certain offenses. In our view, Congress did not mandate in § 811 that conspiracies to commit the enumerated offenses must receive the same guidelines sentence as the underlying substantive offense; Congress merely provided that the statutory maximum penalty for the conspiracy offense is the same as for the underlying substantive offense. Nothing in the statute requires the Commission to deviate from its usual approach, set forth in § 2X1.1, to the sentencing of conspiracy offenses. We suggest that all conspiracies, including those to commit the offenses listed in § 811, be sentenced under § 2X1.1.

VI. PART E--TERRORISM ADJUSTMENT IN § 3A1.4.

Part E of the proposed amendments relates to the terrorism adjustment set forth at § 3A1.4. We have a number of comments on this provision.

1. As a general matter, § 3A1.4--with its extraordinary minimum sentence of 210 months--represents far too blunt an instrument for addressing the wide range of conduct that has come to be labeled "terrorism." The adjustment in effect dictates a statutory maximum sentence for almost all offenses that have any connection to terrorism. We suggest that the Commission abandon § 3A1.4 and address those aspects of the defendant's conduct that cause it to be labeled "terrorism" through specific offense characteristics attached to the Chapter Two guideline for the offense or, in the alternative, that the Commission refine § 3A1.4 to provide a range of adjustments depending on the culpability of the defendant's conduct. At a minimum, in our view, the Commission should confine the adjustment to an increase of a fixed number of levels and eliminate the level 32 "floor" and the requirement that the defendant's criminal history category be set at VI, regardless of his actual criminal history.

2. We oppose application of the § 3A1.4 adjustment to offenses that are "intended to promote" a federal crime of terrorism, but do not "involve" such an offense. In our view, the § 3A1.4 adjustment should apply (if at all) only when the

defendant has been convicted of a "federal crime of terrorism," as listed at 18 U.S.C. § 2332b(g)(5)(B). See United States v. Graham, 275 F.3d 490, 529-37 (6th Cir. 2001) (Cohn, J., dissenting).

In § 120004 of the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"), Congress directed the Sentencing Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103-322, § 120004, 103d Cong., 2d Sess., 108 Stat. 1796, 2022 (1994). In response, the Commission adopted § 3A1.4, which initially provided an adjustment when "the offense is a felony that involved, or was intended to promote, international terrorism." United States Sentencing Commission, Federal Guidelines Manual, Appendix C, amendment 526 (effective Nov. 1, 1995).

In § 730 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress directed the Commission to revise § 3A1.4 so that it "only applies to Federal crimes of terrorism, as defined in section 2332b(g) of Title 18, United States Code." Pub. L. No. 104-132, § 730, 104th Cong., 2d Sess., 110 Stat. 1214, 1303 (1996). The legislative history of AEDPA

provided in part with respect to § 730: "In amendments to the Sentencing Guidelines that become effective November 1, 1996, a new provision substantially increases jail time for offenses committed in connection with a crime of international terrorism. This section of the bill will make that new provision applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established at the sentencing phase of the prosecution, without having to wait until November 1996 for the change to become law." H. Conf. Rep. 104-518, at 123, 104th Cong., 2d Sess., reprinted in 1996 U.S. Code Cong. & Ad. News 944, 956 (emphasis added). The Commission amended § 3A1.4 in response to this directive effective November 1, 1996 and made the amendment permanent effective November 1, 1997. United States Sentencing Commission, Federal Guidelines Manual, Appendix C, amendments 539 (effective Nov. 1, 1996), 565 (effective Nov. 1, 1997). As amended, § 3A1.4 now provides an adjustment for any felony that "involved, or was intended to promote, a federal crime of terrorism." Application note 1 provides that "federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g); the proposed revised application note 1 spells out that definition in more detail.

In our view, the language of § 730--which directed the Commission to amend § 3A1.4 so that the adjustment "only applies

to Federal crimes of terrorism, as defined in" § 2332b(g)--and the accompanying legislative history establish that Congress intended § 3A1.4 to apply only when the defendant is convicted of an offense listed in § 2332b(g)(5)(B). Because § 3A1.4 appears to apply even when the defendant is convicted of a non-listed offense, as long as the court determines that the non-listed offense was intended to promote a listed offense, we oppose § 3A1.4 both in its present form and as amended.

3. As noted above, the Sentencing Commission adopted § 3A1.4 in response to § 120004 of the VCCLEA. In that statute, Congress directed the Sentencing Commission to "provide an appropriate enhancement for any felony . . . that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103-322, § 120004, 103d Cong., 2d Sess., 108 Stat. 1796, 2022 (1994) (emphasis added). The Commission omitted the underscored language from § 3A1.4 and its application notes. We believe that § 3A1.4 should expressly include the limitation that Congress mandated.

4. For the reasons discussed in Part I, we believe that the Apprendi principles require that the elements of the § 3A1.4 adjustment be found by the jury beyond a reasonable doubt. At a minimum, however, under United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), and its progeny, see, e.g., United States v.

Jordan, 256 F.3d 922, 927-29 (9th Cir. 2001); United States v. Mezas de Jesus, 217 F.3d 638, 642-43 (9th Cir. 2000), those elements should be subject to proof by a clear and convincing evidence standard, see Graham, 275 F.3d at 540-41 (Cohn, J., dissenting).

5. As § 3A1.4 stands now, it exceeds the statutory authority that Congress gave the Commission under VCCLEA and AEDPA, and it imposes far too severe an adjustment on many defendants whose conduct may be labeled as terrorism. Because § 3A1.4 is already more sweeping and draconian than it should be, we oppose the proposal (in application note 3) to permit an upward departure for offenses that do not "technically" fall within § 3A1.4.

VII. PART F--MONEY LAUNDERING OFFENSES.

We agree with the proposal that "terrorism" be defined in application note 1 of § 2S1.1. Although we remain opposed to the definition of "domestic terrorism" in 18 U.S.C. § 2331(5) because of its potential for punishing civil disobedience with undue severity, the unfairness of the definition can be ameliorated through more carefully calibrated adjustments and specific offense characteristics for offenses that relate to terrorism. In addition, we suggest that a new application note should be added to § 2S1.1 which makes clear that, where the terrorism specific offense characteristic in § 2S1.1(b)(1)

applies, the court should not also apply the § 3A1.4 adjustment. In our view, application of both § 2S1.1(b)(1) and § 3A1.4 would produce impermissible and unwarranted double-counting.[1]

VIII. PART G--CURRENCY AND COUNTERFEITING OFFENSES.

With respect to terrorism-related offenses, the Commission inquires in Part G whether §§ 2B1.1(b)(8)(B) and 2B5.1(b)(5) should be amended to provide enhancements if the offense was intended to promote terrorism. We believe that such specific offense characteristics would be appropriate, with two caveats. First, we suggest that a six-level increase would be appropriate, consistent with § 2S1.1(b)(1). Second, if the Commission adopts a terrorism specific offense characteristic for §§ 2B1.1 and 2B5.1, it should make clear that the court cannot also apply the terrorism adjustment in § 3A1.4.

IX. PART H--MISCELLANEOUS AMENDMENTS.

In Part H, the Commission requests comment on the proper sentencing of offenses under 18 U.S.C. § 1001, particularly such offenses that are committed in connection with acts of terrorism. We suggest that § 1001 offenses continue to be sentenced under § 2B1.1 (or another Chapter Two guideline if specifically applicable to the underlying conduct), with a specific offense characteristic for offenses that relate to

---

[1] We offer the same comment with respect to the proposal in Part H that a definition of "terrorism offense" be added to § 2L1.2.

terrorism. If the Commission adopts such a specific offense characteristic, it should make clear that courts cannot apply both that enhancement and the § 3A1.4 adjustment.

WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D. C. 20036
202 588-0302

March 19, 2002

U.S. Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Attn: Public Information
Washington, DC. 20002-8002

Re: Proposed Amendments to Sentencing Guidelines on Terrorism,
67 Fed. Reg. 2456 (Jan. 17, 2002)

Dear Commissioners:

The Washington Legal Foundation (WLF) and WLF's Economic Freedom Law Clinic at George Mason University School of Law (Clinic) hereby submit these comments in general support of the Commmission's proposed amendments to the sentencing guidelines with respect to those offenses involving terrorism.

I. Interests of WLF and Clinic

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has a longstanding interest in the work of the Sentencing Commission and the appropriate sentences that should be established for various categories of offenses. WLF has submitted written comments and has testified before the Commission on several occasions regarding various substantive issues, supporting enhanced sentences for certain *malum in se* crimes, and more lenient sentences for others, particularly *malum prohibitum* violations, such as environmental regulatory infractions. WLF has also urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and guidelines with respect to environmental offenses. *See Washington Legal Foundation v. U.S. Sentencing Comm'n*, 17 F.3d 1446

(D.C. Cir. 1993); *Washington Legal Foundation v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

With respect to terrorism issues, WLF has participated as amicus curiae in litigation urging strong enforcement measures against those connected with terrorism. *See, e.g., United States v. El-Gabrowny*, 35 F.3d 63 (2d Cir. 1994) (opposing pretrial bail for terrorism suspect in 1993 World Trade Center bombing); *United States v. Najjar*, 273 F.3d 1330 (11th Cir. 2001) (opposing release of suspected terrorism supporter pending deportation). In addition, WLF has petitioned various federal agencies to remove sensitive information from their websites and public reading rooms that could be used by terrorists in plotting additional terrorist attacks on America.

WLF's Clinic at George Mason University School of Law has been involved in public interest litigation and regulatory issues over the last three years. Currently, the Clinic is researching and focusing its efforts and activities on the various legal actions that have arisen out of the terrorist attack on America on September 11, 2001.

Accordingly, both WLF and the Clinic have an interest in the proposed guidelines that would modify sentencing policy with respect to offenses involving terrorism.

II. Comments on Proposed Amendments

The Commission has proposed certain revisions to its guidelines, policy statements, and commentary as a result of the passage of the USA PATRIOT Act of 2001, Pub. L. 107-56, signed into law by President George Bush on October 26, 2001. As a preliminary matter, WLF and the Clinic commend the Commission for taking swift action in proposing the various modifications to its guidelines with respect to sentencing those convicted of

certain terrorism crimes, by holding public hearings on those revisions, and by seeking public comment.

As a general matter, WLF and the Clinic urge the Commission to adopt those proposed changes to its guidelines that would allow a court to impose the maximum punishment allowed by law for those who commit terrorist acts and for those who aid and conspire with them. In other words, the Commission should be careful not to structure its guidelines in such a way as to prohibit, inadvertently or intentionally, upward departures by a court in appropriate cases as authorized by §5K2.0 because the Commission had considered the various aggravating circumstances in setting the guideline. *Cf. United States v. Sablan*, 90 F.3d 362 (9th Cir. 1996) (district court could not adjust sentence upward in sentencing defendant who maliciously destroyed government building with explosive device because such crime was within "heartland" of offense).

WLF and the Clinic also generally support the positions of the Federal Bureau of Investigation (FBI), as reflected in the testimony of James F. Jarboe, Chief of the FBI's Domestic Terrorism/Counterterrorism Planning Section (February 25, 2002), and that of the Department of Justice, as reflected in the testimony of Cathleen Corken, Deputy Chief for Terrorism, Terrorism and Violent Crime Section of the U.S. Department of Justice (February 25, 2002).

While the Commission has proposed certain amendments with respect to a number of terrorism-related crimes and issues (Parts A-H), WLF and the Clinic will focus on certain amendments in Part A.

1. The Commission requests comment on how the guidelines should treat certain offenses against mass transportation and air piracy. WLF and the Clinic believe that the Commission should add an enhancement to the sentence if death results, and that a specific offense characteristic should be added if the offense endangered or harmed multiple victims. Clearly, the essence of an act of terrorism is to endanger or harm as many lives as possible; accordingly, the guidelines should reflect the seriousness of those crimes by providing for increased sentences based upon the number of lives that are harmed or threatened.

2. The Commission has also solicited public comment on how the guidelines should treat offenses involving the conveying of false information, and threats and hoaxes of a terrorist nature. WLF and the Clinic agree with the Justice Department's position that the intentional conveying of false information and hoaxes should be treated the same since they are essentially the same in effect. Responding to threats of terrorism is expensive in terms of financial and human resources. The costs to society are the same even if the threat were a hoax or a false alarm. Clearly, if the threat was a serious one, such as where the person had the capability and means to carry out the threat, the guidelines should reflect that by imposing a sentence that would have been imposed if the threat were in fact carried out. The punishment should not be reduced simply because the terrorist act was prevented or disrupted by law enforcement, or for other reasons, such as the malfunctioning of weapons. On the other hand, an idle threat or hoax, while serious and should be punished severely, need not be treated as if the underlying crime that was the subject of the idle threat or hoax, was in fact carried out. This position is also shared by the Justice Department.

We also agree with the Justice Department that the current generic guidelines for threats found in §2A6.1 do not do adequate justice in the terrorism context. Rather, that section seems to be tailored more towards non-terrorist communications, that is, those involving "threatening or harassing communications" directed at one person, rather than at the population at large. In that regard, courts have found it necessary to depart upward to reflect the seriousness of a threat to the general population. *See, e.g., United States v. Horton*, 907 F. Supp. 295 (C.D. Ill. 1995) (40-month upward adjusted sentence imposed on person making false bomb threat to federal building in Illinois one day after terrorist Timothy McVeigh bombed federal building in Oklahoma City because §2A6.1 did not adequately account for type of potential disruption of government building, even though Justice Department sought minimal sentence).

Accordingly, if the Commission were to use §2A6.1 as a guideline for terrorism-related offenses, the Commission should add specific offense characteristics with substantial enhancements to reflect the seriousness of the threats and the disruption caused by the threat or hoax. By comparison, the Commission has added specific offense characteristics for environmental infractions where the infraction may have inadvertently caused a disruption of public utilities or evacuation of a community by increasing the sentence 4 levels. *See* §2Q1.2(3). Surely, where there is an intentional threat that is designed to cause serious disruption of public facilities and cause the expenditure of resources to respond to the threat, the Commission should provide for enhancements so that the resulting sentence is one that is at the higher end of the statutory maximum.

3. The Commission is also soliciting comment with respect to sentences imposed for providing material support to terrorists and foreign terrorist organizations under 18 U.S.C. §2339A and 18 U.S.C. §2339B. We agree with and endorse the views of the Justice Department on this issue. As a general matter, WLF and the Clinic believe that whenever the Commission is considering what level of enhancement should be used in the guidelines, the Commission should adopt the higher number that will result in a longer sentence.

III. Conclusion

WLF and the Clinic appreciate the opportunity to present these comments, and urge the Commission in amending its guidelines to adopt the strongest measures to punish and deter offenses involving terrorism.

Sincerely yours,

Daniel J. Popeo
General Counsel

Paul D. Kamenar
Senior Executive Counsel
and Clinical Professor of Law

Djuana Parmley
Law Student, George Mason Univ. School of Law

PROBATION OFFICERS ADVISORY GROUP

to the United States Sentencing Commission

Ellen S. Moore
Chairperson, 11th Circuit

U.S. Probation Office
P.O. Box 1736
Macon, GA 31202-1736

Phone # 478-752-8106
Fax # 478-752-8165

March 13, 2002

The Honorable Diana E. Murphy, Chairman
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C., February 19 - 21, 2002, to discuss and formulate recommendations to the United States Sentencing Commission regarding the *Sentencing Guidelines* proposed amendments that were published in the *Federal Register* November 27, 2001, and January 17, 2002. We are submitting comments relating to the following proposed amendments:

- Proposed Amendment One -- Cultural Heritage;
- Revised Proposed Amendment Three -- Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a);
- Proposed Amendment Four -- Expansion of Official Victims Enhancement;
- Revised Proposed Amendment Five -- Acceptance of Responsibility;
- Proposed Amendment Seven -- Terrorism;
- Proposed Amendment Eight -- Drugs;
- Proposed Amendment Nine -- Alternatives to Imprisonment; and
- Proposed Amendment Ten -- Discharged Terms of Imprisonment.

Proposed Amendment One – Cultural Heritage

The Probation Officers Advisory Group supports the creation of this new guideline which recognizes the special harm caused by theft, damage, or destruction of items of cultural heritage as many of these objects are priceless and irreplaceable. It is apparent that the current guidelines do not address the severity of harm these offenses may cause to Native American cultures, national memorials, archeological resources, national parks, and national historic landmarks. Offenses of these types of crimes are dissimilar to property crimes due to the special significance of the artifacts, the non-pecuniary harm associated with the resources, and the fact that many of the items cannot be replaced. Other property crimes are currently covered by USSG §2B1.1. POAG is of the opinion that offenses of this type should be held separate and distinct from the ones ordinarily governed by §2B1.1.

POAG does not have a position with respect to the enhancement for pattern of similar violations or for use of explosives. However, it is our opinion that an application note regarding the applicability of an upward departure is appropriate "if the value of the cultural heritage resource underestimates its actual value". We found that many of the specific offense characteristics were straightforward and application would not appear burdensome. However, there was concern regarding determination of the value of the object. It was suggested by Paula J. Desio, Deputy General Counsel to the United States Sentencing Commission, that this information would be provided by the prosecutor. POAG is of the opinion that this may be an area of litigation at the sentencing hearing with defense attorneys filing objections and presenting their expert witnesses. However, it is recognized that this issue, likewise, occurs in many loss-related cases.

Additionally, POAG identified a potential grouping problem with this offense. If an individual is charged with multiple counts wherein the Chapter Two guideline is §2B1.5, it appears these counts would be grouped together under §3D1.2(d). It is suggested that this guideline be specified as an offense covered under §3D1.2(d).

If an individual is charged with a cultural heritage offense as well as theft/destruction of other government property at the same time, the counts may or may not group in accordance with USSG §3D1.2(c) based on the aggregate loss amount. We are of the opinion that cultural heritage offenses present an unique societal harm differing from other theft related offenses. Therefore, it is suggested that an application note relative to potential grouping problems/solutions be considered when this guideline is promulgated.

Revised Proposed Amendment Three – Career Offenders and Convictions Under 18 U.S.C. §§ 924(c) and 929(a)

Please note that the following comments are in response to the revised proposed amendment of March 7, 2002.

POAG was told that the origin for development of this proposed amendment was based on the statutory directive at 28 U.S.C. §994(h) in conjunction with the decision in *U.S. vs Labonte*, 520 USC 751 (1997). Recognizing the considerable efforts that have already been expended and the Commissioners' desire to provide a guideline that adheres to the philosophy and justification for the amendment, POAG has identified several problematic issues to include: (1) the need to complete multiple sets of calculations in every case;

(2) the complexity of the procedure for imposition of sentence in conjunction with §5G1.2; (3) imposition of sentence with respect to multiple counts of 18 U.S.C. §924(c) convictions; and (4) concern of the impact if a defendant was successful on appeal regarding the §924(c) conviction and an imprisonment sentence of only one day was imposed on the underlying offense of conviction. Furthermore, it is our opinion that probation officers will have a difficult task when explaining the application of the proposed amendment to their respective judges and fellow practitioners.

As the proposed amendment distinctly connects USSG §2K2.4 with USSG §4B1.1, it is POAG's recommendation that the Commission defer this amendment until the results of the recidivist study are available. Furthermore, this will allow additional time for consideration of the issues that have been identified as problem areas. POAG supports the Commission in their endeavor to ensure that the *Federal Sentencing Guidelines* are harmonious with statutory directives as well as Supreme Court and Circuit case law.

Proposed Amendment Four – Expansion of Official Victims Enhancement

POAG recognizes the need for an expansion of the enhancement for official victims at §3A1.2(b). We agree that a victim should include injury to non-correctional officers. It is our opinion that the proposed amendment accomplishes the intended purpose and that the proposed definition for the term "prison employee" will be helpful when applying this guideline.

Revised Proposed Amendment Five – Acceptance of Responsibility

The Probation Officers Advisory Group reiterates our previous position as set forth in our position paper dated August 5, 2001. It is our experience that there is no uniformity in the application of USSG §3E1.1. Many courts require the defendant to address offense issues with the probation officer, whereas other courts do not hold the defendant to that same requirement. It is difficult for the probation officer to make a proper analysis of the defendant's acceptance of responsibility without engaging in such a discussion with the defendant. However, it is an adjustment that appears to be applied in the majority of cases that enter guilty pleas.

It is the majority view of POAG members that the timeliness component for the additional one-level decrease is best left to the recommendation of the government and the discretion of the court. It has been our experience that the timeliness of a defendant's plea may be attributable to a number of factors, some of which are not directly caused by the defendant. It is our opinion that the proposed amendment is successful in resolving the existing circuit conflict as to whether or not the court may deny acceptance of responsibility reduction when the defendant commits a new offense unrelated to the offense of conviction. It is perceived that this clarification will decrease the current disparity concerning this issue.

For these reasons, POAG supports Option Two of the revised proposed amendment.

Proposed Amendment Seven -- Terrorism

POAG recognizes the extensive efforts that have been put forth by the various work groups in fashioning this proposed guideline amendment. These guidelines are evolving and driven primarily by statute. At this time, POAG does not have the prior experience with these type of offenses to formulate an informed response to the proposed amendment.

Proposed Amendment Eight -- Drugs

The Probation Officers Advisory Group strongly supports the Commission's attempt to generally improve the overall operation of the drug guidelines and decrease the reliance on drug quantity as a means of calculating the penalty levels. Furthermore, we strongly support a change in the crack/cocaine ratio but do not take a position on the specifics of the ratio. POAG recognizes that the proposed specific offense characteristics for violence is a distinguishing factor in separating the violence associated with the more serious drug traffickers. After reviewing the proposed amendment in its entirety, POAG generally found the proposed amendment to be straightforward with the exception of several areas which are later addressed. POAG is concerned about the impact this amendment may have on guideline sentencing if the proposed amendment is passed without a corresponding decrease in the crack/cocaine ratio. The group has routinely maintained that many aggravating adjustments are not supported by the courts when determining the defendant's guideline sentencing range in an attempt to lower the lengthy sentences to which drug defendants are exposed.

Base Offense Level -- Mitigating Role Enhancement

POAG has concerns regarding the consideration of what is considered normally a Chapter Three adjustment when calculating a Chapter Two specific offense characteristic. This application is contrary to the instructions at USSG §1B1.2 and the methodical approach that has been used since the inception of the guidelines. Additionally, POAG has concerns regarding the problematic application of mitigating role as an adjustment under USSG §§ 3B1.2(a) and (b) and is of the opinion that application of the adjustment is too nebulous to warrant level reductions exceeding the normal two to four levels. It is our recommendation that the Commission first address the circuit conflicts pertaining to mitigating role before proceeding with the specific proposed amendment at USSG §2D1.1(a)(3).

Enhancement -- Protected Locations, Underage or Pregnant Individuals

POAG supports the specific offense characteristic; however, it is noted that a potential application problem was identified with respect to attempts or conspiracies charged under 21 U.S.C. §846. To simplify application, POAG recommends that violations of 21 U.S.C. §846 be considered a charge statute when used in conjunction with the other listed statutes.

Enhancement - Violence

As previously noted, POAG is in favor of the specific offense characteristic if there is a corresponding change in the cocaine/crack ratio. We are concerned about the specific offense characteristic involv

firearms. These specific offense characteristics appear in two forms: "defendant specific" versus "offense related". Possibly an inequity exists in the specific offense characteristics in a case where a defendant does not actually discharge the weapon but is held accountable for possessing a dangerous weapon and the bodily injury caused by the shooting. It is our opinion that there may be some confusion surrounding the application of relevant conduct with respect to these enhancements. A commentary note that addresses the distinction between the two concepts and its dissimilarity to USSG §1B1.3 -- Relevant Conduct -- may clarify this issue.

Enhancements -- Prior Criminal Conduct

POAG opposes the proposed amendment that provides a floor offense level of 26 at USSG §2D1.1(b)(3). We support the two-level enhancement for defendants who possess a felony conviction of either a crime of violence or a controlled substance offense. It is our opinion that this application is consistent with the approach taken in §2K2.1 and provides an enhancement for the repeat drug trafficker.

Reduction For No Prior Conviction

POAG does not support this reduction and is of the opinion that the current Safety Valve reduction provides sufficient consideration. However, we encourage the Commission to look at this proposal in connection with possible changes in Chapter Four and the potential creation of a new criminal history category for a true first-time offender. Furthermore, this relief should be awarded to all defendants who fall within this category and not just defendants who commit drug violations.

Proposed Amendment Nine -- Alternatives to Imprisonment

Of the three options presented, POAG supports Option One. Option Two provides for lengthy commitments in a community correctional center and may confuse practitioners when attempting to implement a sentence which involves serving at least half of the minimum in a form of confinement other than home detention. It is our experience that probation officers, attorneys and judges already find a "split sentence" option to be confusing. Implementing the additional requirement in Option Two may cause additional problems/ confusion when executing the sentence.

We find that Option Three limits expansion of sentencing alternatives to those offenders in Criminal History Category I. POAG has previously expressed concerns that there appear to be a significant number of defendants who fall within Criminal History Category II based on minor misdemeanor offenses and petty offenses. If Option Three is selected, these defendants absent a departure would be excluded from receiving an alternative sentencing option even though their criminal history points may be for offenses less significant and less violent than an individual found to be in Criminal History Category I. Again, it is our recommendation that further review of the problems identified within Chapter Four may address some of the Commission's concerns.

Although information has been presented to the Commission that community correctional centers are universally available, this is not the case in every district. Many of the community correctional centers that

have been identified are actually county jails and are not as effective in re-integrating offenders back into the community. Generally, it is our opinion that a period in excess of six months under either home confinement or in a community confinement center loses its impact and effectiveness. Additionally, many of the local jails used as community confinement centers do not allow the defendants to work unless the defendant is able to provide his or her own transportation. These facilities are not equipped, staffed, or have the available resources to accomplish the desired result. POAG would discourage the use of community correctional center placement as a condition of probation.

Proposed Amendment Ten – Discharged Terms of Imprisonment

It is the consensus of POAG that Option One would provide the clearest application of the guideline amendment proposal. The plain and simple addition of language including "discharged terms of imprisonment" was preferred over Option Two. However, POAG has identified a potential application problem in cases that may require minimum mandatory sentencing when the court, absent a substantial assistance motion, would be incapable of departing below the minimum mandatory sentence. For example, a defendant convicted of a drug conspiracy offense which has a minimum mandatory term of five years imprisonment and as part of the conspiracy, a substantive drug sale occurred, where the defendant has already served a two-year sentence. The defendant is not eligible for a safety valve reduction because his criminal history category is II. Based on a total offense level of 26, the guideline imprisonment range is 70 to 87 months. Absent the filing of a §5K1.1 motion, how does the defendant receive credit for the two-year state sentence he has already served? POAG also notes that the meaning of "conduct taken fully into account" was questioned, as many districts appear to have difficulty applying this guideline when conduct was only partially considered. We recommend consideration be given to an explanation as to the intent of this concept.

Closing

We trust you will find our comments and suggestions beneficial during your discussions of these proposed amendments. We appreciate the opportunity to provide the Commission our perspectives on guideline sentencing issues. Should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Ellen S. Moore

Ellen S. Moore
Chair

Cathy A Battistelli

Cathy Battistelli
Chair Elect

ESM:CBB/amc

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS JIM FELMAN AND BARRY BOSS
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, NW
WASHINGTON, DC 20009
202 234 9000 (BARRY BOSS)
813 229 1118 (JIM FELMAN)

March 15, 2002

VIA HAND DELIVERY
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: PAG comment on proposed amendments published January 17, 2002

Dear Judge Murphy:

We are writing to provide the Commission with the PAG's position on the proposed amendments and issues for comment published in the Federal Register on January 17, 2002. We are submitting comments on all of the pending amendments, except terrorism (amendment # 7).[1]

DRUGS (PROPOSED AMENDMENT #8)[2]

The Practitioners' Advisory Group could not be more pleased that the Commission plans to address, over the next two cycles, a review of the most controversial aspect of federal sentencing. The current quantity-based sentencing scheme for drug crimes has universally been criticized as frequently resulting in sentences that are arbitrary, racially biased, disproportionate and unnecessarily harsh.

The Practitioners' Advisory Group believes that designing a new system in which quantity is not the fundamental organizing principle is consistent with, and indeed required by, the congressional mandate that the Commission continue to evaluate the federal guidelines to ensure that punishment is proportionate, non-disparate, and race and gender neutral. The Practitioners' Advisory Group believes that the Commission's proposal to give greater weight to aggravating and mitigating aspects of drug offenders and offenses, while reducing the influence of quantity, is the right approach to correcting the myriad of problems generated by the current guidelines.

---

[1] With regard to the proposed guidelines regarding terrorism, our members lack the type of substantive experience with these cases that would render our perspective helpful. We would defer to the views of the Defenders on this issue.

[2] This section was drafted primarily by PAG member Lyle Yurko.

The Practitioners' Advisory Group strongly believes that all Commission decisions regarding drug sentencing should be based on neutral criteria anchored in the fundamental precepts that the use and distribution of drugs are criminal acts because drug abuse is harmful to individual citizens and therefore to society. The proper punishment for drug offenses should accordingly be based on the relative pharmacological harmfulness of the various substances which are abused.

Grounding the drug guidelines in scientific principles can go a long way in transforming them into objective measures of culpability. We believe the published proposals are a good start in this process.

CRACK/POWDER

The Practitioners' Advisory Group believes that a serious assault on the concept of neutral drug sentencing occurred when Congress rejected the Commissions' 1 to 1 crack to powder ratio proposal in 1995. Again in 1997, the Commission made neutral sentencing recommendations to Congress in response to the 1995 rejection of the crack amendments and Congress did not act. We agree with the Commission that it is time to again address this significant sentencing issue.

The record is clear that Congress intended to establish minimum punishments for mid- and upper-level dealers when it enacted mandatory minimum sentencing provisions in 1987. However, the Commission's exhaustive research demonstrates that the minimum triggering quantities selected for crack of 5 grams and 50 grams result in punishing street dealers with sentences designed to punish more highly culpable individuals. (Figure 11, January 2002 Drug Briefing).[3] The severity of the punishment selected by Congress is compounded by the fact that crack is punished at a ratio of 100 to 1 to powder cocaine.

There is no serious disagreement that the 100 to 1 crack/powder ratio creates the most significant post-guidelines sentencing disparity. This disparity is arbitrary because there exists no scientific justification for the differential. The disparity is also arbitrary because powder cocaine is sold to street dealers who then turn it into crack. The middlemen and their suppliers, when interdicted, are usually sentenced using the less punitive powder guidelines. When the street dealers are prosecuted in federal court, they are sentenced pursuant to the inappropriately harsh crack guidelines. The result is that the street dealers often go to prison for longer terms than those who supply them with cocaine. (Figure 2). Also, some PAG members have reported that they see street crack dealers being prosecuted unevenly throughout the federal districts. Street dealers are also more likely to be drug users themselves, and such individuals are not appropriate targets for harsh federal sentences. Rather, as is now being recognized by state

---

[3] The figures refer to the Commission's drug sentencing data that has now been published on its web site.

criminal justice systems across the country, these user/dealers should be identified for treatment and diversion. Finally, the fact that most of the street crack dealers are black has resulted in racially disparate sentencing.

The Commission's 1995 crack report cogently and clearly illustrated that no scientific or social evidence justified the severe sentences for crack cocaine resulting from the 100 to 1 crack/powder ratio. The statistical evidence which has been generated since the 1995 report also does not support this disparity. (Figure 19) If any rational basis for the differential remained intact after 1995, the Commission's current findings lay it to rest. One of the oft-stated reasons for the severe crack penalties was the perception that crack cocaine trafficking was marked by greater violence, sufficient to warrant the extreme penalties, even for its personal use possession. In fact, crack defendants of late possess fewer weapons, commit less violent crimes, and engage in less aggravating conduct than was the case in the early 1990s. (Figure 19)

While we do not believe there is any support for the perceived inherent relationship between crack and powder that was used to justify the profoundly harsh sentences, we believe that all drug defendants who engage in aggravated conduct, especially in violent aggravating conduct, should be punished more harshly than drug defendants who do not engage in such conduct.

Lowering the crack penalty while targeting aggravating conduct for increased punishment is a much sounder course than lowering the powder trigger, either alone or in combination with raising the trigger for crack. The Practitioners' Advisory Group disfavors any increase in the penalty for powder cocaine. Linking the five- and ten-year guideline sentences to 500 and 5000 grams of powder respectively does fairly approximate mid- and high-level trafficking in powder cocaine. This is the result Congress intended when it established these threshold quantities for mandatory minimum treatment. *See, e.g.,* H.R. Rep. No. 99-845 at 11-12 (1986); *see also* Figure 18. Also, no one suggests that the powder penalties are lenient. In fact, compared to most federal non-drug sentences, such penalties are severe. *See* Figure 2. Increasing the severity of powder cocaine sentences simply to help ease the correction of the crack mistake does not solve the problem and is unwarranted by the evidence.

The point was cogently made in the 1995 Commission report that crack and powder cocaine is the same drug. Testimony presented in two days of hearings on February 25th and 26th reiterated that point with up-to-date medical and social science. Thus, today, more than ever, the severity of the crack cocaine penalty standing alone and in relation to that for powder is insupportable. That said, when Congress, in Public Law 104-38 rejected the Commission's proposed amendment, it stated that should the Commission return with a proposed amendment "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). Thus, while it appears the Commission is precluded from proposing

the equalization of penalties for crack and powder cocaine, there are sound reasons for doing as the Practitioner's Advisory Group asks: make the ratio as close to one to one as is supportable.

One suggested guide is the Median Quantity by Function Table in Figure 18. High-level perpetrators handle median weights of nearly 3000 grams. Managers' and Supervisors' median weights are 250-1500 grams. Centering the mandatory penalty weight levels somewhere in these ranges is supported by the original intent of Congress, provides a sound basis to structure a new crack table, and brings crack cocaine sentencing in line with that for other drugs.

AGGRAVATING AND MITIGATING FACTORS AND QUANTITY

The Practitioners' Advisory Group applauds the Commission's effort to reduce the influence of quantity in the drug sentence calculus by establishing neutral aggravating and mitigating sentencing factors. Violence and aggravating conduct occur across the entire spectrum of drug trafficking, and we therefore agree that these specific offense characteristics should be applied across the drug guidelines. Therefore, the Practitioners' Advisory Group endorses the establishment of universal SOCs, but believes that at a minimum, the entire drug table must be reduced proportionately by two levels below current levels. Thus altered the quantity levels which encompass the ten-year mandatory minimums would have a base offense level of 30 instead of the current 32, and the quantity levels corresponding to the five-year mandatory minimum would have a base offense level of 24 and not the current 26.

This proposal is in keeping with congressional intent in establishing mandatory minimums to reach mid- and high-level dealers. Currently many such mid- and high-level traffickers receive role enhancements, raising their sentences above the five- and ten-year targeted mandatory sentences and such conduct is therefore double counted in the guidelines. That is, defined quantities trigger mandatory minimum sentences that are reflected in guideline sentences that are indexed to the mid- and high-level dealer roles. Then, additional enhancements, for supervising (mid-level) or leading (high-level) drug trafficking operations, are added on, increasing the sentence for those mid- and high-level dealers. Lowering the guidelines by two levels will provide headroom in which to apply the aggravating role enhancements, as well as any weapons and violence enhancements presently contemplated. And, such a change would give greater effect to the Safety Valve by giving sentences somewhere to go when a defendant qualifies.

Moreover, absent such a change in the table, the SOCs could drive many sentences higher than the inappropriately harsh sentences which are required now. This is a result the Practitioners' Advisory Group cannot endorse.

By reducing the drug table by two levels, and by establishing the proposed SOCs, aggravating conduct is actually deterred by the guidelines — a congressionally mandated goal of sentencing reform.

The Practitioners' Advisory Group believes that the crack/powder ratio changes must be instituted immediately. These unjust and inappropriate guidelines have destroyed far too many lives and families already. While we do not necessarily oppose the simultaneous adoption of SOCs designed to de-emphasize the role of quantity in determining the relative culpability of a drug offender, we remain concerned that the proposed aggravating SOCs are applicable to all drug types; thus, only a table reduction of two levels can prevent the new SOCs from inappropriately increasing drug sentences for many drug offenders. The two level table reduction will provide for sentences that are not only more appropriate, but which will also remain consistent with the sentencing choices selected by Congress in establishing mandatory minimums for certain of the substances encompassed by the drug table. We believe that the only way for the new SOCs to function properly is for the Commission to change the table, and we believe that the currently published crack issue for comment is broad enough to authorize a table reduction for all drugs.

EXAMINATION OF THE PROPOSED SOCs

We believe that the SOCs for violence, weapons possession and use all should apply to only those defendants who actually possess or injure, or to those who directly order such possession and/or injury. The Commission should reject broad-based concepts of vicarious liability of conspiracy participants for injury or weapons based solely on the notion that violence and weapons are tools of the drug trade and thus reasonably foreseeable. Such a perspective not only fails to distinguish among very different types of offenders but also is now outdated. The statistics developed by the Commission have conclusively established that guns and violence are not so inherent in the drug trade as to be reasonable foreseeable. Absent genuine, proven forseeability, the factor should only apply to those who actually possess or injure, and those who in fact directly aid and abet by providing the weapon or actually ordering a killing. The guidelines must be altered to reflect this reality because in the vast majority of courtrooms, both prosecutors and district court judges continue to propagate the myth that guns are tools of the trade for the vast majority of drug defendants.

The Practitioners' Advisory Group finds no need to establish minimum offense levels for those traffickers who possess weapons or administer violence. The combination of quantity and aggravating factors should determine offense levels. Threatened violence with no actual violent behavior as a factor is best tied to individual case events with departure available for appropriately severe behaviors. These are precisely the kinds of fact and circumstance ridden cases, where guided discretion, not mandatory results, should inform judging decisions.

We strongly believe that an SOC for prior drug convictions is unnecessary and would result in double counting, unless the enhancement conviction is excluded from criminal history. Prior record is adequately considered in most criminal history scores and need not also influence one's offense level. Departure is always available when an offender's prior conduct cannot be

counted or does not adequately reflect the gravity of the prior conduct. Therefore, we urge that the guideline not be amended in this fashion. Should the commission nonetheless adopt this factor it should limit its application only to similar offenses. Prior crimes unrelated to drug trafficking should not raise offense levels.

The Practitioners' Advisory Group supports an additional two-level reduction for true first offenders. We raise the question of tying this reduction to the safety valve criteria, especially if prior trafficking convictions will also result in an increase in offense level absent other aggravating factors. If a prior conviction, without more, is going to serve as a basis for significantly increasing an offender's offense level, then the lack of such prior convictions, without more (i.e., the additional criteria required for safety valve eligibility), should serve to decrease a defendant's offense level.

The Practitioners' Advisory Group does not oppose incorporating the factors in 2D1.2 as SOCs in 2D1.1 so long as a defendant must still be indicted under 21 USC § 860 for that factor to apply. We are especially concerned that in many inner cities all parks and schools are within 1000 feet of each other and the city boundaries. Absent a requirement that the park or school was chosen as a drug location to target children, the indictment requirement does provide for a degree of discretion in using this provision to increase sentencing for only appropriate targets. We also believe that the minimum level 26 should not be extended to other factors in (b)(3).

Finally, we believe that a cap for those who qualify for mitigating role adjustment is a welcome change. It will elevate role over quantity and will prevent enormous relevant conduct activity from warehousing conspiracy participants whose actual role in the distribution enterprise is limited. The numbers selected for the offense level cap will ultimately depend on what other choices the Commission makes in adjusting drug sentencing. However, the Practitioners' Advisory Group believes that minor and minimal participants should never be incarcerated for more than ten years, regardless of their prior criminal history. The cap should be administered on the basis of role only with no exclusions for other conduct. The Practitioners' Advisory Group favors a cap for both minimal and minor role qualifiers.

REGARDING CIRCUIT CONFLICTS

The Practitioners' Advisory Group favors role in offense mitigating factor comparisons which relate to other actual offense participants (U.S. v Ajmal, 67 F.3d 12 (2nd Cir. 1995)); favors using the relevant conduct which calculates the base offense level to determine role (U.S. v James, 157 F.3d 1218 (10th Cir. 1998)) and does not support "expanded relevant conduct;" and favors the analogous approach to departure for role (U.S. v Speenburgh, 990 F.2d 72 (2nd Cir. 1993)).