

CHAPTER TWO

The Sentencing Guidelines

Guideline Amendments

The legislation creating the Sentencing Commission provides that “[t]he 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.” 28 U.S.C. § 994(o). Given this congressional mandate, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, enactment of new statutes, and input from federal criminal justice practitioners. By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, emergency amendments in connection with particular legislation.

In 1999, however, the Commission was unable to promulgate any amendments to the sentencing guidelines due to vacancies that were created in October 1998 when the chair resigned and the remaining commissioners’ terms expired. Without voting commissioners, the agency was unable to take formal action on any policy development issue during the amendment cycle ending May 1, 1999.

In November 1999, the full complement of seven voting commissioners was appointed to the Commission. The newly constituted Commission identified priority policy development issues for the amendment cycle ending May 1, 2000, and published a notice of proposed priorities in the *Federal Register* in December 1999. The priorities include responding to outstanding legislative issues from the 105th and 106th Congresses, as well as resolving selected issues of circuit conflict.

Policy Teams

As part of its continuing analysis of the sentencing guidelines and related sentencing issues, the Commission annually identifies a number of priorities for the coming year and, in some cases, beyond. Selected priority areas are examined and analyzed by interdisciplinary policy teams, each comprising a cross section of the Commission staff (*e.g.*, legal staff, policy analysis staff, and training staff).

Policy teams typically study a specific guideline issue, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group reviews monitoring data regarding sentencing practices; case files of sentencing defendants; training and legal staff reports of frequent questions about guideline application (HelpLine calls) from probation officers, judges, and attorneys; previously considered draft amendment proposals; relevant court decisions; public comment; and legislative history and recent legislative enactments.

The teams also solicit input from the Practitioners' Advisory Group and the Probation Officers Advisory Group.¹

While the 105th Congress did not enact an “omnibus” crime bill, it did pass a number of crime and sentencing-related laws focused on discrete issues that necessitate consideration of possible guideline amendments. Included among these laws are several that contain directives to the Commission relating to copyright and trademark infringement, the cloning of wireless telephones, identity theft and assumption, and the sexual abuse of children. Before Congress adjourned (thereby ending the service of three of the four remaining voting commissioners), the Commission voted to publish proposed amendments and issues for comment pertaining to several of these matters.² Additionally, looking ahead to the appointment of new commissioners, the outgoing chair worked closely with staff to develop a comprehensive plan to guide staff preparatory work on issues growing out of the recently enacted legislation. Several new policy teams were formed to focus exclusively on some of the legislative directives, and existing teams devoted considerable time to studying the implications of the new laws and developing options for the incoming Commission to consider.

Economic Crimes Policy Team

The 105th Congress enacted a number of sentencing-related laws that deal with economic crimes, including directives to the Commission about the cloning of wireless telephones and identity theft and assumption. The Economic Crimes Policy Team analyzed this legislation and prepared reports for the incoming commissioners. These reports were designed to provide background information and options to amend the guidelines in response to the directives. As part of its ongoing review of the economic crime package, the policy team continued its work on drafting possible revisions to the loss definition for theft and fraud offenses and conducted a review of counterfeiting offenses.

Cellular Telephone Cloning

In April 1998, Congress passed the Wireless Telephone Protection Act, Pub. L. 105-72, in response to increasing financial losses to the telecommunications industry and the growing use of cloned phones in connection with other criminal activity. The Act made significant changes to

¹ The Probation Officers Advisory Group, organized in June 1992, provides input from field officers on Commission priorities and proposed amendments. The 15-member group is composed of one probation officer from each circuit, plus an additional officer from the Fifth, Ninth, and Eleventh Circuits (due to their size). In addition, a probation officer in each district is designated as a liaison to his/her respective circuit representative.

The Practitioners' Advisory Group (PAG), a voluntary membership organization composed of approximately 50 practicing attorneys, provides defense bar perspectives on Commission policies, sentencing procedures, and proposed guideline amendments. In addition, representatives of the National Association of Criminal Defense Lawyers (NACDL), the American Bar Association Federal Sentencing Guidelines Committee, and the Federal Public and Community Defenders also attend most meetings.

² See 63 Fed. Reg. 229, 65980 (1998).

18 U.S.C. § 1029 and directed the Commission to “review and amend the federal sentencing guidelines, the policy statements of the Commission, and, if appropriate, to provide an appropriate penalty for offenses involving the cloning of wireless telephones. . . .” The directive also requires the Commission to consider eight specific factors in conducting its review (*e.g.*, the range of conduct covered by the offense; the extent to which the value of the loss caused by the offense, as defined in the sentencing guidelines, is an adequate measure for establishing penalties).

The policy team reviewed the legislative history of the Act; studied the literature about the cloning of cellular telephones; analyzed cloning cases sentenced in 1998; reviewed relevant case law; and met with representatives of the U.S. Department of Justice, the U.S. Treasury Department, the U.S. Secret Service, and the Cellular Telecommunications Industry Association (CTIA). The team also received and analyzed data from CTIA and the U.S. Secret Service.

In reviewing the adequacy of penalties for cloning offenses, the policy team identified two concerns regarding the current guideline for cloning offenses (§2F1.1 (Fraud)) – (1) whether the range of conduct covered by the offenses is adequately covered by the current guideline; and (2) whether the determination of loss in cloning cases is being accomplished in a consistent, appropriate manner by the guidelines.

The team prepared a report on its findings and presented several options to address sentencing in phone cloning cases. See the Commission’s Internet web site at <http://www.ussc.gov/pdf/cloning.htm>.

Identity Theft

The Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-31, criminalized the unauthorized use or transfer of a means of identification with the intent to commit or to aid or abet any federal violation or state felony. The Act directed the Commission to “review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate penalty for each offense under section 1028 of title 18, United States Code, as amended by this Act” and to consider a number of specific factors in conducting the review (*e.g.*, the number of means of identification, identification documents, or fake identification documents involved in the offense; the extent to which the value of loss to any individual caused by the offense is an adequate measure for establishing penalties).

Prior to the passage of this Act, only the unauthorized use or transfer of identity *documents* was illegal under 18 U.S.C. § 1028(a)(1)-(6), while the unauthorized use of credit cards, PINs, ATM codes, and other electronic access devices was illegal under 18 U.S.C. § 1029. The addition of subsection (a)(7) to section 1028 reflects the rapidly evolving developments in technology and commerce by which an individual’s “means of identification” can now properly include *information* such as social security and other governmental identification numbers, dates of birth, and unique biometric data, as well as electronic access devices and routing codes used in the telecommunications and financial sectors. The new law also expanded the universe of identifiable victims beyond the government or financial institution that sustains the primary economic loss of identity theft to include the individuals whose identification means are misused.

In order for the Commission to determine the type of offense conduct for which there should be enhanced penalties for identity theft, staff met with law enforcement agencies and consumer protection advocates, conducted an extensive analysis of Commission data, and prepared a

report providing quantitative information on the scope of conduct covered by the new law and preliminary policy options for consideration. See the Commission's Internet web site at <http://www.ussc.gov/identity.htm>.

Definition of Loss and Loss Tables

The Economic Crimes Policy Team continued to work on the proposed comprehensive rewrite of the loss definition for theft and fraud offenses using the results of the 1998 "field test" of the loss definition amendment proposal. For this test, Committee members and other judges, with the assistance of probation officers, applied the new definition to a hypothetical fact scenario and to a group of recently sentenced, actual cases. Participants then completed a survey regarding loss definition issues.

In 1998, test participants had traveled to Washington, D.C., for a day-long debriefing session in September to discuss their findings and make recommendations. Representatives of the federal defenders, the Commission's Practitioners' Advisory Group, and the Department of Justice also attended. The team subsequently analyzed these findings and recommendations. In October 1998, the policy team issued a loss definition field testing report. See the Commission's Internet web site at <http://www.ussc.gov/pdf/lossdefn.pdf>.

Counterfeiting

The economic crime policy team also conducted a review of issues relating to counterfeiting offenses. In November 1998, the Department of Treasury submitted proposed amendments to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) and raised concerns about new techniques of digital counterfeiting. Historically, counterfeiting has been accomplished by the offset printing method, but the increased availability of personal computers, inkjet printers, and other digital technology now makes it possible for relatively unskilled individuals to engage in counterfeiting with little investment in equipment. The number of counterfeit cases has increased substantially since 1995. New techniques of digital counterfeiting can make tracking the source of counterfeit currency difficult.

To assess the impact of recent technological developments on counterfeiting, the policy team studied counterfeiting methodology and the scope of counterfeiting activity. The team analyzed Commission data on counterfeit cases, pre-guidelines cases from the Administrative Office of the U.S. Courts, and sentencing data from the Department of Treasury. The group also examined federal case law on counterfeiting offenses. On several occasions, the team met with representatives of the Department of Treasury and the Secret Service about the concerns of law enforcement regarding the changing nature of counterfeiting offenses. The team also examined supplemental data from a case coding project designed by the Commission's Office of Policy Analysis. The team moved towards completion of a report on the findings of its review, including an analysis of guideline amendment proposals from the Department of Treasury and a variety of policy options for the commissioners' consideration.

No Electronic Theft Act Policy Development Team

Congress passed the No Electronic Theft Act (the "NET Act"), Pub. L. 105-147, in December 1997. This Act criminalizes computer theft of copyrighted works, whether or not the defendant derives a direct financial benefit or commercial advantage from the act of

misappropriation. The Act directs the Commission to (1) provide that the guideline range for intellectual property offenses is sufficiently stringent to deter those offenses; and (2) ensure that the pertinent guideline considers the retail value and quantity of the intellectual property infringed upon. The existing sentencing guideline, §2B5.3 (Criminal Infringement of Copyright or Trademark), provides for increasing offense levels based solely on a monetary adjustment using the retail value of the infringing item. Pursuant to the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, the Commission faced a deadline of April 6, 2000, to promulgate temporary emergency amendments implementing the NET Act.

In October 1998, the Commission formed a policy development team to assist commissioners in developing and evaluating possible responses to the Act. Building on the work performed earlier, the team (1) analyzed the legislative history of the Act, (2) reviewed the history of §2B5.3, (3) reviewed public comment, (4) conducted an empirical analysis of cases sentenced under §2B5.3, (5) conducted a literature review, (6) researched relevant state law and federal regulations, and (7) conducted a lengthy series of informal meetings with economists and representatives of industries most affected by intellectual property offenses. The team report, completed in February 1999, analyzed the role of the guidelines in deterring infringement crimes, the types of harm caused by copyright and trademark infringement, and the difficulty of accurately measuring total harm. The report also provided a number of possible options for the Commission to consider in implementing the Act. See the Commission's Internet web site at <http://www.ussc.gov/pdf/netrpt99.pdf>.

The Firearms Policy Team

The Firearms Policy Team began a comprehensive examination of the guidelines' approach to sentencing for (1) possession or use of a firearm during a crime of violence or drug trafficking offense, and (2) violations of the various firearm regulatory and status offenses sentenced under §2K2.1 and §2K2.5. In 1999, the policy team completed a report on the first area of concern.

In response to *Bailey v. United States*,³ Public Law 105-386 (enacted on November 13, 1998) broadened the scope of conduct covered under 18 U.S.C. § 924(c) to make it a crime for a person who, in furtherance of a crime of violence or drug trafficking crime, "possesses a firearm." The new version of section 924(c) calls for tiered sanctions of imprisonment for "not less than" five, seven, or ten years (depending on whether the weapon was used, carried, brandished, or discharged), while the previous version of the statute provided for fixed minimum penalties.

To determine whether these changes to the statute may warrant amendments to the guidelines, the firearms policy team reviewed the legislative history of Public Law 105-386 and examined the guideline approach to sentencing offenses that involve possession or use of a weapon. The team prepared a report providing an overview of sentencing for firearm possession and use, including a discussion of the difficulty of integrating into the guideline structure the minimum and maximum penalties of the statute and the statutory definitions of terms such as "brandish" and "possession in furtherance." The policy team developed various policy options for amending the guidelines to address potential application problems that could result from the revised statute.

The team continued to examine the firearms and explosives guidelines with an eye toward recommendations to address problem areas, to make the guidelines more internally consistent, and to

³ 516 U.S. 137 (1995).

generally improve their operation. Part of this effort includes a review of recommendations for guideline amendments received from the Department of the Treasury and the Bureau of Alcohol, Tobacco, and Firearms.

Methamphetamine Policy Team

The Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. 105-277, increased the statutory mandatory minimum penalties for methamphetamine offenses by cutting in half the quantity of the pure substance and methamphetamine mixture that triggers the separate five- and ten-year mandatory minimums. The legislation set the quantities necessary for the five- and ten-year mandatory minimum sentences as follows:

Five-year minimum: 5 grams of methamphetamine (actual) or
50 grams of methamphetamine mixture

Ten-year minimum: 50 grams of methamphetamine (actual) or
500 grams of methamphetamine mixture

Following passage of the Act, the Commission formed the Methamphetamine Policy Team to study trends in methamphetamine trafficking and to develop options for possible amendments to the guidelines.

The Commission had previously amended the guideline penalties applicable to methamphetamine mixture offenses in response to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237. The Commission's response to the 1996 legislation made the offense levels applicable to methamphetamine mixture offenses correspond to the minimum penalties for such offenses required by the 1998 Act. The Commission faced the choice of whether or not to incorporate the increased mandatory minimums of the statute for methamphetamine (actual) offenses by amending the drug quantity table to provide corresponding penalties for those offenses.

The Methamphetamine Policy Team conducted a comprehensive review of methamphetamine offenses, including a review of the legislative history of pertinent statutes, a review of the relevant, previous amendments to the guidelines, and preparation of demographic and sentencing summaries of methamphetamine offenders and offenses. The team prepared a report of its findings that included several policy options to amend the drug quantity table to make penalties for certain methamphetamine offenses consistent with the 1998 statutory amendments. See the Commission's Internet web site at <http://www.ussc.gov/pdf/methreport.pdf>.

Sexual Predators Act Policy Team

On October 30, 1998, Congress passed the Sexual Predators Act, Pub. L. 105-314. The Act increased the penalties for certain offenses involving child pornography and sexual activity with minors. It also created two new crimes: (1) transmittal of identifying information about minors for criminal sexual purposes and (2) distribution of obscene materials to minors. The Act also includes several directives to the Commission to amend the guidelines relating to the sexual abuse of children. Among other requirements, those directives mandate that the Commission provide a sentencing increase if the defendant used a computer in connection with a sexual abuse offense against a minor or engaged in a pattern of sexual abuse or exploitation of a minor.

The policy team focused on the following questions: (1) what solutions are there for addressing the perceived inadequacy of punishment for cases sentenced under the guidelines for statutory rape and Chapter 117 offenses (Transportation for Illegal Sexual Activity and Related Crimes)?; (2) how might high-risk offenders best be identified and incapacitated?; and (3) what is the best way to provide an appropriate enhancement in a case in which the defendant engaged in a “pattern of activity” involving the sexual abuse or exploitation of a minor? The team sought information from interested organizations and reviewed pertinent statutes, relevant case law, and the legislative history of the Act. The team also reviewed the Commission’s 1996 report to Congress on sex offenses against children, in particular that report’s amendment options and recommendations to Congress to increase statutory maximum penalties. In addition, the policy team reviewed offense conduct and sentences imposed in fiscal years 1996-98 for sexual abuse, pornography, and obscenity. The team’s report presents the group’s findings and sets forth several policy options to assist the Commission in implementing the directives. See the Commission’s Internet web site at <http://www.ussc.gov/sexpred/sexpred.htm>.

Nuclear, Biological, and Chemical Weapons Policy Team

During the past few years, Congress and the public have become increasingly concerned with the threat posed by criminal behavior that involves nuclear, biological, and chemical weapons, materials, and technologies. In the National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, Congress expressed its sense that “the sentencing guidelines. . . for the offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological and chemical materials constitute inadequate punishment for such offenses” and urged the Commission to revise the relevant sentencing guidelines to provide for increased penalties under various criminal statutes. Congress also created several new offenses in this area, making it necessary for the Commission to consider their appropriate treatment under the guidelines. Specifically, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, (1) incorporated attempts and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons, and (2) expanded the meaning of “biological agents.” The Chemical Weapons Convention Implementation Act of 1998, Pub. L. 105-277, created a new offense at 18 U.S.C. § 229, which makes it unlawful for a person knowingly to develop, produce, otherwise acquire, transfer, receive, stockpile, retain, own, possess, use, or threaten to use any chemical weapon, to assist or induce any person to do so, or to conspire to do so.

In November 1998, the Commission published in the *Federal Register* an issue for comment on how to treat these new offenses and how to respond to the sense of Congress described above.⁴ The policy team is gathering information on the myriad issues related to the sentencing of these offenses to assist the Commission in making informed decisions on the appropriate penalties for these offenses.

Telemarketing Fraud Policy Team

In 1998, the Commission conducted a detailed study of telemarketing fraud offenses in conjunction with its multi-year comprehensive assessment of fraud and related guidelines. As a

⁴ See 63 Fed. Reg. 229, 65993 (1998).

result of its analysis, the Commission recommended to the leadership of the House and Senate Judiciary Committees that Congress amend 18 U.S.C. § 2326 (Enhanced Penalties for Telemarketing Fraud) to (1) provide a simpler statutory enhancement, (2) cover conspiracy offenses, and (3) clarify the mandatory restitution provisions for these offenses. The Commission also promulgated amendments to the guidelines providing sentencing enhancements for offenses involving mass marketing and sophisticated concealment.

Partially in response to the Commission's recommendations, Congress passed the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105-184. The Commission subsequently promulgated emergency amendments to the guidelines providing for separate sentencing enhancements for fraud offenses that involve sophisticated means (modifying the amendment providing for the sophisticated concealment enhancement) and all offenses perpetrated against a large number of vulnerable victims.

In the fall of 1998, the Commission submitted the emergency amendments to Congress with a second report explaining the rationale for the emergency amendments along with their expected impact on sentencing. A policy development team remained in place to assist the new commissioners in making the emergency amendments a permanent part of the guidelines. See the Commission's Internet web site at <http://www.ussc.gov/pdf/telrpt1.pdf>.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. To fulfill this responsibility, in 1999 the Commission continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses.

Throughout the year, the Commission responded orally or in writing to hundreds of congressional requests for assistance (*e.g.*, requests for federal sentencing and criminal justice data, analyses of proposed legislation and the ways in which proposed legislation may impact the guidelines, explanations of guideline application, technical assistance in drafting legislation, and regular updates on Commission action in response to recently enacted crime and sentencing-related legislation). The Commission also testified before the Courts and Intellectual Subcommittee of the House Judiciary Committee to brief Subcommittee members on the agency's progress in implementing the directives contained in the No Electronic Theft Act of 1998. Throughout the year, the Commission also supplied numerous Commission publications and resource materials to members of Congress and their staff.

