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March 30, 2009

Honorable Ricardo H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on the Court Security Act of 2007

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the Commission's requests for comment regarding the Court Security Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 ("the Act"), that were published in the Federal Register on January 27, 2009.[1] At the public hearing on March 18, 2009, we submitted written testimony on these matters. A copy of that testimony is attached and incorporated as part of this public comment. We supplement our testimony here with a few additional comments.

A. Threats Occurring Over the Internet Are Not More Serious than Other Threats.

Testimony at the hearing supported our position that threats occurring over the Internet and prosecuted under 18 U.S.C. § 115(a) are not more serious than threats occurring in some other manner. Mario J. Scalora, Associate Professor of Psychology at the University of Nebraska-Lincoln, testified that email threats are associated with fewer risk factors than threats by letters, a finding supported by empirical research. In 2007, Professor Scalora and others published a study comparing 301 letters and 99 emails sent to public officials and concluding that letter writers are "engaging in behavior that is higher risk for problematic approach than emailers."[2] Letter writers also "tended to be

[1] *See* 74 Fed. Reg. 4,802, 4,813-15 (Jan. 27, 2009).

[2] *See* Katherine A. Schoeneman-Morris et al., *A Comparison of Email Versus Letter Threat Contacts toward Members of the United States Congress*, 52 J. Forensic Sci. 5, 1142-47 (Aug. 2007).

significantly older, have more criminal history, and write longer communications."[3] Based on this research, Professor Scalora cautioned the Commission not to focus on the Internet or the "modality of the threat" when considering its relative seriousness. Instead, he suggested that the Commission focus on the contextual behavior of the person making the threat.

Although Michael J. Prout, Assistant Director for Judicial Security for the U.S. Marshals Service, described various scenarios in which a threat communicated over the Internet *might* reach unknown and unknowable numbers of people who *might* be incited to commit violence against a member of the federal judiciary, he did not point to any actual cases in which an individual was prosecuted or convicted for making a threat under § 115(a) and whose communications evidenced an intent to incite others to commit violence. Nor are we aware of any cases involving threats occurring over the Internet that evidenced an intent to incite others to commit violence.

The Commission should not amend § 2A6.1 in anticipation of hypothetical scenarios that might occur in prosecutions under § 115(a). As the discussion among the Commissioners and witnesses at the hearing illustrated, it would be difficult to describe the hypothetical threat occurring over the Internet and resulting in conviction under § 115(a) that causes greater harm or risk of harm because of its potential to incite others to commit violence. The Commission should trust courts to use their authority to depart or vary from the guideline range under § 2A6.1 when appropriate, as it already does. In Application Note 4, the Commission explains that "offenses covered by [§ 2A6.1] may include a particularly wide range of conduct and [] it is not possible to include all of the potentially relevant circumstances in the offense level." USSG § 2A6.1, comment. (n.4(A)). As a result, courts are invited to depart upward to account for factors not incorporated in the guideline. *Id.*

To the extent that the testimony at the hearing may prompt the Commission to shift its focus to the public nature of a threat, as opposed to its modality, it would act beyond the scope of the directive. Congress directed the Commission to study the guidelines as they apply to "threats that occur over the Internet [to] determine whether and by how much that circumstance should aggravate the punishment" for threats prosecuted under § 115(a). *See* Pub. L. No. 110-177, § 209. It did not direct the Commission to study all threats made in a public forum or otherwise indicate by the plain terms of the directive that it was concerned with threats that might incite others to violate the law.

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[3] *Id.*

B. The Commission Should Not Modify Appendix A to Refer Convictions Under 18 U.S.C. § 1513 to Other Guidelines in Part A of Chapter Two of the Manual.

As we stated in our written testimony, we recognize that Appendix A refers obstruction of justice offenses under 18 U.S.C. § 1512, which are similar to offenses under 18 U.S.C. § 1513, to several guidelines in Chapter Two, Part A (Offenses Against the Person) in addition to the obstruction of justice guideline at § 2J1.2. But this was not always the case.

In November 1986, Congress amended § 1512 (Tampering with a witness, victim, or informant) to add provisions to punish killing and attempted killing of any person in violation of that statute. *See* Pub. L. 99-646, § 61 (Nov. 10, 1986) (amending § 1512 to include killing or attempted killing). It did not do the same for offenses under § 1513 (Retaliating against a witness, victim, informant). As originally promulgated, Appendix A referred both § 1512 and § 1513 offenses only to § 2J1.2. *See* USSG, App. A (1987). In fact, *no* obstruction of justice offense was referred to any guideline in Part A of Chapter Two of the original Manual. *Id.* As the Commission explained at the time, offenses referred to § 2J1.2 range from "a mere threat to an act of extreme violence." USSG § 2J1.2 comment. (backg'd).

In 1989, the Commission amended Appendix A to refer offenses under § 1512 to §§ 2A1.1, 2A1.2, 2A21, and 2A2.2 in addition to § 2J1.2. *See* USSG, App. C, Amend. No. 298 (Nov. 1, 1989). The Commission's stated reason for the change was "to make the statutory index more comprehensive." *Id.*

In 1994, Congress amended § 1513 to punish killing and attempted killing with intent to retaliate against any person for attendance at, or testimony given in, an official proceeding. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 60017 (Sept. 13, 1994). However, the Commission did not amend Appendix A to refer these convictions to guidelines under Part A of Chapter Two. Nearly fifteen years have passed since Congress amended § 1513, and there is no apparent need for the Commission to act now.

Courts have discretion under § 2J1.2 to fashion an appropriate sentence, up to the statutory maximum if necessary. Further, as Congress recognizes, "the authority of the court to impose a sentence in excess of the applicable guideline range" can mean that the guidelines "are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense." *See* Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11008(e)(2)(D). Although we do not know how many sentences under § 2J1.2 are driven by convictions under § 1513, we know that judges impose above-guideline sentences under § 2J1.2 at a rate of only 3%,[4] indicating that no change is necessary.

[4] USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2008).

To the extent that the Commission is considering amending Appendix A so that offenses under § 1512 and § 1513 are treated in the same manner, we suggest that the solution is not to refer § 1513 offenses to guidelines other than § 2J1.2, but to reverse the 1989 amendment and refer § 1512 offenses only to § 2J1.2. Put simply, both offenses are obstruction of justice offenses, and § 2J1.2 is the obstruction of justice guideline. Moreover, other obstruction of justice offenses referred to § 2J1.2, including some that do not involve personal injury, have statutory maximum penalties as high as those under § 1513. *Compare* 18 U.S.C. § 1503 (maximum of life in a noncapital case for killing of a juror, fifteen years for manslaughter, and twenty years for attempted killing); 18 U.S.C. § 1512(c) (maximum of twenty years for tampering with a witness by altering or destroying records) *with* 18 U.S.C. § 1513 (maximum of life in a noncapital case for killing a witness, thirty years for attempting to murder, and twenty years for causing bodily injury). Thus, there can be no uniform rationale for referring § 1513 offenses to guidelines other than § 2J1.2, especially since courts do not appear to find § 2J1.2 inadequate to meet the purposes of sentencing. To the contrary, referring § 1512 offenses only to § 2J1.2 would be *more* consistent with the Commission's treatment of other obstruction offenses.

C. The Commission Should Not Interpret An Increase in a Statutory Maximum as an Implied Directive to Increase a Guideline Range.

The increases in statutory penalties in the Court Security Act of 2007 well illustrate why the Commission should not increase guideline ranges solely because Congress increases statutory maxima. Nor should the Commission interpret Congress's silence regarding whether it intends for the Commission to increase guideline ranges as an implicit directive to do so. As indicated by the recent directive to the Commission in the Ryan Haight Online Pharmacy Consumer Protection Act of 2008,[5] Congress recognizes that increasing guideline ranges based solely on an increase in statutory penalties as a result of an unusually tragic or highly publicized case is not good policy.

Congress passed the Court Security Improvement Act of 2007 largely in response to the tragic and highly publicized murder of two family members of a federal judge. *See* 153 Cong. Rec. 4653, 4659-60 (Apr. 18, 2007) (statement of Senator Durbin); 153 Cong. Rec. 7462, 7465 (July 10, 2007) (statement of Rep. Conyers). The stated purpose of the Act is "to protect judges, family members, and witness." Pub. L. No. 110-177, tit. II. The Commission should not interpret Congress's action in response to this highly unusual case as an implied directive to increase penalties for all offenders convicted of

[5] Pub. L No. 110-425, § 3(k)(2) ("The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to conform the Federal sentencing guidelines and policy statements to this Act and the amendments made by this Act, should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement.").

manslaughter or assault, most of whose conduct was not aimed at a federal judge or her family. This is especially so because the primary effect of increasing guideline ranges for manslaughter and assault in general would be to increase the sentences of Native Americans who did nothing to a federal official, which was not the purpose of the directive.

Statutory maxima represent, at best, a legislative judgment that a high penalty should be available for the offense committed in its most egregious form. If Congress had meant for an increase in the available maximum term of imprisonment to override the Commission's statutory mandate to act as an independent expert body that establishes sentencing policy and practices in accordance with the Sentencing Reform Act, then it should have said so. If the Commission were to amend the guidelines because Congress raised the statutory maxima, and with no solid empirical data supporting the increases, it would abandon its characteristic institutional role, invite judicial disagreement with the guidelines, and promote disrespect for the processes set forth in the SRA.[6]

As always, we very much appreciate the opportunity to submit comments on the Commission's proposed amendments and issues for comment. We look forward to continue working with the Commission on all matters related to federal sentencing policy.

Very truly yours,

J. Sands /mc

JON M. SANDS
Federal Public Defender, District of Arizona
Chair, Federal Defender Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
Commissioner William B. Carr, Jr.
Commissioner Dabney Friedrich
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Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Jonathan Wroblewski
Ken Cohen, General Counsel
Judith M. Sheon, Staff Director
Kelley Land
Michael Courlander, Public Affairs Officer

[6] *See Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (Jan. 21, 2009); *Nelson v. United States*, 129 S. Ct. 890 (Jan. 26, 2009).

Testimony of Jon Sands
Federal Public Defender
District of Arizona
On Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2009
March 18, 2009

Thank you for the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the Commission's requests for comment regarding the Court Security Improvement Act of 2007.

A. Increases in Statutory Maximum Penalties

With the Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 ("the Act"), Congress increased statutory maximum sentences for a number of offenses set forth in four separate statutes: 18 U.S.C. § 115 (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member); 18 U.S.C. § 1112 (Manslaughter); 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant); and 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant). The Commission has requested comment regarding whether the guidelines are adequate as they apply to these offenses, and if not, whether the Commission should increase guideline ranges "to address the increases in the statutory maximum penalties."[1]

As we wrote to the Commission in July of last year, the Commission should not take any action to increase guideline ranges in response to the Act unless it has reached the conclusion, based on its own study and expertise and without regard to statutory maxima, that guideline ranges are inadequate.[2] The Commission should not increase guideline ranges merely because Congress has increased the statutory maximum for a particular offense, but instead, should be guided by the purposes of sentencing and the need to avoid unwarranted disparities and unwarranted similarities. The Commission should also keep in mind the stated purpose of the Act. The Commission should conclude that guideline ranges for these offenses are adequate.

As Judge Tjoflat emphasized at the recent hearing in Atlanta, judges understand that guidelines based on statutory minima and maxima are "just arbitrary," and will not blindly follow such guidelines now that they are not mandatory.[3] Unlike the original Commission, the current Commission has at its disposal a vast accumulation of empirical

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[1] *See* 74 Fed. Reg. 4,802, 4813-14 (Jan. 27, 2009).

[2] *See* Letter from Jon Sands to Hon. Ricardo J. Hinojosa, *Re: Final Priorities for Cycle Ending May 1, 2009*, Mem. at 47 (Sept. 8, 2008) ("Priorities Letter") (citing the Criminal Law Committee of the Judicial Conference's similar position with respect to mandatory minimums).

[3] *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Spears v. United States*, 129 S. Ct. 840 (Jan. 21, 2009); *Nelson v. United States*, 129 S. Ct. 890 (Jan. 26, 2009).

data. Instead of reflexively keying sentences to arbitrary statutory norms, the Commission should use its data and other expert research at its disposal to create guidelines that further the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). As Judge Tjoflat indicated, judges would be more likely to follow a guideline if the Commission explained what purpose or purposes it was meant to serve and on what basis the Commission concluded that it would serve that purpose or those purposes.

Further, the Commission should resist actions that seem mathematically rational in their incremental application but have the overall effect of increasing yet again the recommended guideline range. In 2004, when the Commission voted to increase the guideline ranges for homicide and assault, Judge Sessions expressed his concern that in "passing judgment based on numbers, the Commission looks to individual enhancements that might require an increase." He noted that "nobody seems to consider the big picture, or the cumulative effect of all the little decisions that the Commission makes."[4] He further noted that "as a result, the penalties seem to continually grow based on apparently legitimate reasons. [I]f one looks to the overall system, which is not known to be particularly lenient, it is continuously becoming more severe."[5] Recognizing that penalties get ratcheted up through the continual interaction of new legislation and the Commission's concern with proportionality, Judge Sessions emphasized the Commission's duty to "make independent judgments, and that it reflect upon its ultimate goal."[6]

With these general observations in mind, we address several areas of specific concern.

(1) Manslaughter

The Act amended 18 U.S.C. § 1112 to increase the statutory maximum from 10 to 15 years for voluntary manslaughter and from 6 to 8 years for involuntary manslaughter. The Act also increased the statutory maximum from 20 to 30 years for both attempted murder of a witness, victim, or informant to prevent testimony in an official proceeding, 18 U.S.C. § 1512(a)(3)(B), and attempted killing of a person to retaliate for providing testimony, 18 U.S.C. § 1513(a)(2)(B). Convictions for manslaughter under § 1112 are referred to USSG §§ 2A1.3 (Voluntary manslaughter) and 2A1.4 (Involuntary manslaughter), as are convictions under § 1512(a) that involve manslaughter. Currently, all convictions under § 1513 are referred to USSG § 2J1.2.

The Commission should not raise offense levels in response to the increases in statutory maxima for manslaughter. First, as currently structured, guideline ranges for manslaughter do not hit the statutory maximum unless the defendant falls into Criminal

[4] USSC, *Minutes of the March 19, 2004 Public Meeting*, at 5, available at www.ussc.gov/MINUTES/3_19_04.htm.

[5] *Id.*

[6] *Id.*

History Category VI. Raising the base offense levels would not only reduce the range of guideline sentences available, but would virtually eliminate any range at all for offenses motivated by the victim's official status, the offenses at which the Court Security Act is aimed. In those cases, the midpoint of the range increases to 15.8 years as the result of the six-level adjustment in § 3A1.2, which is *above* the statutory maximum.

Second, an increase under § 2A1.3 or § 2A1.4 would apply to a number of other offenses as well, which would result in higher sentences for offenses unrelated to the Act. For example, 18 U.S.C. § 1841 (Protection of unborn children) refers to § 1112 for its penalties for manslaughter, which are in turn referred to §§ 2A1.3 and 2A1.4. Although statutory maximum penalties for these offenses were also raised by operation of the Act, these offenses have nothing to do with its purposes. The Commission should not do anything that would raise guideline ranges for offenses that are not the subject of Congress's concern in the Act.

There is no evidence that sentences for manslaughter in general are not already high enough. In 2004, the Commission raised the base offense level for voluntary manslaughter from level 25 to level 29. USSG, App. C, Amend. 663 (Nov. 1, 2004). At the same time, the Commission raised the base offense level to 22 for involuntary manslaughter involving the reckless operation of a means of transportation, both to account for the 1994 increase in the statutory maximum and to comport with the recommendation of the Commission's Ad Hoc Advisory Group on Native American Issues.[7] While the Commission adopted the Advisory Group's recommendation to increase punishment for reckless involuntary manslaughter, it also increased the punishment for negligent involuntary manslaughter contrary to the Group's recommendation to leave it unchanged.[8] According to data provided by the Commission in November 2007, sentences for involuntary and voluntary manslaughter increased 94.4% and 92.4%, respectively, as a result of the 2004 amendments.[9]

As it stands now, the rate of below-guideline sentences in manslaughter cases is nearly three times that of above-guideline sentences. For the primary offense category of manslaughter, courts sentence above the guideline range at a rate of 7.7% percent, and below the guideline range at a rate of 19.2%, representing a judicial rate of 11.5% percent

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[7] *Id.*; *see also* USSC, *Report of the Native American Advisory Group*, at 16-18 (Nov. 4, 2003) ("Native American Report").

[8] The Commission adopted the Advisory Group's recommendation to increase the base offense level for reckless involuntary manslaughter from 14 to 18 and add 4 levels for drunk driving. *Id.* at 16, 36. Instead of leaving the base offense level for criminally negligent involuntary manslaughter at 10 as recommended, *id.* at 17, the Commission raised it to 12. Instead of leaving the base offense level for voluntary manslaughter at 25 and adding specific offense characteristics as recommended, *id.* at 18-19, the Commission raised the base offense level for all cases to 29.

[9] *See* Letter from Thomas W. Hillier, II to John Conyers, Jr., Chair of the House Judiciary Committee et al., at 2 & n.1 (Nov. 13, 2007).

and a government-sponsored rate of 7.7%.[10] For involuntary manslaughter, the rate of above guideline sentences is only 4.6%, while the rate of all below-guideline sentences is 25.6%; for voluntary manslaughter, 2 of 15 sentences were above the guideline range and none were below it.[11] When the Commission raised guideline ranges for voluntary manslaughter in 2004, it did so in part because the above-guideline rate for voluntary manslaughter was at 28.6 percent.[12] The most rational conclusion to be drawn from current judicial feedback (and following the Commission's own principles) is that no change is indicated for voluntary manslaughter and guideline ranges for involuntary manslaughter are generally too *high*.[13]

In addition, increasing offense levels for manslaughter would disproportionately impact Native Americans convicted of garden variety manslaughter offenses having nothing to do with the stated purpose of the Act. In fiscal year 2008, Native Americans represented the overwhelming majority of persons convicted of manslaughter in federal court,[14] but Congress was not concerned with increasing punishment for Native Americans when it passed the Court Security Improvement Act of 2007. Proportionate to their percentage of the population (1%), more Native Americans are serving federal prison time than any other racial group at 249 per 100,000 residents.[15] In 2002, responding to concerns regarding the disproportionate impact of federal sentencing policy on Native Americans, the Commission created the Ad Hoc Advisory Group on Native American Sentencing Issues.[16] As recognized by that group, alcohol and poverty play a

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[10] *See* USSC, *Fiscal Year 2008 – Preliminary Quarterly Data Report – 4th Quarter*, tbl. 3 & App. A (2008) ("4th Quarter Data Report – 2008).

[11] *Id.* tbl. 5.

[12] *See* USSG, App. C, Amend. 663 (Nov. 1, 2004), Reason for Amendment.

[13] *See* USSC, *Report to Congress: Downward Departures From the Federal Sentencing* Guidelines, at 5 (Oct. 2003) ("Downward Departures") ("[A] high or increasing rate of departures for a particular offense, for example, might indicate that the guideline for that offense does not take into account adequately a particular recurring circumstance and should be amended accordingly."); *see also* USSG ch. 1, intro, pt. 4(b); *see also* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.").

[14] Fourth Quarter Data Report – 2008, tbl. 23 & App. A (showing that 84.9% of persons convicted of manslaughter were classified as "Other," which includes Native Americans, Alaskan Native, and Asian or Pacific Islanders). Because Commission data do not provide the exact percentage of Native Americans convicted in any given category, we base our assertion on the assumption that the category of "Other" is mostly comprised of Native Americans. In 2003, the Ad Hoc Advisory Group on Native American Sentencing Issues reported that it reviewed data provided by the Commission and found that "close to 75% of manslaughter cases involved Native Americans." Native American Report at 14.

[15] *See* Gary Fields, *On Tribal Land, Tragic Arson Case Leads to a Life Sentence: Justice Can Be Unequal in Reservation Crimes*, Wall St. J., at 1, Aug. 13, 2007.

[16] Native American Report at 10-11.

devastating role in reservation crime.[17] Increasing punishment for the majority of those sentenced under the manslaughter guidelines for reasons wholly unrelated to the nature and circumstances of those offenses can hardly further the purposes of sentencing. We strongly urge the Commission to reconstitute that group and to provide it with the tools and the time to examine thoroughly the potential impact that increasing penalties for manslaughter would have on the Native American population.

Third, other offenses referred to the manslaughter guidelines have much higher statutory maxima. For an offender in Criminal History Category I convicted of voluntary manslaughter, the midpoint of the sentencing range, 8.2 years, now represents 55% of the statutory maximum. In contrast, for offenses under 18 U.S.C. § 2199 (Stowaways on vessels or aircrafts), 18 U.S.C. 2291 (Destruction of vessel or maritime facility), and 18 U.S.C. § 2332b(a)(1) involving voluntary manslaughter, also referred to § 2A1.3, the midpoint of the range for defendants in criminal history category I is also 8.2 years, while the statutory maximum is life.

The same is true for offenses involving involuntary manslaughter. For an offender convicted of involuntary manslaughter involving the reckless operation of a means of transportation (at base offense level 22 and representing the majority of defendants sentenced under § 2A1.4[18]), the ratio is now 48%. In contrast, offenses under 18 U.S.C. § 2199, 2291, and 2332b(a)(1) involving involuntary manslaughter result in a ratio ranging from a *low* of 2.5 years / life to a *high* of 76% for those at base offense level 12, and from 15% to 19% for those at base offense level 22. In other words, there are a number of offenses referred to § 2A1.4 representing a lower ratio than the ratio now in place for the majority of involuntary manslaughter convictions under § 1112. These numbers make clear that the Commission has no consistent practice of using the statutory maximum as the appropriate point of orientation for establishing base offense levels.

Finally, with respect to offenses under 18 U.S.C. § 1513, the Commission should carefully examine its data regarding convictions under that statute before it amends the guidelines to refer such convictions involving manslaughter to guidelines other than USSG § 2J1.2. We recognize that convictions under § 1512, a similarly structured statute, are referred to the guidelines in Chapter 2, Part A when the offense conduct charged in the offense of conviction establishes a murder or other physical assault. *See* USSG, Appendix A. However, courts have discretion under § 2J1.2 to fashion an appropriate sentence, up to the statutory maximum, if necessary. Other offenses referred to § 2J1.2 have statutory maximum sentences that are as high as those under § 1513. *See, e.g.*, 18 U.S.C. § 1503 (statutory maximum of 15 years for voluntary manslaughter and life for murder). In addition, for the rare obstruction offense involving an official victim,

[17] *Id.* at 17, 35-37.

[18] USSC, *Use of Guidelines and Specific Offense Characteristics – Fiscal Year 2007*, at 2 (2007) ("2007 Guideline Frequencies").

§ 3A1.2(a) provides for a three-level upward adjustment.[19] Although the Commission does not publish data regarding sentences for § 1513 in particular, the above-guideline rate for cases sentenced under § 2J1.2, at 3%, is far lower than rates that have previously prompted the Commission to raise a guideline.[20] Unless more specific data indicates that § 2J1.2 is inadequate to address § 1513 offenses, the Commission should not act.

(3) Assault and threat offenses

The Act increased the statutory maxima for two offenses under 18 U.S.C. § 115(b)(1) involving the influence or retaliation against a federal officer by physical assault. First, it increased from 8 to 10 years the maximum term of imprisonment for causing physical contact with a current or former federal official or family member of a current or former federal official with the intent to commit another felony. 18 U.S.C. § 115(b)(1)(B)(ii). It also increased from 20 to 30 years the statutory maximum term of imprisonment if serious bodily injury resulted from the offense or a dangerous weapon was used. *Id.* § 115(b)(1)(B)(iv). Convictions under these provisions are referred to USSG §§ 2A2.1, 2A2.2, and 2A2.3.

The Act also increased the statutory maximum under 18 U.S.C. § 1512(a) from 20 to 30 years for tampering with a witness involving attempted murder or physical assault. Such convictions are also referred to USSG §§ 2A1.2, 2A2.2, and 2A2.3. In addition, the statutory maximum for convictions under § 1513 involving attempted murder or bodily injury is now 30 years (raised from 20) and 20 years (raised from 10), respectively. These offenses are referred to USSG § 2J1.2.

For reasons similar to those set forth above relating to manslaughter offenses, the Commission should not increase guideline ranges for these offenses. First, the rate of sentences below the guidelines for assault is well over twice the rate of sentences above the guidelines.[21] The Commission should view this data as feedback from judges that, in general, the guidelines are adequate for assault offenses.

Second, as with offenses involving manslaughter, we urge the Commission to refrain from acting before having considered the potentially disproportionate impact on Native Americans, a group whose conduct was not the focus of the Act and who already experience disparity under the federal system. Native Americans represent less than 4%

[19] USSC, *Chapter 3 Adjustments – Fiscal Year 2007*, at 54 (2007) ("2007 Chapter 3 Adjustments") (showing that the upward adjustment for official victim was applied in only 0.6% of cases sentenced under § 2J1.2).

[20] 4th Quarter Data Report – 2008, tbl. 5. *Compare* USSG App. C, Amend. 663 (Nov. 1, 2004) (homicide guidelines increased in part based on high rates of upward departure for second degree murder (34.3%) and voluntary manslaughter (28.6%)); *see also Downward Departures* at 16-17 (explaining that the 2001 amendment to § 2L1.2 (Illegal Reentry) was prompted by the 35.6% rate of downward departure).

[21] *Id.* tbl. 3 (for the primary offense category of assault, which includes offenses involving threatening communication and obstructing or impeding officers, showing a 6.9% rate of sentences above the guideline range and a 16.2 % rate of non-government-sponsored below-guideline sentences).

percent of federal offenders, but over one-third of offenders sentenced for assault.[22] In 2003, the Ad Hoc Advisory Committee on Native American Sentencing Issues found significant unwarranted disparity in sentences for Native Americans sentenced for assault in the state system versus those sentenced in the federal system.[23] It strongly recommended that the Commission lower the offense level for aggravated assault by two levels, which represented a "conservative approach" to the disparity found by the group.[24] In response, the Commission lowered by one level the base offense level in § 2A2.2 (from 15 to 14), but at the same time increased by one level each of the specific offense characteristics in § 2A2.2 addressing degrees of bodily injury. Given that nearly 79% of aggravated assault convictions involve bodily injury, this amendment is not likely to have reduced the disparity found by the Ad Hoc Advisory Group. The Commission should seek the advice of a reconstituted Advisory Group on Native American Sentencing Issues before taking any steps with respect to the guidelines for assault.

Third, as with manslaughter offenses, the new midpoints of the relevant guideline ranges for defendants in Criminal History Category I convicted of assault under one of these provisions still represent a higher or comparable percentage of the total range than for other offenses referred to those same guidelines. For example, a defendant convicted under § 1512(a) for attempted murder and sentenced under § 2A2.1, the midpoint, 12.6 years, represents 42% of the new statutory range. And for an offense motivated by the official status of the victim, the midpoint rises to 24.6 years, or 80% of the statutory maximum. In contrast, a defendant convicted under 18 U.S.C. § 351(c) for attempting to kill a member of Congress, Cabinet or Supreme Court Justice, or under 18 U.S.C. § 1751(c) for attempting to assassinate the President or his staff, will start at the same midpoint, 12.6 years, where the statutory maximum is life in prison.

Similarly, for a defendant convicted under § 115(b)(1)(B)(iv) involving aggravated assault where there was serious bodily injury or a dangerous weapon was used, the midpoint of the guideline range under § 2A2.2 is 3.5 years, or 12% of the new statutory maximum of thirty years. This is a higher ratio of midpoint-to-maximum than if the same offense had been charged under 18 U.S.C. § 111, which applies to assaulting federal officers or employees, where the ratio is 10% (midpoint 2 years/maximum 20 years).[25] This is nearly the same as the ratio for a conviction under 18 U.S.C. § 113(a)(6) for assault with a dangerous weapon or with intent to do bodily harm (15%), a conviction

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[22] *Id.* tbl. 23 & App. A (showing 39.8% of assault offenders are categorized as "Other," which includes Native Americans, Alaskan Natives, Asians and Pacific Islanders). As with manslaughter offenses, we do not know the exact percentage of Native Americans convicted of assault and are assuming that the majority of "Others" are Native Americans. In 2003, the Ad Hoc Advisory Group reported that about 34% of offenders in federal custody for assault were Native American. *See* Native American Report at 58.

[23] Native American Report at 32-33.

[24] *Id.* at 34.

[25] Again, if the offense was motivated by the official status of the victim, the offense level will increased by six levels under § 3A1.2(b), representing 38% of the statutory maximum.

under 18 U.S.C. § 2199 for an offense involving stowaways with serious bodily injury (14%), or torture under 18 U.S.C. 2430A with serious bodily injury (14%).

These numbers tell us that the increases in the statutory maximum sentences under § 115(b)(1) have not rendered guideline ranges necessarily out of proportion with other offenses sentenced under these same guidelines. They also tell us that increases in guidelines to achieve proportionality in relation to statutory maxima would be an arbitrary exercise, which experience has shown leads only to further cycles of increase that do not take into account the sentencing practices of judges. Legislative increases do not, in and of themselves, tell us anything about whether guideline ranges are adequate.

With respect to offenses under § 1513 involving assault, which are currently referred only to USSC § 2J1.2, we again urge restraint. As the Commission recognizes, offenses referred to § 2J1.2 range from "a mere threat to an act of extreme violence." USSG § 2J1.2 comment. (backg'd). Courts retain the discretion under § 2J1.2 to sentence up to the statutory maximum of thirty years for attempted murder and 20 years for other assaults. In addition, § 3A1.2 provides for a three-level upward adjustment if the offense was motivated by the official status of the victim. Available data indicate only a 3% above-guideline rate for cases sentenced under § 2J1.2.[26] Absent sentencing data showing that guideline ranges for offenses involving assault are inadequate under § 2J1.2, the Commission should not act.

(3) Obstruction of justice

Congress amended 18 U.S.C. § 1512(b) to increase the statutory maximum from 10 to 20 years for knowingly intimidating, threatening, or corruptly persuading, attempting, or misleading another person to influence, delay or prevent testimony in an official proceeding. It also amended § 1512(d) to increase the statutory maximum from one to three years for harassing another person to hinder, delay, or prevent another person from testifying in an official proceeding. These offenses are referred to USSG § 2J1.2.

As with manslaughter, assault, and threat offenses, the Commission need not take any action in response to these new statutory maximum sentences. Guideline ranges for obstruction offenses fall at widely varying points in relation to statutory maximum sentences, indicating that the statutory maximum is not the appropriate point of reference. Moreover, other offenses also referred to § 2J1.2 have similar or higher statutory maxima than offenses under § 1512(b), such as offenses involving a killing under § 1503 (with a statutory maximum of life or death), or tampering with a witness under § 1512(c) (with a maximum of 20 years).

For a defendant in Criminal History Category I convicted under § 1512(d), the midpoint of the applicable guideline range is still 50% of the three-year statutory maximum (down from an inexplicable 150%). At this rate, the statutory maximum is reached for a defendant in Criminal History V, even without any adjustment under §

[26] 4th Quarter Data Report – 2008, at tbl. 5.

3A1.2 if the offense was motivated by the official status of the victim. With that adjustment, the statutory maximum is reached at Criminal History Category III.

B. Official Victim

The Commission requests comment on whether USSG § 3A1.2 adequately addresses the circumstance of an official victim and, more specifically, whether the Commission should increase the impact or scope of its provisions regarding official victims. The Commission also asks whether an upward departure provision for "exceptionally high level officials" should be incorporated into one or more of the guidelines in Chapter 2, part A. The Commission should take no action with regard to § 3A1.2.

First, the upward adjustment for official victim in § 3A1.2 was increased in 2004 in response to the Federal Judiciary Protection Act of 2002, div. C, title I, § 11008 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 (Nov. 2, 2002). In that Act, Congress increased the statutory maximum for a number of offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a Federal judge, magistrate judge, or any other official described in section 111 or 115 of title 18. *Id.* § 11008(b). It also directed the Commission to "review and amend the Federal sentencing guidelines and the policy statements of the commission, if appropriate, to provide an appropriate sentencing enhancement" for these offenses. *Id.* § 11008(e). In doing so, the Commission was instructed to consider several factors, including "the extent to which sentencing enhancements within the Federal sentencing guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense." *Id.* § 11008(e)(2)(D).

In response to this directive, the Commission restructured § 3A1.2 to double the upward adjustment from three to six levels when the offense of conviction was motivated by the official status of the victim and the applicable offense guideline is from Chapter 2, Part A (Offenses Against the Person). *See* USSG, App. C, Amend. 663 (Nov. 1, 2004). At the time, the Guidelines were still mandatory, so the courts had little authority to exceed the guideline range.

Second, there is no evidence that the guidelines are inadequate to account for the official status of the victim. In fiscal year 2007, the vast majority (99.7%) of all offenses did not involve an official victim.[27] For all offenses against the person, only 7.8% were motivated by the official status of the victim.[28] For offenses sentenced under § 2J1.2, only 0.6% were motivated by the official status of the victim[29]. Moreover, in the years

[27] 2007 Chapter 3 Adjustments, at 2.

[28] *Id.* (out of a total of 932 offenses sentenced under Chapter 2, Part A, 73 received an official victim adjustment under §3A1.2).

[29] *Id.* at 54.

since § 3A1.2 was amended, the official status of the victim was listed as a reason given by courts for a sentence above the guideline range only in fiscal year 2005 and only in five cases.[30]

Third, Congress did not direct the Commission in the Court Security Act of 2007 to take any action with respect to § 3A1.2. To the extent that the Commission is examining § 3A1.2 because Congress increased penalties for several offenses involving federal employees and court officers, we urge caution for all the reasons set forth above with respect to those increased penalties. Even Congress recognizes that "the authority of the court to impose a sentence in excess of the applicable guideline range" can mean that the guidelines are "adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense." Pub. L. No. 107-273, § 11008(e)(2)(D). Now that the guidelines are advisory, there is no limit on the court's authority to impose a sentence at or near the maximum penalty in the most egregious case, including a case involving "exceptionally high-level officials." The Commission should allow courts to exercise that authority as it already exists, and refrain from creating enhancements that may apply to cases that are not the most egregious.

C. Section 115(b)(4) Threat Offenses

Background

Specifically with respect to threats punishable under 18 U.S.C. § 115(b)(4),[31] Congress directed the Commission to study the guidelines as they apply to threats occurring over the Internet and determine "whether and by how much that circumstance should aggravate the punishment" and provided several factors the Commission should consider in conducting the study, including the number of threats made and the intended number of recipients. *See* Pub. L. No. 110-177, § 209. During the last amendment cycle, the Commission requested and received comment from the Defenders and from the Practitioners Advisory Group, which both recommended that the Commission do nothing in response to this directive.[32]

In apparent response to the directive (though without any evidence of study), the Commission amended Application Note 4(B) to USSG § 2A6.1, which applies to § 115(b)(4) offenses, to encourage upward departure if the offense involved "substantially

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[30] USSC, *2005 Sourcebook of Federal Sentencing Statistics*, tbl. 24B (post-*Booker*) (2005). It may also be that the courts were varying upward to account for the amendment in cases sentenced under pre-2004 guidelines.

[31] Congress did not increase the statutory maximum for these offenses in the Court Security Act of 2007. However, it had increased the maximum from three to six years in 2002 as part of the Federal Judiciary Protection Act of 2002. *See* Pub. L. No. 107-273, Div. C, tit. I, § 11008(c)(2) (Nov. 2, 2002)

[32] *See* Letter from Jon Sands to Ricardo H. Hinojosa, *Re: Comments on Proposed Amendments*, at 13 (Mar. 6, 2008) (agreeing with the Practitioners Advisory Group); Letter from David Debold & Todd Bussert, Practitioners Advisory Group, *Re: Response to Request for Comment on Proposed Amendments for 2008*, at 6-7 (Mar. 7, 2008).

more than two false liens" against the property of the same victim or "substantial pecuniary harm to a victim."[33] At the same time, the Commission amended § 2H1.3 to incorporate the new offenses created by the Act of publishing restricted information with the intent to threaten or intimidate. *See* 18 U.S.C. § 119. The Commission added an 8-level specific offense characteristic if the defendant was convicted under § 119, and a 10-level enhancement if the defendant was convicted under § 119 "and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available." USSG, App. C, Amend. 718 (Nov. 1, 2008). The Commission explained that the two-level enhancement for use of a computer or an interactive computer service "accounts for the more substantial risk of harm posed by widely disseminating such protected information via the Internet."

Before the amendment became effective, we asked the Commission to reconsider its decision to add a two-level enhancement for the use of a computer in § 119 offenses.[34] We pointed out that the directive regarding the use of the Internet was aimed at § 115 offenses, and the Commission did not publish for comment that it was considering such an enhancement for § 119 offenses. As a result, the Commission lacked the benefit of public comment on an amendment that exceeded the scope of the directive. We also pointed out that because the Internet functions today as the most readily available and widely used means of accessing and communicating all kinds of information, and because it is likely that a computer will be involved in most offenses involving the publication of restricted information, the use of a computer is not truly an aggravated form of the offense. Moreover, the enhancement would sweep in not just those who widely disseminate information via the Internet, but also a defendant who published restricted information by email to only one person but the information was never "widely disseminated."

(1) Threats occurring over the Internet

The Commission again requests comment on whether it should address Congress's directive by amending § 2A6.1 to provide that use of the Internet is an aggravating circumstance for threat offenses under § 115(b)(4). And we again urge the Commission to refrain from adding a specific offense characteristic to account for the use of the Internet under § 2A6.1.

As we reported to staff last November, it appears that the Internet plays little role in § 115 offenses. Cases reported by Defenders in response to our survey indicated that threat convictions under § 115 generally involve verbal threats in person, by phone, or by

[33] USSG, App. C, Amend. 718 (Nov. 1, 2008). Application Note 4(B) already encouraged upward departure if the offense involved "substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims." USSG § 2A1.6 (2007).

[34] Priorities Letter, Mem. at 47-48.

letter.[35] Only one case reported in response to our survey involved use of the Internet. In that case, a veteran diagnosed with PTSD sent a threatening email message to a Congressman's office because he was frustrated with the Veteran's Administration's handling of his application for a higher disability rating. He had also used the Internet to get a map to D.C. Based on several mitigating factors, the court sentenced him *below* the guidelines range of 18-24 months.

As we pointed out then, it would have taken more effort, deliberation, and planning for the defendant to get a physical map to D.C. and to mail a letter to the Congressman. The defendant's use of the Internet reflected less culpability, and no greater harm, than if he had used "old-fashioned" means.

Research confirms our conclusion that the Internet is not an aggravated way of committing § 115 offenses. We found two cases in which a threat prosecuted under § 115 involved the use of a computer, and only one that clearly involved the Internet.[36] In neither case was there any suggestion that the harm was greater because a computer was involved. Given the pervasiveness of the Internet, using it as a method of transmission does not appear to indicate greater culpability on the part of the defendant or to cause more harm than a threat that is mailed, telephoned in, or made in person. If anything, the use the Internet to convey a threat to a public official indicates *less* culpability and risk of harm.[37]

It is conceivable that a person could send a blast email conveying a threat to many officials, but that has not occurred (to our knowledge), and such conduct is already a basis for departure under Application Note 3(B) to § 2A6.1 or an increased sentence under 18 U.S.C. § 3553(a)(1), (a)(2)(A). Absent data indicating otherwise, the Commission should not amend § 2A6.1 to add an enhancement for threats under § 115 occurring over the Internet.

Nor do we believe it would be appropriate to add a two-level enhancement for use of the Internet to § 2A6.1 because the Commission added a similar enhancement to § 2H3.1. As set forth above, we object to the enhancement in § 2A6.1 because it increases

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[35] Memorandum from Amy Baron-Evans to Kelley Land, *Court Security Act Directive re Threats Over the Internet* (Nov. 18, 2008).

[36] *See United States v. Johnson*, 18 Fed. Appx. 463 (9th Cir. 2000) (threat by email communications); *United States v. Erskine*, 2004 U.S. App. LEXIS 842 (9th Cir. June 5, 2003) (address of person threatened located by using a county computer in the tax assessor's office)

[37] Katherine A. Schoeneman-Morris et al., *A Comparison of Email Versus Letter Threat Contacts toward Members of the United States Congress*, 52 J. Forensic Sci. 5, 1142-47 (Aug. 2007) (comparing 301 letters and 99 emails sent to public officials with results indicating "letter writers were significantly more likely than emailers to exhibit indicators of serious mental illness (SMI), engage in target dispersion, use multiple methods of contact, and make a problematic approach toward their target. . . . [They also] tended to be significantly older, have more criminal history, and write longer communications. . . . The group differences illuminated by this study reveal that letter writers are engaging in behavior that is higher risk for problematic approach than are emailers") (abstract available at http://www3.interscience.wiley.com/journal/118519300/abstract).

punishment for conduct that is likely to occur in most § 119 offenses and because it sweeps more broadly than its intended purpose. We therefore object to any action that is aimed at conforming § 2H3.1 to that enhancement. If the Commission is concerned with proportionality, it should *remove* the enhancement at § 2A6.1 so that it conforms with § 2H3.1 as it is currently written.

Further, it is not inappropriate for guideline ranges under § 5H3.1 to be lower than guideline ranges under § 2A6.1. Offenses prosecuted under § 115 are qualitatively different from § 119 offenses. Unlike § 119, threats under § 115 do not involve exposing a victim to greater harm by third parties through *disclosure* of restricted information in an effort to threaten or intimidate or incite violence. Instead, § 115 offenses involve a specific threat by the defendant, conveyed to the victim. And when the threat is conveyed over the Internet, it is even less likely to expose the victim to harm.[38]

(2) Number of threats or victims

The Commission has also requested comment regarding whether the provisions in § 2A6.1 are adequate to address the number of threats or the number of victims. We believe they are. First, the specific offense characteristic at subsection (b)(2)(A) if the offense involved more than two threats is applied in fewer than 30% of cases.[39] Second, the above-guideline rate in § 2A6.1 cases is only 11%, while the rate of non-government sponsored below-guideline sentences is 18.2%.[40] This judicial feedback suggests that guidelines ranges under § 2A6.1 are adequate, and there is no need to transform the upward departure factors listed at Application Note 4 into enhancements as part of the guideline.

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[38] *Id.*

[39] 2007 Guideline Frequencies, at 8.

[40] 4th Quarter Data Report – 2008 tbl. 5. The rate of all downward departures, including those sponsored by the government is 20.8%.