

NUCLEAR, BIOLOGICAL, AND CHEMICAL (NBC) WEAPONS POLICY TEAM

Executive Summary

I. INTRODUCTION

Issues concerning sentencing for nuclear, biological, and chemical weapons are before the Commission at the urging of Congress and the Department of Justice. The purpose of this Executive Summary is to provide Commissioners with a synopsis of the information necessary for considering the accompanying proposed amendment options for publication. There are two major topics set forth in sections A and B.

Section A addresses the statutes and guidelines for nuclear, biological, and chemical weapons importation and exportation offenses. In 1997 Congress urged the Commission to increase these guidelines in a Sense of Congress Provision.¹ The Attorney General joined Congress in urging that penalties be increased for the importation and exportation offenses.² Section B addresses the offenses for biological and chemical weapons, 18 U.S.C. § 175 (implementing the Biological Weapons Anti-Terrorism Act) and 18 U.S.C. § 229 (implementing the International Chemical Weapons Convention) that do not have guidelines. The Attorney General urged the Commission to draft guidelines for the new biological and chemical offenses enacted at 18 U.S.C. §§ 175 and 229, to provide deterrence and punishment that would be “sufficiently clear, certain, and proportionate to the potential harm caused by the unlawful activity.”³

The accompanying final report provides extensive background materials, including an analysis of the pertinent legislative history and Commission data, a case review, a proportional comparison of national defense guidelines with other types of offenses, information taken from reports of special presidential commissions on terrorism and on protection of the nation’s critical infrastructure addressing federal sentencing, and background information derived from the team’s literature review and attendance at seminars and congressional hearings. The team also met with representatives of the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) and prepared options for revising the guidelines for the offenses discussed at Section A and for promulgating new guidelines for the offenses discussed at Section B.

A. **The Sense of Congress Provision, Section 1423 of the National Defense Authorization Act of 1997, Pub. L. 104-201 (Sept. 23, 1996)**

¹Section 1423 of the National Defense Authorization Act of 1997, Pub. L. 104-201 (Sept. 23, 1996).

²The Department of Justice addressed these sentencing issues in the Attorney General’s Five-Year Interagency Counter-Terrorism and Technology Crime Plan submitted to Congress in 1998.

³*Id.*

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In 1997 Congress enacted a Sense of Congress Provision urging the Commission to increase the guideline penalties for the following offenses:

- 50 U.S.C. § 2410, of the Export Administration Act of 1979
- 22 U.S.C. §§ 2778, 2780, of the Arms Export Control Act
- 50 U.S.C. § 1701, *et seq.*, of the International Emergency Economic Powers Act⁴
- 42 U.S.C. § 2139a, of the Nuclear Non-Proliferation Act of 1978

The Sense of Congress Provision stated that “the sentencing guidelines prescribed by the United States Sentencing Commission for the offenses of importation, attempted importation, exportation, and attempted exportation for nuclear, biological, and chemical weapons materials constitute inadequate punishment for such offenses.” Congress urged the Sentencing Commission to “revise the relevant sentencing guidelines to provide for increased penalties for the offenses relating to importation, attempted importation, exportation, and attempted exportation of nuclear, biological, or chemical weapons or related materials or technologies” for the provisions listed above, and the Attorney General concurred.

The team examined guidelines 2M5.1 and 2M5.2,⁵ the applicable guidelines, and found that the guidelines provide relatively limited punishments for the offenses that carry a ten-year statutory maximum penalty⁶ in comparison to the guideline penalties for other national security offenses that have a maximum sentence of ten years imprisonment.⁷

There is minimal data to analyze because few cases have been brought under these statutes. In nine years (1991-1999) 226 cases were brought under these statutes. The majority of the cases (190 cases of 226, or 84%) were violations of 22 U.S.C. § 2278, the statute prohibiting the export

⁴There is no guideline referenced for 50 U.S.C. § 1701 in the Statutory Index in Appendix A. The team recommends that the Appendix be amended to reference that statute to guidelines 2M5.1 and 2M5.2.

⁵Guideline 2M5.1 (Evasion of Export Controls), the guideline that addresses offenses under 50 U.S.C. §§ 2401-2420, became effective November 1, 1987, and has never been amended. Guideline §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), the guideline for offenses under 22 U.S.C. § 2778 (Control of arms exports and imports), became effective November 1, 1987, and was amended effective November 1, 1990 to also cover offenses under 22 U.S.C. § 2780 (Transactions with countries supporting acts of international terrorism). The amendment also deleted the concept of “sophisticated weaponry” and substituted its current language and structure, starting at Base Offense Level 22 unless “the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten,” in which case the Base Offense Level is 14.

⁶The median sentences for these offenses under §§2M5.1 and 2M5.2 range from 10 to 13.5 months of imprisonment.

⁷Several of the other ten-year national security statutes have a guideline Base Offense Level of 26. The guidelines for the statutes that are subject to the Sense of Congress Provision have alternative Base Offense Levels of 22 and 14. At criminal history category I, bottom of the guideline range, these sentences at Base Offense Level 22 or 14 are 22 or 48 months lower than the sentence at Base Offense Level 26.

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of arms, munitions, or military equipment without a valid export license, and 166 of those were sentenced under guideline §2M5.2.⁸ The team found that there was a high rate of downward departures (28%) for these defendants.

The team has sought input from DOJ to determine what concerns drive the sense that sentences in these cases are inadequate and how they might be revised to provide appropriately greater punishment for the more serious offenses. The main inadequacy DOJ has related to the team is that the current guideline ranges do not provide a sufficient sentence to deter these offenses and do not constitute sufficient punishment, compared with the guideline sentences for other national defense offenses that carry a 10-year statutory maximum penalty.

Based on this review and input, the team has formulated several options for revising guidelines 2M5.1 and 2M5.2:

Option 1. Increase the offense level for §§2M5.1(a) and 2M5.2(a) by four levels.

An increase of four levels from Base Offense Level 22 to 26 would bring guidelines 2M5.1 and 2M5.2 in line with other national security offenses that have ten-year maximum sentences. In the majority of cases, the defendant receives a three-level downward adjustment for acceptance of responsibility, and the resulting offense levels will be 23. At Base Offense Level 26, the sentencing range at Criminal History Category I would be 63-78 months, and the 120 month statutory maximum would be reached at Criminal History Category V. A defendant who receives the three-level downward adjustment for acceptance of responsibility would be sentenced at Base Offense Level 23, Criminal History Category I (46-57 months imprisonment).

The Sense of Congress is that the sentences for importation and exportation of nuclear, biological, and chemical weapons materials are inadequate. The language for §2M5.1(a)(1) should also be amended to add “biological or chemical weapons” to the offense level, to state “26, if national security or nuclear, biological, or chemical weapons proliferation controls were evaded.” The current guideline’s higher alternative base offense level only applies to national security and nuclear proliferation controls violations.

Option 2. Add specific offense characteristics to account for the more aggravated forms of the offense conduct.

One method would be to add additional alternative base offense levels. For example, the current alternative Base Offense Level 14 for §2M5.2 applies “if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.” A higher base offense level of 16, for example, could be applied for an increased number of weapons (number of non-fully automatic small arms was more than 10 but did not exceed 30 or some other number). An example of the use of alternate base offense levels for types and numbers of guns is guideline 2K2.1, the firearms guideline. In that guideline, an additional two levels is added if the firearms were stolen, or had altered or obliterated serial numbers, and

⁸The data indicates a high number of downward departures for those cases (43 cases of 166, or 28%).

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additional levels are added to a base offense level depending upon the number of firearms involved.

B. Biological and Chemical Weapons Statutes⁹

There are no guidelines for the relatively new offenses for biological and chemical weapons, 18 U.S.C. § 175 (broadening the Biological Weapons Anti-Terrorism Act of 1989) and 18 U.S.C. § 229 (implementing the International Chemical Weapons Convention). In the Attorney General's Five-Year Interagency Counter-Terrorism and Technology Crime Plan, DOJ urged the Sentencing Commission to adopt tough sentencing guidelines to provide deterrence and punishment that would be "sufficiently clear, certain, and proportionate to the potential harm caused by the unlawful activity." The plan stated that "even though the use of a biological agent as a weapon can be deadly or even catastrophic, current federal sentencing guidelines do not always promote sentences that reflect this potential harm."¹⁰

1. Biological Weapons

Section 511(c) of the Antiterrorism and Effective Death Penalty Act of 1996¹¹ amended 18 U.S.C. § 2332a (Use of certain weapons of mass destruction) to specify that the prohibitions and penalties therein apply to the use of any biological agent, toxin, or vector (as those terms are defined in section 178 of title 18). The penalties for a violation of this section are set out at 18 U.S.C. § 2332a(a) and include any term of years or for life, and if death results, death or imprisonment for any term of years or for life. Section 511(b)(1) also expanded the prohibition against development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin or delivery system for use as a weapon to include attempts, threats, or conspiracies to do so. *See* 18 U.S.C. § 175(a). Violators of this provision may be fined or "imprisoned for life or any term of years, or both." *Id.*

2. Chemical Weapons

⁹In its October 1997 report, "Critical Foundations, Protecting America's Infrastructures," the President's Commission proposed that the sentencing guidelines "do not adequately address the severity of consequential damages arising from attacks on critical infrastructures – for example, damage resulting from the 'downstream' effects of a denial-of-service attack," and recommended that the Sentencing Commission "consider expanding coverage of its Guidelines to better address consequences of the use of biological and chemical weapons not resulting in death."

¹⁰Because no guidelines have been promulgated for these offenses, courts have been directed by guideline 2X5.1 to apply the most analogous guideline or if there is no sufficiently analogous guideline, to impose sentence following the provisions of 18 U.S.C. § 3553(b) (setting forth the general purposes of sentencing). Courts have analogized to various guidelines, including 2K2.1, 2A2.2, and 2N1.1.

¹¹Section 1 of Pub. L. 101-298 provided that the Act (enacting this chapter, amending section 2516 of this title) may be cited as the "Biological Weapons Anti-Terrorism Act of 1989." (Amended Pub. L. 102-132, Title V, §511(b)(1), Apr. 24, 1996).

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In 1998, Congress created a new section of title 18 U.S.C. § 2332c¹² that expanded the scope of unlawful conduct to include the development, production, acquisition, transfer, receipt, stockpiling, retention, possession, use, and threat to use any chemical weapons, and to assist or induce another person to engage in such conduct, or attempt or conspire to do so. The penalties are set forth at 18 U.S.C. § 229A and include imprisonment for any term of years or for life, and if death results, death or imprisonment for life.

Although only eight cases have been sentenced under the biological weapons statute, and none under the chemical weapons statute, the FBI reports a dramatic increase in the number of threats to use biological and chemical weapons in the last four years, from 37 reported threats in 1996 to more than 250 in 1999. The majority of these threats were telephone calls or letters stating that an individual or building had been contaminated with anthrax¹³ where a substance was involved that was not in fact anthrax, or where no substance actually was dispersed.

The team consulted with the Domestic Terrorism Section of DOJ and the FBI to learn more about the issues, such as how to sanction threats, and how to account for the “downstream effects” of an actual attack. Among the key harms to consider that can result from these offenses are the number and severity of casualties, the disruption of governmental and commercial functions, the potential requirement to evacuate an area, terrorist motivation, the seriousness of the biological agent or toxin (“select agents”) or toxic chemical (schedule 1 of the Annex on Chemicals of the Chemical Weapons Convention) or nuclear materials, the extent of any hazardous material clean up required, and the seriousness of any threat including the potential for harm and evidence of intent or ability to carry out the threat.¹⁴

The team recommends that the Commission promulgate guidelines for these statutes, and has prepared several options:

Option 1. Amend guideline 2M6.1 to create one combined guideline for nuclear, biological, or chemical weapons offenses.

Guideline 2M6.1, the nuclear material guideline, can be amended to add biological and chemical weapons offenses. The guideline can have alternative base offense levels. For example, the guideline can add a level 42 for cases where the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization. It can keep

¹²That section has since been repealed and re-designated as 18 U.S.C. § 229 *et seq.* See Pub.L. 105-277 (Oct. 21, 1998).

¹³Testimony of Ambassador Paul Bremer, Chair of the National Commission on Terrorism before the Senate Subcommittee on Technology, Terrorism and Government Information (June 28, 2000).

¹⁴Although some of the anthrax threats have been directed at individuals, several have been directed at public buildings, including courthouses, hospitals, schools, and abortion clinics. In some cases individuals have been subjected to disinfection processes as a precaution, and in some instances the building was evacuated and disinfected. The situations necessarily involve using public resources, such as the hazardous materials units of fire departments.

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a base offense level of 30 or use a lower offense level of 28, and add specific offense characteristics, such as: two levels if the material was a specified listed chemical or select agent or nuclear material; four levels if the offense resulted in a substantial expenditure of funds to respond to the offense; four levels if serious bodily results. A specific offense characteristic can be added that would subtract a set number of levels (six is proposed) if the case involved a threat only.

Another method presented as an alternative is to build some of the harms into the base offense level and then invite upward or downward departures in specific instances.

Option 2. Cross-reference to the threat guideline at §2A6.1.

Because a large number of reported offenses involve threats, another option to consider is whether to use a cross-reference from any primary NBC guideline to the threat guideline at §2A6.1 (Threatening or Harassing Communications), and treat threats to use these materials under that guideline where no nuclear, biological, or chemical weapons material was actually involved. For example, guideline §2A6.1 could be amended to add an alternative base offense level of 18 if the threat involved nuclear, biological, or chemical weapons materials. This higher base offense level would take into account the heightened psychological harm caused by this type of threat.¹⁵ The guideline commentary could also be amended to invite an upward departure where hazardous materials units responded to the threat, actual decontamination was undertaken as a precaution, persons were subjected to decontamination as a precaution, buildings were forced to be closed for inspection or decontamination, etc.

¹⁵Barbara Martinez, Chief of the FBI's Weapons of Mass Destruction Operations Unit, characterized the heightened psychological distress involved in these threat situations by explaining that an individual can leave a building if there is a bomb threat, but when the threat involves exposure to nuclear, biological, or chemical weapons material, the individual cannot escape, but must wait for test results to learn whether they have been infected or contaminated.