Amendment No. 4 – Immigration

U.S. Department of Justice

The DOJ states that it appreciates the Commission's efforts to address various application issues that have come to its attention surrounding §2L1.2 of the guidelines.

The DOJ believes the definition of "child pornography offense" should include offenses described in 18 U.S.C. §§ 2252A and 2260. The DOJ states that both of these sections seem to clearly fit within the categories of defendants the Commission is trying to capture with the 16-level adjustment in §2L1.2(b)(1)(A); the latter being especially relevant in light of the relationship between that offense and the immigration laws for which this guideline is applicable.

The DOJ believes the definition of "human trafficking offense" should include offenses described in 18 U.S.C. §§ 1589, 1590, and 1591. Sections 1589 which covers forced labor, section 1590 which addresses trafficking with respect to slavery, and particularly section 1591, which covers sex trafficking of children or by force, also seem to clearly fall within the category of human trafficking offenses intended to be captured, and DOJ believes all should be included.

Committee on Criminal Law (CLC)

The CLC expresses no view as to whether Option One or Option Two should be adopted. The CLC believes, however, that if Option Two is adopted by the Commission, then the change should not be made retroactive. The CLC expressed concern that if the change were made retroactive, then it would cause a flood of collateral litigation.

Federal & Community Public Defender (Defenders)

The Defenders state that even after the 2001 amendments, 2L1.2 remains a "flawed guideline." The guideline applies to offenses that are essentially "status" offenses which cannot be deterred and punished justly because they are driven by need and other complicated human factors as opposed to the usual greed or malevolence. The magnitude of the enhancement (8 to 16 levels) for prior conduct basically unrelated to the severity of the instant offense, the vast range of conduct underlying the enhancement, and a cross-reference to the immigration code, which is unrelated to the criminal code, all contribute to disproportionate sentencing under the guideline. The guideline also double counts past criminal conduct which is a questionable measure of culpability. The Defenders propose importing the staleness provisions of 4A1.2(e) to help ameliorate this problem.

With respect to the specific proposals published by the Commission, the Defenders:

- recommend a two-part test to trigger the 8-16 level enhancement for "aggravated felonies": (1) the prior conviction must be a felony under federal law, an offense punishable by imprisonment in excess of one year, and (2) the prior conviction must meet the statutory definition of "aggravated felony" found in 8 U.S.C. 1104(a)(43).

- support the proposal to exclude juvenile adjudications but suggest that offenses committed prior to age 18 be excluded regardless of how the offense was classified under the laws of the jurisdiction in which the defendant was convicted.

- support the decision to exclude "simple possession" from the definition of aggravated felony.

- generally support the three gradations for drug trafficking offenses but recommend imposing a 4-level, rather than 8-level, enhancement for sentences of probation or fine. For offenses involving a prison sentence of less than 13 months or a mitigating role adjustment (regardless of the term of imprisonment), the 8-level, rather than 12-level, enhancement should apply. The Defenders include a table depicting their proposal.

- oppose the proposed amendment to the commentary which provides that the "sentence imposed" includes a sentence imposed upon revocation of probation, parole, or supervised release. The Defenders oppose counting revocation sentences imposed subsequent to defendant's deportation. Counting revocation sentences imposed after the defendant has returned to the U.S. after deportation is inconsistent with both the statute, 8 U.S.C. 1362(b)(2) and the guideline, 2L1.2(b). The Defenders also oppose counting revocation sentences imposed prior to deportation because revocation sentences are unrelated to, and do not reflect the seriousness of, the original offense or the defendant's dangerousness.

- oppose the definition of "alien smuggling" that would include specified offenses "regardless of whether the indictment charged that the offense was committed for profit." This is a drastic deviation from *Taylor*'s categorical approach that risks turning sentencing hearings into mini-trials on the "for profit" issue, and it is inconsistent with the approach adopted for other guideline provisions including 4B1.1.

Additionally, the Defenders suggest:

- clarifying that the 8-level aggravated felony enhancement applies only to defendants who were convicted of felonies, as that term is defined in 2L1.2, comment. n. 1(B)(v), and does not apply to defendants convicted of misdemeanors whose convictions qualify as aggravated felonies under the statutory definition of that term.

- grading crimes of violence in a manner consistent with the graded scheme for drug

trafficking offenses. The Defenders point out that some offenses will qualify for the 16-level crime of violence enhancement that may not qualify as aggravated felonies for immigration purposes. Also, a defendant convicted of assault after a barroom brawl are treated the same as defendants convicted of murder under the present scheme.

- limiting consideration of prior convictions to convictions counted under 4A1.1. For defendants whose prior convictions are remote, regardless of when they returned to the U.S., the Commission should encourage downward departures, or, as a less desirable alternative, encourage departures for defendants who have remained crime-free until the date of their arrest.

Finally, the Defenders address the Ninth Circuit's holding in *U.S. v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002), and argue that if the sentencing court could not impose a prison sentence for the defendant's prior offense, the offense should not be counted as a felony under 2L1.2. The Defenders state that the Ninth Circuit's approach could potentially turn countless misdemeanors into felonies.

National Immigration Project
Dan Kesselbrenner, Esq.
14 Beacon Street, Suite 602
Boston, MA 02108

- The National Immigration Project (NIP) suggests that the Commission amend proposed Application Note 1(B)(iii) to conform to the statutory definition of aggravated felony. The NIP states that if the Commission does not modify Application Note 1(B)(iii), then a defendant could receive an enhancement under 8 U.S.C. § 1326(b)(2) for a conviction that does not satisfy the definition of an aggravated felony.

- The NIP states that an offense under federal, state, or local law that prohibits the possession of a firearm is not an aggravated felony. The NIP states that a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the title 8 definition of aggravated felony. The NIP respectfully suggests that the Commission delete the reference in Application Note 1(B)(vi)(II) to firearm possession offenses.

- The NIP states that a conviction under 18 U.S.C. § 2260 is not a "child pornography" offense for purposes of the definition of aggravated felony. Thus, the NIP suggests that the Commission amend the proposed change to delete the reference to a 16-level enhancement for a conviction under 18 U.S.C. § 2260.

- The NIP states that a conviction under 18 U.S.C. §§ 1590 and 1591 is not a "human trafficking offense" for purposes of the definition of aggravated felony. Thus, the NIP

suggests that the Commission strike the reference to a conviction under 18 U.S.C. §§ 1589 - 91 from the guideline.

- The NIP suggests deleting the reference to state smuggling offenses in the proposed guideline because the power to punish persons for smuggling offenses flows exclusively from the federal government's power to regulate the status of noncitizens.

- The NIP states that the statutory definition of aggravated felony does not mention "terrorism offenses" as a distinct category of crime; thus, the NIP asserts that terrorism offenses should not be included in the proposal.

Amendment No. 5 – §5G1.3

Committee on Criminal Law (CLC)

The CLC stated that it has no preference regarding whether consecutive sentences under current Application Note 6 are mandatory for defendants who commit the instant offense while out on probation, parole, or supervised release and have had such supervision revoked. The CLC requests that the Commission amend Application Note 6 to clearly indicate its intent as to whether the provision is mandatory or discretionary.

U.S. Department of Justice (DOJ)

Regarding the proposed amendment addressing the meaning of "fully taken into account", the DOJ prefers Option One A because it ensures that only when a defendant's guideline offense level for the instant offense has actually been impacted by the offense underlying the prior term of imprisonment will a concurrent sentence apply.

Regarding the proposed amendment to resolve a circuit conflict in cases in which the defendant has committed the instant offense while on federal or state probation, parole, or supervised release that has been subsequently revoked, the DOJ supports Option One A – and the majority of the circuits addressing the issue. The DOJ believes that it is extremely serious when an offender under criminal justice supervision commits a new crime and that consistent with Chapter Four of the guidelines, some incremental punishment should be imposed in such circumstances.

The DOJ believes that the Commission should resolve the circuit split on this question of whether a court may grant "credit" for prior terms under §5G1.3(c). The DOJ believes that subsection (c) appropriately does not, and should not, authorize such credit, for the reasons given in *United States v. Fermin*, 252 F.3d 102, 108-110 (2d Cir. 2001). The DOJ also believes that such a credit would be bad public policy, because in a subsection (c) case, "the defendant is sentenced for an offense involving criminal conduct that differs from that which produced the undischarged sentence," *Fermin*, 252 F.3d at 109. Thus, DOJ asserts that providing credit for an unrelated offense would bring about the strange result of an offender with recent other offenses serving a shorter period of incarceration than an offender with no other recent convictions.

Federal & Community Public Defender (Defenders)

The Defenders state that district courts should be granted the limited discretion authorized under Application Note 6 because: (1) a broad range of behavior may constitute a violation, (2) requiring the sentence for the instant offense to run consecutively to the violation in all instances may not always be workable, and (3) requiring consecutive sentences in all instances may

interfere with the district court's ability to fashion an appropriate sentence in light of the prison resources, facilities, and characteristics of the offender and the offense.

With respect to 5G1.3(b), the Defenders recommend adoption of Option Two because it is (1) easier to understand and apply and (2) is more fair. The Defenders also support the new 5G1.3(b)(2) that authorizes district courts to adjust the instant sentence for any period of imprisonment already served on a sentence that meets the criteria for 5G1.3(b) proposed in Option Two, but the adjustment should be mandatory. At a minimum, the Defenders recommend stating that this adjustment "should" apply.

Commissioner Dana Jones
Cherokee County
75 Peachtree Street
Murphy, NC 28906

Cherokee County Commissioner Dana Jones writes to support retroactive application of proposed amendments to §5G1.3. Commissioner Jones states she understands that if the amendments are made retroactive, defendants who have been denied an adjustment to the length of their sentence because of a distinction between discharged and undischarged terms will have an opportunity to seek relief nunc pro tunc. Commissioner Jones notes that the departure provision for discharged terms of imprisonment addressed the Fourth Circuit's decision in United States v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996). She adds that if the departure provision is made retroactive, then Charles McHan will have an opportunity to seek relief.

Amendment No. 6 – Miscellaneous Amendments

U.S. Department of Justice

A. Free Speech Amendments to §§ 2A3.1, 4B1.5 and 2G2.4

The Department of Justice believes that the proposed definition of child pornography may create significant problems and that this amendment should be tabled for the current amendment year. First, by not citing specifically to § 2256, the guideline eliminates any indication of the meaning of "sexually explicit conduct," which the DOJ believes is critical, or of "visual depiction." In addition, DOJ states that legislation is currently moving quickly through the Congress to address the *Free Speech* decision. The DOJ suggests that rather than amending the definition now and perhaps being required to do so again as early as this spring (and thus creating significant confusion for all), the Commission should wait to see both the progress of the legislation as well as how courts address relevant cases.

B. Mitigating Role Cap for Offenses Sentenced Under §2D1.11

The DOJ believes this is very significant and substantive amendment to the guidelines and as such, is inappropriate for the miscellaneous/consent calendar. The DOJ states that there are a variety of issues that the Commission should consider, including the fact that this amendment intersects (and perhaps conflicts) with at least one congressional directive. Second, for reasons stated during the last amendment cycle, the DOJ opposes any mitigating role cap for drug offenders. Last year, the DOJ opposed the mitigating role cap when it was promulgated by the Commission for offenses sentenced pursuant to §2D1.1. The DOJ now opposes the mitigating role cap being proposed for offenders sentenced pursuant to §2D1.11. The DOJ states that given the significant opposition in Congress to the Commission's actions on this issue last year regarding §2D1.1 as well as the existing and relevant congressional directives, the Commission should at the very least consult further with Congress and seriously reconsider this proposal.

C. Red Phosphorous

The DOJ believe the Commission's methodology and proposal on red phosphorous are reasonable. However, the DOJ requests that the Commission (1) add white phosphorous to the chemical quantity table in the same quantities as proposed for red phosphorous, since these two chemicals are used interchangeably in the same quantities, and (2) add hypophosphorous acid (50% solution) at a ratio of 1:1 with current sentences for iodine since these two chemicals are used together in the same quantities. Additionally, the DOJ suggests an application note allowing departure for any significantly more or less concentrated solution of hypophosphorous acid.

D. Application note of §2G2.1

The DOJ oppose the elimination of the upward departure provision based on the age of the child at this time. As the DOJ outlined in its annual letter of priorities to the Commission, the DOJ believes significant penalty increases are warranted for offenses sentenced under this guideline. Until such increases are put in place, the DOJ believes some upward departure language and invitation should remain in the guideline for the age of the victim. Legislation has also been proposed in Congress to address these issues, and the DOJ believes this strongly suggests that the Commission table this amendment at this time.

E. Subsection (b)(5) of §2G2.2

The DOJ supports the proposed amendment to broaden the increase for certain child pornography-related activities to the extent they involve the use of a computer.

Federal & Community Public Defender (Defenders)

Section 1B1.1, comment. (n. 4)

The Defenders propose that the Commission create a default rule whereby multiple adjustments apply in the alternative, with only the adjustment that best describes the conduct applying in a given case.

Sexual Conduct Amendments

The Defenders support the changes to bring the guidelines definitions into compliance with statutory and constitutional limits.

Drug Guidelines

With respect to 2D1.11, the Defenders support extending to offenses involving precursor chemicals the provision that caps the base offense level at 30 for defendants who receive a mitigating role adjustment. It would be irrational to cap controlled substance offenses at 30 for less culpable defendants under 2D1.1 and not do the same for less culpable defendants under 2D1.11. For the same reason, the Defenders support extending the two-level reduction for meeting the Safety Valve criteria to defendants sentenced under 2D1.11.

Regarding red phosphorus, the Defenders are concerned that the Commission runs the risk of establishing a quantity ratio for red phosphorus that has little relation to the culpability of those who may possess the chemical. There is no accepted measure in the scientific literature for extrapolating the amount of controlled substance that will be manufactured from a quantity of red phosphorus. Further, the quantities of red phosphorus purchased or possessed are more reflective of the unit of sale than the scope of the clandestine methamphetamine labs. Red phosphorus has legitimate industrial uses and, as a result, is sold in large volume quantities.

Amendment No. 7 – Involuntary Manslaughter

U.S. Department of Justice

The DOJ believes the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. The DOJ suggests that in addition to examining the base offense level for this offense, the Commission should consider the inclusion of specific offense characteristics. For example, the guideline could include for vehicular manslaughter cases such factors as the offender's past driving history and current license status, because an offender who commits involuntary manslaughter while driving on a suspended license deserves a stiffer sentence than one who is on the road legally.

The DOJ believes that at a minimum, the base offense levels for involuntary manslaughter should be raised to level 16 if the homicide was criminally negligent, and level 20 if it was reckless (the maximum offense levels proposed by the Commission in the Federal Register notice). Further, the DOJ believes that the Commission, following the report on this issue of the Native American Working Group, should revisit all of the homicide guidelines and make further adjustments as warranted.

Federal & Community Public Defender (Defenders)

The Defenders recommend that in raising the base offense level for involuntary manslaughter to correspond to the increased statutory maximum penalty for the offense, the Commission retain the penalty at a level proportionally lower than the guideline penalties for aggravated assault, which has a higher statutory maximum sentence and requires intent to cause injury. The Defenders also recommend that the Commission increase the base offense levels only slightly, to offense level 12 for criminally negligent conduct and offense level 16 for reckless conduct, and recommend use of specific offense characteristics, in lieu of higher base offense levels, to be applied in the exceptional cases.

Amendment No. 8 – Cybersecurity

National Association of Criminal Defense Lawyers
One Columbus Circle, N.E., Suite G-430
Washington, DC 20002

The Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

The Sentencing Project
514 10th Street, N.W., Suite 1000
Washington, DC 20004

The National Association of Criminal Defense Lawyers (NACDL), The Electronic Frontier Foundation, and the Sentencing Project believe the guideline range for an offense involving a violation of 18 U.S.C. § 1030 should not be increased for four reasons. Examining Department of Justice (DOJ)'s non-exhaustive data of 59 computer crime cases, they found that almost half of the cases involved disgruntled insiders misusing company computers and 43 cases involved harm to a solely private interest. Accordingly, these groups contend that the heartland of computer offenses is similar to white-collar fraud and should be penalized similarly. Second, these groups maintain that, although Congress amended 18 U.S.C. § 1030 to prohibit cyber-terrorism, USSG §3A1.4(a) already addresses these concerns, so additional punishment is unnecessary. Third, these groups reviewed statistics about DOJ enforcement of computer crimes and concluded that the incidence of computer crime is low and that, while prosecutions are slowly increasing, they are not increasing at a rate that currently justifies instituting harsher penalties. Fourth, they argue that an increased penalty is not warranted for deterrence purposes because the Commission concluded in a 1996 report to Congress that recidivism was not an issue for section 1030 offenses. Moreover, harsher penalties may chill legitimate computer research, business development, and reporting of security vulnerabilities because the terms "unauthorized access" and "transmission" of harmful code are broadly defined by section 1030.

In addition, these groups comment on Congress's directive to the Commission to consider various factors for section 1030 violations. They contend that some factors would be applied in almost every computer crime. By way of background, they explain that section 1030 employs a threshold loss amount of $5,000 to distinguish between misdemeanors and felonies. These groups state that since federal authorities "rarely prosecute misdemeanors," almost every computer crime will involve losses greater than $5,000, resulting in a two-level enhancement to the base offense level (*i.e.,* from level 6 to 8). In addition, they argue that computer criminals will almost always receive a two-level enhancement for use of a special skill under USSG §3B1.3 due to the inherent nature of the crime. They are also concerned about liberal application of a two-level enhancement for "sophisticated means" under USSG §2B1.1(b)(8)(B). These groups also contend that the inclusion of *unforeseeable* pecuniary harms in the definition of loss

results in computer crimes being treated more harshly than other crimes. Moreover, the category of harms described as "loss," are not easily assigned an objective monetary value, so loss estimates may vary widely. They also criticize the emphasis on loss as a sentencing factor because it may not reflect the defendant's true culpability.

Orin S. Kerr
Associate Professor
George Washington School of Law
2000 H Street, NW
Washington, D.C. 20052

Professor Orin Kerr states that with regards to 18 U.S.C. § 1030, Section 225(b)(2), Congress was incorrect in its belief that the criminal sentences for computer criminals under the current versions of the guidelines are lower than sentences for criminals who commit similar crimes off-line. Professor Kerr states that the guidelines presently treat computer criminals as harshly, if not more harshly, than those who commit analogous crimes off-line.

Professor Kerr suggests increasing penalties for offenses under 18 U.S.C. § 1030 by providing a two-level increase for the use of a computer, similar to the enhancement at §2G2.4(b)(3), so as to deter misconduct for offenses that are easy to commit and difficult to trace. Professor Kerr states that in this way, the law could counteract technology in that as it becomes easier to commit these offenses, sentencing enhancements could raise the cost that the law imposes to compensate the difference. Further, Professor Kerr suggests that this enhancement should apply to all computer crimes, not just those charged under 18 U.S.C. §1030.

Professor Kerr requests that the Commission not implement drastic changes for the sentencing of 18 U.S.C. § 1030 offenses. If, however, the Commission should choose to enact a sentencing enhancement for computer crimes, Professor Kerr suggests that it consider a broad-based enhancement to reflect how the Internet changes the perceived risks and harms of criminal conduct.

Amendment No. 9 – Offenses Involving Assault Against a Federal Judge

Committee on Criminal Law (CLC)

The CLC believes that an enhancement is appropriate for offenses against federal judges and other officials, either as a specific enhancement under the Chapter Two guidelines that apply to these offenses or by raising the Official Victim adjustment in §3A1.2. The CLC states that the Commission may wish to consider whether a separate, additional enhancement is appropriate when the offense is motivated by the official victim's role in the administration of justice.

Miscellaneous Comment

National Association of Criminal Defense Lawyers
Lawrence S. Goldman
President

Families Against Mandatory Minimums
Julie Stewart
President

ACLU Washington National Office
Laura W. Murphy
Executive Director

In a letter to Senators Leahy and Hatch, the above listed organizations expressed opposition to certain sentencing provisions of the PROTECT Act (S.151) and the Identity Theft Enhancement Act (S.153). The organizations urged the Judiciary Committee to issue only general directives to the Sentencing Commission, rather than enacting mandatory minimums. The organizations stated that mandatory minimum sentencing is not an effective instrument for deterring crime and assert that the guidelines are better able to account for various factors relevant to sentencing determinations.

American Academy of Pain Medicine
4700 W. Lake Avenue
Glenview, IL 60025-1485

The American Academy of Pain Medicine (AAPM) is opposed to criminalization of activities incident to the practice of medicine. The AAPM states that the inappropriate use of controlled substances is a deviation from the standard of care within the legitimate scope of medical practice; thus, such deviations should be resolved within the administrative and civil justice systems.

U.S. Department of Justice

Criminal Division

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

February 18, 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 December 18, 2002. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

* * * * *

TERRORISM

I. REMAINING USA PATRIOT ACT AMENDMENTS

A. Terrorism Enhancement in Money Laundering Guideline

We have no objection to this proposed amendment which addresses the overlap between the terrorism adjustment in §3A1.4 and the terrorism adjustment in the money laundering guideline, §2S1.1. We think an additional amendment to Application Note 2 in §3A1.4, however, may be warranted, to ensure that an offense that involves the laundering of funds that were the proceeds of a federal crime of terrorism offense shall be considered to have involved, or to have been intended to promote, a federal crime of terrorism and thus shall trigger the application of the terrorism adjustment in §3A1.4.

B. Reference of 18 U.S.C. 1960 to Money Laundering Guideline

We prefer a combination of both Options 1 and 2 of this proposed amendment. On the one hand, we believe guideline application will be easier with a direct and appropriate statutory

reference to §2S1.1 for offenses under 18 U.S.C. § 1960(b)(1)(C) rather than with indirect guideline application through a different statutory reference followed by cross-reference from the one guideline to the other. On the other hand, as suggested in the issue for comment, we do think it appropriate for the Commission to provide a cross-reference to §2S1.1 for any offense referenced to §2S1.3 where the government can prove the offense involved the intent to promote unlawful activity, knowledge or belief that the funds were proceeds of unlawful activity, or a reckless disregard of the illicit source of the funds. Thus, we suggest that § 1960(b)(1)(C) offenses be referenced to §2S1.1 and that a cross-reference be added to §2S1.3 as suggested above.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

Under current law, the offense level for those convicted of accessory after the fact is capped at level 20 in certain cases, such as those in which the conduct is limited to harboring a fugitive, and at level 30 otherwise. Under the proposed amendment, the maximum offense level under §2X3.1 for harboring a fugitive would be level 30 rather than level 20 if the defendant was convicted under 18 U.S.C. § 2339 (harboring or concealing terrorists) or 18 U.S.C. § 2339A (providing material support to terrorists), or if the defendant harbored persons who had committed specified offenses (i.e., an offense listed in 18 U.S.C. § 2339 or 18 U.S.C. § 2339A, or an offense involving or intended to promote a federal crime of terrorism).

We support this proposal. Harboring a fugitive in the terrorism-related contexts specified in the guideline is a very serious offense. Furthermore, under the amendment, the final Chapter Two offense level may still be lower than level 30, (see §2X3.1 – the offense level is 6 levels lower than the offense level for the underlying offense); the amendment merely ensures that Chapter Two offense level will not be artificially capped at level 20.

We would point out a few technical issues with the proposal. First, a parenthetical in the explanatory text introducing the amendment incorrectly states that predicate offenses listed in 18 U.S.C. § 2339A are the same as the offenses listed in 18 U.S.C. § 2332b(g)(5). Second, the maximum sentence for a § 2339A offense is life imprisonment if death results from the offense, and 15 years otherwise; the explanatory text is therefore imprecise when it lists the maximum punishment as 15 years. Finally, there is a minor issue with the text of the amendment itself. The text would apply the maximum base offense level of 30 to certain obstructive or perjurious conduct. We believe this language is unnecessary and that its inclusion may cause confusion. Hence, we recommend deleting "; or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I)".

II. AMENDMENTS REQUIRED BY THE PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

A. Biological Agents and Toxins

The primary thrust of this amendment is to integrate new offenses pertaining to biological weapons into the guidelines. Specifically, 18 U.S.C. § 175b, as recently amended, criminalizes the unregistered possession of certain biological agents subject to special regulation, as well as the transfer of such agents to unregistered persons. The amendment would reference these offenses to §2M6.1 with a base offense levels of 22. The amendment would also make certain technical changes to §2M6.1.

We support these amendments. We agree that §2M6.1 is the appropriate guideline for these offenses and that level 22 is an appropriate base offense level for these offenses. We note, in this connection, that these offenses will play a pivotal role in maintaining the new statutory registration scheme.

B. Safe Drinking Water Provisions

This amendment would consolidate the guidelines covering tampering or threatening to tamper with consumer products (§§2N1.1 & 2N1.2) with the guidelines applicable to tampering or threatened tampering with a public water system (§§2Q1.4 & 2Q1.5).

While we agree that the base offense levels and specific offense characteristics for offenses under 42 U.S.C. § 300i-1(a) and (b) should be amended to account for the substantially increased maximum punishment, we do not believe the way to accomplish this is by taking those crimes out of the environmental crimes guidelines and merging them with a guideline covering entirely unrelated offenses. The amendment and issue for comment suggests merging Safe Drinking Water Act offenses with the consumer product tampering crimes because of the rareness of prosecutions of these offenses, a view that the offenses are similar, and the supposed promotion of proportionality if the environmental terrorism and consumer products crimes are in the same guideline. We do not believe these are sufficient reasons for breaking up the environmental crimes guidelines in Part 2Q.

While it is true that the types of crimes covered by Parts 2Q and 2N fortunately have been relatively rare to date, there is little similarity beyond that, except perhaps for the fact that the means of tampering in either medium could be poison of some nature. (In the case of drinking water tampering, the contaminant – that is, the "poison" – could be a chemical, biological, or radiological agent.) Tampering with a drinking water supply, though, also might be by interfering with a system's operation, for example, by blowing up a water pipeline. There is a great difference between the two crimes, though, in terms of scale of possible effect. It is difficult to think of any consumer products that are used by everyone in a community; hence it is hard to conceive of a product tampering crime that would have an effect beyond the consumers

of one discrete product. Public drinking water, on the other hand, is used by virtually every member of any community. A single act would put at risk an entire community (perhaps 10 million or more people in one of our larger metropolitan areas), not just the users of a particular pain reliever, for example. This potential broad effect of a Safe Drinking Water Act offense is characteristic of many of the environmental crimes that are covered by Part 2Q.

As to proportionality of punishment, that can be achieved by parallel amendments to Part 2Q and 2N without combining them into guidelines under a Part entitled "Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws". Public drinking water does not come within any of those categories, and the environmental laws are not a subset of any of those laws. A basic organizational concept of the sentencing guidelines from the beginning has been that related offenses would be treated together. Therefore, all of the environmental crimes were included within a single sub-part of the guidelines, 2Q1 (while wildlife offenses, which have a tie with environmental violations, are in 2Q2).[1] This grouping of similar crimes together is logical and is consistent with the guideline drafting principles to organize rules logically and clearly so that referring to them is relatively easy.

The Safe Drinking Water Act crimes certainly share more with other environmental crimes than they do with food, drug, agricultural product, and odometer violations. The same activity that might be prosecuted as drinking water tampering also could constitute a violation of the Federal Water Pollution Control Act, the Resource Conservation and Recovery Act, and/or the Comprehensive Environmental Response, Compensation and Liability Act, and those crimes might well be charged in the same indictment.[2] This proposed shifting of Safe Drinking Water Act violations to a part of the guidelines treating consumer products would compromise the organization of Part 2Q with two crimes under one environmental statute separated entirely from all of the other environmental crimes, including at least one other under the same statute. See, 42 U.S.C. § 300h-2(b)(2). We do not believe that this fragmentation is a sound approach.

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[1]Granted, some offenses that are not environmental crimes per se are covered by 2Q1, specifically hazardous materials transportation crimes under 2Q1.2 and hazardous or injurious devices on federal lands under 2Q1.6; however, these are crimes that very well may be related to environmental crimes. An unlawful hazardous materials transportation also may be an unlawful hazardous waste transportation, and the hazardous device left on a federal land could be a container of hazardous waste.

[2]All of those other crimes would be sentenced under 2Q1.2 and possibly 2Q1.3 (depending upon the nature of a contaminant). Given their nature, there should be overlap among the specific offense characteristics for those crimes. The Commission's proposal would eliminate from the Safe Drinking Water Act guideline the specific offense characteristic for on-going, continuous, or repetitive offense, attributing that elimination to "definitional difficulties." It is not at all clear to what "definitional difficulties" the Commission is referring.

In sum, we do not believe that the tampering/attempt crimes under the Safe Drinking Water Act should be consolidated with unrelated crimes. The guidelines for those crimes should be revised because of amendments to the law, but the Commission's purpose of proportionality in punishment can be achieved by separate guidelines that track one another. As to the issue of consolidating the tampering and attempt crimes, that seems a reasonable proposal.

We believe the better course would be to raise the base offense level in §2Q1.4 to 25 (as in 2N1.1); retain the §2Q1.4(1) specific offense characteristic in order to capture risk, which is key in environmental law, whether or not a person is successful in causing harm; retain the specific offense characteristics in §2Q1.4(b)(2)-(4); and add the cross-references and special instruction from 2N1.1(c) and (d).

C. Animal Enterprise Terrorism

We support the proposed amendment to Application Note 15 in §2B1.1 – adding an upward departure consideration – to account for enhanced statutory penalties under 18 U.S.C. § 43 (animal enterprise terrorism) for cases involving death or serious bodily injury.

III. AMENDMENTS REQUIRED BY THE TERRORIST BOMBINGS CONVENTION IMPLEMENTATION ACT OF 2002

This amendment relates to three new offenses recently created by Congress.

First, 18 U.S.C. § 2332f criminalizes the unlawful delivery, placement, discharge, or detonation of an explosive or other lethal device against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction where that destruction results in major economic loss.

We fully agree with the Commission's proposal to reference this offense to §§2K1.4 and 2M6.1 of the guidelines. If the offender uses a biological, chemical, radiological, or nuclear weapon, then §2M6.1 would apply; otherwise, §2K1.4 would apply. These guidelines will provide, we believe, the appropriate punishment for this offense, particularly in light of the proposed amendment to §2K1.4, whereby the enhanced base offense level set forth in §2K1.4(a)(1) will be applicable to an offense that involves the destruction or attempted destruction of a public transportation system, a state or government facility, an infrastructure facility, or a place of public use.

Second, 18 U.S.C. § 2339C(a)(1) criminalizes certain types of terrorist financing. The Commission proposes to reference violations of § 2339C(a)(1)(A) to §2X2.1 (aiding and abetting), such that the defendant would receive the same offense level as that for the underlying offense. This seems sensible to us and tracks the treatment of similar offenses under § 2339A.

The Commission proposes to reference violations of § 2339C(a)(1)(B) to §2M5.3. (Unlike § 2339C(a)(1)(A) offenses, § 2339C(a)(1)(B) offenses are not tied to a specific federal predicate offense). This would result in a base offense level of 26, a two-level enhancement if the defendant knew that the funds would be used to purchase weapons, and a cross-references to other guidelines if the offense resulted in death, was tantamount to attempted murder, or involved nonconventional weapons of mass destruction. We would suggest one addition to the Commission proposal. We believe a two-level enhancement for the provision of funds or other material support or resources with the intent or knowledge that they are to be used to commit a violent act should be added. We believe the defendant who acts with that knowledge or intent (a category that includes all § 2339C(a)(1)(B) offenders, and some § 2339B offenders) is significantly more culpable than other defendants, and should be punished more severely. This suggested enhancement could be integrated into existing § 2M5.3(b)(1) by the addition of a new subsection (E), such as the following: "(E) funds or other material support or resources with the intent or knowledge that they are to be used to commit or assist in the commission of a violent act".

The third statute is 18 U.S.C. § 2339C(c)(2), which prohibits (A) knowingly concealing material support or resources provided in violation of 18 U.S.C. § 2339B, and (B) knowingly concealing any funds provided or collected in violation of § 2339C(a). The Commission proposes to reference violations of § 2339C(c)(2)(A) to §2X3.1 (accessory after the fact), with 18 U.S.C. § 2339B as the underlying offense. This seems sensible to us. For clarity, we suggest, in proposed Application Note 1 to §2X3.1, striking "material support, resources, or funds" and substituting "material support or resources."

With regard to 18 U.S.C. § 2339C(c)(2)(B), the Commission proposes to treat some of these violations differently from others. Specifically, the Commission proposes (1) to reference offenses under (c)(2)(B) that involve the concealing of funds collected in violation of (a)(1)(A) to §2X3.1 (accessory after the fact), since they can be tied to a specific underlying federal offense; and (2) to reference (c)(2)(B) violations that involve the concealing of funds collected in violation of (a)(1)(B) to §2M5.3. We think this is a reasonable approach.

IV. MISCELLANEOUS AMENDMENTS

The Commission has proposed amending the applicable guidelines for offenses under 18 U.S.C. § 842(p)(2) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction) in several ways. Currently, offenses under 18 U.S.C. § 842(p)(2) are referenced to §2K1.3 if the information relates to conventional ordnance, and to §2M6.1 if the information relates to biological, chemical, radiological, or nuclear weapons or devices. We support the Commission's proposals and believe the penalty increases contained in them are suitable for this twenty year offense.

Finally, the Commission is proposing minor amendments to the statutory provisions following §2M6.1. We suggest deletion of the phrase ", but including any biological agent,

toxin, or vector" both times it appears; we believe this phrase is no longer needed in light of statutory amendments to 18 U.S.C. § 2332a(c)(2)(C).

IMMIGRATION

We appreciate the Commission's efforts to address various application issues that have come to its attention surrounding §2L1.2 of the guidelines. We have two comments on the Commission proposal.

First, we believe the definition of "child pornography offense" should include offenses described in sections 2252A and 2260 of title 18, United States Code. Section 2252A criminalizes the possession, receipt, and distribution of child pornography. Section 2260 criminalizes the production of child pornography for importation into the United States. Both of these sections seem to clearly fit within the categories of defendants the Commission is trying to capture with the 16-level adjustment in §2L1.2(b)(1)(A); the latter being especially relevant in light of the relationship between that offense and the immigration laws for which this guideline is applicable.

Second, we believe the definition of "human trafficking offense" should include offenses described in sections 1589, 1590, and 1591 of title 18, United States Code. Sections 1589 which covers forced labor, section 1590 which addresses trafficking with respect to slavery, and particularly section 1591, which covers sex trafficking of children or by force, also seem to clearly fall within the category of human trafficking offenses intended to be captured, and we believe all should be included.

§5G1.3 (IMPOSITION OF A SENTENCE ON A DEFENDANT SUBJECT TO AN UNDISCHARGED TERM OF IMPRISONMENT)

This amendment attempts to clarify and expand the formula through which prior periods of imprisonment are accounted for in sentencing.

First, §5G1.3(b) would be amended to allow the court "to adjust the length of the sentence for any prior period of imprisonment that 'resulted from offenses that have been fully taken into account in the determination of the offense level for the instant offense,'" for both discharged and undischarged periods of prior imprisonment. (The current subsection (b) applies only to undischarged prior terms of imprisonment.) The proposal eliminates the "fully taken into account" language, which has been the subject of litigation, and instead provides two options setting forth parameters to address prior periods of imprisonment. Option One A would impose concurrent sentencing for undischarged prior terms of imprisonment in situations where the prior offense is (1) relevant conduct to the instant offense and (2) the basis for an increase in the offense level for the instant offense. Option Two A would impose concurrent sentencing for undischarged prior terms of imprisonment where the prior offense is (1) incorporated in the base offense level for the instant offense, (2) covered by a specific offense characteristic in the

guideline for the instant offense, or (3) covered by a Chapter Three adjustment applicable to the instant offense. Thus, unlike Option One A, Option Two A does not require that the offense level be increased by the prior offense in order for concurrent sentencing to apply. We believe Option One A is preferable, because it ensures that only when a defendant's guideline offense level for the instant offense has actually been impacted by the offense underlying the prior term of imprisonment will a concurrent sentence apply.

Through an amendment to subsection (a) and Application Note 6, the proposal also attempts to resolve a circuit conflict in cases in which the defendant has committed the instant offense while on federal or state probation, parole, or supervised release that has been subsequently revoked; with Option One A requiring that the sentence for the instant offense be imposed to run consecutively to the undischarged term of imprisonment, and Option One B merely suggesting that the sentence run consecutively. We support Option One A – and the majority of the circuits addressing the issue. We believe it is extremely serious when an offender under criminal justice supervision commits a new crime and that consistent with Chapter Four of the guidelines, some incremental punishment should be imposed in such circumstances.

Finally, the Commission invites comment as to whether it should resolve a circuit split regarding subsection (c) (policy statement on concurrent versus consecutive sentencing) and, specifically, "whether the sentencing court may grant 'credit' for time served in state prison for an undischarged sentence, in addition to running the federal sentence concurrently with the remaining portion of the defendant's preexisting state sentence." We think that the Commission should resolve the circuit split on this question. We believe that subsection (c) appropriately does not, and should not, authorize such credit, for the reasons given in *United States v. Fermin*, 252 F.3d 102, 108-110 (2d Cir. 2001). We also believe that such a credit would be bad public policy, because in a subsection (c) case, "the defendant is sentenced for an offense involving criminal conduct that differs from that which produced the undischarged sentence," *Fermin*, 252 F.3d at 109. Providing credit for an unrelated offense would bring about the strange result of an offender with recent other offenses serving a shorter period of incarceration than an offender with no other recent convictions.

MISCELLANEOUS AMENDMENTS

Free Speech Amendments to §§ 2A3.1, 4B1.5 and 2G2.4.

These proposed amendments are intended by the Commission to address the definition of "child pornography" in §2A3.1 (Criminal Sexual Abuse) and §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), as well as the definition of "visual depiction" in §2G2.4 (Possession of Materials Depicting Minor Engaged in Sexually Explicit Conduct), in light of *Ashcroft v. Free Speech Coalition, et al.*, 122 S.Ct. 1389 (2002). Previously, §§2A3.1 and 4B1.5 defined "child pornography" as having "the meaning given that term in 18 U.S.C. § 2256(8)." The proposed amendment to Application Note 1 of §2A3.1 would define "child pornography" as follows:

> "Child pornography" means any visual depiction, including any photography, film, video, picture, or computer or computer-generated image of picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, in which -
> (A) the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

The proposal appears to be simply following the language from the surviving portions of 18 U.S.C. § 2256(8). Subsection (A) above is identical to 18 U.S.C. § 2256(8)(A), subsection (B) mirrors 18 U.S.C. § 2256(8)(B), minus the "or appears to be" language after the word "is" that was problematic for the Supreme Court in *Free Speech*, and subsection (C) is identical to 18 U.S.C. § 2256(8)(C). The proposed definition excludes the language in 18 U.S.C. §§ 2256(8)(B) and (D) that was found problematic in *Free Speech*.

I don't think we have to refer to the statute

We believe, however, that defining child pornography in this way may create significant problems and that this amendment should be tabled for the current amendment year. First, by not citing specifically to § 2256, the guideline eliminates any indication of the meaning of "sexually explicit conduct," which we believe is critical, or of "visual depiction." In addition, legislation is currently moving quickly through the Congress to address the *Free Speech* decision. Rather than amending the definition now and perhaps being required to do so again as early as this spring (and thus creating significant confusion for all), we think the Commission should wait to see both the progress of the legislation as well as how courts address relevant cases. We believe that in the mean time, the reference to 2256(8) will be interpreted by courts to refer to all parts of 2256(8) that have not been held unconstitutional.[3]

The proposed amendment to § 2G2.4 adds another wrinkle. The guideline states that "[i]f the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a *visual depiction* involving the sexual exploitation of a minor, increase by 2 levels." Application Note 1 currently defines "visual depiction" as "any visual depiction

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[3]In §4B1.5 (establishing adjustments for Repeat and Dangerous Sex Offender Against Minors), "child pornography" was previously defined with reference to 18 U.S.C. § 2256(8); it is now defined with an internal cross-reference to Application Note 1 of § 2A3.1, analyzed above. Thus any adjustment to Application Note 1 of § 2A3.1 will automatically apply to § 4B1.5 as amended.

described in 18 U.S.C. § 2256(5) and (8)." Notably, "sexual exploitation of a minor" is not defined in the guideline.

The proposed amended definition for "visual depiction" in §2G2.4, in an attempt to address Free Speech, still refers to 18 U.S.C. § 2256(5), but replaces the reference to 18 U.S.C. § 2256(8) with the same three-part narrative used above in the proposed amendment to §2A3.1. For the reasons stated above, we believe the Commission should wait and see how the pending legislation is resolved before amending the definition here.[4]

Mitigating Role Cap for Offenses Sentenced Under §2D1.11

First, we think this is very significant and substantive amendment to the guidelines and as such, is inappropriate for the miscellaneous/consent calendar. There are a variety of issues that the Commission should consider, including the fact that this amendment intersects (and perhaps conflicts) with at least one congressional directive. Second, for reasons which we spelled out in detail during the last amendment cycle, we oppose any mitigating role cap for drug offenders. Last year, we opposed the mitigating role cap when it was promulgated by the Commission for offenses sentenced pursuant to §2D1.1. We now oppose the mitigating role cap being proposed for offenders sentenced pursuant to §2D1.11. We think given the significant opposition in Congress to the Commission's actions on this issue last year regarding §2D1.1 as well as the existing and relevant congressional directives, the Commission should at the very least consult further with Congress and seriously reconsider this proposal.

Red Phosphorous

Effective November 16, 2001, red phosphorous, along with white phosphorous, and hypophosphorous acid, became DEA-regulated List I chemicals. All three listed chemicals are used, along with iodine, in the illicit production of methamphetamine; they are chemical catalysts to drive the conversion of ephedrine or pseudoephedrine to methamphetamine. The combination of red phosphorous, for example, and iodine substitutes in the production process for hydriodic acid, which became more scarce on the illicit market after it was made a listed chemical about a decade ago. Quantity guidelines are set forth in §2D1.11 for iodine – which was made a List II chemical as a result of the Comprehensive Methamphetamine Control Act of 1996 – but no guidelines exist for red phosphorous, white phosphorous, or hypophosphorous acid.

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[4]Moreover, the proposed amendment creates a strange phenomenon: "visual depiction involving the sexual exploitation of a minor" is defined by the guideline either under § 2256(5) (definition for "visual depiction") or under the three-part, post-*Free Speech* narrative above (which is not a definition for "visual depiction," but rather, is derived from the surviving portions of the § 2256(8) definition for "child pornography"), which is then defined as "visual depiction . . . of sexually explicit conduct," neither of which are further defined, because the narrative does not refer to the statute.

The Commission's proposed amendment for red phosphorous is based on the ratio of the chemical used to the methamphetamine yield in clandestine laboratories. It assumes a ratio of 1:1.4 red phosphorous to methamphetamine. The proposal does not address, however, white phosphorous or hypophosphorous acid. We believe the Commission's methodology and proposal on red phosphorous are reasonable. However, we ask the Commission to (1) add white phosphorous to the chemical quantity table in the same quantities as proposed for red phosphorous, since these two chemicals are used interchangeably in the same quantities, and (2) add hypophosphorous acid (50% solution) at a ratio of 1:1 with current sentences for iodine since these two chemicals are used together in the same quantities. Additionally, we suggest an application note allowing departure for any significantly more or less concentrated solution of hypophosphorous acid.

Application note of §2G2.1

This proposal would amend the departure provision in Application Note 6 of §2G2.1 to conform to Application Note 12 of §2G1.1.

Section 2G1.1 relates to Promoting A Commercial Sex Act or Prohibited Sexual Conduct. It provides a base offense level of 14 – and 19 if the offense involved a minor – for offenses under 8 U.S.C. § 1328 (importation of alien for immoral purpose), 18 U.S.C. §§ 1591 (sex trafficking of children), and 18 U.S.C. §§ 2421, 2422, 2423(a) and 2425 (travel statutes). The guideline contains a specific offense characteristic such that "[i]f the offense involved a victim who had (A) not attained the age of 12 years, increase by 4 levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels." Application Note 12 provides for an upward departure if the offense involved more than 10 victims.

Section 2G2.1 relates to Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material and other related offenses. It provides a base offense level of 27 for offenses under 18 U.S.C. §§ 1591 (sex trafficking of children), 2251(a), (b), and (c)(1)(B) (sexual exploitation of children), and 2260 (production of child pornography for importation). This guideline contains a specific offenses characteristic such that "[i]f the offense involved a victim who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels." Application Note 6 currently allows for upward departures in two circumstances: (A) if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (B) if the offense involved more than 10 victims. The proposed amendment would eliminate circumstance (A), so that the only basis for departure would be if an offense involved more than 10 victims, in conformity with Application Note 12 of §2G1.1, discussed above.

While we understand the Commission's desire to address overlapping departure and specific offense provisions, we nonetheless oppose the elimination of the upward departure provision based on the age of the child at this time. As we outlined in our annual letter of

priorities to the Commission, we believe significant penalty increases are warranted for offenses sentenced under this guideline. Until such increases are put in place, we believe some upward departure language and invitation should remain in the guideline for the age of the victim. Legislation has also been proposed in Congress to address these issues, and we believe this strongly suggest that the Commission table this amendment at this time.

Subsection (b)(5) of §2G2.2

This proposal involves broadening the increase for certain child pornography-related activities to the extent they involve use of a computer. We support this proposed amendment.

INVOLUNTARY MANSLAUGHTER

As we stated in our annual letter of priorities to the Commission, we believe the guideline penalties for homicide, other than for first degree murder, are seriously inadequate. While the number of homicides prosecuted in federal court is relatively few because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes involved.

The guidelines for second degree murder and attempted murder are particularly problematic. Under the guideline for second degree murder, §2A1.2, a defendant who accepts responsibility for a second degree murder and falls within either Criminal History Category I or II is eligible to receive a sentence of less than 10 years' imprisonment. Even a defendant who falls within the most serious criminal history category is eligible to receive a sentence of just 14 years. A thorough examination of the second degree murder guideline by the Commission, we believe, is in order.

The guidelines applicable to voluntary and involuntary manslaughter (§§2A1.3 and 2A1.4) are also in need of improvement. Currently, the guideline for voluntary manslaughter establishes an offense level of 25, with no adjustments for specific offense characteristics. This offense level results in a guideline sentence of as low as three-and-a-half years of imprisonment for a defendant in Criminal History Category I who accepts responsibility for the offense. But voluntary manslaughter, such as a killing in the heat of passion, is a serious offense for which incapacitation should be an important goal of sentencing.

Under the sentencing guidelines for involuntary manslaughter, the base offense level is 10 if the conduct was criminally negligent or 14 if it was reckless, §2A1.4. Thus, for example, vehicular homicide resulting from reckless driving brought about by intoxication can result in a guideline sentence of just five months of imprisonment and five months of home detention for a first offender who accepts responsibility for the offense.

The involuntary manslaughter guideline has no specific offense characteristics that take into account the heightened culpability or increased danger present in some cases. Thus, in addition to examining the base offense level for this offense, the Commission should consider the inclusion of specific offense characteristics. For example, the guideline could include for vehicular manslaughter cases such factors as the offender's past driving history and current license status, because an offender who commits involuntary manslaughter while driving on a suspended license deserves a stiffer sentence than one who is on the road legally.

We believe that at a minimum, the base offense levels for involuntary manslaughter should be raised to level 16 if the homicide was criminally negligent, and level 20 if it was reckless (the maximum offense levels proposed by the Commission in the Federal Register notice). We think the Commission, following the report on this issue of the Native American Working Group, should revisit all of the homicide guidelines and make further adjustments as waranted.

* * * * *

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 and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Eric H. Jaso
Counselor to the
Assistant Attorney General

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February 5, 2003

Honorable Diana Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
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Dear Diana:

The Judicial Conference Committee on Criminal Law respectfully submits the following comments to the proposed guideline amendments published in the November 27 and December 18, 2002, *Federal Register*.

1. Proposed Amendment to §2L1.2, Unlawfully Entering or Remaining in the United States.

The Commission has proposed two options for amending this guideline to address felony drug trafficking offenses that receive a sentence other than imprisonment.

The Committee expresses no view whether Option One or Option Two should be adopted. The Committee believes, however, that if Option Two is adopted by the Commission, the change should not be made retroactive. It has been the experience of members of the Committee that news of guideline amendments rapidly circulates among the inmate populations and that courts are often flooded with requests, frequently ill-advised and not supported by actual amendments, to revise defendants' sentences. Given the large number of defendants sentenced under § 2L1.2, especially by the border courts, the Committee is concerned that a flood of collateral litigation would arise from a retroactive amendment to this guideline.

2. Proposed Amendment regarding Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment.

The Commission has proposed several options for amending §5G1.3. As the Commission's synopsis recognizes, there is a circuit conflict whether to construe the word "should" in Application Note 6 to §5G1.3 as meaning "shall" (the majority view), or as a non-mandatory directive (the minority view). At least two circuits have concluded that the application note is ambiguous in this context and have urged the Commission to clarify its intent. United States v. Gondek, 65 F.3d 1, 4 (1st Cir. 1995); United States v. Smith, 282 F.3d 1045, 1048 (8th Cir. 2002).

Proposed Options One A and Two A resolve the ambiguity by amending §5G1.3(a). These options require that in cases in which the instant offense was committed while the defendant is on federal or state probation, parole, or supervised release and such supervision is revoked, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. They also restate this requirement by replacing the word "should" with "shall" in a new Application Note 1. Options One B and Two B leave current Application Note 6 unchanged.

The Committee expresses no view as to whether consecutive sentences should be mandatory, or encouraged but not required, in cases to which Application Note 6 applies. But the Committee is concerned that simply leaving the present language unchanged, as stated in Options One B and Two B, would not resolve the conflict in the circuits because many courts have found the word "should" to be ambiguous in this context. Regardless of how the Commission resolves this issue of whether consecutive sentences shall be mandatory, or encouraged but not required, the Committee suggests that Application Note 6 be amended to express the Commission's intent more clearly.

3. Offenses Involving Assault Against Federal Judges.

The Commission has asked whether an enhancement should be provided in the assault guidelines for offenses against federal judges and other officials described in 18 U.S.C. §§ 111 or 115. At its January 8, 2003 meeting, the Commission voted to seek comments about whether such an enhancement would be appropriate for other Chapter Two guidelines that apply to these offenses and whether, and to what extent, the three-level adjustment now provided in §3A1.2 for offenses against official victims should be increased.

The Committee believes that an enhancement is appropriate for offenses against federal judges and other officials, either as a specific enhancement under the Chapter Two guidelines that apply to these offenses or by raising the Official Victim adjustment in §3A1.2. The Commission may wish to consider whether a separate, additional enhancement is appropriate when the offense is motivated by the official victim's role in the administration of justice.

The members of the Committee appreciate the opportunity to comment on these proposed guideline amendments and will be pleased to provide any other information requested by the Commission.

With warm personal regards, I am

Sincerely,

Billy

William W. Wilkins

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February 10, 2003

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Dear Diana:

The Judicial Conference Committee on Criminal Law respectfully submits the following comments to the proposed guideline amendments published in the January 17, 2003 *Federal Register*.

The Commission has sought comment on whether the loss tables for fraud, theft, and property destruction offenses should be separate. The Committee has studied these issues and provides the following observations for the Commission's consideration.

In May 2001, the Commission proposed the Economic Crime Package, which became effective November 1, 2001. The Economic Crime Package was the result of a 6-year study of economic crime sentences by the Commission and other interested groups, including probation officers, defense counsel, the Department of Justice, and the Criminal Law Committee, and was adopted after extensive Commission hearings and a major symposium. The Economic Crime Package built upon and improved a draft proposal that, with our Committee members' participation, was successfully field tested in 1998 and found to be superior to the previous guidelines in organization, workability, and resolution of circuit conflicts. The Economic Crime Package was the first comprehensive rewrite of guidelines dealing with a major category of crime.

The Economic Crime Package consolidated the theft, property, and fraud guidelines, revised the loss table for the consolidated guidelines and a similar tax offense table, and provided a revised definition of loss for the consolidated guideline. The loss table revision resulted in

substantial increases in penalties for moderate and high loss offenders while slightly reducing offense levels for low loss offenders.

The Committee strongly believes that it would be ill-advised to now precipitously reverse course by pulling apart the consolidated guideline into separate theft, fraud, and property guidelines, or to revise and separate the definition of loss. The considerations that favored the adoption of the Economic Crime Package are still valid. One key consideration, as we understood it, was to avoid disparate sentencing outcomes for conceptually similar offenses that sometimes were occurring depending on whether sentencing occurred under the theft or the fraud guideline. For example, a bank officer's fraudulent personal loan scheme should be punished the same, whether the offense was charged as a bank fraud under 18 U.S.C. § 1341 or as an embezzlement under 18 U.S.C. § 656. Similarly, a consolidated guideline would appear to better ensure consistent sentencing treatment of the various hybrid theft/fraud and new technology offenses, such as identity theft and cellular telephone cloning.

Since these guideline amendments are only applicable to offenses committed after November 1, 2001, there is little available data on the effect that these changes have had on sentencing and virtually no appellate case law. Moreover, prosecutors, defense counsel, probation officers, and judges are only now becoming familiar with these new guidelines. Revision of these guidelines by the Commission would result in enormous confusion and a waste of governmental and private resources as counsel, probation officers, and judges have to learn new guidelines after only recently beginning to digest the November 2001 amendments.

The Committee strongly believes that the Commission should wait until sufficient empirical data and case law guidance are available concerning the Economic Crime Package before considering any major revisions. At a minimum, the Commission should publish specific proposals on how the loss tables would be separated and provide specific examples on how the proposed guidelines would operate.

The members of the Committee appreciate the opportunity to comment on the proposal to separate the loss tables and will be pleased to provide any other information requested by the Commission.

With warm personal regards, I am

Sincerely,

Billy

William W. Wilkins

The National Association of Criminal Defense Lawyers, The Electronic Frontier Foundation and the Sentencing Project write in response to the Commission's request for public comment about how the Commission should respond to Section 225(b) of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107-296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under 18 U.S.C. § 1030. We thank the United States Sentencing Commission for this opportunity.

Interests of the Commentators

The **National Association of Criminal Defense Lawyers** (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,400 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The National Association of Criminal Defense Lawyers (NACDL) encourages, at all levels of federal, state and local government, a rational and humane criminal justice policy for America -- one that promotes fairness for all; due process for event the least among us who may be accused of wrongdoing; compassion for witnesses and victims of crime; and just punishment for the guilty.

Equally important, a rational and humane crime policy must focus on the social and economic benefits of crime prevention -- through education, economic opportunity, and rehabilitation of former offenders. As a society, we need to eschew such simplistic, expensive, and ineffective "solutions" as inflexible mandatory sentencing, undue restriction of meritorious appeals, punishment of children as adults, and the erosion of the constitutional rights of all Americans because of the transgressions of a few.

NACDL's values reflect the Association's abiding mission to ensure justice and due process for all.

The **Electronic Frontier Foundation** ("EFF") is a non-profit, civil liberties organization founded in 1990 that works to protect rights in the digital world. EFF is based in San Francisco, California, but has members all over the United States.

EFF has been deeply concerned about the criminalization of online behavior since its inception. The founders intended EFF to bring balance and reason to law enforcement in cyberspace. One incident that brought this need home was a 1990 federal prosecution of a student for publishing a stolen document. At trial, the document was valued at $79,000. An expert witness, whom EFF helped locate, was prepared to testify that the document was not proprietary, and was available to the public from another company for $13.50. When the government became aware of this information through defense's cross-examination of government witnesses, it moved to dismiss the charges on the fourth day of the trial.

Accordingly, EFF is very concerned that the Sentencing Commission act very carefully with regard to computer crime sentencing. We believe that those convicted of computer crimes are already punished more harshly compared to other crimes for the reasons stated in these Comments.

The Sentencing Project is a Washington, D. C.-based 501(c)(3) non-profit organization which promotes greater use of alternatives to incarceration and the adoption of sentencing policies and practices which are fair and effective in reducing crime. Founded in 1986 to encourage improved sentencing advocacy by the defense, The Sentencing Project has become well known as a source of widely reported research and analysis on sentencing and other criminal justice issues. The range of these issues includes: the number of non-violent, low-level drug offenders in state prisons; crack-powder cocaine sentencing discrepancy in federal law; unwarranted racial disparity in the criminal justice system; the impact of the federally mandated ban on receipt of welfare benefits for women convicted of drug offenses; "Three Strikes" mandatory minimum sentencing laws; denial to nearly four million Americans of the right to vote following felony convictions; and, the significance of prosecuting children as adults.

The Sentencing Project's interests in the matter before the United States Sentencing Commission are to insure that federal penalties are not increased absent objective indications that an increase in penalties will reduce criminal computer fraud or "hacking," when other steps may provide a higher degree of public safety and corporate security, and when the rational for increasing penalties may be based on a misperception of the nature and character of most crimes prosecuted through application of 18 U.S.C. Section 1030.

COMMENTS

Congress has directed the Commission to review the guidelines applicable to person convicted of offenses under 18 U.S.C. section 1030 to ensure that the guidelines reflect the serious nature of such offenses, the growing incidence of such offenses and the need for an effective deterrent and appropriate punishment to prevent such offenses. We write in response to the Sentencing C request for comments because we believe that the guideline range should not be increased.

Current guidelines not only adequately reflect, but also in many cases overstate the seriousness of 18 U.S.C. 1030 offenses. Section 1030 proscribes offenses that range in seriousness from misdemeanors to threats to national security. However, the heartland section 1030 violations are white collar fraud or insider misappropriation of information cases that should be treated comparably to other white collar fraud cases. Current section Three guidelines would substantially enhance sentences in rare cases of "cyberterrorism". Also, there has not been a significant increase in the commission of section 1030 offenses over the past five years that requires increased sentencing. Further, increased sentences will not deter terrorists, who may be willing to die for their cause, but may deter legitimate business innovation and practices as well as important computer security research and vulnerability testing.

In fact, current guidelines are rife with problems, mostly surrounding the special definition of loss in computer crime cases. The definition includes unforeseeable losses that are wholly defined by the victim's behavior rather than the defendant's actions. Sentences that are widely disparate for identical offenses, easily manipulatable, and that do not accurately reflect the defendant's culpability result.

I. THE GUIDELINE RANGE SHOULD NOT BE INCREASED

A. The Seriousness of the Offense is Comparable to Other Fraud or Theft Cases, not Offenses to the Person or Terrorism Cases

The typical computer crime offense involves a disgruntled current or former employee misusing company computers. The Department of Justice maintains a non-exhaustive chart of computer crime cases on its website at www.cybercrime.gov/cccases.html. The chart has 59 entries, representing 55 unique cases. Of those, the chart describes sixteen of the defendants as employees of the victim company. Review of the linked DOJ press releases shows that an additional nine defendants were also employees or independent contractors of the victim. (Luckey, Blum, Leung, Farraj, Scheller; Brown; Carpenter; Dennis, and Alibris.) Thus, almost half of the cases in the table are readily identifiable as involving disgruntled insiders. In forty three of the fifty nine entries, the defendant caused harm to a solely private interest. Only fifteen of the cases involve harm to a public or public and private interests. Only one case, where the defendant was a juvenile, involved a threat to safety. This small set of data shows that the heartland computer crime case involves disgruntled employees causing harm to private companies.

Of course, this cursory analysis depends entirely on a small set of data selected for publication by the Department of Justice. Defendants in the listed cases may eventually be acquitted, or the nature of the case may not be fully or accurately reflected in the press releases, or by the inclusion of the case in the table. For example, United States v. Alibris involved allegations that a company that provided email services to subscribers violated18 U.S.C. 2511 (interception of electronic communications), not 18 U.S.C. 1030. Additionally, the district court recently ruled in the Alibris case that the company's actions were not prohibited by section 2511. U.S. v. Councilman, U.S. District Court for the District of Massachusetts, 01-CR-10245-MAP (February 12, 2003), available at http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=ponsor/pdf/councilman2.pdf. Also, not all section 1030 cases are included in the table – for example, U.S. v. Middleton, 35 F.Supp.2d 1189 (ND Cal 2002), 231 F.3d 1207 (9th Cir. 2002) and U.S. v. Sablan, 92 F.3d 865 (9th Cir. 1996), in which both defendants were disgruntled (ex-) employees.

Based on the available information the typical section 1030 offense appears to be comparable to a white collar fraud. We urge the Commission to treat section 1030 offenses similarly, absent other considerations. Since the Commission recently amended the guideline applicable to economic crimes (2B1.1), there is no reason now to increase penalties further for computer crime cases.

B. There are Already Guidelines that Can Apply to Terrorism Offenses and Offenses to the Person that Fall Under Section 1030

To date, there are no reported incidents of terrorists attempting to harm the health and safety of individuals through unauthorized computer access. However, in an abundance of caution, Congress amended section 18 U.S.C. 1030 to especially prohibit this type of offense and to proscribe a term of up to life in prison. 1030(a)(5)(A)(i). This should not inspire the Commission to increase punishment under the guidelines for the heartland of section 1030 cases, which, as shown above, primarily involve employment disputes. There are already guidelines that apply to attempts to commit bodily harm, as wells as the rare terrorist computer crime offender. Guideline §3A1.4(a) provides "if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32." This guideline is adequate to punish a violator of Section 1030 who acts with terroristic intent.

C. Incidents of Section 1030 Violations are Not Increasing

Current statistics do not show an upward trend in section 1030 violations. We would expect to see some increase in violations as more people use computers and become connected to the Internet. We would also expect to see increased convictions as law enforcement becomes better trained and puts more resources into computer crime investigation and the formation of high tech crime task forces. However, the actual incidence of computer crime prosecutions is little more than 100 per year.

The Transactional Records Access Clearinghouse (TRAC) located at Syracuse University makes targeted FOIA requests to collect, among other things, statistics on DOJ enforcement. For each incident referred to the DOJ, TRAC records a host of information, including referral date and agency, lead charge, disposition date and type, and prosecution filing date or declination reason. TRAC defines enforcement data as:

> Fraud involving violations of 18 U.S.C. 1030 or 2701 et. seq., computer "bulletin boards" and other schemes in which a computer is the target of the offense, including when charged as violations of 18 U.S.C. 1343, 2314, or 2319 e.g., computer viruses or where the defendant's goal was to obtain information or property from a computer or to attack a telecommunications system or data network. (All such cases are national priorities.)

Program Category, at http://tracfed.syr.edu/help/codes/progcode.html (last visited June 19, 2002). Further information about TRAC's enforcement database resides at http://tracfed.syr.edu/index/cri/cri_help_index_pros.html/

Data obtained by the commentators on computer crime prosecutions shows a steady increase in referral for prosecution and also in prosecutions. However, the number of prosecutions remains low and shows only slow growth. Though there was a dramatic increase in referrals from 1999 to 2000, there was also a large increase in the number of prosecutions declined. The actual conviction rate increased, but from only 72 convictions to 107 between 1999 to 2001.

	53	68	110	105	126	125	196	271	393	496

In comparison, in 1999, 38,288 drug offense cases were referred for prosecution. That same year, 29,306 people were charged with a drug offense. Between 1984 and 1999, the number of defendants charged with a drug offense in Federal courts increased from 11,854 to 29,306. United States Department of Justice, Bureau of Statistics, Special Report, Federal Drug Offenders, 1999, with Trends 1984-1999, available at http://www.ojp.usdoj.gov/bjs/abstract/fdo99.htm In 1999, United States Attorneys chose to prosecute over 88% of suspects referred for drug crime.

In fiscal year 1998, the DOJ disposed of 253 computer crime referrals. Some of these referrals reached the DOJ in earlier years, but the DOJ disposed of all of them between October 1, 1997 and September 30, 1998. Of the 253 dispositions, 196 (77%) were declined prosecutions while 57 (23%) ended in court. Forty-seven dispositions (19%) were due to a guilty verdict or an appellate court victory, and 10 (4%) were due to acquittals or dismissals. Of the 47 found guilty in court, 20 (43%, 8% of all disposals) received prison sentences. In 2001, the DOJ disposed of 631 computer crime referrals. Of these, 496 (78%) were declined prosecutions, while 135 (21%) ended in court. One hundred seven dispositions (17%) were convictions and twenty eight (4%) were due to acquittals or dismissals.

The Department of Justice declined prosecution for the following reasons.

Declination Reason	*Number*	*% of Declinations*	*% of Total Dispositions*
Lack of evidence of criminal intent	27	13.78%	10.67%
Weak or insufficient admissible evidence	34	17.35%	13.44%
Suspect to be prosecuted by other authorities	23	11.73%	9.09%
No federal offense evident	21	10.71%	8.30%
Minimal federal interest or no deterrent value	19	9.69%	7.51%
No known suspect	17	8.67%	6.72%
Juvenile suspect	10	5.10%	3.95%
Agency request	10	5.10%	3.95%
Civil, administrative, or other disciplinary alternatives	6	3.06%	2.37%

Office policy (fails to meet prosecutive guidelines)	6	3.06%	2.37%
Jurisdiction or venue problems	5	2.55%	1.98%
Pre-trial diversion completed	5	2.55%	1.98%
Lack of investigative or prosecutive resources	4	2.04%	1.60%
Witness problems	3	1.53%	1.19%
Suspect being prosecuted on other charges	3	1.53%	1.19%
Other	13	6.63%	5.15%

Thus, a review of the statistics suggests that the incidence of computer crime is very low, and, while slowly increasing, is not increasing at a rate that currently justifies instituting harsher penalties in light of the other considerations. Also, a significant number of these offenses involve disgruntled former employees, and criminal conduct of similar seriousness. The statistics on declinations suggest that the Assistant United States Attorneys do not believe that the damages and consequences of computer crimes reported to the Department are serious enough to merit a higher prosecution rate. Similarly, these crimes do not merit an increase in sentence length.

D. Deterrent and Chilling Effect

Nor should the Commission increase computer crime penalties as a deterrent unless statistical evidence shows that those convicted of section 1030 offenses re-offend at a statistically significant rate. In 1996, the Commission concluded that "existing data do not permit the Commission to draw any firm conclusions regarding the deterrent effect of existing guideline penalties for these computer-related crimes." Report to the Congress: Adequacy of Federal Sentencing Guideline Penalties for Computer Fraud and Vandalism Offenses, p. 3. Similarly, The Commission should examine whether new data allows any new conclusions.

Greater penalties are dangerous. They may chill legitimate computer research, business development, and reporting on security vulnerabilities. Section 1030 generally prohibits "unauthorized access" to computer systems, while subsection 1030(a)(5) prohibits the "transmission" of harmful code. These are broad definitions. Case law shows that a wide range of common business practices have been challenged in civil suits under section 1030. Though these cases are civil, and though some of the business practices were held not to be actionable, the Commission should view these cases as a cautionary tale. First, there is no difference between the definition of civil and criminal offenses under section 1030, so the judicial interpretations of the statute apply in both situations. Second, in cases where the plaintiff's case failed, it was always for failure to show jurisdictional damages of greater than $5000, rather than failure to show that the contested business practice was in fact "unauthorized access" or an illegal "transmission."

Common business practices that may be "unauthorized access" or illegal transmission including sending unsolicited bulk email (America Online v. National Health Care Discount, 121 F.Supp.2d 1255, 1273 (N.D. Iowa 2000)), using automated search programs to collect even publicly available data (Register.com v. Verio, Inc., 126 F.Supp.2d 238, 251 (S.D.N.Y. 2000) [domain name information]; eBay v. Bidder's Edge, 100 F.Supp.2d 1058 (N.D.Cal. 2000) [internet auction information], EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001) [travel agent prices]) and placing "cookies" the computers of website visitors for purpose

of monitoring their web activity (In re Intuit Privacy Litig.,138 F Supp 2d 1272 (CD Cal 2001); Chance v. Ave. A, Inc., 165 F.Supp.2d 1153 (WD Wash 2001).[1]

Additionally, companies like AOL and Toshiba are potentially liable under section 1030(a)(5) for "transmission" of harmful code for shipping faulty software. See, e.g. Shaw v. Toshiba Am. Info. Sys., 91 F.Supp.2d 926 (ED Tex. 1999) [mailing floppy diskettes containing faulty microcode]; In re AOL, Inc.Version 5.0 Software Litig., 168 F Supp 2d 1359 (SD Fla. 2001) [AOL's transmission of its Version 5 software which allegedly "changes" the host system's communications configuration and settings so as to interfere with any non-AOL communications and software services actionable under 1030(a)(5)(A)]; Christian v Sony Corp. of Am., 152 F Supp 2d 1184, 1187 (DC Minn. 2001) [shipping personal computers with faulty floppy diskette controllers.] In Christian, though summary judgment was granted for Defendant Sony corporation on damages grounds, the Court believed that the inclusion of a defective FDC constituted a "transmission" within the meaning of section 1030. "[T]he Court was persuaded by the Plaintiffs that Sony's actions could, theoretically, be actionable under the CFAA. For example, Sony's argument that the inclusion of a defective FDC--one which causes corruption of data--in a computer, which was then distributed to individual consumers, does not constitute a 'transmission' within the meaning of the CFAA is not persuasive."

Also, the practice of programming software to shut down under certain circumstances, even to prevent unauthorized use or to enforce contractual obligations, is a potential section 1030 violation. See North Texas Preventative Imaging v. Eisenberg, 1996 U.S. Dist. LEXIS 19990 (C.D. Cal. August 19, 1996); Gomar Manf. Co. v. Novelli, C.A. No. 96-4000 (D.N.J. Jan. 28, 1998).

While these cases are primarily civil, each helps define the activity prohibited by section 1030, "unauthorized access" and "transmission" of harmful code. Increasing punishments for section 1030 offenses potentially increases criminal liability for any of these business practices that also causes $5000 worth of damage. Also, in many of the cases cited above, the lawsuit failed because the threshold damage level was not met. But, the new definition of damage allows harm to be aggregated across acts, victims and time. Under this new definition, practices which were previously the subject of unsuccessful lawsuits, like using cookies or collecting on-line travel data, could be illegal. Internet advertising company DoubleClick, search engine Google.com, Sony, Toshiba and AOL could all be criminally convicted of violation 18 U.S.C. 1030 for common business conduct.

This is a problem that would best be addressed by Congressional amendment of section 1030. However, the Commission must decide whether increased penalties are appropriate. That decision must be informed by the fact that conduct that constitutes an offense under section 1030 is not necessarily serious, malum per se, or even an undesirable business practice.

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[1] Many of these cases find no liability under section 1030 based on the plaintiff's failure to allege or prove damages of the proper type or in sufficient amount. The underlying activity, however, is unauthorized access or unlawful transmission within the scope of section 1030.

Additionally, legitimate computer security research and vulnerability reporting is chilled by disproportionate sentencing. For example, port scanning is a common practice among computer security researchers. "A port scan is a method of checking a computer to see what ports are open by trying to establish a connection to each and every port on the target computer. If used by a network administrator on his own network, the scan is a method of determining any possible security weaknesses. If used by an outsider, the scan indicates whether a particular port is used and can be probed for weakness." Moulton v. VC3, 2000 U.S. Dist. LEXIS 19916 (ND Ga. November 7, 2000). Though port scanning is a common tool for security researchers, both in determining vulnerabilities in their own systems and surveying networks for information about deployed programs and security weaknesses, many researchers fear that the activity is arguably illegal under section 1030.

Unfortunately, tales of consultants who are prosecuted criminally or civilly for informing authorities of vulnerabilities are common. A recent cases is that of Stefan Puffer, a computer security analyst who was indicted after demonstrating to the Harris County, Texas District Clerk's office that ITS wireless computer network was vulnerable to unauthorized users. See "County Cuts Off Computer Network", Houston Chronicle, by Steve Brewer, March 21, 2002, available at http://www.chron.com/cs/CDA/story.hts/topstory/1302663#top. See also, "Ethical Hacker Faces War Driving Charges", The Register, by John Leyden, July 26, 2002, available at http://www.chron.com/cs/CDA/story.hts/tech/news/1507766. Many computer security practitioners fearfully view this prosecution as a case of shooting the messenger.

In another recent incident of a computer security practitioner being charged criminally, David McOwen, a PC specialist at Georgia's DeKalb Technical Institute was convicted for participating in a project by the non-profit organization distributed.net that allowed computer users to donate their unused processing power to test the strength of a certain type of encryption. McOwen installed the distributed.net programs on several of the machines he maintained for his employer. Eighteen months later, McOwen was charged under Georgia law with computer trespass. Facing up to 120 years in prison, McOwen decided not to challenge the application of the law to his conduct. Instead, he plead guilty for probation under Georgia's First Offender Act. "Plea Agreement In Distributed Computing Case", SecurityFocus, By Ann Harrison, Jan 18 2002 available at http://www.securityfocus.com/news/311. As a result, computer security professionals fear that distributed computing itself may be illegal. See "Is Distributed Computing A Crime?", SecurityFocus, by Ann Harrison, December 20, 2001 available at http://www.securityfocus.com/news/300. Cases such as McOwen's chill innovation and slow the adoption of valuable new technologies.

People who innocently stumble upon vulnerabilities may also be dissuaded from reporting them. A few years ago, Center for Internet and Society Director Jennifer Granick (also counsel for this submission) received a telephone call from someone who noticed that a co-worker was connecting to the Internet with PC Anywhere file sharing enabled. The caller believed that anyone else could access the co-worker's computer and view files, and successfully tested this theory by doing just that. The caller wanted to notify the co-worker that he was vulnerable and should change his computer configuration, but was afraid to do so, for fear that he would get in trouble for having viewed one of the co-worker's files. The attorney called the co-worker and notified him, keeping the identity of the reporter secret. However, the attorney also

could not give the co-worker the kind of detailed information about why he was vulnerable and how he could fix the problem that the more knowledgeable reporter could. That valuable information was lost in the translation.

Thus, the Commission must act carefully to strike the right balance between deterring crime and chilling business innovation and security research.

II. CURRENT GUIDELINES MAY BE OUT OF LINE WITH THE OFFENDER'S ACTUAL CULPABILITY, AND THE COMMISSION MAY SEE FIT TO AMEND THEM DOWNWARD

The Commission was also directed to consider "the potential and actual loss resulting from the offense, the level of sophistication and planning involved in the offense, whether the offense was committed for purposes of commercial advantage or private financial benefit, whether the defendant acted with malicious intent to cause harm in committing the offense, the extent to which the offense violated the privacy rights of individuals harmed, whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure, and whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person." Many of these factors are already taken into consideration in the guidelines. A review of the current guidelines suggests that these factors are over-emphasized, and result in a sentence disproportionate to the defendant's culpability.

The current scheme applies the guideline for economic crimes, specifically section 2B1.1, to most computer crimes. Theoretically, treating computer crimes like economic crimes is appropriate since the heartland of the offense is similar. However, Section 1030 crimes are treated *more harshly* than other crimes in several important ways. First, for all practical purposes, the starting offense level for computer crime cases is eight, because almost every computer criminal will receive a two level adjustment for the jurisdictional loss of $5000. Second, computer crimes almost always receive an enhancement for use of special skill in the commission of an offense. (3B1.3, 2B1.1(b)(8)). Third, the calculation of loss in computer crime cases is rife with problems that adjusts the sentence more harshly than in other economic crime cases.

A. The Typical Computer Crime Case Will Be Sentenced At Least As Harshly, If Not More So, Than Other Economic Fraud Cases

Most of the offenses set forth in section 1030 have as an element of the crime that the perpetrator causes $5000 or more in loss. For example, 1030(a)(5)(A) actions are offenses if the defendant caused or would have caused loss aggregated across victims during any one year period, aggregating at least $5000. 18 U.S.C. 1030(a)(5)(B). For violations of section 1030(a)(5)(A)(i), under subsection (c)(2)(B)(iii), if the value of information accessed is over $5000, then the offense is a felony rather than a misdemeanor. Since federal authorities will rarely prosecute misdemeanors, in almost every computer crime case, damages will be at

least $5000. Under Guideline 2B1.1, the Base Offense Level is 6. However, the BOL will be adjusted by at least two levels for loss, giving a minimum offense level of 8 for any prosecuted computer crime. This adjustment is "double counting", since the existence of $5000 of loss makes the offense not only a felony, but also enhances the Base Offense Level. Additionally, it has the effect of sentencing computer crimes more harshly than other economic crime cases.

B. Special Skill

Computer crime offenders disproportionately receive a sentencing enhancement for special skill. Under the pre-2002 guidelines, perpetrators received an adjustment under 3B1.3 for abuse of trust. That section provided that the district court may enhance the defendant's offense level if he "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." 3B1.3. The phrase "special skill" is defined as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." Id. comment. (applic. note 2). The "adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable." Id. comment. (backgr'd).

The application of 3B1.3 overstates a defendant's culpability because almost every computer offense inherently requires abuse of trust or special skill. Though the public uses computers, it is generally uninformed about computer security matters. A computer intruder must either use a password that permits access, leading to an abuse of trust adjustment, or know how to circumvent the password requirement, leading to a special skill adjustment. In its 1996 Report to Congress on the adequacy of federal sentencing guideline penalties for computer fraud and vandalism offenses, the Commission reported that 32.5% of all computer crime cases received an upward adjustment for abuse of position/special skill, as compared to 8.8% of white collar cases and 3% of all cases. Table 2.

Almost certainly, that percentage, and that discrepancy is higher today, if only because case law has supported a liberal application of 3B1.3 in computer crime cases. In United States v. Petersen, (9th Cir. 1996) 98 F.3d 502, the Ninth Circuit held that the special skill adjustment only requires that the offender have skills not possessed by members of the general public. Special education or certification is not a prerequisite. While the Petersen court did not hold that a special skill adjustment would apply in every computer crime case, it greatly liberalized any limits on when the adjustment would apply. Anecdotal evidence suggests that a special skill adjustment is applied in almost every computer crime case today.

If the abuse of trust/special skill adjustment is applied, and the $5000 adjustment applies, then the minimum level at which the most innocuous computer crime offense would be punished is a level 10, not a level 6.

Additionally, there's a special adjustment in 2B1.1 for "sophisticated means" under 2B1.1(b)(8)(B). "'Sophisticated means' means especially complex or especially intricate offense

conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." 2B1.1. If this adjustment is also liberally applied to computer crimes, than the most basic computer crime offenses will be sentenced at a minimum level 12. This results in a minimum sentence more than two times as high as the minimum sentence for the most basic economic crime.

C. The Special Calculation of Loss in Computer Crime Cases Results in Harsher Punishments that That for Comparable Economic Crimes

Under the current sentencing law, the estimation of loss is the primary factor driving both economic and computer crime sentencing. Along with other relevant factors under the guidelines, loss should reflect the seriousness of the offense and the defendant's relative culpability. In economic crimes, the calculation of loss is generally limited to "reasonably foreseeable pecuniary harm." However, in computer crime sentencing, "actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service." USSG § 2B1.1 Application Note 2(A)(v)(III). The inclusion of unforeseeable pecuniary harms in the definition of loss, including "*any* lost revenue due to interruption of service" results in computer crimes being treated more harshly than other crimes.

Additionally, the categories of harm described as loss are not easily assigned objective monetary value. As a result, the loss estimation for identical offenses can differ widely, resulting in grossly disparate sentences for identical conduct. Additionally, the estimation of loss can be manipulated by victims, investigators and prosecutors.

The cost of conducting a damage assessment depends more on the victim's actions than it does on the perpetrator. Assume an intruder compromises two computer systems in identical ways. One victim simply restores the hard drive from backup. The other victim hires $300-an-hour consultants to assess exactly what the intruder did and how he did it. The victim may also ask the consultants to review every other computer system they control, just in case the intruder gained unauthorized access there as well. This is "reasonable". However, in the first instance, the access does not result in loss equal to $5000. The case will probably not be filed, and if it is, the perpetrator will probably not go to jail. In the second instance, the case will be prosecuted and a prison sentence will result. However, the perpetrator's actions and intent are identical.

A similar problem occurs with including any lost revenue due to interruption of service in the loss calculation. Assume one intruder destroys a personal computer, while a second intruder places an unwanted program, like a packet interceptor on an e-commerce computer. The value of the personal computer and the information on it is probably low. The intruder's sentence will be low. In the second instance, the e-commerce server may have to be taken off-line. If the business is small, the loss will be low, but probably higher than the loss the individual has

suffered. If the business is thriving, the loss could be very high. Again, the adjustment the perpetrator receives does not reflect the defendant's relative culpability, but depends on the nature of the victim. Individuals are probably less likely to be able to protect themselves against computer crime, or bounce back from an offense than well-to-do companies. Yet, less real damage on an e-commerce site will probably result in greater prison sentences than malicious destruction of a personal machine. Thus, the definition of loss appears to undermine victim-related adjustments in unwarranted and undesirable ways.

Moreover, loss of revenue is difficult to measure. In the 2000 denial of service attacks on Yahoo! Inc., the company went off-line for about three hours. Yahoo! initially refused to estimate how much the attack cost it in lost revenue. Yahoo! makes money from sale of goods and from showing advertisements. Its difficult to estimate whether Yahoo! actually lost any sales or advertising contracts as a result. Yet, some analysts estimated that Yahoo!'s loss would add up to millions of dollars. ZDNet News, February 7, 2000 http://zdnet.com.com/2100-11-518359.html?legacy=zdnn. Sources quoted by the Industry Standard estimated that losses for Yahoo! and eBay would amount to 1.2 Billion dollars. February 11, 2000, http://www.thestandard.com/article/display/0,1151,9703,00.html. The attack was perpetrated by a Canadian juvenile who never gained unauthorized access to Yahoo! machines or harmed data on the victim systems. Yet sentencing according to these loss estimates would have resulted in the maximum punishment possible under the law.

Similarly, section 1030(c)(2)(B)(iii) makes theft of data valued at over $5000 a felony offense. Valuing data is extremely difficult. For example, in U.S. v. Mitnick, the defendant accessed computers and viewed source code owned by the victim companies. The victims reported their estimate of the entire cost of research and development as their actual loss in the case, amounting to approximately 80 million dollars. However, the companies were not deprived of the use of that information, nor was it redistributed to competitors, thus reducing its use value. Subsequently, one of the victims started giving the same source code away for free. Additionally, none of the companies reported any economic loss as a result of the intrusions in their SEC filings.

Of course, loss can be difficult to estimate in any economic crime cases. However, this is a serious problem in computer crime cases because loss includes unforeseeable pecuniary harm, losses defined by victim's conduct rather than offense conduct, and more commonly involve the valuation of data and intellectual property. As a result, the loose measure of loss undermines uniformity in sentencing. It also means that loss can be a distorted, or even wholly inaccurate, reflection of the defendant's culpability.

Finally, it means that loss can be structured by victims, law enforcement and prosecutors, to manipulate the number of felonies charged and the sentences for them. In the commentator's experience, victims will be asked for estimates of how much time they spent on the problem, without being informed what type of efforts count towards loss (e.g. damage assessment) and what efforts do not (e.g. improving the security of the system). Victims often do not supply documentation to support their estimates. Rather, they estimate or summarize. The victims do not know that the law imposes limitations on factors that contribute to loss, so they naturally throw in everything.

Law enforcement fails to ensure that loss estimates are reasonable by not providing victims with guidelines to define loss. But the flexible definition of such an important factor leaves sentencing open to manipulation. In one of counsel's cases, the investigating FBI agent sent victims an email instructing that they document as much time spent investigating the problem as possible. For every $5000 they found, the email advised, the government could add another charge.

Similarly, loss has become a huge barga ining chip in plea bargain negotiations. In the beginning of a case, the Department of Justice has early damage estimates based on initial contact with victims during the investigatory stage. Prosecutors will often offer the defendant a plea bargain based on that number. The prosecution tells the defendant that if he does not plead, they will contact victims that did not respond, or re-contact victims to gather additional evidence of damages, thus opening up the possibility of greatly increased loss estimates. Defendants, including those with potentially meritorious defenses, are frightened into entering a plea because the uncertainty of damages means they could do vastly more time in prison once the Department has beaten the bush for numbers from victims.

Loss as currently defined is at risk of completely failing to accurately assess either actual harm, defendant's culpability, or proportionality in sentencing. Also, such vague categories open the sentencing process up to manipulation.

D. The Statute And The Guidelines Do Not Distinguish Between The Culpability Of Offenders Acting With Less Criminal Intent

Relying so heavily on loss as a sentencing factor in computer crime cases misrepresents the defendant's true culpability. This point is further illustrated by the fact that malicious intent to cause harm will be punished less severely than negligent or reckless intent to cause harm if the ultimate loss amount is less. Section 1030(a)(5)(A) sets a maximum of ten years for malicious harm, five years for reckless harm, and one year for unintentional or negligent harm, unless the intrusion was for commercial advantage, in furtherance of another criminal offense or involved the theft of information worth more than $5000. In the first case, the intruder maliciously uses a software program to delete data on the victim computer in violation of 1030(a)(5)(A)(i). The system administrator restores the data from back up in approximately two hours. The maximum sentence ten years. However, even though the defendant acted maliciously, the crime would probably not be charged, because the loss is well below $5000. In the second case, a teenager uses a program he finds on the Internet to get into his school's computer network. While looking around, he unintentionally corrupts the computer database. The school has to purchase new software and hire consultants to try to restore the data. The consultants bill the school for 40 hours of work at $300 an hour. The curious student has amassed $12,000 in damages. The offense would have had a cap of a year in jail. However, the damages exceed $5000, so the maximum is five years. The student would be sentenced at a level 12, or 10 to 16 months. (BOL 6, loss 4, special skill to download and run the program 2).

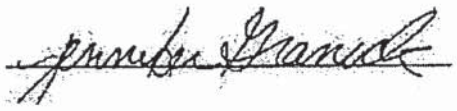
III. CONCLUSION

We encourage the Sentencing Commission to act very carefully with regard to computer crime sentencing. We need to eschew simplistic, expensive, and ineffective tactics like inflexible, harsh sentencing. Those convicted of computer crimes are already punished more harshly compared to similar crimes. Additionally, there are fundamental problems with the way computer crimes sentences are currently determined. These problems should be resolved before the Commission considers new enhancements or penalties. Failure to address these problems, particularly the problem with the special definition of loss including unforeseeable pecuniary harms, USSG $ 2B1.1 Application Note 2(A)(v)(III), results in sentences which are disproportionate to the defendant's culpability and which chill legitimate computer security research, reporting and adoption of new, beneficial technologies. We believe that the Commission should not increase sentences for computer crime offenses. Also, the Commission should consider ways to revise the current scheme to resolve these issues.

Dated: February 19, 2003

Respectfully submitted,

By:



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Federal & Community Public Defenders
(Intro Page)

As the Commission embarks on the fifteenth year of amendments, we ask you to consider whether the Guidelines are producing the "certainty and fairness [and] individualized sentences" required by 28 U.S.C. § 991(b)(1)(B). We recognize that the guidelines result not just from the discretionary actions of the Sentencing Commission. The Commission certainly must carry out any express congressional mandates and must formulate guidelines that correlate to newly enacted criminal statutes. At the same time, the Commission must exercise its broad discretion to establish sentencing practices and promulgate amendments. In this regard, we refer you to an observation by the Honorable Richard Posner, commenting on the "disturbing state of affairs" of our criminal justice system that marks us as the "most penal of civilized nations." Judge Posner notes that judges "should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. Richard A Posner, Overcoming Law 157-158 (Harvard U. Press, 1995).

At present, the guidelines require a sentence of life (without parole) for persons convicted of premeditated murder as well as for repeat drug offenders where death results from use of the drug. See U.S.S.G. § 2A1.1; 2D1.1(a).[1] Yet, it is not simply the most serious offenders designated so by Congress who end up with an offense level 43 but also a number of drug offenders who are neither kingpins nor violent whose sentence, based on sentencing factors determined on a preponderance of "reliable hearsay" result in a guideline range of life. Now, the guidelines also require life sentences for first-time defendants convicted of serious white collar offenses although the maximum statutory penalty for white collar offenses is generally twenty years.[2]

The consequence, intended or unintended, of years of ratcheting up penalties where all but a few of the six-hundred forty-eight amendments promulgated since1988 have increased sentences is a guidelines system that provides sentences "greater than necessary" to comply with any legitimate sentencing purpose. 18 U.S.C. § 3553(a).

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[1] In the federal system, "good time" credit is not deducted for defendants who are sentenced to imprisonment for life even where that sentence results not just from a statutory mandate but from an aggregate of guideline factors. See 18 U.S.C. § 3624(b)(1). In contrast, the federal Three-Strikes law which mandates a sentence of life does for violent repeat offenders does provide an opportunity for early release for those who reach the age of seventy after having served thirty years of their sentence and are not a danger to others. 18 U.S.C. § 3582(c)(1)(A)(ii).

[2] A first time, white-collar offender convicted of an offense (offense level 6), for which he was not the leader or organizer (no reduction), involving a loss of more than $50 million (+24); to a publicly traded company that, as a result of the offense, suffered a substantial reduction in the value of its assets or its equity securities or the value of its employee retirement accounts (+4); where the offense involved more than 250 victims (+6); and was committed through sophisticated means such as the use of offshore financial accounts or corporate shells to hide assets or transactions or merely the use of complex transactions (+2); and the defendant was also an officer or director of the company (+4); would be facing, even after pleading guilty in a timely fashion and admitting responsibility, a sentence of life (offense level 46-3 = 43).

The Federal and Community Defenders thank the Commission for the consideration of our comments and welcome the opportunity to provide additional information, if desired.

CORPORATE FRAUD PERMANENT AMENDMENTS

A. Increasing the Loss Table at the Low End Is Neither Required Nor Advisable

Defenders oppose any increase of the loss table at lower loss amounts because these are not the offenses or offenders targeted by the Sarbanes-Oxley Act. The purpose of the Act is clear: "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. 107-204. The cases that concerned Congress were those like the Enron Corporation that involved multimillion dollar losses and "endangered the solvency or financial security of a substantial number of victims." *See Id.*, § 805(a)(4). The Act also focuses on offenses involving registered brokers and dealers and "corporate directors and officers of publicly traded corporations who commit" serious offenses involving "securities, pension, and accounting fraud." *See* Pub. L. 107-204, § 1104(a)(2) & (b)(1). The emergency amendments the Commission just promulgated more than adequately take into account each of the harms identified by Congress in the Sarbanes-Oxley Act and no increase of the loss table at the low end is required or advisable.

1. A Sentence of Imprisonment Is Inappropriate for Low Level White Collar Cases Under 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(g) & (j)

The Commission correctly responded to the Sarbanes-Oxley Act when it did not increase sentences for low-level white collar offenses. Increasing the loss table at the low-end just to ratchet up sentences is not sound policy. It is not consistent with the parsimony principle in 18 U.S.C. § 3553(a) nor with the stated purposes of sentencing in 3553(a)(2).

It was proper for the Commission to comply with the directive in 28 U.S.C. § 994(j), which requires the Commission to insure that the guidelines provide a sentence "other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Although § 994(j) does not explicitly define "serious offense," there is no reason to suddenly interpret 994(j) any differently particularly where the Sarbanes-Oxley Act does not explicitly or impliedly require a reassessment of the definition that has been in *de facto* use.

Indeed, compliance with the §994(j) mandate is now more critical than ever. As the Commission may be aware, the Bureau of Prisons recently has restricted the use of community confinement facilities for nonviolent, low-level offenders based on a Department of Justice memoranda that newly interprets the requirements of U.S.S.G. § 5C1.1 and 18 U.S.C. §§ 3621 and 3624. The persons affected are now being sent directly to prison or spending longer periods in prison before being released to community confinement centers. Although a number of suits

challenging the new BOP rule are pending in the courts, the Commission should act now to bring the guidelines into compliance with the 994(j) mandate. It should, as it has been considering for the last few cycles, expand the sentencing zones to permit sentencing alternatives to imprisonment for cases covered by § 994(j).

The factors that Sarbanes-Oxley identifies for enhancements are in fact consistent with the current interpretation of §994(j). For example, the Act requires the Commission to increase penalties for offenses where a large number of victims are injured or when the victims face financial ruin. *See* Pub. L. 107-204, §805(a)(4); 1104(b)(5). The legislative history of the Act is the same. The section-by-section analysis of title VIII of the Act describes the Enron case as a "serious fraud" involving "publicly traded securities [that] can affect thousands of victims." 148 Cong. Rec. S7418-01, S7420.

Loss amounts already often overstate the culpability of defendants. Calculating loss under the relevant conduct guideline sweeps in the conduct of others, based on a preponderance standard, without the opportunity to confront the witness, and based on uncharged, dismissed, acquitted and related conduct. Loss also includes intended loss no matter how economically unrealistic the intended loss may be. Sometimes, a defendant commits the offense just to retain his or her job, or for misguided loyalty or no personal profit and for motives that may be tinged with financial need rather than pure greed. Increasing the base offense level or compacting the loss table to increase offense levels will just exacerbate the overrepresentation of culpability in many cases.

For practical and policy reasons, it makes little sense for the Commission to enhance penalties for low level white collar defendants in light of the time and effort that just went into completely revamping the guidelines for white collar offenses effective November 1, 2001. There is also no empirical basis for increasing penalties for low level white collar offenders. That is, there is no evidence that higher penalties at the low end would deter or result in more just punishment.

Each loss table and offense level increase that results in mandatory prison terms or greater terms of imprisonment for persons who commit low level white collar offenses will do little more than create additional chaos for the persons and their families without any corresponding benefit to society. Imprisonment for such low level defendants will mean a loss of jobs and the consequent disruptions, loss of homes, emotional costs to children, disbanded family ties, inability to care for children and elderly parents, loss of health benefits, inability to make restitution and the increased recidivism that follow such disruptions. No corresponding benefit will likely flow from sentences that at most will require several months' imprisonment. *Cf. United States v. Rivera*, 994 F.2d 942, 956 (1st Cir. 1993) (explaining that small downward departure for low level embezzlement may be appropriate to allow defendant to retain his job and make restitution) (Breyer, then-C.J.).

It is also runs afoul of 28 U.S.C. § 994(g) which requires the Commission to consider prison capacity in formulating guidelines. As in other instances where the guidelines overstate the seriousness of the offense, ratcheting up the sentences for low level defendants will likely result in

a lack of uniformity in sentencing and a lack of fairness for those left out in the shuffle. Defendants in larger districts where such relatively less serious offenses will tend to clog the dockets will plea bargain for discounted sentences through informal accommodations such as "fast-track" departures, charge bargaining, and other stipulated downward departures and adjustments. Smaller districts will not follow the same procedures. The uniformity and fairness that the guidelines purportedly provide will be lost.

The reality is that judges will depart downwardly and the parties will find ways around the sentence if the guidelines are set to require imprisonment for first time, nonviolent offenders for whom a sentence other than imprisonment is more fair and practical. Based on the abilities of defense and government counsel, the judicial temperament of the judge and the happenstance of the circuit where the offense was committed, some defendants will receive downward departures and some will not; some of the departures will be affirmed and others reversed. All will occur based more on the vagaries of fate than on the culpability of the defendant.

B. Permanent Amendments Should Be Adjusted to Comply with the Structure of the Guidelines

1. Cap the Offense Level

Defenders recommend that the Commission make two changes to the recently promulgated emergency amendments before making them permanent. First, the Commission ought to cap the total offense level for white collar offenses at a level below offense level 43. As shown in the example at footnote two, the guidelines currently provide a sentence of life without parole (offense level 43), for defendants convicted of white collar offenses involving a loss in excess of $50 million even if there is a timely acceptance of responsibility. At the highest loss level, someone who is a leader or organizer and who timely accepts responsibility would end up with a total offense level of 53, ten levels above the highest offense level. Such a sentence is inappropriate.

Moreover, Defenders have consistently advocated that offense level 43 which calls for a mandatory sentence of life should not be available in any case where Congress has not established mandatory life as the maximum penalty. Simply stated, a sentence of life without parole is one that should be available only upon the will of Congress. It should be reserved only for the most serious offenses where the incapacitation of a person for life is essential for the protection of society. It should be imposed only after scrupulous adherence to the Constitutional protections of a grand jury indictment, upon a finding by a jury, beyond a reasonable doubt. In an American court, life without parole should not be imposed on a person as a result of an aggregate of findings based on a preponderance of "reliable hearsay" determined by a court at a sentencing hearing. In our view, Congress cannot delegate the authority to make an offense punishable by a sentence of life without parole to the Sentencing Commission to be meted out under procedures with such limited due process protections. In addition, there is no circumstance where the appropriate punishment for a nonviolent offense should be life without parole.

Furthermore, offense level 43 or greater for a guideline applicable to offenses that generally carry a statutory maximum of 20 years is simply inconsistent with the structure of the guidelines. The most egregious offense calculated under §2B1.1 ought to come out with a maximum offense level 40 (or 36 assuming that a 4-level enhancement for role in the offense is imposed). In that fashion, a first time offender who timely accepts responsibility(-3), would end up with an offense level 37 for a sentencing range of 210 to 262 months, within the statutory maximum of twenty years. Compare, for example, that an armed bank robbery (OL 22) committed by a first-time offender, where a firearm was discharged and permanent bodily injury resulted to a victim (capped at +11), the loss exceeded $5 million (+7), a person was restrained to facilitate the offense (+2), and the defendant timely accepted responsibility (-3)would result in a total offense level of 39 (42-3) with a sentencing range of 262 to 327 months, within the statutory maximum twenty five-years.

Offense level 43 should simply not be an available option for an offense calculated under U.S.S.G. § 2B1.1, the guideline applicable for offenses that generally carry a statutory maximum of 20 years. Compare, for example, that the guidelines provide an offense level of 42 for espionage only if "top secret information was gathered or transmitted" but offense level 37, otherwise. See 2M3.1.

2. The Offense Level for Less Culpable Defendants Should Be Capped

For less culpable defendants, the Commission ought to set a cap on the cumulative specific offense characteristics that may be imposed. Defenders propose the following provision:

(b) Specific Offense Characteristics

. . .

(14) If the defendant receives an adjustment under §3B1.2(Mitigating Role), the cumulative adjustments from U.S.S.G. § 2B1.1(b) shall not exceed 20 levels.

Under this provision, a secretary or clerk who is convicted of aiding and abetting the commission of a serious white collar offense, for example, but who neither directed nor profited directly from the extensive fraud would be facing a maximum offense level 26.

1. Cumulative Adjustments for Like Harms Should Be Capped

The Commission ought to set a maximum cap for various enhancements that capture related harms. In other guidelines, the Commission has established such caps. For example, in the robbery guideline, the cumulative adjustments that may be imposed for use of a weapon and for injury to a victim may not exceed 11 levels. See U.S.S.G. § 2B3.1(b)(2) & (3). The Commission ought to cap the cumulative adjustments that may be imposed for harm to victims in the same fashion in § 2B1.1.

IMMIGRATION – U.S.S.G. § 2L1.2

A. Background

When the Commission amended this guideline in 2001, it did so to eliminate the "disproportionate penalties" that resulted because "the breadth of the definition of 'aggravated felony' provided in 8 U.S.C. § 1101(a)(43), which is incorporated into the guideline by reference, means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault." U.S.S.G. App. C, Amend 632 (Reason for Amendment). The Commission also found that the inequity was being addressed "on an ad hoc basis in such cases by increased use of departures." Id. The amendment provided a "more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant." Id.

The current proposal seeks once again to address the disproportionate penalties by further refining the "aggravated felony" enhancement. In considering the current amendments, Defenders ask the Commission to consider that problems continue to plague this guideline because in most respects it is a flawed guideline.

First, § 2L1.2 applies to offenses that are essentially "status" offenses. That is, persons sentenced under this guideline are guilty of being in the United States (or attempting to enter the United States) after having been deported. The majority of these persons return to the United States to be reunited with children and spouses left behind in the United States, to take care of sick relatives, or to earn money to provide food and sustenance for themselves and their dependent families doing work made available to them by American citizens and corporations. The guideline does not punish any other new criminal conduct, which if it has been committed is covered under a separate guideline. Section 2L1.2 will continue to be plagued by problems in its application so long as it fails to take into account the motivation of the offender and so long as it continues to mete out such harsh punishment for an offense that is more difficult to deter and punish justly because it is generally driven by need and other complicated human factors rather than by calculated greed or malevolence.

Second, the magnitude of the enhancement – from 8 to 16 offense levels – for prior conduct basically unrelated to the severity of the instant offense is another major source of the disproportionate penalties and problems that plague this guideline. Making matters worse, as the Commission has recognized, is the vast range of conduct underlying this enhancement. Its application is further complicated because it is driven by a definition found in the immigration code established for purposes unrelated to the criminal code and the appropriate punishment to be applied. An enhancement of this magnitude is rare under the guidelines because it is inconsistent with the notion of graduated punishment geared to fit the crime that undergirds guideline sentencing and will continue to create inequities until the Commission scraps it and returns to a more modulated and just measure of this offense characteristic.

Third, this enhancement is problematic because it double counts a measure – past criminal conduct – which is a questionable measure of culpability in any event but particularly with respect to this offense. A single prior, which may or may not reflect serious past criminal conduct, may account for a 16-level offense increase and 6 criminal history points, if criminal history recency enhancements are applied. This is another area where the Commission needs to refine the guideline. For this reason, Defenders believe that the Commission ought to import from Chapter IV the staleness provisions in U.S.S.G. § 4A1.2(e) currently used to ameliorate the problems encountered when using prior convictions to enhance sentences.

Despite our basic objections to this guideline, Defenders support a number of the published proposals and, in some instances, recommend that the Commission refine the definitions even further. A simple but an essential initial step to deal with the application problems caused by this enhancement is for the Commission to establish a uniform definition for "aggravated felony."

B. "Aggravated Felony" Defined

Defenders recommend a two-part test before a prior conviction would trigger the 8-16 level enhancement that § 2L1.2 provides for "aggravated felonies." First, the prior conviction must be a felony as defined under federal law, namely an offense punishable by imprisonment in excess of one-year. Second, the prior conviction must meet the statutory definition of "aggravated felony" found in 8 U.S.C. § 1101(a)(43). These two prerequisites would help simplify and bring some uniformity to an area that is complicated by the intersection of immigration and criminal law definitions, which are not always consistent with each other.

That two-part definition is the beginning but not the end. For offenses that meet the two-part definition, the Commission ought to add further refinements to the "aggravated felony" enhancement to reduce the "disproportionate penalties" that have plagued this guideline, address the vast range of conduct that underlie the list of "aggravated" felonies, and diminish the inequities that confront persons accused of these offenses and which, at times, are addressed on an "ad hoc" basis by the district courts, the government and the defense bar.

C. Juvenile Adjudications

Defenders support the Commission's proposal to exclude juvenile adjudications. This approach is consistent with the immigration precedents, which do not treat juvenile adjudications to be convictions for purposes of removal or exclusion. In re Devison-Charles, 22 I & N. 1362, 2000 WL 1470461 (BIA, Sept. 12, 2000)(interpreting 8 U.S.C. § 1101(a)(48)(A)).

Defenders would further recommend that any offense committed prior to the defendant's reaching the age of 18 not be counted for an offense level enhancement regardless of how it was classified under the laws of the jurisdiction in which the defendant was convicted. The normal application rules for criminal history calculation may be applied in assessing criminal history points

for such offenses. However, there is no need to double count offenses committed prior to age 18 to enhance the offense level under this guideline.

D. Simple Possession of Controlled Substances

Defenders support the Commission's decision to exclude simple possession offenses from the guideline definition of "aggravated felony." Among other reasons, the immigration code includes only drug trafficking but not simple possession offenses in the list of aggravated felonies. See 8 U.S.C. § 1101(a)(43)(B).

E. Amendment to Provide Three Gradations for Drug Trafficking

The Federal Defenders support the proposed amendment, which would provide three gradations for drug trafficking offenses but recommend that for offenses where the sentence imposed was probation or a fine, the enhancement be 4 levels rather than 8 levels. For offenses, where the sentence imposed was less than 13 months or where the defendant received a mitigating role cap, the enhancement should be 8 levels rather than 12.

The following table describes our proposal.

Drug Trafficking Offenses				
Sentence Imposed	**Current**	**Option 1**	**Option 2**	**Defenders' Proposal**
> 13 mos	16 levels	16 levels	16 levels	16 levels
> 13 mos and defendant received a mitigating role adjustment	16 levels	16 levels	16 levels	8 levels
< 13 mos	16 levels	12 levels	12 levels	8 levels
probation/fine	16 levels	12 levels	8 levels	4 levels

1. A Four-Level Increase if Sentence For Prior Conviction Was Probation or Fine Is Sufficient and A Substantial Increase Under the Guidelines

A sentence of probation or fine usually reflects that the court sentencing a defendant considers that the offense was minor and that the offender is not violent or dangerous. Requiring a 4-level increase for a prior, minor drug trafficking conviction where the sentence imposed was probation is a substantial enhancement, particularly where the prior already is counted under the criminal history score. Under the guidelines, 4-level increases are more severe than the commonly used 2-level increase and reflect offense characteristic involving serious risk of injury or harm to others. For example, the guidelines provide a 4-level increase where a person is abducted to facilitate commission the commission or escape of a bank robbery. See U.S.S.G. § 2B3.1(b)(4). In the kidnapping guideline, a 4-level increase is imposed where the victim sustained permanent or life-threatening bodily injury. See U.S.S.G. § 2A4.1(b)(2). In air piracy cases where the offense involved intentionally or recklessly endangering the safety of a mass transportation vehicle or facility and a dangerous weapon was otherwise used a 4-level increase is imposed but if the weapon was brandished or its use threatened, only 3-levels are imposed. See U.S.S.G. § 2A5.2(b)(1)(ii). A four-level increase applies where the victim of abusive sexual contact had not attained the age of twelve years. See U.S.S.G. § 2A3.4(b)(1). In the white collar context, a 4-level increase is warranted where there are 50 or more victims. See U.S.S.G. § 2B1.1(b)(2)(B).

2. An 8-Level Increase Sufficiently Reflects the Severity of the Conduct

An 8-level enhancement is used even more infrequently under the guidelines because it reflects a substantial enhancement. In the bribery guidelines, for example, it applies where the offense involved a payment to influence a high-level elected official. See U.S.S.G. § 2C1.1(b)(2)(B); 2C1.2(b)(2)(B). It applies to obstruction of justice offenses where the offense involved causing or threatening to cause physical injury or property damage to obstruct the administration of justice. See U.S.S.G. § 2J1.2(b)(2). In the gun guideline it applies where the offense involved more than 100 firearms. See U.S.S.G. § 2K2.1(b)(1)(D).

Hence, Defenders recommend that the Commission impose no more than an 8-level enhancement where the prior drug trafficking offense involved a sentence of less than 13 months or regardless of the sentence of imprisonment, where the defendant received a mitigating role adjustment for his less culpable role in the prior offense.

The 8-level enhancement is more than sufficient to reflect the severity of the past conduct, particularly when the past conduct is already counted under the criminal history guideline.

3. With Respect to Offense Level Enhancements, the Sentence Imposed Should be Limited to the Sentence Originally Imposed.

The Federal Defenders oppose the proposed amendment to the commentary, which would provide that the sentence imposed includes a sentence imposed upon revocation of probation or a suspended sentence. U.S.S.G. § 2L1.2, comment. (n. 1(A)(iv)(III)(Proposed). The proposed amendment will only create additional confusion and is inconsistent with the approach taken in other provisions of the sentencing guidelines.

An alien convicted of returning unlawfully to the United States after removal, in violation of 8 U.S.C. § 1326(a), is subject to an enhanced sentence if his removal was "*subsequent* to a conviction for an aggravated felony." 8 U.S.C. § 1326(b)(2) (emphasis added). In many instances, the determination of whether an offense is an aggravated felony depends on the sentence imposed. See e.g. 8 U.S.C. §§ 1101(a)(43)(F)(crime of violence), (G)(theft); United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999)(aggravated assault "probation" was not aggravated felony); accord United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000). Under the statute, the sentence imposed includes the term of imprisonment imposed "regardless of any suspension of such an imprisonment" 8 U.S.C. § 1101(a)(48)(B); United States v. Graham, 169 F.3d 787, 790 (3d Cir.), cert. denied, 120 S.Ct. 116 (1999).

In some instances, the 2001 guideline also bases enhancements on the sentence imposed. For example, a defendant who previously received a sentence of more than thirteen months for a drug trafficking offense is enhanced sixteen levels, U.S.S.G. § 2L1.2(b)(1)(A)(i), while a defendant who received a lesser sentence is enhanced twelve levels. U.S.S.G. § 2L1.2(b)(1)(B). In an effort to address the disproportionate penalties arising from the broad definition of aggravated felony, the Commission amended the commentary to exclude the suspended or probated portion of the sentence from the consideration of the sentence imposed. U.S.S.G. § 2L1.2, comment. (n.1(A)(iv)) (Nov. 1, 2001).

The Commission now proposes to amend the commentary to require the addition of any sentence imposed upon revocation of probation, parole, or supervised release, for purposes of determining the term of imprisonment imposed. U.S.S.G. § 2L1.2, comment. n.1(A)(iv)(III). First, to the extent that this commentary permits consideration of a term of imprisonment imposed *subsequent* to the alien's removal, it is inconsistent with both the statute and the guideline itself. The statute enhances the sentence for aliens who were *removed subsequent to* conviction for the aggravated felony. 8 U.S.C. § 1326(b)(2). Thus, the aggravated felony conviction must precede removal. Similarly, the guideline enhances the offense level for an alien who was previously deported "after" conviction for certain offenses. U.S.S.G. § 2L1.2(b). Thus, the court must look to the conviction and sentence imposed prior to deportation. United States v. Sanchez-Mota, 2002 WL 31883195 (1st Cir. Dec. 24, 2002); United States v. Guzman-Bera, 216 F.3d 1019, 1020-21 (11th Cir. 2000).

This approach is consistent with other guidelines that enhance a defendant's offense level based on his status at the time of the new offense. For example, the Commission amended the firearms guideline to specify that a felon's offense level should be enhanced only if he possessed the firearm "subsequent to" conviction(s) for crimes of violence or drug trafficking. U.S.S.G. §§ 2K2.1(a)(1)-(4) (Nov. 1, 2000).

The offense addressed in U.S.S.G. § 2L1.2 is the illegal return after deportation. It is the defendant's status at the time of deportation that is relevant to his offense level, not any criminal conduct that occurs subsequent to his return. Such conduct is already adequately addressed in the calculation of criminal history.

Some courts have permitted consideration of the term of imprisonment imposed upon revocation of supervision if revocation occurred prior to the alien's removal. See e.g. United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002); United States v. Jimenez, 258 F.3d 1120, 1125-26 (9th Cir. 2001). This approach is also flawed.

The 2001 amendments to § 2L1.2 were designed to address the dangerousness of individuals who had been convicted of a wide variety of offenses deemed aggravated felonies, offenses that had dramatically different ranges of severity. As the Commission has said elsewhere, a revocation does not reflect the seriousness of the offense for which probation was originally imposed. It is not a punishment for the original offense, but a new sanction for a defendant's "breach of trust" in failing "to follow the court-imposed conditions of probation." U.S.S.G. § Ch.7, Pt.A(3)(b), p.s. "[T]he sentence imposed upon revocation" is "intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision," not to punish the defendant for his past crime, or even "for any new criminal conduct." Id. Because the revocation conduct has nothing to do with the nature of the underlying offense, a revocation in no way reflects the seriousness of that offense. Because revocation can occur merely for failing to follow court orders, it does not reflect the dangerousness of the defendant.

This is especially true in the cases of undocumented aliens. Because of their illegal status, they often cannot comply with various conditions of probation such as employment. Indeed, they are often deported and when they return they are faced with a motion to revoke probation for the failure to report or for the reentry itself. The probated sentence originally imposed reflects the severity of the underlying offense. It is that sentence that should be considered in determining the defendant's offense level under U.S.S.G. § 2L1.2.

4. **The Commission Should Clarify that the Aggravated Felony Enhancement Applies only to Defendants Who Were Convicted of a Felony.**

As discussed supra, a defendant may be deemed an aggravated felon even if he was actually convicted of a state misdemeanor if the sentence imposed, regardless of suspension, was at least one year. See e.g. Urias-Escobar, 281 F.3d at 167-68; Graham, 169 F.3d at 788, 791-93. While the Commission has clarified that such convictions are not considered "felonies" under this guideline, U.S.S.G. § 2L1.2, comment. n.1(B)(v), the eight-level enhancement applies to any defendant deported after "conviction for an aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C). Just as the use of the term "aggravated felony," may result in treatment of drug possession as "drug trafficking," the commentary's definition notwithstanding, Caicedo-Cuero, supra, a court might still impose the eight-level enhancement on a defendant who received a one-year sentence for a misdemeanor because the offense is still considered to be an aggravated felony under the immigration code. The Commission should clarify that the eight-level enhancement applies only to defendants previously convicted of a "felony," as defined in U.S.S.G. § 2L1.2, comment. n.1(B)(v).

F. Definition of "Crime of Violence" Should Exclude Offenses That Do Not Meet Definition under Immigration Code

1. Sixteen Level Enhancement Should Be Limited to Defendants Who Received a Sentence of More Than Thirteen Months for a Felony Conviction for a Crime of Violence.

The current guideline provides a sixteen-level enhancement for any alien who was deported after a felony conviction for "a crime of violence." U.S.S.G. § 2L1.2(b)(1)(A)(ii). This guideline is at once broader and narrower than the aggravated felony definition contained in the statute.

Under the statute, a "crime of violence" is an aggravated felony only if the sentence imposed was at least one year. 8 U.S.C. § 1101(a)(43)(F). Thus, a defendant convicted of aggravated assault, who receives a sentence of straight probation or deferred adjudication, has not been convicted of an aggravated felony for immigration purposes. See United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999). The sixteen-level enhancement contained in the guideline, however, apparently applies regardless of the sentence imposed.

On the other hand, the guideline is in some respects is more narrow than the immigration statute has been interpreted by some courts. A defendant convicted of a misdemeanor crime of violence is considered to be an aggravated felon if he received a one-year sentence. United States v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002). The guideline requires conviction of a "felony," U.S.S.G. § 2L1.2(b)(1)(A), which is defined to include only offenses punishable by a prison term exceeding one year. U.S.S.G. § 2L1.2, comment. n.1(B)(v). The immigration statute adopts the definition of "crimes of violence" contained in 18 U.S.C. § 16, which includes offenses that involve

the use of force against property. The guideline is generally limited to offenses that involve the use or threatened use of physical force against a person. U.S.S.G. § 2L1.2, comment. n.1(B)(ii)(I).

The absence of any limitation based on the sentence imposed, however, continues to result in harsh sentences for defendants convicted of a wide range of behavior. For example, the offense of assault may involve a wide variety of behavior. Participants in a bar room brawl may choose to accept a sentence of probation rather than risk the results of a trial. In some jurisdictions, assault is considered a misdemeanor but punishable by up to two years in jail. Thus, the offense falls within the guideline definition of a felony. A limitation on the sixteen-level enhancement to individuals who were sentenced to a term of imprisonment exceeding thirteen months, similar to the limitation for individuals convicted of drug trafficking, would reduce the unwarranted disparity in the treatment of these individuals.

G. Alien Smuggling – U.S.S.G. § 2L1.2, comment (n. 1(b)(i))

1. The Sixteen-Level Enhancement for Alien Smuggling Should be Limited to Defendants who were indicted and Convicted of Smuggling for Profit

Defenders oppose the definition of "alien smuggling" proposed by the Commission that would include specified offenses "regardless of whether the indictment charged that the offense was committed for profit." The proposed amendment would permit a sixteen-level enhancement for defendants previously convicted of an alien smuggling offense for profit regardless of whether the "profit" allegation was included in the indictment. U.S.S.G. § 2L1.2, comment. (n.1(B)(i)). This amendment would be a drastic deviation from the categorical approach normally applied to such terms under statutory enhancement provisions in the sentencing guidelines. See Taylor v. United States, 495 U.S. 575, 588-89, 601 (1990). If the government is allowed to prove the "profit" allegation by reliance of facts outside the indictment, due process would require that the defendant be permitted an equal opportunity to refute such evidence by reference to evidence and witnesses outside the indictment. In addition, where a conviction was obtained pursuant to a plea agreement to a lesser or different charge, it would be unfair to attempt to establish conduct that was the excluded from consideration pursuant to an agreement in return for which the defendant waived constitutional rights to a trial by jury, to confront witnesses and others.

Where the guidelines enhance sentences on the basis of prior convictions, courts are not to look beyond the elements of the offense of conviction, see e.g. United States v. Zavala-Sustaita, 214 F.3d 601, 603 (5th Cir.)(citing Taylor, supra), cert. denied, 531 U.S. 982 (2000), or at most, the conduct set forth in the indictment. For example, in determining whether an offense should be considered a crime of violence under §2L1.2, the court must determine whether the elements of the offense charged include the intentional use of force. United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002)(injury to child not a crime of violence or aggravated felony); United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001)(DWI not a crime of violence or aggravated felony);

United States v. Hernandez-Castellanos, 287 F.3d 876, 879 (9th Cir. 2002)(felony endangerment).

Similarly, in the firearms and "career offender" guidelines, the categorical approach is used to determine if the defendant was previously "convicted" of crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1. Offenses are included if the elements of the offense include the use or threatened use of force or "the conduct set forth *(i.e., expressly charged)* in the count of which the defendant was convicted involved use of explosives ... or, by its nature, presented a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2, comment. (n.1) (emphasis added). Consequently, with respect to the "career offender" provision of the guidelines, it is error to look beyond the face of the indictment to the actual underlying conduct in order to determine whether a prior conviction qualifies for the enhancement. United States v. Hascall, 76 F.3d 902, 904 (8th Cir. 1996) (second-degree burglary of a commercial building); United States v. Telesco, 962 F.2d 165, 166-67 (2d Cir. 1992) (following Taylor); United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992). A defendant is subject to the Armed Career Criminal provision only if the elements of the offense charged in the indictment included the intentional use of force. United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc).

The same reasoning should be applied to § 2L1.2(b)(1)(A)(vii)(Nov. 1, 2001). That provision explicitly requires "*a conviction* for a felony that is . . . an alien smuggling offense committed for profit." (Emphasis added). Therefore, to qualify for enhancement under § 2L1.2(b)(1)(A)(vii), the defendant's prior alien smuggling conviction must be under a statute whose elements establish "an alien smuggling offense committed for profit," see e.g. Zavala-Sustaita, 214 F.3d at 603, or, at a minimum, the conduct alleged in the indictment must unequivocally establish such an offense.

Further, a requirement that the previous conviction actually include as an element an allegation that the offense was committed for profit is more reliable and efficient. The court can readily determine whether the defendant was charged and convicted of such an offense by the traditional references to the charging instrument, judgment, and, if necessary, the jury charge. As the Supreme Court recognized:

> The practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the ...definition... the trial court would have to determine what that conduct was....Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own...?Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts.

Taylor, 495 U.S. at 601. The proposed amendment would result in unfairness and inconsistency among similar guidelines provisions.

H. Remote Convictions Should Not Serve to Enhance the Offense Level

The illegal re-entry guideline contains no temporal limitation on consideration of prior convictions under U.S.S.G. § 2L1.2(b). This is in contrast to other guideline provisions, which count only convictions considered within the time limitations set forth in the criminal history provisions. See e.g. U.S.S.G. § 2K2.1 (a)(1)-(4) & comment. (n.15) (felon in possession of firearm). The guideline already provides that a defendant is subject to enhancement regardless of whether the conviction was considered to be an aggravated felony at the time of conviction or deportation. U.S.S.G. § 2L1.2, comment. (n. 2). Thus, a defendant may have a conviction that is so remote, that it is not included in criminal history, but it will still result in a dramatic enhancement in the offense level. The guideline should be amended to limit consideration of prior convictions to convictions counted under U.S.S.G. § 4A1.1.

Of note, this amendment still will not assist numerous defendants convicted of illegal re-entry. This is because illegal re-entry is considered to be a continuing offense that runs from the date of the illegal re-entry, until the defendant is discovered by the INS. United States v. Reyes-Nava, 169 F.3d 278, 280 (5th Cir. 1998); United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996). A defendant could have been convicted decades ago, but returned shortly thereafter to work and live quietly with his family in the United States. At the time of his removal, his offense was in all likelihood not considered an aggravated felony. Yet, if he is discovered in the United States after 1996, he will be subject to the enhancements for defendants convicted of an aggravated felony.

To address defendants whose prior felony convictions are remote, regardless of when they returned to the United States, the Commission should encourage a downward departure. As a less desirable alternative, the Commission could limit the departure to defendants who have been otherwise crime free (until the date of arrest, not re-entry).

I. If the Court Cannot Impose a Prison Sentence, the Offense Should Not Be a Felony under U.S.S.G. § 2L1.2.

In United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002), the defendant had been previously convicted in Arizona, where a sentence of probation was mandatory for first and second-time drug possession offenses. The Ninth Circuit held that where the maximum penalty authorized by state law is probation, the offense cannot be considered an "aggravated felony." Id. at 903-05. The court noted that under the immigration statute, the term of imprisonment, rather than the terminology, is controlling. 281 F.3d at 903, 904 & n.3. Under 8 U.S.C. § 1101(43), a drug trafficking offense, defined as a "felony" punishable under the Controlled Substances Act, is an aggravated felony. United States v. Garcia-Olmedo, 112 F.3d 399,4004 (9th Cir. 1997). A "felony drug offense," however, is "an offense punishable by imprisonment for more than one year... 21 U.S.C. § 802(44). Further, as the Ninth Circuit recognized, an offense punishable only by probation, is not a "felony" under Guideline 2L1.2. The Commission has limited the term "felony" to "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." U.S.S.G.

§ 2L1.2, comment. (n. 1(B)(iv)). Robles-Rodriguez, 281 F.3d at 905.

Both the Fifth and the Ninth Circuits have limited Robles-Rodriguez to the idiosyncracies of Arizona law. Both courts have held that a prior conviction must be considered a felony if the defendant can be sent to prison for more than one year upon revocation of probation. Caicedo-Cuero, 312 F.3d at 702-705; United States v. Arellano-Torres, 303 F.3d 1173, 1180 (9th Cir. 2002).

Although this logic is superficially appealing, on closer analysis it is untenable. *Potential* imprisonment beyond 365 days is irrelevant to whether an offense is "punishable" by more than a year in the first instance. If potential punishment upon revocation of mandatory probation defines an offense as a "felony," then countless misdemeanors would be considered to be "felonies." For instance, Class A federal misdemeanors are punishable by up to 365 days in jail. 18 U.S.C. §§ 3559(a)(6) & 3581(b)(6). Class A misdemeanors are additionally punishable by up to one year of supervised release. 18 U.S.C. § 3583(b)(3). Upon revocation of such supervised release, a defendant can be sentenced to an additional year of prison. 18 U.S.C. § 3583(e)(3).

Therefore, *potentially* a Class A federal misdemeanor could be punished in excess of one year, yet clearly courts treat Class A misdemeanors as non-felonies under federal law. See, e.g., United States v. Smith, 20 Fed. Appx. 258, 269 (6th Cir. 2001) (finding evidence to be insufficient to support the defendant's conviction under 18 U.S.C. § 924(c)(1) & (2) where the defendant's predicate drug offense was merely a Class A misdemeanor of simple possession of a controlled substance); United States v. Fountain, 993 F.2d 1136, 1137 n.1, 1139 (4th Cir. 1993) (same); see also United States v. White, 969 F.2d 681 (8th Cir. 1992) (holding that, if the evidence of a defendant's intent to distribute is insufficient, then the defendant "would be resentenced for the lesser included possession offense [which is a Class A misdemeanor] . . . and his § 924(c)(1) conviction would be reversed because a simple possession offense is not a predicate 'drug trafficking crime'").

SECTION 5G1.3 – Imposition of Sentences in Cases Involving Other Terms of Imprisonment

A. The Commission Should Retain the Limited Discretion Now Available Under Application Note 6 to the Commentary

The Commission proposes to make several changes to this guideline to address circuit conflicts. The simplest proposal to resolve is the one that proposes retaining the current Application Note 6 of the Commentary. This proposal offers a choice between requiring consecutive sentences where the defendant was on probation, parole or supervised release when he committed the instant offense versus retaining language that provides that such sentences "should" be consecutive but allowing district courts some discretion to do otherwise. Defenders believe that this is an area where district judges should be granted the limited discretion authorized because of the broad range of behavior that may constitute a violation and because requiring the sentence for the instant offense in all instances to run consecutively to the violation may not always be workable and may interfere with the sentence the district court is trying to fashion in light of the prison resources, facilities and

the characteristics of the offense and the offender.

B. Sentences Involving §5G1.3(b) Where a Term of Imprisonment Resulted from Another Offense

Defenders recommend adoption of Option Two A that clarifies the application of §5G1.3(b) by explaining that the sentencing court is authorized to adjust the sentence for any period of imprisonment already served in any case where a term of imprisonment "resulted from another offense that is covered by the applicable Chapter Two guideline or an applicable Chapter Three adjustment for the instant offense of conviction." The courts have split as to whether the other offense had to be "fully" taken into account in the sense that the instant offense and the separate offense resulted in a sentence as if both had been prosecuted in a single proceeding.

The rule proposed in Option Two is more workable and less complicated in an area where application of the guideline has caused some confusion. Option Two clarifies that §5G1.3(b) applies in cases where the conduct of the prior offense is (1) incorporated in the base offense level for the instant offense; (2) covered by a specific offense characteristic in the guideline for the instant offense; or (3) covered by a Chapter Three adjustment in the instant offense. In addition to being easier to understand and apply, this option also is a more fair way of dealing with conduct that has already been the subject of another prosecution and sentence. It much more closely comports with the fundamental notion that persons should not be punished doubly for the same conduct.

Defenders also support the new §5G1.3(b)(2) that authorizes district courts to adjust the instant sentence for any period of imprisonment already served on a sentence that meets the criteria for §5G1.3(b) proposed in Option Two.

The adjustment should be mandatory because it is fundamentally more fair to adjust the current sentence in mitigation of imposing two separate sentences based on the same conduct. We believe that at a minimum the Commission ought to require that the sentencing court "should" adjust the current sentence for any period of imprisonment already served.

MISCELLANEOUS AMENDMENTS

C. Application Instructions – Section 1B1.1, comment. (n. 4):

The Commission proposes to include new language in U.S.S.G. §1B1.1, comment. (n.4) to cover instances where multiple adjustments are triggered by the same conduct. In such cases, the proposal would establish a default rule that makes multiple adjustments ordinarily apply cumulatively. Defenders recommend that the Commission make the default rule that such adjustments ordinarily should apply in the alternative, applying only the adjustment that best describes the conduct. In the ordinary case, the same conduct should only trigger a single enhancement. Where appropriate, the Commission may specify that multiple enhancements apply

even where they arise out of the same conduct.

Our proposal would allow courts to determine, on a case by case basis, that the particular injury or harm captured by the several adjustments should trigger multiple enhancements for example, where certain injuries or harms resulting from the single act are so different as to require multiple enhancements.

B. SEXUAL CONDUCT AMENDMENTS

The proposed changes deal with the definitional sections of the guidelines relating to Criminal Sexual Abuse, Repeat and Dangerous Sex Offenders and Child Pornography. None of the changes are substantive. They clean up or tweak definitional sections. These changes appear in part to be an effort to rid the guidelines of statutory references to language found unconstitutional in Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) regarding "virtual" child pornography. Defenders support the changes to bring the guidelines definitions into compliance with statutory and constitutional limits.

C. DRUG GUIDELINES

The Commission proposes three changes to the drug guidelines.

1. Amendments to U.S.S.G. § 2D1.11 (Unlawful Trafficking of Listed Chemicals).

a. Offense-Level Cap for Less Culpable Defendants

Defenders support extending to offenses involving precursor chemicals the provision that caps the base offense level at 30 for defendants who receive a mitigating role adjustment. Offenses involving listed precursor chemicals are sentenced under U.S.S.G. § 2D1.11, a different guideline than offenses involving the actual controlled substance, which are sentenced under U.S.S.G. § 2D1.1. Last year, when the mitigating role cap was promulgated the Commission made it applicable only to § 2D1.1 offenses. Under the guideline for listed chemicals, the maximum base offense level for most listed chemicals is offense level 30. U.S.S.G. § 2D1.11(e). Certain precursor chemicals, however, are subject to base offense levels as high as offense level 38, which is the same as for controlled substances calculated under U.S.S.G. § 2D1.1. See U.S.S.G. § 2D1.11(d). It would be irrational to cap controlled substance offenses at 30 for the less culpable defendants while sentencing similarly less culpable defendants who were involved with listed chemicals at a higher offense level. Indeed, those prosecuted for trafficking in listed chemicals, whose offenses are more inchoate, may generally be less deserving of punishment than defendants involved with controlled substances.

2. Reduction for Safety Valve Defendants

For the same reason, Defenders support the proposal to extend the two-level reduction currently available for offenses sentenced under U.S.S.G. § 2D1.1 to defendants who meet the criteria for the Safety Valve to defendants prosecuted for offenses involving precursor chemicals under U.S.S.G. § 2D1.11. Defendants involved with precursor chemicals who meet the Safety Valve criteria are as deserving of the reduction as those involved with the controlled substance.

3. Red Phosphorus

In response to recent action by the Attorney General scheduling Red Phosphorus as a prohibited "List 1" chemical in Schedule 1, the Commission proposes to add Red Phosphorus to the listed chemicals in U.S.S.G. § 2D1.11. The proposed quantity table for Red Phosphorus ranges from a base offense level 12 for a quantity of less than 3 grams up to an offense level 30 for quantities of 714 grams or more of Red Phosphorus. The Commission has not published any data to explain how these quantities were determined.

The problem with establishing a quantity of Red Phosphorus for sentencing purposes is that there is no accepted measure in the scientific literature that we are aware of for extrapolating the amount of a controlled substance that will be manufactured from a quantity of red phosphorus. It is not a precursor chemical but rather a catalyst for making methamphetamine by one particular method. "[C]landestine methamphetamine laboratories . . . utilize phosphorus chemicals as catalysts to drive the chemical conversion of ephedrine or pseudoephedrine to methamphetamine." 65 Fed. Reg.57577, 57578 (Notice of Proposed Rule Making proposing the addition of red phosphorus as a List I chemical). Hence, the amount of Red Phosphorus possessed by a person has only a very rough or crude correlation to the amount of methamphetamine that will or may be manufactured.

It is somewhat like yeast to the manufacture of wine or eggs to the baking of a cake. To make a cake that calls for two eggs, a person may purchase a dozen eggs. The dozen eggs reflects nothing more than the fact that eggs are sold by the dozen. It does not reflect that the person intends to bake six cakes.

We are concerned that the Commission runs the risk of establishing a quantity ratio for Red Phosphorus that has little relation to the culpability of those who may posses the chemical, many of whom are likely to be less culpable couriers or other low-level participants. There is some indication that the quantities of Red Phosphorus purchased or possessed are more reflective of the unit of sale of Red Phosphorus than the scope of the clandestine methamphetamine labs. Red Phosphorus has legitimate industrial uses in the manufacture of "pyrotechnics, safety matches, . . . fertilizers, incendiary shells, smoke bombs, tracer bullets and pesticides." 65 Fed. Reg.57577, 578 (Notice of Proposed Rule Making proposing the addition of Red Phosphorus as a List I chemical). It is sold at least for industrial use, in large volume quantities. For example, various distributors of Red

Phosphorus on the Internet advertise the product for sale in large quantities including a Belgium company, Brenntag N.V. that offers to sell 60-kilogram drums of Red Phosphorus. See http://www.brenntag.be/prd/product/phosphorusphosphoriquefosforischen.shtml.

Defenders recommend that the Commission not establish the proposed quantity ranges for Red Phosphorus unless empirical evidence that reflects culpability supports them at those levels.

INVOLUNTARY MANSLAUGHTER

B. Proportionate Sentencing

Defenders recommend that in raising the base offense level for involuntary manslaughter to correspond to the increased statutory maximum penalty for the offense, now six years' imprisonment, the Commission retain the penalty at a level proportionally lower than the guideline penalties for aggravated assault. The maximum penalty for aggravated assault offenses is generally ten years' imprisonment or more. See, e.g. § 18 U.S.C. § 113(a)(2) (assault with intent to commit a felony);18 U.S.C. § 113(a)(3) (assault with a dangerous weapon or with intent to do bodily harm). For example, assault with intent to torture or main, one of the offenses sentenced under the aggravated assault guideline, carries a statutory maximum twenty years' imprisonment. See 18 U.S.C. § 114.

The *mens rea* for involuntary manslaughter is an absence of malice coupled with either negligent or reckless conduct. See 18 U.S.C. § 1112. This contrasts with the aggravated assault offenses which are based on a general or specific intent to cause harm or injury, sometimes of a serious nature to another person.

The current proportionality between the involuntary manslaughter guideline and the aggravated assault guideline is entirely consistent with the different maximum penalties and offense elements established by Congress.

Because involuntary manslaughter offenses result from negligent or reckless conduct rather than malicious intent, Defenders recommend that the Commission increase the base offense levels only slightly, to offense level 12 for criminally negligent conduct and offense level 16 for reckless conduct. Rather than set a higher offense level that will overstate culpability in a number of cases, the Commission could include specific offense characteristics where the negligent or reckless conduct warrants it. For example, a 2-level increase could be applied where the defendant used a firearm, where the defendant risked injury to multiple victims, or where the vehicular homicide involved driving while intoxicated.

In considering this amendment, the Commission should also consider the disproportionate application of this guideline to cases prosecuted in Native American reservations.

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February 10, 2003

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Re: Response to request for comment on proposed permanent amendments responsive to the Sarbanes-Oxley Act

Dear Judge Murphy:

I am writing in response to the Commission's request for comment published in the Federal Register on January 17, 2003. In this letter, I will address the question of whether the base offense level and/or the loss table of U.S.S.G. § 2B1.1 should be further modified to provide across-the-board sentence increases for economic crime offenders at virtually all loss levels. In my view, no case for doing so has yet been made. In a subsequent letter, I will address the suggestion that the five years of work which produced the simplifying achievement of the 2001 Economic Crime Package should be cast aside by separating "theft" offenses and "fraud" offenses into two different guidelines.

The Sarbanes-Oxley Act and the Department of Justice

The Sarbanes-Oxley Act (the "Act") was passed in the summer of 2002 in response to a spate of corporate scandals involving mismanagement, questionable accounting practices, and a variety of allegedly criminal behavior by senior officers of some of America's largest corporations. In January 2003, the Commission passed a set of emergency amendments in response to directives in the Act. Prior to the passage of the January 2003 amendments, the Department of Justice argued that Sarbanes-Oxley contained an express or implied directive that sentences should be increased for virtually all economic crimes, regardless of loss amount or other indicia of seriousness. The Commission reviewed the language and legislative history of the Act and wisely rejected the view that it mandated across-the-board sentence increases. Instead, the Commission enacted a number of amendments targeting sentence increases at those serious corporate offenders whose misdeeds were the focus of the language and legislative history of the Act.

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The Department of Justice has nonetheless persisted in its campaign to secure sentence increases for all classes of economic crime. Its Commission representative has proposed modifications to the loss table of § 2B1.1, and I am given to understand that the Department is drafting legislation for congressional consideration that would mandate sentence increases.

Should legislation be enacted, the Commission would, of course, be obliged to comply with its dictates. In the absence of such legislation, however, the Commission's charge is to make new law only when there is a sound, compelling case for doing so. Particularly where the proposed course of action is a significant increase in the length of prison sentences to be served by literally thousands of defendants, the burden of proving the advisability of acting is very high.

Thus far, the Justice Department's argument in favor of raising economic crime sentences across the board has rested entirely on the contention that the Commission was *required* to raise all sentences by the Sarbanes-Oxley Act. Entirely absent has been any effort to explain why the Commission *should* enact a general sentence increase. To date, the Department has failed to support its proposals with arguments grounded in experience, statistical evidence, penological theory, reason, or common sense.

The Justice Department's approach has the rhetorical advantage of making a response difficult. One cannot rationally analyze an argument that has not been made. However, the Department's abstention from substantive argument leaves even a potentially sympathetic observer like myself -- a former federal and state white collar prosecutor with no affinity for thieves and swindlers -- at something of a loss. Therefore, in composing the following comments, I have been compelled to consider the arguments one can only presume the Department would make if it were to engage in a debate on the merits.

Response to a Crime Wave?

It occurred to me that the Department might be proposing sentence increases in response to a rising tide of economic crime. Therefore, I examined available statistics on the prevalence of economic offenses over the past several decades. I first considered the broad category of property crimes. Figures published by the Justice Department's Bureau of Justice Statistics show that the rate of property crime has been dropping steadily since 1974. As the BJS chart on the next page (Figure 1) illustrates, the victimization rate for property crimes fell from 551 incidents per 1,000 households in 1974 to 167 per 1,000 households in 2001, a decline of

69%.[1] This long-term trend continued throughout the 1990s. Figure 2, excerpted from a 2001 BJS publication, shows the percentage of households experiencing a property crime of property theft, motor vehicle theft, or household burglary declined from about 21% in 1994 to about 14% in 2000.[2]

Figure 1: Property Crime Rate, 1973-2001

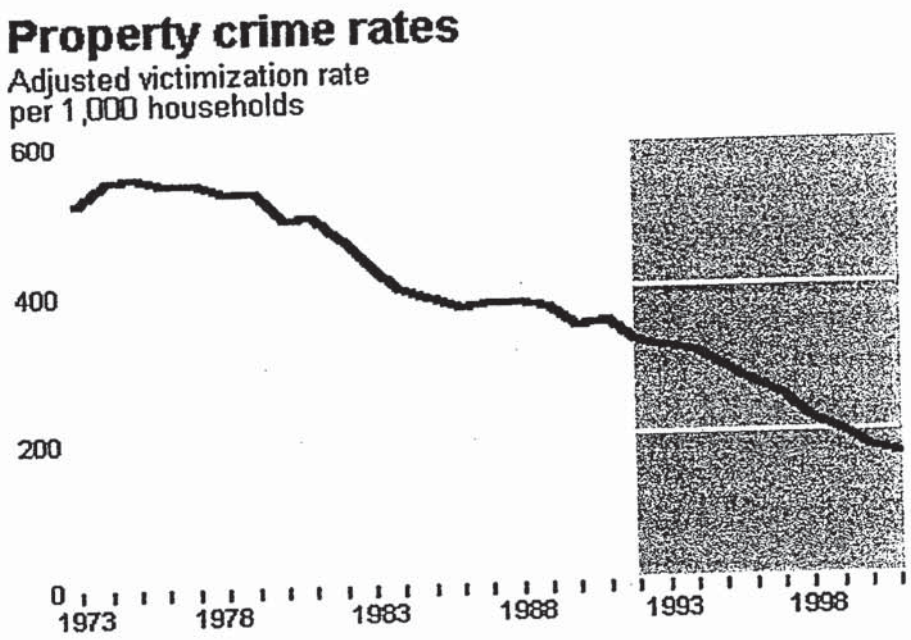
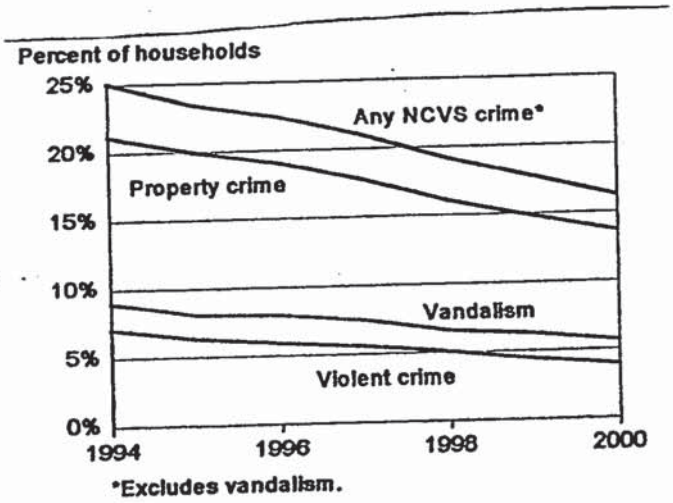


Figure 2: Property Crime Rates, 1994-2000

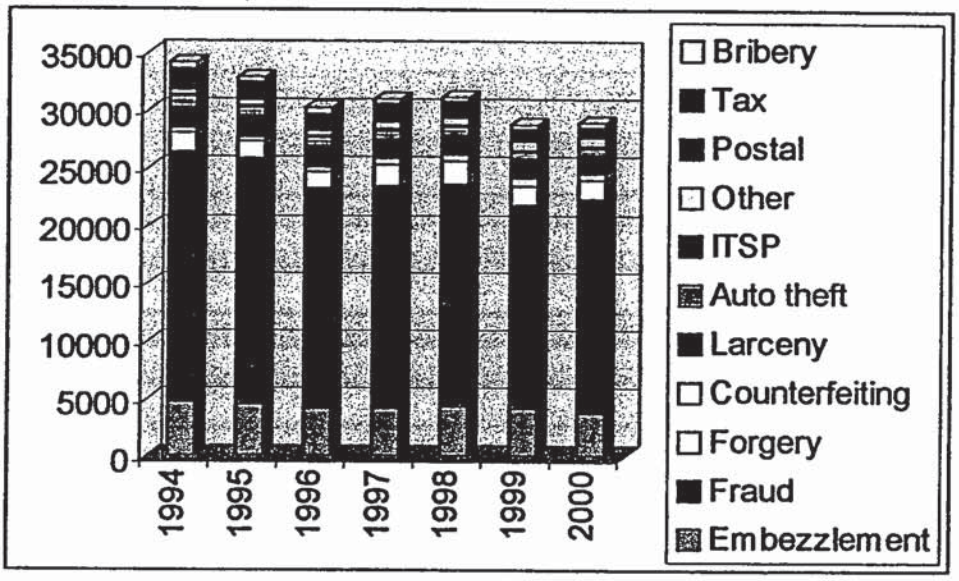


[1] Figure 1 and statistics in the text are from BJS website, http://www.ojp.usdoj.gov/bjs/glance/house2.htm.
[2] Figure 2 is excerpted from Patsy A. Klaus, *BJS Bulletin: Crime and the Nation's Households, 2000*, NCJ 194107 (Sept. 2002).

Of course, the national statistics reported in Figures 1 and 2 are primarily for offenses prosecuted at the local level. Therefore, in order to determine if the national downward trend in property crime is mirrored in economic crimes prosecuted in federal court, I examined Justice Department statistics on referrals by federal investigative agencies to U.S. Attorney's Offices. As Figure 3 below illustrates, in recent years referrals to U.S. Attorney's Offices for economic offenses have declined steadily, dropping by 5,166 or 15% between 1994 and 2000.

This decline is rendered even more striking when one considers that between 1994 and 2000, the U.S. population grew by 20 million people.[3] Thus, while the absolute number of economic crime referrals to U.S. Attorney's Offices fell by 15% during 1994-2000, in the same period the rate of economic crime referrals to federal agencies per 1,000 population fell by 21%.

Figure 3: Referrals to U.S. Attorney's Offices, 1994-2000[4]

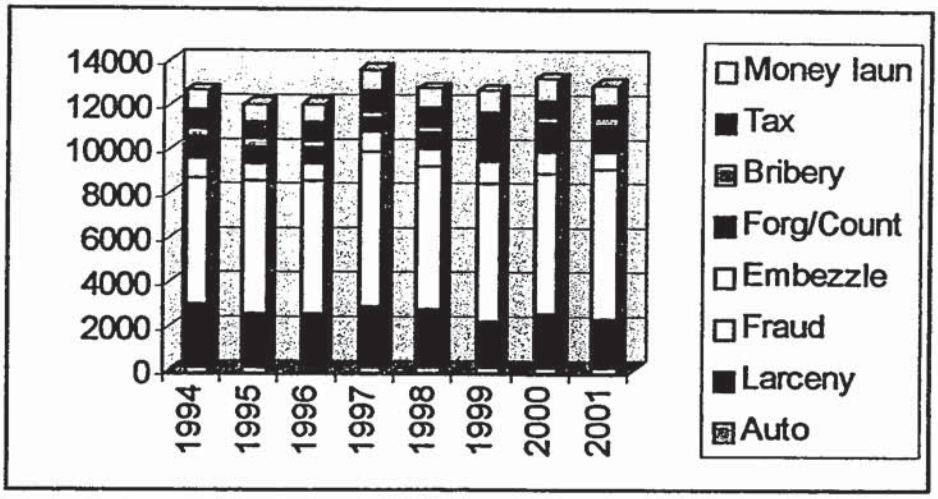


[3] U.S. Census Bureau, *Statistical Abstract of the United States 2001*, at 8, Tbls. 1 and 2 (2002) (showing that the population of the United States grew from approximately 260,000,000 in 1994 to 281, 421,906 in 2000).

[4] The data in Figure 3 is drawn from the 1994-2000 editions of the BJS *Compendium of Federal Criminal Justice Statistics*, Chapt. 1, Tbl. 1.1.

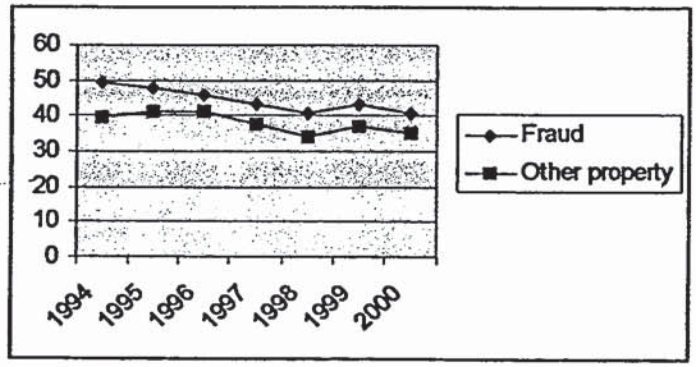
Interestingly, as shown in Figure 4 below, while federal economic crime referrals dropped from 1994-2000, the number of economic crime defendants sentenced in federal court held roughly steady between 1994 and 2001. The number of defendants sentenced for economic crimes peaked in 1997 at 13,571, but was virtually identical in 1994 (12,631) and 2001 (12,887).

Fig. 4: Defendants Sentenced Federal Court – Economic Crime, 1994-2001[5]



As one would expect, maintaining a roughly constant number of economic crime defendants from a decreasing supply of economic crime referrals has meant U.S. Attorney's Offices must decline fewer economic crime cases. Figure 5 illustrates the decreasing declination rates for fraud and other property offenses between 1994 and 2000.

Figure 5: Declination Rates: Fraud & Other Property Crime, 1994-2000 (%)[6]



[5] Data in Figure 4 from U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1994-2001). Crime categories in Figs. 3 and 4 are different because BJS and the Sentencing Commission code data differently. Nonetheless, the offenses covered by the two graphs are roughly congruent.

[6] Data in Fig. 5 from seven volumes of BJS, Compendium of Federal Justice Statistics (1994-2000); 1998-2000 data from Table 2.2; 1994-1997 data from Table 1.2. BJS counts fraud, embezzlement, forgery and counterfeiting as "fraud," and burglary, larceny, auto theft, arson, ITSP, and miscellaneous as "other."

In sum, the available evidence suggests that, far from confronting a rising tide of economic crime, the Department of Justice has been obliged to dip ever deeper into a shrinking pool of offenders to hold roughly constant the flow of economic crime defendants through the federal courts. There are doubtless many explanations for this phenomenon. But whatever else these statistics may show, they do not make out a case for a general increase in economic crime penalties.

A Reaction to Declining Sentences?

I also wondered whether the Justice Department might be reacting to some trend in economic crime sentences actually imposed. The average sentence imposed by federal judges in a number of major crime categories declined during the 1990s. The average (mean) length of sentences imposed on drug defendants decreased from 87.6 months to 71.7 months between 1994 and 2001, while the average length of sentences for violent offenders declined from 101.6 months to 89.5 months.[7] If a similar trend existed in economic crime sentencing, the Justice Department's current position might be explainable as an effort to reverse it. However, Sentencing Commission statistics establish that during the same period drug and violent crime sentences were dropping, the average (mean) sentence of white collar defendants actually increased slightly, from 19 months in 1994 to 20.8 months in 2001. The median sentence increased still more, from 12 months in 1994 to 15 months in 2001.[8]

Moreover, the figures just cited apply only to those defendants actually sentenced to a term of imprisonment. Sentencing Commission figures also show that the percentage of economic crime defendants who receive terms of imprisonment increased markedly throughout the 1990s. Figure 6 below illustrates the upward movement in imprisonment rates for auto theft, larceny, fraud, embezzlement, forgery/counterfeiting, and tax offenders. Figures 6A, 6B, and 6C break out the numbers for the major categories of fraud, larceny, embezzlement.

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[7] U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001, at 32 Fig. E (2002); U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1998, at 32 Fig. E (1999). For an analysis of the causes of the decline in drug sentence length, *see* Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L.R. 477 (2002); Frank O. Bowman, III and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. R. 1043 (2001).

[8] U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001, at 32 Fig. E (2002); U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1998, at 32 Fig. E (1999).

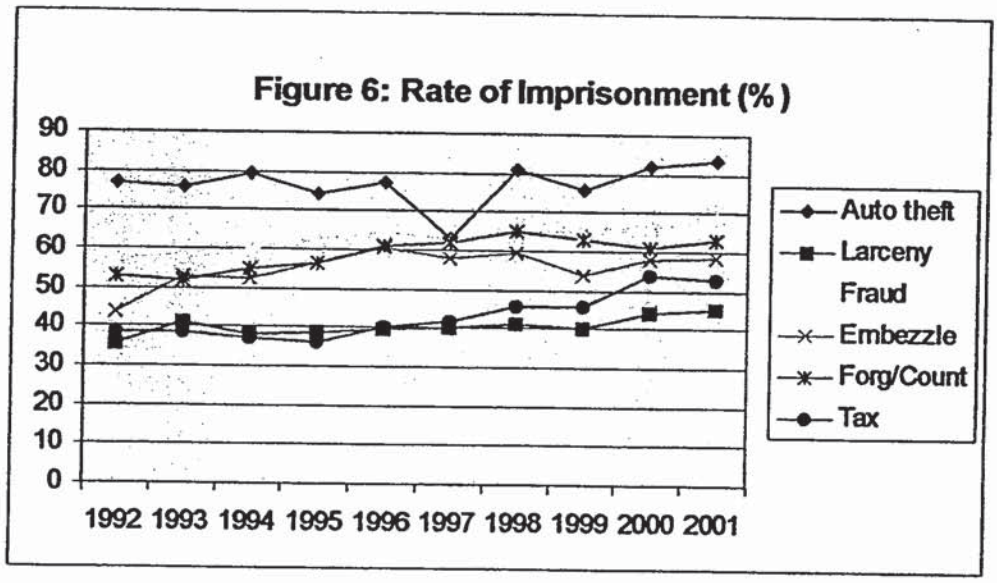


Figure 6: Rate of Imprisonment (%)
90
80
70
60
50
40
30
20
10
0
1992 1993 1994 1995 1996 1997 1998 1999 2000 2001
Auto theft
Larceny
Fraud
Embezzle
Forg/Count
Tax

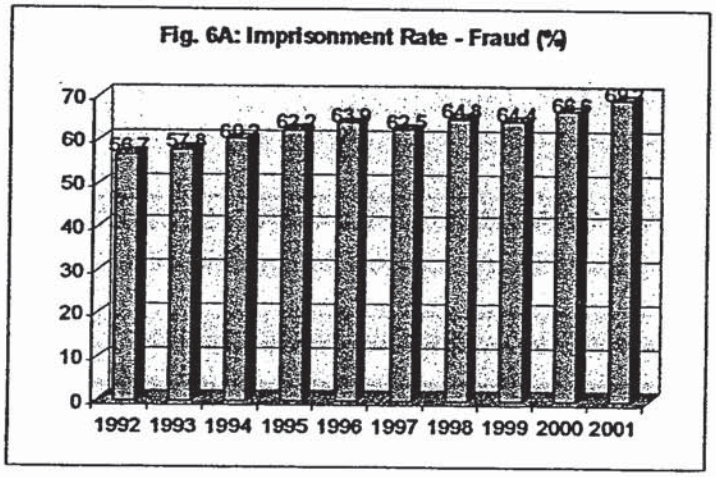


Fig. 6A: Imprisonment Rate - Fraud (%)
70
60
50
40
30
20
10
0
1992 1993 1994 1995 1996 1997 1998 1999 2000 2001

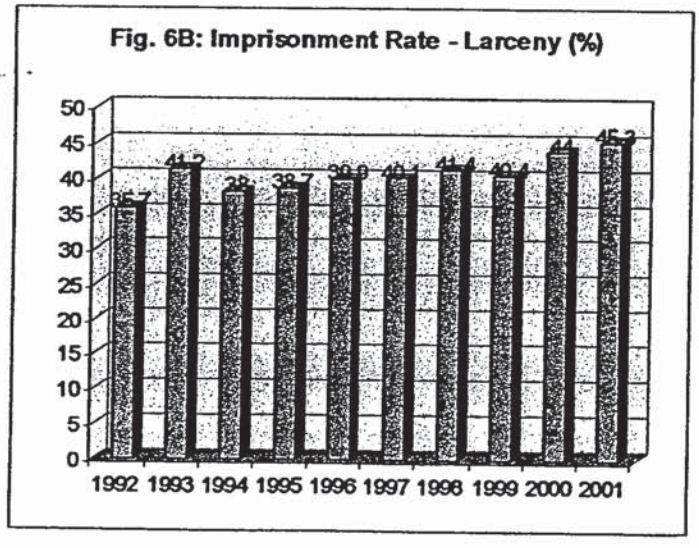
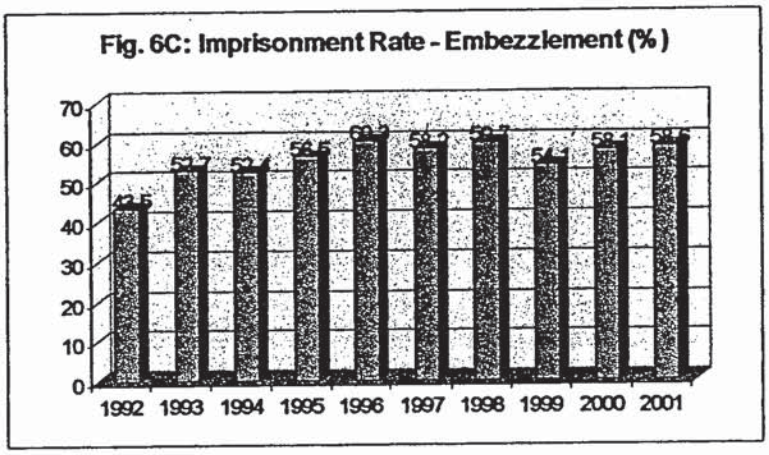


Fig. 6B: Imprisonment Rate - Larceny (%)
50
45
40
35
30
25
20
15
10
5
0
1992 1993 1994 1995 1996 1997 1998 1999 2000 2001



In short, during the 1990s, an ever-increasing percentage of economic offenders were sentenced to prison and those who received prison sentences received higher average sentences.

Still more importantly for present purposes, the upward trend will accelerate over the next few years as the sentence increases built into the 2001 Economic Crime Package begin to take effect. With regard to the 2001 amendments, three points should be noted. First, the 2001 amendments are only the latest in a series of sentence increases for economic crime that have been enacted at intervals since the advent of the Guidelines in 1987. Second, these amendments embody very significant sentence increases for virtually all economic crime defendants whose offenses are even moderately serious. And third, because the 2001 amendments affect only defendants whose crimes occurred after November 1, 2001, relatively few defendants have been sentenced under the new law and we have no meaningful data on its effects.

In order to illustrate the first two of these points, I have assembled an illustrative group of hypothetical defendants with varying loss amounts and offense characteristics. Figures 7A and 7B below describe these defendants and the sentences they would probably have been subject to in 1987, 1989, 1991, 1998, November 2001, and presently.

Figure 7A: Description of Representative Defendants

Def. A	Teller in federally insured bank. Steals $2,000 from bank.
Def. B	Wife of social security recipient. Continues to cash checks after death of spouse. Loss = $11,000
Def. C	Defendant is a postal worker who steals credit cards from the mail and uses them to purchase goods worth $35,000, which he then sells to support a drug habit.
Def. D	Defendant commits online auction fraud from his home computer. Causes loss of $50,000 to more than 50 victims.
Def.E	Doctor submits false billings to Medicare using complex system of double books. Loss = $125,000
Def. F	Telemarketer runs boiler room with 8 employees. Defrauds more than 250 elderly victims of $250,000.
Def. G	Computer expert constructs scheme for stealing credit card and other personal information online. Using this information, he obtains merchandise and phony car loans online totaling $450,000 from 25 individual and institutional victims.
Def. H	President of small, publicly traded bank commits bank fraud causing loss of $1.1 million and collapse of the bank. In the course of the offense, he causes false statements to be made in required SEC filings. Thirty employees lose their jobs.
Def. I	CEO of publicly traded corporation operating chain of hospitals and nursing homes, in collusion with 4 other members of his management team, defrauds Medicaid and Medicare of $10.1 million and causes false statements to made in required SEC filings.
Def. J	CEO of large conglomerate, in collusion with CFO and other members of management, engage in accounting fraud and stock manipulation causing bankruptcy of company and losses to shareholders and employee pension fund of $110 million.

Figure 7B: Applicable Guideline Range of Representative Defendants[9]

	1987	1989	1991	1998	Nov. 2001	Jan. 2003
Def. A	0-6 mos.[i]	0-6 mos.[ii]	0-6 mos.	0-6 mos.	0-6 mos.	0-6 mos.
Def. B	2-8 mos.[iii]	4-10 mos.[iv]	4-10 mos.	4-10 mos.		6-12 mos.
Def. C	12-18 mos.[vi]	15-21 mos.[vii]	15-21 mos.	15-21 mos.		27-33 mos.
Def. D	10-16 mos.[ix]	12-18 mos.[x]	12-18 mos.	12-18 mos.		27-33 mos.
Def. E	21-27 mos.[xii]	24-30 mos.[xiii]	24-30 mos.	24-30 mos.		33-41 mos.
Def. F	37-46 mos.[xv]	41-51 mos.[xvi]	41-51 mos.	41-51 mos.		
Def. G	24-30 mos.[xx]	30-37 mos.[xxi]	30-37 mos.	30-37 mos.		78-97 mos.
Def. H	27-33 mos.[xxiii]	37-46 mos.[xxiv]	57-71 mos.	57-71 mos.		
Def. I	57-71 mos.[xxviii]	87-108 mos.[xxix]	87-108 mos.	87-108 mos.		
Def. J	57-71 mos.[xxxii]	121-151 mos.[xxxiii]	121-151 mos.	121-151 mos.		

[9] Figure 7B assumes first-time offenders (Criminal History Category I) convicted after trial. Sentences for defendants pleading guilty would be slightly lower. Sentences for defendants with criminal records would be slightly (in some cases considerably) higher. Shaded boxes indicate increase due to guideline change.

- no acceptance

Figures 7A and 7B illustrate visually several points of central importance:

First, Guideline sentences for economic crime have been raised repeatedly since 1987. For some classes of offenders, the Commission has raised sentences four times since 1987, and three times within the last five years.

Second, the increases are very substantial, in both absolute and percentage terms. The Guideline sentence of all but one defendant in Figure 7B whose loss level exceeds $10,000 has at least doubled since 1987 (and that defendant [E] would now receive a sentence 60% higher than in 1987). For the five most serious offenders, sentences rose between 160% and 330%. In absolute terms, Guideline sentences for the same conduct rose by as little as four months (Defendant B) to as much as *fourteen additional years* (Defendant I). And in the case of Defendant J, whose circumstances mirror those of the leading figures in last summer's corporate scandals, the minimum guideline sentence has skyrocketed from less than five years in 1987 to mandatory life imprisonment.

Third, the sentence increases shown in Figure 7B result in large measure from amendments adding or modifying Specific Offense Characteristics, as well as from the amendments to the loss table in 1989 and 2001. In 1987, the theft and fraud guidelines combined contained only nine sentence-enhancing Specific Offense Characteristics. By 2001, there were twenty-three. The January 2003 amendments added at least three more. Application of any one of these enhancements produces at least a 25% increase in a defendant's guideline sentence.[10] Where more than one enhancement applies, the cumulative effect begins to rival that of the loss amount. This is a critical point because the Justice Department would have us focus purely on the loss table, as if no other factors affected a defendant's sentence. Particularly in serious economic crime cases of the sorts which receive wide public attention -- telemarketing fraud, complex schemes involving offshore concealment, fraud against the elderly, identity theft, bank fraud, bankruptcy fraud, and now high-level corporate fraud -- the Commission has added a plethora of sentence enhancements.

Fourth, Figure 7B does not capture an important component of the 2001 Economic Crime Package that will produce additional sentence increases beyond those immediately obvious from reading the Loss Table or Specific Offense Characteristics. The revised definition of loss, which focuses on pecuniary harms reasonably foreseeable to a defendant at the time of the offense will, in a good

[10] This is so because all SOCs carry at least a 2-offense level increase, and , beginning at Offense Level 8, every two-level upward adjustment on the Sentencing Table carries at least a 25% increase in the minimum guideline sentence.

many cases, produce a higher loss figure and thus a higher sentence than the old definition.[11]

Fifth, it bears repeating that the impact of the 2001 sentence increases has not yet been felt because these increases are applicable only to offenses completed on or after November 1, 2001.

Too low as compared to the states?

It occurred to me that perhaps the Department's argument is based on a comparison to sentences under state law, so I examined national statistics on economic crime sentences. Figure 8 compares state and federal economic crime sentences for 1998 using Justice Department figures for the most recent year for which BJS has published data. Precise state-federal comparisons are difficult given differences in offense definitions, sentencing practices, categorization of offense characteristics, the availability in states of parole, etc. Nonetheless, it appears that, on average, sentences served by federal economic offenders are markedly more severe than those served by state economic crime defendants. And the 1998 figures I have cited here do not account for the federal sentence increases in November 1998, 2001, and 2003. Therefore, the Justice Department's position cannot be explained as an effort to achieve parity with state sentences.

Fig. 8: Comparison of State & Federal Economic Crime Sentences (1998) [12]

	Average (Mean) Sentence Imposed		Average (Mean) Actual Sentence Served[13]	
	State	Federal	State	Federal
Larceny	25 mos.	32 mos.	12 mos.	29 mos.
Fraud	27 mos.	22 mos.	13 mos.	20 mos.
Burglary	39 mos.	27 mos.	18 mos.	25 mos.

Too low as compared to other federal crimes?

Perhaps the Justice Department is of the view that economic crime sentences are too low in comparison with sentences for other types of federal crime. A superficially plausible case for this view might be made by comparing the

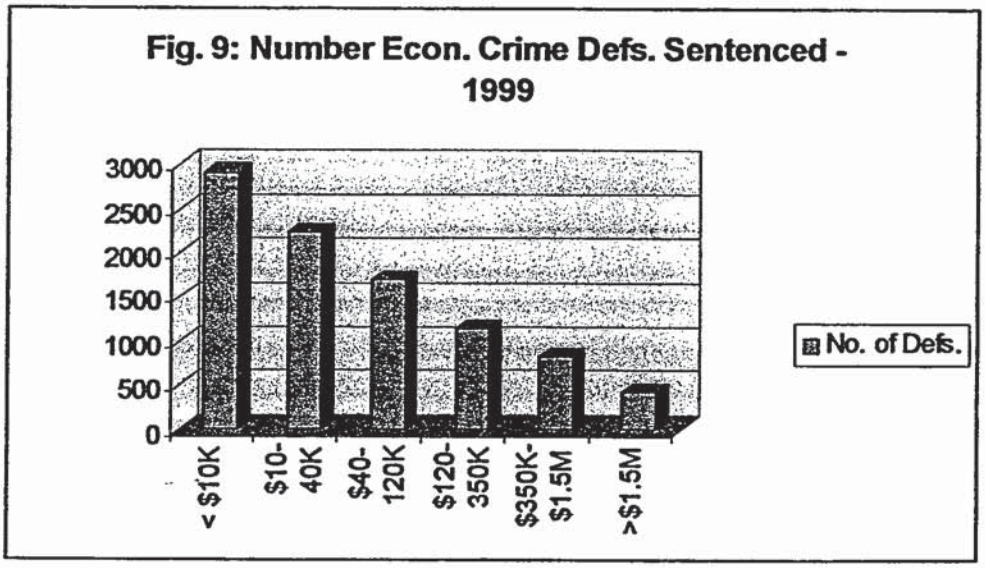
[11] The field test of the revised loss definition found that the new definition produced a higher loss amount in about 15% of randomly selected cases. *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission*, available at http://www.ussc.gov/research.

[12] Matthew R. Durose, David J. Levin, and Patrick A. Langan, *BJS Bulletin: Felony Sentences in State Courts, 1998*, NCJ 190103, at 3 (Oct. 2001).

[13] Although the average nominal sentences *imposed* by state court judges for economic offenses are comparable to, or sometimes higher than, average imposed federal sentences, in 1998 state court defendants served only 47% of their imposed sentences, as compared to 91% for federal defendants. *Id.* Therefore, the average actual sentences served by federal economic crime defendants are higher than those served by state defendants.

2001 average white-collar sentence of just over 20 months with the average drug sentence (71.7 mos.) or violent crime sentence (89.5 mos.).[14] However, any such comparison of averages would be inherently flawed. First, no serious observer would argue that crimes against property are as serious as violent crimes against persons. Second, it would be surprising, to say the least, if this Administration were to contend that garden variety thefts and frauds are as serious as drug trafficking, an activity the Administration has publicly linked to terrorism and cited as a threat to national security.

In any event, focusing on the relatively low average prison sentence for the entire class of white collar offenders is profoundly misleading because the vast majority of federal economic crime defendants are low-level offenders whose crimes caused only modest losses. For example, in 1999, **55% of all federal defendants** sentenced for economic crime offenses caused **losses less than $40,000**. More than 30% were responsible for losses less than $10,000. *And fully 15% of all federal economic defendants, or one out of seven, took less than $2,000.*[15] In short, the average federal economic crime sentence is relatively low, not because the sentencing structure is unduly lenient, but because U.S. Attorney's Offices are prosecuting thousands of small cases in which little or no prison time would be called for under any rational sentencing scheme.



If, rather than focusing on the average sentence, one looks instead at the sentences now required for even moderately serious white collar offenders -- the

[14] U.S. Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 32, Fig. E (2002).

[15] *See, Proceedings of the Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12-13, 2000,* Fig. Semisch-2: Number of Offenders in Each Loss Amount Category (2001). The data in Figure 9 are drawn from the same source.

defendants who were the real concern of Congress in enacting Sarbanes-Oxley -- the comparative picture is very different. For example, the current sentencing range of Defendant C in Figure 7B above (the postal worker who committed a $35,000 credit card fraud) is 27-33 months; the low end of this range is eight months longer than the average bribery sentence in 2001 and three months longer than the average sentence for burglary.[16] Defendant E (the doctor who overbilled Medicare for $125,000) has a sentencing range of 33-41 months; the low end of this range is nine months longer than the average sentence imposed on burglars in 2001 and almost exactly equivalent to the 34.3 month average sentence for manslaughter.[17] The range for Defendant F (the telemarketer who bilked elderly victims of $250,000) is 97-121 months, or 8-10 years. This is eight months longer than the average sentence imposed for violent crimes in 2001, and 25 months longer than the average drug sentence.[18] Defendant H, the crooked small bank president who stole $1.1 million, now faces 188-235 months, or roughly 15-20 years. This sentence is higher than the 2001 average sentence for kidnapping, robbery, sexual abuse, assault, arson, drug trafficking, and racketeering.[19] And a sentence in the midpoint of the 188-235 month range would equal the average sentence for murder.[20]

Still not high enough?

In sum, federal economic crime penalties have been repeatedly increased in the last fifteen years. The rate of imprisonment of economic crime defendants, the severity of sentences called for by the Guidelines, and the length of sentences of imprisonment actually imposed are now at all-time highs. Federal economic crime sentences are, on average, higher than economic crime sentences in the states. The misleadingly low average federal white-collar crime sentence is attributable primarily to the predominance of low-level, low-loss cases in the federal system. Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence. Nonetheless, the Justice Department insists that economic crime penalties are not high enough.

Now it may be that the Justice Department is right. I, for one, stand ready to be persuaded. But the Department bears the burden of proving its case on the merits. So far, it has abstained from arguments on the merits, apparently being of the view that it could harness the prevailing political winds to achieve victory without seriously engaging the concerns of those who have reservations about the government's proposals. Before the Commission or Congress gives serious

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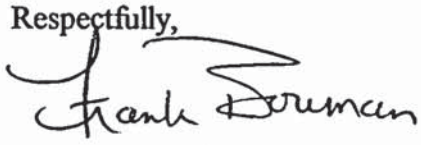
[16] U.S. Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 30, tbl. 14 (2002).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

consideration to the Department's position, the Department should be required to answer at least six questions:

- First, why are economic crime penalties at their current levels insufficient?
- Second, what legitimate sentencing purpose(s) would be advanced by an across-the-board increase in economic crime sentences?
- Third, why would higher sentences advance the identified purpose(s) more than sentences at their current levels?
- Fourth, what evidence is there in support of the position that higher sentences would advance the identified purpose(s)?
- Fifth, in a period of declining budgets and ballooning budget deficits, how much would DOJ proposals cost?
- Sixth, are the benefits of raising sentences worth the cost?

Once answers to these questions are proffered, a serious and dispassionate debate about the desirability of the proposed sentence increases will be possible.

Respectfully,



Frank O. Bowman, III
Professor of Law
Indiana Univ. School of Law – Indianapolis

Cc: All Sentencing Commissioners
Senate Judiciary Committee
House Judiciary Committee

ENDNOTES for FIGURE 7B

[i] Offense Level 6. Assumes no "More than minimal planning" (MMP)
[ii] Offense Level 6. Assumes no MMP.
[iii] Offense Level 8. Assumes no MMP.
[iv] Offense Level 9. Assumes no MMP
[v] Offense Level 10. Assumes no MMP.
[vi] Offense Level 13. Assumes fraud conviction, MMP, 2-level abuse of trust.
[vii] Offense Level 14. Assumes fraud conviction, MMP, 2-level abuse of trust.
[viii] Offense Level 18. Assumes fraud conviction, 4-level undelivered U.S. Mail (§2B1.1 app. note 3(B)).
[ix] Offense Level 12. Assumes MMP.
[x] Offense Level 13. Assumes MMP.
[xi] Offense Level 18. Assumes 4-level > 50 victims, and 2-level sophisticated means.
[xii] Offense Level 16. Assumes MMP, 2-level abuse of trust.
[xiii] Offense Level 17. Assumes MMP, 2-level abuse of trust.
[xiv] Offense Level 20. Assumes 2-level sophisticated means, 2-level abuse of trust.
[xv] Offense Level 21. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
[xvi] Offense Level 22. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
[xvii] Offense Level 24. Assumes MMP, 4-level aggravating role, 2-level vulnerable victim, 2-level mass marketing.
[xviii] Offense Level 28. Assumes 4-level > 50 victims, 4-level aggravating role, 2-level vulnerable victim.
[xix] Offense Level 30. Assumes 6-level > 250 victims, 4-level aggravating role, 2-level vulnerable victim.
[xx] Offense Level 17. Assumes MMP, 2-level use of special skill.
[xxi] Offense Level 19. Assumes MMP, 2-level use of special skill.
[xxii] Offense Level 26. Assumes 2-level sophisticated means, 2-level access device/means of identification, 2-level > 10 victims, 2-level use of special skill.
[xxiii] Offense Level 18. Assumes MMP, two-level abuse of trust.
[xxiv] Offense Level 21. Assumes MMP, two-level abuse of trust.
[xxv] Offense Level 21. Assumes MMP, two-level abuse of trust, four-level endanger financial institution.
[xxvi] Offense Level 32. Assumes 2-level >10 victims, 2-level sophisticated means, 4-level jeopardize financial institution, 2-level abuse of trust.
[xxvii] Offense Level 36. Assumes 2-level >10 victims, 2-level sophisticated means, 4-level jeopardize financial institution, 4-level officer of publicly traded corporation, 2-level abuse of trust.
[xxviii] Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.
[xxix] Offense Level 29. Assumes MMP, four-level aggravating role, two-level abuse of trust.
[xxx] Offense Level 34. Assumes 2-level sophisticated means, 4-level aggravating role, 2-level abuse of trust.
[xxxi] Offense Level 38. Assumes 2-level sophisticated means, 4-level violation of securities law by officer of publicly traded corporation, 4-level aggravating role, 2-level abuse of trust.
[xxxii] Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.
[xxxiii] Offense Level 32. Assumes MMP, four-level aggravating role, two level abuse of trust.
[xxxiv] Offense Level 34. Assumes MMP, 2-level sophisticated means, 4-level aggravating role, 2 level abuse of trust.
[xxxv] Offense Level 48. Assumes 4-level > 50 victims, 2-level sophisticated means, 4-level jeopardize soundness of financial institution (pension fund), 4-level aggravating role, 2-level abuse of trust.
[xxxvi] Offense Level 54. Assumes 6-level > 250 victims, 2-level sophisticated means, 4-level jeopardize soundness of financial institution (pension fund), 4-level violation of securities law by officer of publicly traded corporation, 4-level aggravating role, 2-level abuse of trust.

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February 18, 2003

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Re: Proposal to divide theft and fraud cases between 2 guidelines

Dear Judge Murphy:

This is the second of my letters in response to the Commission's request for comment published in the Federal Register on January 17, 2003. In this letter, I will address the suggestion that the five years of work which produced the simplifying achievement of the 2001 Economic Crime Package should be cast aside by separating "theft" offenses and "fraud" offenses into two different guidelines with different loss tables and specific offenses characteristics. This is a bad idea. In the remainder of this letter, I'll try to explain why.

1. Different penalty levels for "theft" and "fraud" would create chaos to no purpose

It may be suggested that carving up the consolidated economic crime guideline is really no big deal since, after all, we had separate theft and fraud guidelines for fourteen years. In this view, resplitting them would mean only a return to the status quo ante. Nothing could be further from the truth.

Separate theft and fraud guidelines coexisted in the pre-2001 guidelines because they were essentially identical -- regardless of which guideline was applied, the resulting sentence was the same in virtually every case. Precisely because the theft-fraud distinction made no practical difference, there was never a need to parse highly technical (and largely illusory) distinctions between theft and fraud. By contrast, the proposal under consideration by the Commission would set different sentencing levels for the two categories, with "fraud" defendants generally receiving higher sentences than similarly situated "theft" defendants.

The first point to remember about the proposal before you is this: If the Commission adopts a scheme in which the categorization of an offense as a "theft" or a "fraud" affects sentencing outcomes, that categorization will be litigated in thousands of federal cases. A now-meaningless formal distinction will become central to countless plea negotiations, sentencing hearings, and appeals.

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Of course, guideline amendments often generate litigation. But the Commission should only create sentencing categories that require litigation if two conditions are met: (1) The categories can be readily distinguished from each other in all but the most unusual cases. (2) The categories separate defendants into groups that are genuinely different for sentencing purposes. That is, if the Guidelines separate defendants into a Group A with offense level X and a Group B with offense level X+2, we should be able to say with confidence that, all else being equal, the Group B defendants are more culpable, more dangerous, or otherwise more deserving of longer punishment than Group A.

The proposal to split "theft" and "fraud" cases between two guidelines meets neither of these conditions. As I will discuss below, the distinction between "theft" and "fraud" is largely illusory, and even where not illusory is complex and highly technical. More importantly, there is no basis in history, current state or federal practice, or common sense for imposing different sentences on defendants based on the categorization of their offense as a "theft" or a "fraud."

2. Theft and fraud cases cannot be separated into two analytically distinct categories

The proposed separation of theft and fraud cases rests on the erroneous assumption that theft and fraud cases can be separated into two mutually exclusive, or even meaningfully distinct, categories. To understand why this assumption is erroneous requires a brief foray into Anglo-American legal history, followed by a quick survey of modern American criminal law.

Very early English law criminalized only forceful takings of property, what we would call robbery.[1] However, by at least the Thirteenth Century, non-violent dispossessions were criminalized as larceny.[2] Common law larceny proscribed the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.[3] Originally, the requirement of a "trespassory taking" was construed to mean a taking unpermitted by the lawful owner or possessor of the property.

However, this definition was insufficient to cover cases in which bailees and carriers of goods pilfered from the shipping containers entrusted to them by merchants. Consequently, in 1757, the Kings' Council of the Star Chamber created the legal fiction of "breaking bulk" that allowed a larceny conviction whenever a bailee received an unopened container, but opened it to steal its contents.[4] The original common law definition of larceny also excluded any case

[1] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 545 (3d Ed. 2001).
[2] *See, e.g.*, Roger D. Groot, *Petit Larceny, Jury Lenity and Parliament*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW (2001).
[3] DRESSLER, *supra* note 1, at 546.
[4] Anon v. The Sheriff of London (The Carrier's Case), Year Book 13 Edw. IV pl. 5 (1473).

[70]

in which the defendant deceived the property owner into voluntarily parting with the property, as for example where a defendant "rents" a horse, all along intending to sell it. To fill this gap, in 1779, English judges began to hold that deceiving an owner into transferring possession of property constituted a "trespass" and thus could be charged as larceny.[5] This form of larceny became known as "larceny by trick."[6] Thus, by the 18th Century, common law larceny already embraced conduct with two of the primary indicia of what we might think of as "fraud" -- breach of trust and false representations relied upon by the victim.

To complicate matters further, English legislators filled other gaps in the law of larceny by creating in 1757 the crime of "false pretences,"[7] and in 1799 of embezzlement.[8] False pretences is the traditional property crime most commonly associated with offenses we might now call "fraud," because conviction required knowingly and designedly obtaining property of another by means of untrue representations of fact with intent to defraud.[9] By contrast, many people think of embezzlement as a sort of fraud crime when, under both ancient and modern statutes, it can be committed without the defendant making any misrepresentation whatever. The traditional definition of embezzlement is the "fraudulent conversion of personal property by a person to whom it was entrusted either by or for the owner."[10] However, the phrase "fraudulent conversion" is misleading because, in embezzlement, the word "fraudulent" means nothing more than an intent to steal.[11] Embezzlement need not even involve a direct breach of trust. Although embezzlements often involve stealing property directly entrusted to the defendant by the owner, under some statutes, embezzlement is also committed when a defendant comes lawfully into possession of property belonging to someone with whom he has no personal connection at all.[12]

Thus, as Professor Joshua Dressler has observed, "Larceny, embezzlement, and false pretences may occur as a result of fraud."[13] Conversely, as we have seen, the traditional property crimes of larceny and embezzlement can be, and often are, committed without any hint of "fraud." In consequence of these and

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[5] King v. Pear, 1 Leach 212, 168 Eng. Rep. 208 (1779).
[6] Dressler, supra note 1, at 552.
[7] 30 Geo. II, c. 24 § 1 (1757).
[8] 39 Geo. III, c. 85 (1799).
[9] ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW (3d Ed. 1982).
[10] *Id.* at 354.
[11] "The element of embezzlement designated by 'fraudulent' is the equivalent of the intent-to-steal element of larceny." *Id.* at 357. *See also*, Dressler, supra note 1, at 563 (fraudulent conversion of property means that defendant "performed some act that demonstrated his intention to deprive another of the property permanently").
[12] Wayne R. LaFave, Criminal Law (3d Ed. 2000) (noting that "the modern view is to make it embezzlement (or a form of the broader crime of theft) fraudulently to convert another's property in one's possession," but observing that "[s]ome states limit the scope of embezzlement by requiring that the property be 'entrusted' or 'delivered' to the embezzler").
[13] DRESSLER, *supra* note 1, at 564.

many other puzzlements created by the complex distinctions between the traditional property offenses, virtually every modern commentator has joined in the view expressed by Professor Perkins and Judge Boyce that, "*the distinctions between larceny, embezzlement and false pretenses serve no useful purpose in the criminal law but are useless handicaps from the standpoint of criminal justice.*"[14] The overwhelming majority of states have abandoned the traditional offenses and their distinctions in favor of consolidated property crime statutes. These statutes gather all of the traditional methods of unlawfully depriving another person of his property into a single offense, usually called "theft." I have attached several representative samples of such statutes to this letter.

I can imagine that proponents of separate theft and fraud guidelines might reply, "But we don't want to create separate guidelines for the old common law offenses. We want to separate 'theft' crimes from 'fraud' crimes." The problem, of course, is that "theft" is a modern catch-all term which has no defined meaning outside the four corners of the particular statute in which it appears. And in virtually every modern statute, the term "theft" subsumes numerous traditional offenses -- larceny by trick, false pretenses, those forms of embezzlement involving misrepresentation, forgeries, and scams of every sort -- containing elements of "fraud." Thus, in modern American law, "fraud" is merely one of the means by which "theft" is committed.

The definitional difficulties evident in common law property crimes and in the modern law of the states are compounded one-hundred-fold in federal law. Federal substantive law regarding economic crime is, frankly, a mess. When I first wrote about sentencing economic offenses in 1998, the Statutory Index of the Sentencing Guidelines listed some 250 different statutes sentenced under the then-existing theft and fraud guidelines.[15] Some of these offenses could be neatly pigeonholed into one of the common law categories.[16] However, a great many federal statutes, particularly those of more recent vintage, follow the modern trend of including within a single crime some or all of the traditionally recognized methods of parting the victim from his money. Consider, for example, a prosecutorial mainstay like 18 U.S.C. § 666, directed at one who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts" property of a program receiving federal funds. Or 18 U.S.C. § 1708, which strikes at anyone who "steals, takes, abstracts, or by fraud or deception obtains" mail matter from a post office or mail depository. Are these crimes "thefts" or "frauds"?

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[14] Boyce and Perkins, supra note 9, at 389.

[15] Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 480 (1998).

[16] For example, 18 U.S.C. § 661 is a pretty classic common law larceny statute. But even here, there remains the question of whether federal law embraces the fraud-like crime of larceny by trick.

Federal statutes directed at embezzlement or unlawful conversion present particularly knotty problems of categorization. As noted above, embezzlement can be committed without either a false representation or a breach of trust, but embezzlements sometimes involve one or both. So, even assuming that one could define distinct categories of "theft" and "fraud," into which category would embezzlement fall? The only honest answer would have to be that it depends on the circumstances of the particular case.

In the Statutory Index of the pre-2001 Guidelines, at least twenty-five statutes are listed as being properly sentenced under either the former theft guideline, §2B1.1, or the former fraud guideline, §2F1.1. Among these schizophrenic statutes are such prosecutorial standards as 18 U.S.C. § 656 (theft, embezzlement, or misapplication by bank officers and employees), 18 U.S.C. § 657 (theft, embezzlement, or misapplication by employees of lending, credit, and insurance institutions), 18 U.S.C. § 659 (obtaining goods from interstate shipment by theft, embezzlement, or fraud), 18 U.S.C. § 1033(b)(1) (insurance fraud), 18 U.S.C. § 2314 (interstate transportation of stolen property), and 18 U.S.C. § 2315 (fencing stolen property).

Given the prevalence of federal economic crimes that can be committed by both fraudulent and non-fraudulent means, the commission would have three choices:

(1) Identify those crimes that can be committed by both fraudulent and non-fraudulent means, designate them in the Statutory Index as sentenceable under *either* the "theft" or "fraud" guideline, and let the trial courts figure out the difference between "theft" and "fraud" on a case-by-case basis. Since a "fraud" will be subject to a different and higher penalty than a "theft," the distinction between "fraud" and "theft" will often be hotly contested at sentencing. And any decision placing the defendant in the more severe "fraud" category will be subject to appeal.

(2) Alternatively, to avoid litigation, the Commission could, by fiat, use the Statutory Index to place *every* economic crime statute in either the "theft" category or the "fraud" category, but never in both. But since we already know that a great many commonly used statutes don't fit neatly in either box, this solution would require courts to sentence many defendants who committed "theft-like" crimes to fraud-length sentences, and vice versa. In taking this option, the Commission would sacrifice one of its most basic mandates -- sentence similarly situated defendants similarly -- for the sake of administrative convenience. Prior to November 2000, trial judges might have

been able to mitigate the unfair effects of such an approach by finding that the guideline for the offense of conviction, say fraud, did not accurately reflect the defendant's conduct and using the theft guideline instead. However, the Commission's 2000 amendment of §1B1.2 precludes this approach by making the Statutory Index designation mandatory.[17]

(3) In order to avoid the litigation inevitable under solution #1 and the arbitrariness of solution #2, and to ensure that every defendant is sentenced under the guideline that most closely matched his conduct, the Commission would be obliged to examine every statute that can be committed by both "theft-like" and "fraud-like" methods and specify which *methods* should be sentenced under the theft guideline and which should be sentenced under the fraud guideline. Thus, the Commission would specify that a defendant who violated 18 U.S.C. §666 should be sentenced under the theft guideline if he "steals" money from a federally funded program, under the fraud guideline if he obtains money from that program "by fraud," under the fraud guideline if he embezzles money using some means characteristic of fraud, and under the theft guideline if the embezzlement lacks indicia of fraud. And so forth throughout the federal criminal code.

It goes almost without saying that none of the foregoing options are particularly attractive. The bottom line is that the proposal to separate economic crime offenses into "theft" and "fraud" guidelines cannot meet the first condition for creating separate sentencing categories -- that the categories can be readily distinguished from each other in all but the most unusual cases.

3. Separate "theft" and "fraud" guidelines are bad sentencing policy because these categories have no necessary connection to offense seriousness, defendant blameworthiness, or any other valid sentencing consideration.

The only good reason to create a sentencing rule dividing defendants into two categories is if the rule reliably distinguishes between those deserving greater and lesser punishment. Trying to separate "theft" and "fraud" defendants is not only a theoretical and practical nightmare, but would serve no valuable purpose. Modern statutes collapse the common law property crimes into consolidated theft

[17] The one exception is in a case of a plea agreement which stipulates that the defendant should properly be sentenced under a guideline calling for a higher sentence than the guideline applicable to the offense of conviction. U.S.S.G. § 1B1.2(a) (2002). But this provision takes the question of the most appropriate guideline out of the hands of the judge and places it, de facto, in the hands of the prosecution.

statutes not only because the traditional distinctions are unfathomable, but because "there is no meaningful difference between the offenses in terms of the culpability of the actors, their dangerousness, or the seriousness of the harm caused."[18] The same is true of federal crimes in the as-yet-undefined categories of "theft" and "fraud."

Modern consolidated theft statutes emerged not merely because drawing distinctions between the various traditional property offenses was so hard. Rather, consolidated theft statutes became virtually universal in the states, and are littered throughout the federal criminal code, because of a consensus that the traditional distinctions between property crimes -- distinctions based on the *method* by which a victim was parted from his money -- are irrelevant to offense seriousness. State theft statutes and federal statutes like 18 U.S.C. §666, in which larceny, embezzlement, false pretenses, and all forms of fraud are subsumed in a single offense, exist because the legislatures that passed them saw no meaningful distinction between the means by which crooks steal.

In the recent history of Anglo-American law and legal scholarship, few, if any, knowledgeable commentators have suggested that a "fraud" is intrinsically more serious than a non-fraudulent "theft" of the same value. Indeed, as an historical matter, frauds have generally been considered less serious than other kinds of property crime. Larceny by trick was a late expansion of the ancient crime of larceny. False pretenses and embezzlement were legislative creations and were enacted as misdemeanors at a time when larceny was a felony and, like all felonies of the time, a capital offense. The only serious argument I know of in modern academic literature for maintaining a distinction between larceny-like crimes and other offenses was advanced by George Fletcher twenty-five years ago.[19] But he believed that the larceny category should be maintained because it is *more serious* than the other types of property offenses developed later. In sum, there is no compelling historical or theoretical argument in favor of punishing a "fraud" more severely than "theft."[20]

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[18] DRESSLER, *supra* note 1, at 567.

[19] George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARVARD L. REV. 469 (1976).

[20] Professors Jeffrey Parker and Michael Block have argued in favor of separate theft and fraud guidelines. Parker and Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason, L.R. 1001 (2001). Considerations of space preclude a detailed analysis of their position, but several points may be worth making.

First, the general tenor of the article makes dispassionate analysis of its arguments difficult. The article is largely devoted to excoriating virtually every fundamental decision made by the Sentencing Commission since 1987, with particular derogatory attention to the process that produced the 2001 Economic Crime Package. For example, the discussion of the economic crime package opens with the declaration that, "The current issues concerning the fraud and theft guidelines provide a thorough illustration of the degenerate course of federal sentencing reform, virtually from the inception of the initial guidelines." *Id.* at 1036.

Second, although the article claims that "theft" and "fraud" should be sentenced differently, it never clearly defines those categories, either in the abstract or by listing the statutes to be placed in those

In order to give the foregoing rather dry and theoretical arguments a human face, consider several representative pairs of hypothetical defendants:

CASE ONE: Defendant A, a civilian employee of NASA, uses his official identification to gain access to a computer storeroom and walks away with $10,000 in computer parts. Defendant B, also a civilian employee of NASA, uses his access to the NASA computer system to generate a false requisition directing that $10,000 in computer parts be mailed from a military warehouse to his residence and billed to NASA. Defendant A violates 18 U.S.C. § 641 (embezzling, stealing, purloining, or converting to his own use property of a U.S. agency). Defendant B commits mail fraud, 18 U.S.C. § 1341.

CASE TWO: Defendant C, a postal carrier, takes envelopes containing $20,000 in postal money orders from his mail bag and cashes them. Defendant D, a postal clerk, tells customers who purchase money orders to be sent overseas that she must put a special address sticker on the envelope to ensure proper delivery, and then addresses the letter to herself. She obtains $20,000 in postal money

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categories. The authors suggest that the defining feature of "fraud" is the presence of some element of deception, but seem unaware of the fact that all common law property crimes, all modern consolidated theft statutes, and virtually all federal economic crime statutes can sometimes involve deception.

Second, the article seems to suggest that "fraud" should (always? sometimes?) be sentenced more severely than "theft," but it provides no explanation of *why* this should be so.

Fourth, some of the foregoing difficulties may be attributable to an evident lack of familiarity with both common law property crimes and the content of modern state and federal economic crime statutes. As but one example, the authors write: "The traditional federal criminal fraud statutes are codified versions of the common-law offenses, in which larceny and fraud were sharply distinguished. Under that system, fraud and simple 'theft' (in the sense of larceny) are not the same offense, either doctrinally or in concept. Fraud involves an element of deliberate deception that is not involved in simple theft." *Id.* at 1045. The imprecisions, errors, and omissions in this passage include: (1) The authors do not identify the "traditional federal criminal fraud statutes" which are supposedly "codified versions of the common law offenses." I am aware of no set of federal fraud statutes which does, or could, meet this description. (2) The assertion that "larceny and fraud were sharply distinguished" under the common law is incorrect. As noted above, larceny, embezzlement, and false pretenses could all be committed by fraud. *See* DRESSLER, *supra* note 13. (3) In modern federal law, the neat division imagined by Parker and Block between fraud and "simple theft (in the sense of larceny)" with no "element of deliberate deception" does not exist. There are a fair number of pure "fraud" statutes (such as 18 U.S.C. § 1341 and 1343), a very few pure larceny statutes (such as 18 U.S.C. § 661), and a bundle of statutes in which disparate theories of criminal liability are jammed into a single statute like passengers into a Tokyo subway car. (4) Neither here nor elsewhere do Parker and Block explain where the numerous federal embezzlement and conversion statutes fit in their bipolar taxonomy.

Fifth, the article offers no practical solution to the question of how to quantify the supposed difference between "theft" and "fraud" offenses. It states, "In fraud, loss more appropriately is measured by the nature and degree of the deception involved, whereas loss in simple theft can be measured by the value of the property right invaded." How, precisely, does one calculate a dollar figure for loss based on the "nature and degree of deception"? For that matter, what is meant by the "value of the property right invaded"?

In short, while this article provides a distinctive perspective on the development of the Federal Sentencing Guidelines, it offers little help in the task of writing guidelines for federal economic offenses.

orders, which she cashes. Both defendants violate 18 U.S.C. § 1708. Defendant C does so by stealing, taking, or abstracting mail matter. Defendant D does so by fraud or deception (and also commits mail fraud under 18 U.S.C. § 1341).

CASE THREE: Defendant E, an 18-year-old gang member, breaks into mail boxes in his tenement and steals Social Security checks totaling $40,000 intended for elderly residents of the building. Defendant F, a widow of straightened means, fails to tell the Social Security Administration that her husband has died, mails in forms in his name, and over a two-year period following his death cashes $40,000 in benefit checks. The gang member steals, takes, and abstracts mail matter in violation of 18 U.S.C. § 1708. The widow commits forgery, 18 U.S.C. § 510, and mail fraud, 18 U.S.C. § 1341.

The proposal before the Commission would require higher sentences for Defendants B and D and E than for Defendants A and C and F. In Cases One and Two, both defendants abused their official positions to obtain precisely the same sum of money from precisely the same victims. In Case Three, the gang member steals from the Social Security Administration to support buy drugs, clothes, or weapons, while the widow lies to support herself at a subsistence level. Most of us, I suspect, would find it difficult to discern any meaningful difference between the defendants in Cases One and Two. And many of us would be disposed to consider the widow's offense in Case Three less serious than that of the gang member. By what logic does a thief who steals by guile *always* deserve a longer sentence than one who brazenly takes what he pleases?

In sum, theft and fraud cases should not be divided between two different guidelines with different sentencing levels because the categorization of a case as a "theft" or a "fraud" has no necessary connection to the seriousness of the offense or the relative blameworthiness of the defendant.

3. Splitting up the newly consolidated economic crime guideline without compelling justification less than eighteen months after the consolidation will damage the institutional credibility of the Sentencing Commission.

Less than eighteen months ago, the Sentencing Commission brought to fruition a five-year process of revising the economic crime guidelines. The project, and its product, are widely hailed even by perennial Commission critics as a success story. The process brought together all of the affected groups and institutions -- judges, probation officers, prosecutors, defense lawyers, Commissioners and their staffs, and the odd academic or two -- for prolonged, careful consultation. Of all the issues considered and resolved during this long process, consolidation of the theft and fraud guidelines was one of the few on which virtually complete unanimity existed from start to finish. No group or institution ever objected to the idea. It was endorsed as a desirable simplification

by the Judicial Conference, the PAG, and the Justice Department. It is now the law.

At best, the project of redividing "theft" and "fraud" cases into two different guidelines, this time with different sentencing levels, is theoretically questionable and practically difficult. Its benefits have yet to be explained. If the Commission were to proceed, less than eighteen months after the effective date of the 2001 Economic Crime Package, to undo one of the central organizing features of that reform, the damage to its institutional credibility would surely be severe. Lawyers and judges in the field would be aghast at the appearance of a third set of economic crime rules in less than a year-and-a-half. The institutions and groups that devoted countless hours to careful honing of the 2001 reforms would wonder, with justice, why they invested their time in a process whose results would be discarded virtually overnight for no publicly apparent reason and without any demand for such a change from any institutional participant in federal sentencing.

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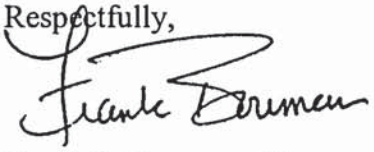
I am aware that considerations relating to other pending economic crime sentencing proposals may dispose some Commissioners to look sympathetically on a theft-fraud decoupling. However, decoupling "theft" and "fraud" will not solve the problem that concerns you and will instead lead the Commission and those who use the Guidelines into a thicket of unnecessary complications.

This is a bad idea. Please don't do it.

Respectfully,



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MINNESOTA STATUTES ANNOTATED
CRIMES, CRIMINALS
CHAPTER 609. CRIMINAL CODE
THEFT AND RELATED CRIMES

Current through End of 2002 1st Sp. Sess.

609.52. Theft

Subd. 2. Acts constituting theft. Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:

(1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property; or

(2) having a legal interest in movable property, intentionally and without consent, takes the property out of the possession of a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of the property; or

(3) obtains for the actor or another the possession, custody, or title to property of or performance of services by a third person by intentionally deceiving the third person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes without limitation:

(i) the issuance of a check, draft, or order for the payment of money, except a forged check as defined in section 609.631, or the delivery of property knowing that the actor is not entitled to draw upon the drawee therefor or to order the payment or delivery thereof; or

(ii) a promise made with intent not to perform. Failure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence; or

(iii) the preparation or filing of a claim for reimbursement, a rate application, or a cost report used to establish a rate or claim for payment for medical care provided to a recipient of medical assistance under chapter 256B, which intentionally and falsely states the costs of or actual services provided by a vendor of medical care; or

(iv) the preparation or filing of a claim for reimbursement for providing treatment or supplies required to be furnished to an employee under section 176.135 which intentionally and falsely states the costs of or actual treatment or supplies provided; or

(v) the preparation or filing of a claim for reimbursement for providing treatment or supplies required to be furnished to an employee under section 176.135 for treatment or supplies that the provider knew were medically

unnecessary, inappropriate, or excessive; or

(4) by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person; or

(5) intentionally commits any of the acts listed in this subdivision but with intent to exercise temporary control only and:

(i) the control exercised manifests an indifference to the rights of the owner or the restoration of the property to the owner; or

(ii) the actor pledges or otherwise attempts to subject the property to an adverse claim; or

(iii) the actor intends to restore the property only on condition that the owner pay a reward or buy back or make other compensation; or

(6) finds lost property and, knowing or having reasonable means of ascertaining the true owner, appropriates it to the finder's own use or to that of another not entitled thereto without first having made reasonable effort to find the owner and offer and surrender the property to the owner; or

(7) intentionally obtains property or services, offered upon the deposit of a sum of money or tokens in a coin or token operated machine or other receptacle, without making the required deposit or otherwise obtaining the consent of the owner; or

(8) intentionally and without claim of right converts any article representing a trade secret, knowing it to be such, to the actor's own use or that of another person or makes a copy of an article representing a trade secret, knowing it to be such, and intentionally and without claim of right converts the same to the actor's own use or that of another person. It shall be a complete defense to any prosecution under this clause for the defendant to show that information comprising the trade secret was rightfully known or available to the defendant from a source other than the owner of the trade secret; or

(9) leases or rents personal property under a written instrument and who:

(i) with intent to place the property beyond the control of the lessor conceals or aids or abets the concealment of the property or any part thereof; or

(ii) sells, conveys, or encumbers the property or any part thereof without the written consent of the lessor, without informing the person to whom the lessee sells, conveys, or encumbers that the same is subject to such lease or rental contract with intent to deprive the lessor of possession thereof; or

(iii) does not return the property to the lessor at the end of the lease or rental term, plus agreed upon extensions, with intent to wrongfully deprive the lessor of possession of the property; or

(iv) returns the property to the lessor at the end of the lease or rental term, plus agreed upon extensions, but does not pay the lease or rental charges agreed upon in the written instrument, with intent to wrongfully deprive the lessor of the agreed upon charges.

For the purposes of items (iii) and (iv), the value of the property must be at least $100.

Evidence that a lessee used a false, fictitious, or not current name, address, or place of employment in obtaining the property or fails or refuses to return the property or pay the rental contract charges to lessor within five days after written demand for the return has been served personally in the manner provided for service of process of a civil action or sent by certified mail to the last known address of the lessee, whichever shall occur later, shall be

evidence of intent to violate this clause. Service by certified mail shall be deemed to be complete upon deposit in the United States mail of such demand, postpaid and addressed to the person at the address for the person set forth in the lease or rental agreement, or, in the absence of the address, to the person's last known place of residence; or

(10) alters, removes, or obliterates numbers or symbols placed on movable property for purpose of identification by the owner or person who has legal custody or right to possession thereof with the intent to prevent identification, if the person who alters, removes, or obliterates the numbers or symbols is not the owner and does not have the permission of the owner to make the alteration, removal, or obliteration; or

(11) with the intent to prevent the identification of property involved, so as to deprive the rightful owner of possession thereof, alters or removes any permanent serial number, permanent distinguishing number or manufacturer's identification number on personal property or possesses, sells or buys any personal property knowing or having reason to know that the permanent serial number, permanent distinguishing number or manufacturer's identification number has been removed or altered; or

(12) intentionally deprives another of a lawful charge for cable television service by:

(i) making or using or attempting to make or use an unauthorized external connection outside the individual dwelling unit whether physical, electrical, acoustical, inductive, or other connection; or by

(ii) attaching any unauthorized device to any cable, wire, microwave, or other component of a licensed cable communications system as defined in chapter 238. Nothing herein shall be construed to prohibit the electronic video rerecording of program material transmitted on the cable communications system by a subscriber for fair use as defined by Public Law Number 94-553, section 107; [FN2] or

(13) except as provided in paragraphs (12) and (14), obtains the services of another with the intention of receiving those services without making the agreed or reasonably expected payment of money or other consideration; or

(14) intentionally deprives another of a lawful charge for telecommunications service by:

(i) making, using, or attempting to make or use an unauthorized connection whether physical, electrical, by wire, microwave, radio, or other means to a component of a local telecommunication system as provided in chapter 237; or

(ii) attaching an unauthorized device to a cable, wire, microwave, radio, or other component of a local telecommunication system as provided in chapter 237.

The existence of an unauthorized connection is prima facie evidence that the occupier of the premises:

(i) made or was aware of the connection; and

(ii) was aware that the connection was unauthorized; or

(15) with intent to defraud, diverts corporate property other than in accordance with general business purposes or for purposes other than those specified in the corporation's articles of incorporation; or

(16) with intent to defraud, authorizes or causes a corporation to make a distribution in violation of section 302A.551, or any other state law in conformity with it; or

(17) takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent.

Subd. 3. Sentence. Whoever commits theft may be sentenced as follows:

(1) to imprisonment for not more than 20 years or to payment of a fine of not more than $100,000, or both, if the property is a firearm, or the value of the property or services stolen is more than $35,000 and the conviction is for a violation of subdivision 2, clause (3), (4), (15), or (16); or

(2) to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both, if the value of the property or services stolen exceeds $2,500, or if the property stolen was an article representing a trade secret, an explosive or incendiary device, or a controlled substance listed in schedule I or II pursuant to section 152.02 with the exception of marijuana; or

(3) to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if:

(a) the value of the property or services stolen is more than $500 but not more than $2,500; or

(b) the property stolen was a controlled substance listed in schedule III, IV, or V pursuant to section 152.02; or

(c) the value of the property or services stolen is more than $250 but not more than $500 and the person has been convicted within the preceding five years for an offense under this section, section 256.98; 268.182; 609.24; 609.245; 609.53; 609.582, subdivision 1, 2, or 3; 609.625; 609.63; 609.631; or 609.821, or a statute from another state, the United States, or a foreign jurisdiction, in conformity with any of those sections, and the person received a felony or gross misdemeanor sentence for the offense, or a sentence that was stayed under section 609.135 if the offense to which a plea was entered would allow imposition of a felony or gross misdemeanor sentence; or

(d) the value of the property or services stolen is not more than $500, and any of the following circumstances exist:

(i) the property is taken from the person of another or from a corpse, or grave or coffin containing a corpse; or

(ii) the property is a record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law with or in the keeping of any public officer or office; or

(iii) the property is taken from a burning, abandoned, or vacant building or upon its removal therefrom, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle; or

(iv) the property consists of public funds belonging to the state or to any political subdivision or agency thereof; or

(v) the property stolen is a motor vehicle; or

(4) to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both, if the value of the property or services stolen is more than $250 but not more than $500; or

(5) in all other cases where the value of the property or services stolen is $250 or less, to imprisonment for not more than 90 days or to payment of a fine of not more than $700, or both, provided, however, in any prosecution under subdivision 2, clauses (1), (2), (3), (4), and (13), the value of the money or property or services received by the defendant in violation of any one or more of the above provisions within any six-month period may be aggregated and the defendant charged accordingly in applying the provisions of this subdivision; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses aggregated under this paragraph.

Formerly cited as IL ST CH 38 ¶ 16-1

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 720. CRIMINAL OFFENSES
CRIMINAL CODE
ACT 5. CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART C. OFFENSES DIRECTED AGAINST PROPERTY
ARTICLE 16. THEFT AND RELATED OFFENSES

Current through P.A. 92-886 of the 2002 Reg.Sess.
& P.A. 93-1 of the 2003 Reg.Sess

5/16-1. Theft

§ 16-1. Theft.

(a) A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner; or

(2) Obtains by deception control over property of the owner; or

(3) Obtains by threat control over property of the owner; or

(4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; or

(5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen, and

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

(b) Sentence.

(1) Theft of property not from the person and not exceeding $300 in value is a Class A misdemeanor.

(1.1) Theft of property not from the person and not exceeding $300 in value is a Class 4 felony if the theft was committed in a school or place of worship.

(2) A person who has been convicted of theft of property not from the person and not exceeding $300 in value

who has been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4-103, 4- 103.1, 4-103.2, or 4-103.3 of the Illinois Vehicle Code [FN1] relating to the possession of a stolen or converted motor vehicle, or a violation of Section 8 of the Illinois Credit Card and Debit Card Act [FN2] is guilty of a Class 4 felony. When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

(3) (Blank).

(4) Theft of property from the person not exceeding $300 in value, or theft of property exceeding $300 and not exceeding $10,000 in value, is a Class 3 felony.

(4.1) Theft of property from the person not exceeding $300 in value, or theft of property exceeding $300 and not exceeding $10,000 in value, is a Class 2 felony if the theft was committed in a school or place of worship.

(5) Theft of property exceeding $10,000 and not exceeding $100,000 in value is a Class 2 felony.

(5.1) Theft of property exceeding $10,000 and not exceeding $100,000 in value is a Class 1 felony if the theft was committed in a school or place of worship.

(6) Theft of property exceeding $100,000 in value is a Class 1 felony.

(6.1) Theft of property exceeding $100,000 in value is a Class X felony if the theft was committed in a school or place of worship.

(7) Theft by deception, as described by paragraph (2) of subsection (a) of this Section, in which the offender obtained money or property valued at $5,000 or more from a victim 60 years of age or older is a Class 2 felony.

(c) When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value.

CREDIT(S)

1993 Main Volume

Laws 1961, p. 1983, § 16-1, eff. Jan. 1, 1962. Amended by Laws 1967, p. 1802 · 1, eff. July 20, 1967; P.A. 77-2638, § 1, eff. Jan. 1, 1973; P.A. 78- 255 § 61, eff. Oct. 1, 1973; P.A. 79-840 ¦ 1, eff. Oct. 1, 1975; P.A. 79-973, § 1, eff. Oct. 1, 1975; P.A. 79-1454 § 16, eff. Aug. 31, 1976; P.A. 82-318 · 1, eff. Jan. 1, 1982; P.A. 83-715, § 1, eff. July 1, 1984; P.A. 84-950 § 1, eff. July 1, 1986; P.A. 85-691 · 1, eff. Jan. 1, 1988; P.A. 85-753, § 1, eff. Jan. 1, 1988; P.A. 85-1030 § 2, eff. July 1, 1988; P.A. 85-1209, Art. II 2-23, eff. Aug. 30, 1988; P.A. 85-1296, § 1, eff. Jan. 1, 1989; P.A. 85-1440, Art. II § 2-9, eff. Feb. 1, 1989.

2003 Electronic Update

Amended by P.A. 89-377, § 15, eff. Aug. 18, 1995; P.A. 91-118 § 5, eff. Jan. 1, 2000; P.A. 91-360 5, eff. July 29, 1999; P.A. 91-544, § 5, eff. Jan. 1, 2000; P.A. 92-16 § 88, eff. June 28, 2001.

FORMER REVISED STATUTES CITATION

February 3, 2003

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Attention: Michael Courlander

Eastman Kodak Company respectfully urges that consideration be given to the endorsement of organizational ombuds functions as an element in the sentencing guidelines currently being proposed. An ombuds function, properly established and maintained consistent with the American Bar Association's Standards of Practice, as well as The Ombudsman Association's Standards of Practice and Code of Ethics, can offer valuable assistance in the implementation of legislation, such as the Sarbanes-Oxley Act of 2002, and other statutory constructs directed at corporate governance.

The consequences of corporate mismanagement on the economy overall, and on employees and pension funds in particular, has led to passage of Sarbanes-Oxley and its mandate that the U.S. Sentencing Commission review sentencing guidelines for offenses covered by the Act. Provisions addressing accounting practices, composition of boards and individual responsibility that form the core of the Act are designed to prevent and ferret out accounting improprieties and punish offenders.

Achieving the goals of Sarbanes-Oxley will depend on companies fostering a culture in which ethical and legal conduct is not an option, but a mandate. A key component will be the willingness of individuals to come forward with information concerning questionable activities. However, individuals have always been reluctant to provide information and register complaints if they cannot be assured of confidentiality. Fear of retaliation is a fact of life in any organizational culture.

How can a corporation most effectively encourage employees to come forward? The answer may well be in a "systems approach" that recognizes the need to connect widely varied resources together. As with most major corporations, Kodak has a number of resources available to employees who care to raise issues of concern (see Attachment A). To make this effort as effective as possible, employees need a "zero barrier" access point that allows anonymous entry into the various corporate resources. An organizational Ombuds Office provides this very important entry point. The three unique characteristics of independence, neutrality, and confidentiality inherent in the ombuds function foster a safe haven in which employees, customers, suppliers, etc., can move issues forward without the fear of retaliation (see Attachment B).

In addition to assisting in the resolution of issues, the ombuds function also serves to familiarize visitors and callers with other available internal resources. Thus, the organizational Ombuds Office is uniquely situated to look across the corporate landscape to identify systemic issues, including those caused by corporate policies or the implementation of those policies. This "systems approach" is key to success.

A. Terry VanHouten, Assistant General Counsel,
Employment Law & Personnel Relations Legal Staff
Eastman Kodak Company 343 State Street Rochester, NY 14650-0218
TEL (585)724-3483 FAX (585)724-6734 E-MAIL: a.terry.vanhouten@kodak.com

An organizational Ombuds Office does not make decisions on behalf of the corporation. Indeed, to be successful, it needs to maintain a separateness and independence from the corporation. But it does contribute to the effectiveness of an overall corporate governance plan by offering an early warning capability, a resolution capability, and in tandem, a mitigating influence in the sentencing process.

Because the Ombuds function is independent, neutral, and confidential, measuring its success can be difficult. However, one metric is the demographics of the visitors and callers. At Kodak, visitors and callers range from the lowest wage graded employee to managers, so the scope of its reach is broad. At Kodak, the ombuds function is a highly effective resource for dispute resolution that continues to have the full backing of senior management.

The best and most explicit legislation is only as successful as its implementation, and implementation depends on cooperation. We feel strongly that because the Ombuds function can be highly beneficial in identifying impediments to effective governance, it needs to be included in the Sentencing Guidelines.

Very truly yours,

Terry VanHouten

A. Terry VanHouten
Eastman Kodak Company

ATV:ddl

Attachments (2)

FORMAL PROBLEM RESOLUTION

Human Resources

Line Management

Compliance Officer

Legal – Intellectual Property/Patent/Copyright

Medical – Disability– Fitness for Duty, Epidemiology

Corporate Security – Law Enforcement

Corporate Audit

Worklife

Diversity

Alternative Dispute Resolution

Health, Safety and Environment

Networks

Benefits

Benefits Hotline

Equal Employment Opportunity

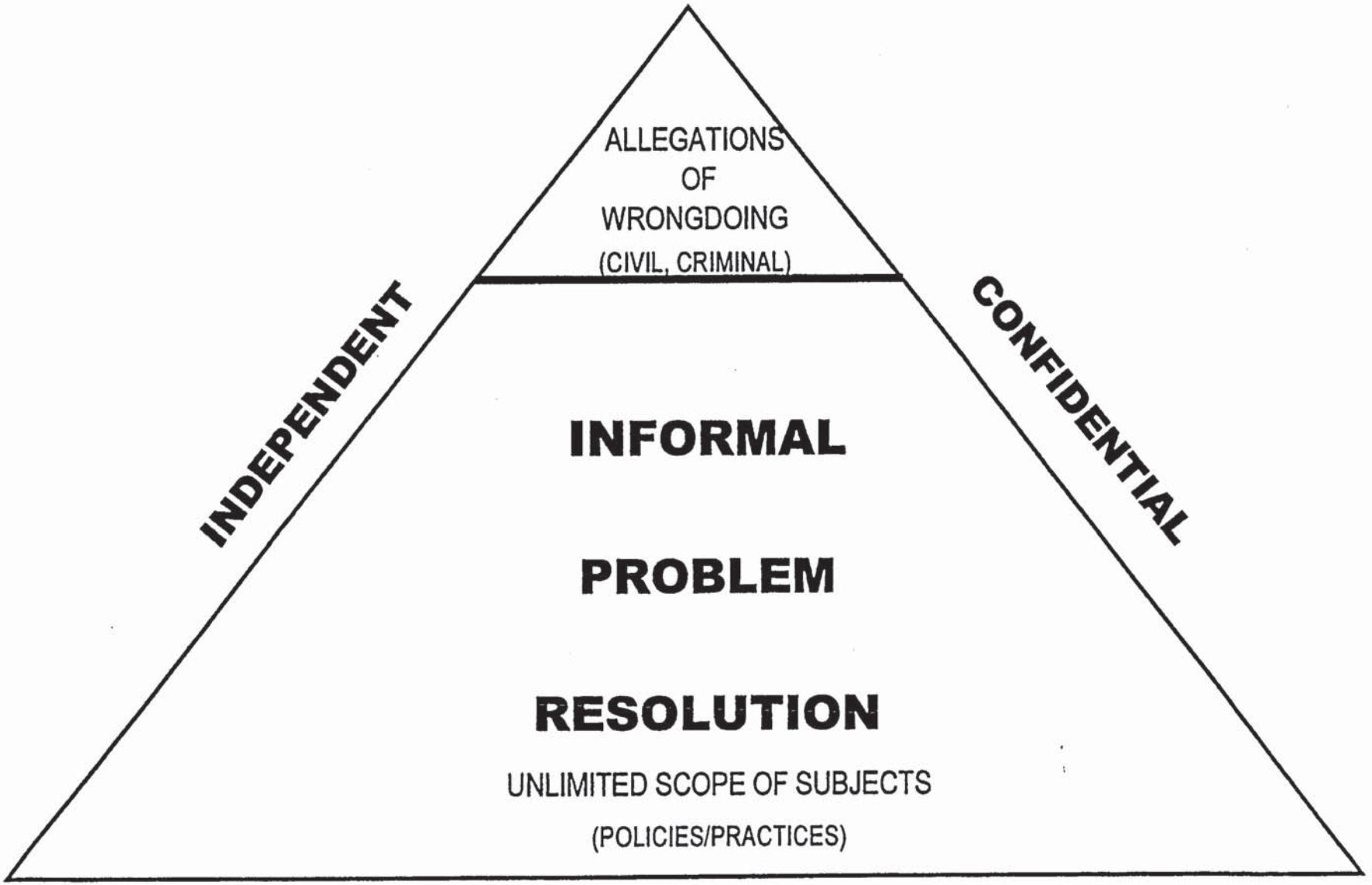
Labor Relations

Risk Management

Quality

ZERO TOLERANCE

Attachment A



Attachment B

OMBUDS OFFICE - Zero Barrier Access Point

January 30, 2003

Chairman Orrin Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Senator Leahy:

The undersigned organizations write to express our objection to certain sentencing provisions in the PROTECT Act (S. 151) and the Identity Theft Penalty Enhancement Act (S. 153). The PROTECT Act would extend existing mandatory minimum sentences to a new category of repeat offenders and the Identity Theft Penalty Enhancement Act would create new mandatory consecutive sentences. If evidence indicates that existing penalties for the offenses at issue are too lenient, we urge the Committee to issue *general* directives to the U.S. Sentencing Commission instead of enacting mandatory minimum sentences.

Chief Justice William Rehnquist has called mandatory sentencing "a good example of the law of unintended consequences," and several Members of this Committee have expressed reservations about mandatory minimum sentences. The Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective. And numerous studies, including those by the Department of Justice and the U.S. Sentencing Commission, indicate that mandatory minimum sentencing is not an effective instrument for deterring crime.

While most criticism of mandatory minimum sentences has focused on the federal drug statutes, the reasons for rejecting mandatory minimums apply without regard to offense type. Mandatory minimum sentencing deprives judges of the ability to fashion sentences that suit the particular offense and offender. Despite their flaws, the Sentencing Guidelines are better able to take into account the range of factors that are relevant to the sentencing decision.

The Sentencing Guidelines also are better able to exclude factors that give rise to unwarranted sentencing disparities. In transferring sentencing discretion from judges to prosecutors, mandatory minimum sentences transfer the sentencing decision from open courtroom to closed

prosecutor's office. Consequently, there are inadequate guarantees that statutorily prohibited factors such as race, age and gender do not influence the ultimate sentence. Even when the charging — and, in effect, sentencing — decision is free from taint, such closed-door decisions can undermine the appearance of equal justice.

While the Sentencing Guidelines are easily fine tuned based upon sentencing data and comments from judges, the Department of Justice, practitioners and others, history shows that mandatory minimums are less amenable to change. This fact, combined with the problems highlighted above, suggests that a general directive to the Sentencing Commission would be the more prudent course. General directives to the Sentencing Commission could better accomplish the goals of this legislation — without undermining the uniformity and fairness that Congress sought by enacting the Sentencing Reform Act.

Lawrence S. Goldman
President
National Association of Criminal Defense Lawyers

Julie Stewart
President
Families Against Mandatory Minimums

Laura W. Murphy
Executive Director
ACLU Washington National Office

cc: Members of the Senate Judiciary Committee

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

January 10, 2003

Re: Request for Public Comment on Responses to Section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107-296

Dear Commission:

I write in response to the Commission's request for public comment about how the Commission should respond to Section 225(b) of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107-296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under 18 U.S.C. § 1030. In particular, Section 225(b)(2) directs the Commission to :

> (A) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses [arising under 18 U.S.C. § 1030], the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses;
>
> (B) consider the following factors and the extent to which the guidelines may or may not account for them--
>
> (i) the potential and actual loss resulting from the offense;
>
> (ii) the level of sophistication and planning involved in the offense;
>
> (iii) whether the offense was committed for purposes of commercial advantage or private financial benefit;
>
> (iv) whether the defendant acted with malicious intent to cause harm in committing the offense;
>
> (v) the extent to which the offense violated the privacy rights of individuals harmed;
>
> (vi) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice;
>
> (vii) whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and
>
> (viii) whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person
>
> (C) assure reasonable consistency with other relevant directives and with other sentencing guidelines;
>
> (D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;
>
> (E) make any necessary conforming changes to the sentencing guidelines; and
>
> (F) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

2000 H STREET, NW • WASHINGTON, DC 20052

I am a law professor at the George Washington University Law School, as well as a former Trial Attorney at the Computer Crime and Intellectual Property Section of the United States Department of Justice. I write and teach in the field of computer crime law, including in the area of how the federal sentencing guidelines apply to computer-related crimes. I have also delivered presentations on how the sentencing guidelines apply to Section 1030 offenses at the Federal Sentencing Guidelines seminar held annually in Palm Springs, California, both in 2001 and 2002. The views expressed in this letter are mine alone, and do not reflect the position of either my current or former employers.

In my opinion, the Commission should begin by recognizing the possibility that Congress's directive was based on an erroneous belief: the belief that criminal sentences for computer criminals under the current versions of the Federal Sentencing Guidelines are lower than sentences for other criminals who commit analogous crimes off-line. This is not true. In fact, the United States Sentencing Guidelines already treat computer criminals as harshly *if not more harshly* than those who commit equivalent crimes off-line. This does not mean that Congress was wrong in its apparent belief that the computer crime laws need to be amended. Those laws do need attention. However, sentencing issues under 18 U.S.C. § 1030 arise only *after* the government has successfully investigated a case and obtained a conviction under the statute, which happens in only about 70 or 80 cases each year. The sentences that are obtained in these small number of cases are not a major problem in the field of computer crime law. The primary difficulties with the current laws arise primarily in the investigative stage, not among the few cases that actually lead to a conviction. As a result, the Commission should proceed cautiously, and should not take the vague directive in the recent law as an invitation to rewrite from scratch the law of sentencing for computer criminals.

It is important for the Commissioners to understand why the current sentencing law treats computer criminals just as seriously (if not more seriously) than others convicted of federal crimes. To begin with, calculations of sentences under the current guidelines under the most commonly used portions of 18 U.S.C. § 1030 -- sub-sections (a)(2), (a)(4), and (a)(5) -- apply the same "economic crimes" packages under 2B1.1 of the Federal Sentencing Guidelines that apply to other economic crimes. This means that the basic calculations of computer crime offenses match those of other crimes. In fact, Section 1030 crimes are treated *more harshly* than other crimes in one important respect: while the calculation of economic losses are generally limited to "reasonably foreseeable pecuniary harm," the current guidelines have a special rule for Section 1030 offenses that involve "unlawfully accessing, or exceeding authorized access" to a computer. (It is unclear whether this special rule was intended to apply to all Section 1030 offenses, or just the subset of cases involving exceeding access to a protected computer.) In such cases, even nonforeseeable pecuniary harms can be included, including "*any* lost revenue due to interruption of service." USSG § 2B1.1 Application Note 2(A)(v)(III) (emphasis added). The effect of this special rule is to treat computer crimes more harshly than other crimes. For example, a computer hacker whose activity inadvertently shuts down an e-commerce site, causing the site a loss of $5,000,000, could be treated the same as a con man who intentionally bilks his victims out of $5,000,000. In the case of a computer hacker, the unforeseeable loss to the victim that did not benefit the hacker would be used to increase his sentence, while in the

case of the con man, only foreseeable losses (and mostly those that directly benefit the defendant) would count.

The current guidelines also account for several nonpecuniary dynamics of computer crimes that arguably warrant special treatment. Most if not all of the factors that Congress points to in its directive are already considered by the current guidelines. For example, Section 3B1.3 of the guidelines already provide for a two-level upward adjustment for use of a "special skill," which has been applied to computer hacking cases. *See, e.g., United States v. Petersen*, 98 F.3d 502 (9th Cir. 1996). The current guidelines also allow for an upward departure for offenses that "result[] in a substantial invasion of privacy interest", USSG § 2B1.1 Application Note 15(A)(ii), which may apply in computer crime offenses that involve important privacy concerns. Finally, the relevance of committing an offense for commercial advantage or private financial gain to the seriousness of the offense is already drawn in Section 1030 itself. *See, e.g.*, 18 U.S.C. § 1030(c)(2)(B)(i). Because of these provisions, current law *already* contain means by which the sentence of computer criminals can be raised in special cases if appropriate.

Despite this, the Commission may feel that faithfully implementing Congress's directive may require the Commission to increase the penalties for violations of Section 1030. One obvious precedent for such an approach would be a provision such as USSG § 2G2.4(b)(3), effective on November 1, 1996, which triggers a two-level enhancement in offenses involving possession of child pornography when the possession "resulted from the defendant's use of a computer." As the Ninth Circuit explained in *United States v. Fellows*, 157 F.3d 1197, 1202 (9th Cir. 1998), this section "provides an extra deterrent to those inclined to pursue illicit pictures in the anonymity of the computer world." The Commission could adopt this approach for Section 1030 offenses, as well. The reasoning would go something like this: computer misuse crimes such as hacking and denial-of-service attacks are easy to commit, and the anonymity of the Internet makes such offenses difficult to trace, such that an extra punishment for computer misuse may be helpful to deter the misconduct. In effect, the law may want to counteract the effect of the technology: as the technology lowers the barriers to committing such offenses, the sentencing enhancement may raise the cost that the criminal law imposes to compensate for the difference.

The difficulty with such a sentencing enhancement is that to the extent such a rationale is convincing, it should apply to all computer crimes, not just the subset of computer crimes charged under 18 U.S.C. § 1030. The actual and perceived anonymity of the Internet tends to lower the perceived cost of several types of crimes. Often those who commit crimes online would be disinclined to commit an equivalent crime offline; they see the Internet as somehow less real, less connected to actual human beings and actual harms. From the standpoint of the traditional theories of punishment underpinning criminal law reflected in 18 U.S.C. § 3553(a)(2), this presents a mixed bag. On one hand, a utilitarian approach might suggest that greater punishment is warranted to deter the harmful conduct. *See* 18 U.S.C. § 3552(a)(2)(B),(C). On the other hand, from the standpoint of retributive theory, *see* 18 U.S.C. § 3552(a)(2)(A), widespread public perceptions that offenses involving the Internet are somehow less real may make such offenses less morally culpable. If those who commit crimes online do not confront the societal implications of their misconduct as directly as those who commit offline crimes do,