

Chapter Two

The Sentencing Guidelines

The legislation creating the 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 directive, 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.

Policy Issues

Identity Theft Enforcement and Restitution Act of 2008

The Commission studied the directive in the Identity Theft Enforcement and Restitution Act of 2008 (“ITERA”).⁶ Section 209(a) of ITERA directed the Commission to review the guidelines and policy statements applicable to persons convicted of computer crime and the theft or misuse of personally identifiable data “in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.” Section 209(b) of ITERA instructed the Commission to consider the extent to which the guidelines and policy statements

adequately accounted for 13 specified factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data.

The Commission considered input from the Department of Justice (“DOJ”), the Federal Trade Commission, the Federal Public Defenders (“FPD”), industry representatives, and other interested parties. The Commission conducted an analysis of cases involving convictions for the five criminal statutes specified in ITERA, as well as cases sentenced under USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and USSG §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). It also considered historical Commission work in the area of identity theft and computer crimes and compared the analysis of more recent cases with past analyses, and conducted a case law and literature review.

The Commission promulgated a multi-part amendment in response to ITERA that became effective on November 1, 2009. First, the amendment added a new two-level enhancement in USSG §2B1.1 that addresses offenses involving personal information. Specifically, the enhancement applies if (A) the defendant was convicted of an offense under 18 U.S.C. § 1030 and the offense involved an intent to obtain personal information or (B) the offense involved the unauthorized public dissemination of personal information.

Second, the amendment also amended the commentary to USSG §2B1.1 to provide that, for purposes of the victims table in subsection (b)(2), an individual whose means of identification was used

⁶ Pub. L. No. 110–326.

unlawfully or without authority is considered a “victim.”

Third, the amendment made two changes to Application Note 3(C) of USSG §2B1.1 regarding the calculation of loss. The first change specified that the estimate of loss may be based upon the fair market value of property that is copied. The second change added a new provision to Application Note 3(C) specifying that, in a case involving proprietary information (*e.g.*, trade secrets), the court may estimate loss using the cost of developing that information or the reduction in the value of that information that resulted from the offense.

Fourth, the amendment moved the definitions of “means of identification” and “personal information” to Application Note 1 and clarified that for information to be considered “personal information,” it must involve information of an identifiable individual.

Fifth, the amendment amended USSG §2H3.1 to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals.

Ryan Haight Online Pharmacy Consumer Protection Act of 2008

The Commission studied the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (“Ryan Haight Act”).⁷ The Ryan Haight Act amended the Controlled Substances Act (21 U.S.C. §§ 801, *et seq.*) to create two new offenses involving controlled substances. The first new offense prohibits the delivery, distribution, or dispensing of controlled substances over the Internet without a valid prescription.⁸ The applicable statutory maximum term of imprisonment is determined based upon the controlled substance being distributed. The second new offense prohibits the use of the Internet to

advertise for sale a controlled substance.⁹ In addition to creating the new offenses, the Ryan Haight Act increased the statutory maximum terms of imprisonment for all Schedule III controlled substance offenses (from five years to ten years), for all Schedule IV controlled substance offenses (from three years to five years), and for Schedule V controlled substance offenses if the offense is committed after a prior drug conviction (from two years to five years). The Ryan Haight Act also added a statutory sentencing enhancement for Schedule III controlled substance offenses where “death or serious bodily injury results from the use of such substance.”

The Commission undertook an analysis of cases sentenced under USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses); Attempt or Conspiracy) involving Schedule III, IV, or V controlled substances, including an examination of the guideline application factors relevant to the offense. Additional information about the specific conduct involved in the illegal distribution of these controlled substances was analyzed. The Commission conducted a literature review of the prevalence of abuse of these controlled substances, the prevalence of adverse consequences from their abuse, the growth in availability of these drugs, and the contribution of Internet pharmacies to these patterns. The Commission also heard testimony from outside groups and reviewed public comment on these issues.

After consideration of this information, the Commission promulgated an amendment to the guidelines in response to the Ryan Haight Act that became effective on November 1, 2009. The Commission amended Appendix A (Statutory Index) to reference the new offense at 21 U.S.C. § 841(h) to USSG §2D1.1. The Commission also amended the Drug Quantity Table in USSG §2D1.1 to raise the maximum base offense level for offenses involving

⁷ Pub. L. No. 110–425.

⁸ See 21 U.S.C. § 841(h).

⁹ See 21 U.S.C. § 843(c)(2)(A).

Schedule III hydrocodone products from level 20 to level 30.

The Commission addressed the new statutory penalty structure for cases involving Schedule III controlled substances where “death or serious bodily injury results from the use of such substance” by adding two new alternative base offense levels at USSG §2D1.1(a)(3) and (a)(4).

Drug Trafficking Vessel Interdiction Act of 2008

The Commission studied provisions of the Drug Trafficking Vessel Interdiction Act of 2008 (the “Act”).¹⁰ The Act created a new offense at 18 U.S.C. § 2285 making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submersible vessel in international waters with the intent to evade detection. The Act directed the Commission to consider a list of circumstances that may arise during the commission of the new offense. The Commission reviewed the legislative history of the Act, previous prosecutions of maritime drug trafficking offenses, and public comment from the DOJ, FPD, the Department of Homeland Security, the United States Coast Guard, and other interested parties before promulgating the amendment that became effective November 1, 2009.

First, the Commission amended USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by expanding the scope of the specific offense characteristic at subsection (b)(2) to apply if a submersible or semi-submersible vessel was used in the import or export of a controlled substance. Second, the Commission created a new guideline at USSG §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense at 18 U.S.C. § 2285. Third, the Commission amended Appendix A (Statutory Index) to reference 18 U.S.C. § 2285 to USSG §2X7.2.

¹⁰ Pub. L. No. 110–407.

Court Security Improvement Act of 2007

The Commission responded to a directive in the Court Security Improvement Act of 2007,¹¹ requiring the Commission to review the guidelines applicable to Internet threats to murder, assault, or kidnap specified federal officials. The Commission received testimony at a public hearing from a representative of the United States Marshals Service, and received and considered public comment from the DOJ, the FPD, and the Commission’s advisory groups. The Commission also considered the results of a literature review and an analysis of cases sentenced under USSG §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens). The Commission responded to the directive by promulgating an amendment that became effective on November 1, 2009. The amendment adds a 2-level enhancement to USSG §2A6.1 that applies if the defendant is convicted of making a public threatening communication against a specified federal official and knew or should have known that the threatening communication created a substantial risk of inciting others to murder, assault, kidnap, or threaten such violent acts against specified federal officials.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

The Commission studied provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“Wilberforce Act”),¹² which included a directive to the Commission and created two new offenses. In order to respond to the Wilberforce Act, the Commission reviewed public comment and considered testimony from representatives of the DOJ, FPD, the Commission’s Victims Advisory Group (“VAG”), and two trafficking victim groups. The Commission also considered the relevant legislative history, case law and sentencing data.

¹¹ Pub. L. No. 110–177.

¹² Pub. L. No. 110–457.

Section 222(g) of the Wilberforce Act directed the Commission “to review and, if appropriate, amend” the alien harboring guidelines to ensure conformity with the commercial sex act guidelines in cases in which the harboring was committed in furtherance of prostitution and the defendant was an organizer, leader, manager, or supervisor of the criminal activity.

The Commission responded to the directive by promulgating an amendment that became effective November 1, 2009. The amendment modified USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative prong to the enhancement at subsection (b)(8), which covers cases in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment. The new alternative prong applies in a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under USSG §3B1.1 (Aggravating Role).

The Wilberforce Act also created two new offenses. The first new offense, 18 U.S.C. § 1351 (Fraud in foreign labor contracting), was referenced in Appendix A (Statutory Index) to USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

The second new offense, 18 U.S.C. § 1593A (Benefitting financially from peonage, slavery, and trafficking in persons), which applies to a person who has knowingly benefitted financially from participating in a venture that has engaged in a violation of 18 U.S.C. §§ 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, was referenced to USSG §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) because that guideline covers the relevant underlying statutes. The

amendment also amended USSG §2H4.1 to provide that a defendant convicted of 18 U.S.C. § 1593A receives the same base offense level as if the defendant were convicted of committing the underlying violation. The amendment also added to the Commentary to USSG §2H4.1 to provide that a downward departure may be warranted in certain cases.

Counterfeiting

The Commission studied concerns expressed by federal judges and members of Congress regarding whether cases involving “bleached notes” should be sentenced under USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) or USSG §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States). Courts in different circuits have revolved this question differently.

The Commission examined the relevant case law, considered public comment, and conducted an analysis of cases involving bleached notes. After considering input from the United States Secret Service, the DOJ, the FPD, its Practitioners Advisory Group (“PAG”) and other interested parties, the Commission promulgated an amendment that became effective November 1, 2009. The amendment makes clear that bleached notes are to be sentenced under USSG §2B5.1. The Commission effected this change by broadening the definition of “counterfeit” in the commentary to USSG §2B5.1.

Additionally, the Commission amended USSG §2B5.1(b)(2)(B) to enhance the sentences of offenders who control or possess genuine currency from which the ink has been removed and deleted the reference of two statutes in Appendix A to USSG §2B1.1 because those statutes do not involve the elements of fraud.

Amendment Promulgation Process

Proposed amendments were published in the *Federal Register* on January 27, 2009. The Commission received written comment on the proposed amendments from a variety of sources. The Commission also conducted a public hearing on March 17-18, 2009, on the proposed amendments. See Table 2. On May 1, 2009, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2009.

The amendments promulgated by the Commission in 2009 include amendments responding to congressional directives and enacted legislation. Specifically, the Commission —

- responded to the Identity Theft Enforcement and Restitution Act of 2008¹³ by (1) amending USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to enhance penalties for offenses involving personal information; (2) amending commentary to USSG §2B1.1 to ensure that, for purposes of the victims table in USSG §2B1.1(b)(2), an individual whose means of identification was used unlawfully or without authority is considered a “victim,” and to clarify the calculation of loss in cases involving proprietary information; and (3) amending section USSG §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) to provide that an upward departure may be warranted in a case in which the offense involved personal information or means of identification of a substantial number of individuals.
- responded to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008¹⁴ by (1) amending USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide two new alternative base offense levels for offenses involving Schedule III controlled substances in which death or injury results; (2) modifying the Drug Quantity Table in USSG §2D1.1 to increase the maximum base offense level for offenses involving Schedule III hydrocodone; and (3) ensuring that the new offenses created by the act are referenced to the appropriate guidelines in Appendix A.
- responded to the Drug Trafficking Vessel Interdiction Act of 2008¹⁵ by (1) amending USSG §2D1.1 to expand the scope of the specific offense characteristic at subsection (b)(2) to apply if a submersible or semi-submersible vessel was used in a drug importation offense; (2) creating a new guideline at USSG §2X7.2 (Submersible and Semi-Submersible Vessels) for the new offense created by the act; and (3) amending Appendix A to reference the new offense to the new guideline.
- responded to the Court Security Improvement Act of 2007¹⁶ by (1) amending USSG §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens) to provide a new enhancement for a case in which the defendant is convicted under 18 U.S.C. § 115, made a public threatening communication, and knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115 and (2) amending Appendix A to add appropriate

¹³ Title II of Pub. L. No. 110–326.

¹⁴ Pub. L. No. 110–425.

¹⁵ Pub. L. No. 110–407.

¹⁶ Pub. L. No. 110–177.

Table 2

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Sentencing Guidelines
Washington, D.C.
March 17–18, 2009

Michael DuBose

*Chief, Computer Crime and Intellectual Property Section
Criminal Division, United States Department of Justice*

Eric Handy

*Mid-Atlantic Coast Representative
Identity Theft Resource Center*

Jennifer Coffin

*National Sentencing Resource Counsel
Federal Public and Community Defenders*

Vincent Weafer

*Vice President, Security Response
Symantec*

Seth Schoen

*Staff Technologist
Electronic Frontier Foundation*

Joseph E. Koehler

*Assistant United States Attorney
Deputy Chief, Criminal Division Immigration Unit
United States Attorney's Office, District of Arizona*

Lesley Whitcomb Fierst

*Associate, Womble Carlyle Sandridge & Rice, PLLC
Federal Public and Community Defenders*

Karen Stauss

*Managing Attorney and Policy Counsel
Polaris Project*

Charles Song

*West Coast Pro Bono Director
Howrey LLP*

Suzanne Ferreira

*Supervising United States Probation Officer for the Southern
District of Florida; Chair, Probation Officers Advisory Group*

Craig D. Magaw

*Deputy Assistant Director, Office of Investigations
United States Secret Service*

Donna Lee Elm

*Federal Public Defender for the Middle District of Florida;
Federal Public and Community Defenders*

Kenneth H. Linn

*Chairman, FedCURE
(Citizens United for Rehabilitation of Errants, Federal Prison
Chapter)*

Michael J. Prout

*Assistant Director for Judicial Security
Judicial Security Division
United States Marshals Service*

Jon M. Sands

*Federal Public Defender for the District of Arizona
Chair, Federal Defender Sentencing Guidelines Committee*

Todd A. Bussert

Co-Chair, Practitioners Advisory Group

Erik R. Stegman

*Board of Directors, The Nakwatsvevat Institute
Carry the Kettle First Nation (Assiniboine)*

Mario J. Scalora

*Associate Professor of Psychology
University of Nebraska-Lincoln*

guideline references for the offenses at 18 U.S.C. §§ 1512 and 1513. These amendments were a further response to the Court Security Improvement Act of 2007; the Commission also responded to that act with several amendments in fiscal year 2008.

- responded to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008¹⁷ by (1) amending USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to provide an alternative enhancement for a case in which the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an adjustment under USSG §3B1.1 (Aggravating Role); (2) amending Appendix A to reference the new offenses created by the act to the appropriate guidelines; and (3) amending the commentary to USSG §2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) to provide that a downward departure may be warranted in a case in which the defendant is convicted under 18 U.S.C. §§ 1589(b) or 1593A if the defendant benefitted from participating in a venture described in those sections in reckless disregard of the fact that the venture had engaged in the criminal activities described in those sections.

In addition, the amendments promulgated by the Commission in 2009 involved other areas of Commission interest. Specifically, the Commission —

- responded to concerns expressed by federal judges and members of Congress regarding which guideline should apply to offenses involving a “bleached note” (*i.e.*, genuine United States currency stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be a note of higher denomination). The Commission resolved the issue by (1) amending the commentary to USSG §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to clarify

that an offense involving “bleached notes” should be sentenced under that guideline; (2) amending USSG §2B5.1 to ensure that an offender who controlled or possessed blank or partially blank bleached notes is subject to the same enhancement as an offender who controlled or possessed “counterfeiting paper similar to a distinctive paper”; and (3) amending Appendix A to ensure that two offenses that do not involve elements of fraud, 18 U.S.C. §§ 474A and 476, are not referenced to USSG §2B1.1.

- addressed a circuit conflict regarding application of the undue influence enhancement in USSG §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to a case in which the only “minor” involved in the offense is an undercover law enforcement officer. The Commission resolved the conflict by amending commentary in USSG §§2A3.2 and 2G1.3 to provide that the undue influence enhancement can apply in a case involving attempted sexual conduct, but does not apply in a case in which the only “minor” involved in the offense is an undercover law enforcement officer.

Other guideline amendments promulgated in 2009 made various technical and conforming changes to the guidelines that —

- provide appropriate guideline references in Appendix A for (1) new offenses created by the Housing and Economic Recovery Act of 2008¹⁸ and other offenses similar to those offenses;

¹⁷ Pub. L. No. 110-457.

¹⁸ Pub. L. No. 110-289.

(2) offenses upgraded from misdemeanors to felonies by the Consumer Product Safety Improvement Act of 2008;¹⁹ (3) a new offense created by the Veterans' Benefits Improvement Act of 2008;²⁰ (4) an offense created by the Violence Against Women and Department of Justice Reauthorization Act of 2005;²¹ and (5) a new offense created by the Child Soldiers Accountability Act of 2008.²²

- made changes throughout the *Guidelines Manual* to reflect the amendments made by the Judicial Administration and Technical Amendments Act of 2008²³ to the probation and supervised release statutes, 18 U.S.C. §§ 3563 and 3583. The changes include a new guideline for intermittent confinement at USSG §5F1.8 (Intermittent Confinement) and other changes to reflect what Congress has provided.
- addressed the Let Our Veterans Rest in Peace Act of 2008²⁴ by expanding the scope of the specific offense characteristic at USSG §2B1.1(b)(6) so that it applies not only to a case involving the damage, destruction, or theft of a veteran's grave marker but also to a case involving trafficking in a veteran's grave marker.
- made changes in the child pornography guidelines, USSG §§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) and 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor;

Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), so that they reflect the amendments made to the child pornography statutes (18 U.S.C. §§ *et seq.*) by the Effective Child Pornography Prosecution Act of 2007²⁵ and the PROTECT Our Children Act of 2008,²⁶ with regard to cases in which child pornography is transmitted over the Internet.

- provided, for offenses at 18 U.S.C. §§ 2280 and 2332a that are committed by threat, an alternative reference in Appendix A to the threat guideline, USSG §2A6.1.
- addressed a new child pornography distribution offense created by the PROTECT Our Children Act of 2008 by providing an alternative base offense level in section 2G2.2 for the new offense.
- clarified Application Note 1 in USSG §3C1.3 (Commission of Offense While on Release) to specify that the court determines the applicable guideline range for a defendant who committed an offense while on release and is subject to the enhancement at 18 U.S.C. § 3147 as in any other case; therefore, under ordinary guideline application principles, only one guideline range applies to such a defendant.
- expanded the scope of the enhancement at subsection (b)(5) of USSG §2B5.3 (Criminal Infringement of Copyright or Trademark), which applies when the offense involved the risk of serious bodily injury, so that it also applies when the offense involved the risk of death; and increased the minimum offense level in USSG §2B5.3(b)(5) to bring it back into parallel with the minimum offense level in USSG §2B1.1(b)(13).

¹⁹ Pub. L. No. 110–314.

²⁰ Pub. L. No. 110–389.

²¹ Pub. L. No. 109–162.

²² Pub. L. No. 110–340.

²³ Pub. L. No. 110–406.

²⁴ Pub. L. No. 110–384.

²⁵ Pub. L. No. 110–358.

²⁶ Pub. L. No. 110–401.

Regional Hearings

In conjunction with the 25th anniversary of the SRA, the Commission in fiscal year 2009 launched a nationwide series of regional public hearings on federal sentencing policy. The Commission held four hearings in this series in 2009. The first regional hearing was held in Atlanta, Georgia, in February 2009, and subsequent hearings were held in Palo Alto, California (May 2009); New York, New York (July 2009); and Chicago, Illinois (September 2009). At the hearings, the Sentencing Commission heard from sentencing experts and stakeholders who had been invited to discuss federal sentencing policy and the implementation of the SRA over the past 25 years. Witnesses testifying at the hearings included circuit and district court judges, representatives from the U.S. Department of Justice, defense attorneys, probation officers, law enforcement, and members of the academic community and community interest groups. See Table 3.

Assistance to Congress

The SRA gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In fiscal year 2009, the Commission worked closely with members of Congress and their staffs, providing them with timely and valuable sentencing-related information and analyses.

The Commission continued providing Congress with extensive real-time data analysis and reporting on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission's website in order to assist Congress in its own analysis of the impact *Booker* and its progeny have had on criminal justice issues. The Commission also held numerous briefings with congressional staff to explain the Commission's amendment process; developing sentencing case law; the case law's impact on the Commission's work and on federal sentencing generally; and information received by the Commission during its regional hearings.

On April 29, 2009, the acting chair of the Commission testified before the Senate Judiciary Committee's Subcommittee on Crime and Drugs at a hearing titled "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity." The acting chair testified about federal cocaine sentencing policy, the 2007 Commission report on federal cocaine sentencing policy, the 2007 amendment to the drug trafficking guideline for crack cocaine offenses, and the results of the amendment's retroactive application. The acting chair also presented similar testimony to the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security on May 21, 2009.

On July 10, 2009, the Commission provided a statistical overview of statutory mandatory minimum sentencing using fiscal year 2008 data to the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security in light of its July 14, 2009 hearing entitled "Mandatory Minimums and Unintended Consequences."

Throughout the year, the Commission conducted numerous congressional briefings and answered congressional inquiries on its work in the area of federal cocaine sentencing. These briefings included presentation of the Commission's data and research in this area, discussion of the Commission's 2007 report on federal cocaine sentencing policy, and its ongoing analyses of the retroactive application of its 2007 amendment to the drug trafficking guideline for crack cocaine offenses.

The Commission also conducted congressional briefings and answered congressional inquiries in other areas of criminal law including health care and other white collar frauds, statutory mandatory minimum penalties generally, terrorism offenses, and general sentencing policy.

The Commission also routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports, and other published Commission work product.

Table 3

REGIONAL PUBLIC HEARING WITNESS LIST
Atlanta, Georgia
February 10–11, 2009

Honorable Gerald B. Tjoflat

Circuit Judge, Eleventh Circuit Court of Appeals

Honorable Dennis W. Shedd

Circuit Judge, Fourth Circuit Court of Appeals

Ellen S. Moore

Chief Probation Officer, Middle District of Georgia

Greg Forest

Chief Probation Officer, Western District of North Carolina

Thomas Bishop

Chief Probation Officer, Northern District of Georgia

Nicole Kaplan

Assistant Federal Public Defender, Northern District of Georgia

Lyle Yurko

Attorney, Yurko & Associates

David O. Markus

Criminal Justice Act Panelist, District Representative Southern District of Florida

Alan Dubois

Senior Appellate Attorney, Federal Public Defender Eastern District of North Carolina

Amy Levin Weil

Attorney, The Weil Firm

William N. Shepherd

Statewide Prosecutor, Office of Statewide Prosecution Tallahassee, Florida

Chief John Timoney

*Miami Police Department
President, Police Executive Research Forum*

Captain Larry Casterline

Commander, Major Crimes Deterrence and Prevention High Point Police Department, High Point, NC

Honorable Bob Conrad, Jr.

Chief District Judge, Western District of North Carolina

Honorable Gregory A. Presnell

United States District Judge, Middle District of Florida

Honorable Robert L. Hinkle

Chief District Judge, Northern District of Florida

Honorable William T. Moore, Jr.

Chief District Judge, Southern District of Georgia

Ronald Wright

*Executive Associate Dean for Academic Affairs
Professor of Law, Wake Forest School of Law*

Dr. Gordon Bazemore

*Chair and Professor of Department of Criminology
Florida Atlantic University*

Dr. Rodney L. Engen

Associate Professor, North Carolina State University

Spencer Lawton

Georgia Criminal Justice Coordinating Council

Hector Flores

Cuban-American Bar Association

Monica Pratt Raffanel

*Communications Director
Families Against Mandatory Minimums*

Table 3 (continued)

REGIONAL PUBLIC HEARING WITNESS LIST
Stanford, California
May 27–28, 2009

Honorable Richard C. Tallman

Circuit Judge, Ninth Circuit Court of Appeals

Honorable Alex Kozinski

Chief Circuit Judge, Ninth Circuit Court of Appeals

Honorable Robert S. Lasnik

Chief District Judge, Western District of Washington

Honorable Susan Oki Mollway

United States District Judge, District of Hawaii

Honorable Charles R. Breyer

United States District Judge, Northern District of California

Marilyn Grisham

Chief Probation Officer, District of Idaho

Christopher Hansen

Chief Probation Officer, District of Nevada

Elizabeth Kerwood

Deputy Chief Probation Officer, District of Hawaii

Karin J. Immergut

United States Attorney, District of Oregon

Lawrence G. Brown

Acting United States Attorney, Eastern District of California

Thomas W. Hillier II

Federal Public Defender, Western District of Washington

Davina Chen

*Assistant Federal Public Defender
Central District of California*

Douglass A. Mitchell

*CJA Panel Attorney, District of Nevada
Counsel, Boies, Schiller & Flexner LLP*

Honorable Vaughn R. Walker

Chief District Judge, Northern District of California

Honorable Edward F. Shea

United States District Judge, Eastern District of Washington

Honorable B. Lynn Winmill

Chief District Judge, District of Idaho

Dean Kevin Cole

University of San Diego Law School

Professor Robert Weisberg

Edwin E. Huddleson Jr. Professor of Law, Stanford Law School

Professor Franklin E. Zimring

*William G. Simon Professor of Law and Wolfen Distinguished
Scholar, Boalt Hall School of Law, University of California -
Berkeley*

Larry Fehr

Senior Vice President, Pioneer Human Services

Michael Finigan

President, NPC Research, Portland, Oregon

Caroline Fredrickson

*Director, Washington Legislative Office
American Civil Liberties Union*

Table 3 (continued)

REGIONAL PUBLIC HEARING WITNESS LIST
New York City, New York
July 9–10, 2009

Honorable Jon O. Newman

Senior Circuit Judge, Second Circuit Court of Appeals

Honorable Brett M. Kavanaugh

Circuit Judge, District of Columbia Circuit Court of Appeals

Honorable Jeffrey R. Howard

Circuit Judge, First Circuit Court of Appeals

Honorable D. Michael Fisher

Circuit Judge, Third Circuit Court of Appeals

Honorable Richard J. Arcara

Chief District Judge, Western District of New York

Honorable John A. Woodcock Jr.

Chief District Judge, District of Maine

Honorable Denny Chin

United States District Judge, Southern District of New York

William Henry

Chief Probation Officer, District of Maryland

Michael Fitzpatrick

Chief Probation Officer, Southern District of New York

C. Warren Maxwell

Deputy Chief Probation Officer, District of Connecticut

Wilfredo Torres

Senior Deputy Chief Probation Officer, District of New Jersey

Alexander Bunin

Federal Public Defender, Northern District of New York

Michael S. Nachmanoff

Federal Public Defender, Eastern District of Virginia

Robert Mann

*Mann & Mitchell, CJA District Representative
District of Rhode Island*

Benton J. Campbell

United States Attorney, Eastern District of New York

Dana J. Boente

United States Attorney, Eastern District of Virginia

Honorable Donetta W. Ambrose

Chief District Judge, Western District of Pennsylvania

Honorable Raymond Dearie

Chief District Judge, Eastern District of New York

Honorable Gustavo A. Gelpi Jr.

United States District Judge, District of Puerto Rico

Honorable Nancy Gertner

United States District Judge, District of Massachusetts

Rachel Barkow

Professor of Law, New York University School of Law

Christopher Stone

*Chair, Program in Criminal Justice Policy and Management
John F. Kennedy School of Government, Harvard University*

James Byrne

*Professor, Department of Criminal Justice and Criminology
University of Massachusetts Lowell*

Raymond W. Kelly

Police Commissioner, New York Police Department

Susan Smith Howley

Director, Public Policy, National Center for Victims of Crime

Table 3 (continued)

REGIONAL PUBLIC HEARING WITNESS LIST
Chicago, Illinois
September 9–10, 2009

Honorable James F. Holderman, Jr.
Chief District Judge, Northern District of Illinois

Honorable James G. Carr
Chief District Judge, Northern District of Ohio

Honorable Gerald E. Rosen
Chief District Judge, Eastern District of Michigan

Honorable Jon P. McCalla
Chief District Judge, Western District of Tennessee

Honorable Karen K. Caldwell
United States District Judge, Eastern District of Kentucky

Honorable Philip Peter Simon
United States District Judge, Northern District of Indiana

Philip Miller
Chief Probation Officer, Eastern District of Michigan

Richard Tracy
Chief Probation Officer, Northern District of Illinois

Honorable J. Michael Brown
Secretary of Justice and Public Safety
Commonwealth of Kentucky

David M. Kennedy
Director, Center for Crime Prevention and Control
John Jay College of Criminal Justice

Honorable Frank H. Easterbrook
Chief Circuit Judge, Seventh Circuit Court of Appeals

Honorable Jeffrey S. Sutton
Circuit Judge, Sixth Circuit Court of Appeals

Honorable Danny J. Boggs
Circuit Judge, Sixth Circuit Court of Appeals

Honorable Patrick J. Fitzgerald
United States Attorney, Northern District of Illinois

Honorable Edward M. Yarbrough
United States Attorney, Middle District of Tennessee

Carol Brook
Federal Public Defender, Northern District of Illinois

Jacqueline Johnson
First Assistant Federal Public Defender
Northern District of Ohio

Thomas W. Cranmer
Principal, Miller Canfield

James Van Dyke
Executive Director
Salvation Army Correctional Services Program

Honorable Roger K. Warren
President Emeritus, National Center for State Courts

Carl Wicklund
Executive Director, American Probation and Parole Association

The year 2009, as used in this report, refers to the fiscal year 2009 (October 1, 2008, through September 30, 2009).