(iv) If the offender committed a sex offense against a minor while not registered, increase by 12 levels.

This recommendation would preserve the current formulation for § 2260A offenses and would create a framework for § 2250(c) offenses with a base offense level of 25, the first offense level exceeding the mandatory minimum for category II, and with specific offense characteristics that would provide for up to level 41, encompassing 30 years for these offenders, in aggravated cases. In order to have appropriate gradations accounting for injuries to minors in cases where the offender committed a crime of violence against a minor while unregistered, we have considered the enhancements at § 2A2.2(b)(3) in developing this proposal and have incorporated similar enhancements here. While the specific offense characteristics would be similar to those under § 2A3.5, we believe that any possible double-counting concerns should be minimized by the fact that Congress specified that the penalty for a § 2250(c) offense is in addition and consecutive to the underlying penalty for the § 2250(a) offense.

We note that the Federal Public Defenders, at pages 11-12 of their letter to the Commission, argue that it is appropriate to have a guideline providing that the guideline range is the minimum period required by statute by citing §§ 2B1.6 and 2K2.4. However, in contrast to the statutes at issue in those guidelines (18 U.S.C. §§ 1028A, 844(h), 924(c), and 929(a)), which with one exception (§ 929(a)), provide for specific terms of imprisonment depending on the applicable facts, § 2250(c) provides a range of between 5 and 30 years' imprisonment. In our view, the Commission should not ignore that broad range and should instead fashion a guideline that would appropriately provide for sentences other than the mandatory minimum term.

Amendment to § 2A3.3: We recommend that the base offense level for this offense be increased to 20, which would recognize the fact that the maximum penalty for this offense has been increased from 5 to 15 years.

Amendment to § 2A3.4: We support the change to § 2A3.4(b)(1) raising the floor offense level for sexual contact offenses against children under 12 from level 20 to level 22.

Amendment to § 2G1.1: The proposal would establish a base offense level of 34 or 36 for 18 U.S.C. § 1591 offenses not involving minors. While the range at level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years for that offense, we believe 36 is an appropriate base offense level given the inherent gravity of these crimes, where force, fraud, or coercion is used to cause persons to engage in commercial sex acts.

Amendment to § 2G1.3: The proposal would establish a base offense level of 34 or 36 for 18 U.S.C. § 1591 offenses involving minors under 14. While the range at level 36 for a criminal history category I offender (188-235 months) is higher than the new mandatory minimum penalty of 15 years for that offense, we believe 36 is an appropriate base offense level given the inherent

gravity of these crimes, where offenders cause children under 14 to engage in commercial sex acts.

The proposal would establish a base offense level of 30 or 32 for 18 U.S.C. § 1591 offenses involving minors between 14 and 18. While level 30 (97-121 months for a criminal history category I offender) encompasses the new 10 year mandatory minimum for this offense, we believe level 32 (121-151 months for a criminal history category I offender) is more appropriate given the inherent gravity of these crimes, where offenders cause children between 14 and 18 to engage in commercial sex acts.

The proposal would establish the same base offense level, either 28 or 30, for 18 U.S.C. §§ 2422(b) and 2423(a) offenses. These offenses, however, now carry the same penalty as 18 U.S.C. § 1591 offenses where the victim is between 14 and 18 years of age. As Congress has set the same penalty for these offenses, they should all have the same base offense level, 32.

At § 2G1.3(b)(5), the proposal would provide for either a 4, 6, or 8 level increase if the victim was under 12 instead of the current 8 level increase. In our view, the amendment's increases to relevant base offense levels resulting from statutory changes to the mandatory minimum penalties should not be a reason to decrease the impact of this specific offense characteristic. Accordingly, we recommend keeping it at 8 levels.

Amendment to § 2G2.5: The proposal would simply add 18 U.S.C. § 2257A as an offense referenced to this guideline. We recommend, however, a specific offense characteristic that would apply to a defendant who tried to frustrate enforcement of §§ 2257 or 2257A by refusing to permit an inspection be added, in order to prevent such a defendant from being eligible for intermittent confinement, home detention, or community confinement. Accordingly, we recommend that the following § 2G2.5(b) be added, and that existing § 2G2.5(b) be renumbered § 2G2.5(c):

> (b) Specific Offense Characteristic: If the offense involved the refusal or attempted refusal to permit the Attorney General or his or her designee to conduct an inspection pursuant to 18 U.S.C. §§ 2257(c) or 2257A(c), increase by 6 levels.

Proposed § 2G2.6: The proposal would establish a base offense level of 34, 35, 36, or 37 for child exploitation enterprise offenses. We recommend level 37 since that is the only base offense level that encompasses the 20 year mandatory minimum for these offenses for a criminal history category I offender. Additionally, we support the revised proposal's inclusion of a specific offense characteristic adding 2 levels for use of a computer or interactive computer service.

Amendment to § 2G3.1: The proposal would revise the specific offense characteristic at § 2G3.1(b)(2) to encompass both use of misleading domain names and embedded words or images in the source code of a website to deceive a minor into viewing material harmful to minors, and contemplates either 2 or 4 levels. As the maximum penalty for relevant offenses under § 2252B is

ten years and under § 2252C is 20 years, it would be appropriate for this to be a 4 level enhancement.

Amendment to § 2J1.2: The proposal would provide a new specific offense characteristic for false statement offenses (18 U.S.C. § 1001) where the matter in which the false statement was issued involves specified sexual abuse or sexual exploitation offenses, or failure to register as a sex offender. As the maximum penalty for this type of § 1001 offense is the same, 8 years, as false statements in the terrorism context, the specific offense characteristic at § 2J1.2(b)(1)(C) should add the same enhancement as § 2J1.2(b)(1)(B) – 12 levels.

Amendment to § 4B1.5: We support changing the definition of "minor" in this guideline to include undercover agents posing as minors, and including 18 U.S.C. § 1591 offenses as covered sex crimes.

Amendments to §§ 5B1.3 and 5D1.3: We support adding compliance with the Walsh Act's sex offender registration requirements as a mandatory condition of probation and supervised release for sex offenders, and we similarly support adding consent to search as a recommended condition of probation and supervised release in sex offense cases.

Amendment to § 5D1.2: We support expanding the definition of "sex offense" to include chapter 109B offenses and § 1591 offenses, and expanding the definition of "minor" to include undercover agents posing as minors.

Issue for Comment 1 - We believe that the best approach for how to incorporate mandatory minimum sentences is the first approach listed, which sets the base offense level at the guideline range in excess of the mandatory minimum (*i.e.*, a 10 year mandatory minimum base offense level would be 32, or 121-151 months for a criminal history category I offender). The reason this is the best approach is simple: Congress, in passing the mandatory minimum penalty, has set that penalty as the absolute minimum, applicable to the least egregious violation of the statute at issue. Applicable specific offense characteristics and criminal history category adjustments reflect aggravated violations and thus it would not be appropriate to have them considered in reaching a guideline range that encompasses the mandatory minimum.

Issue for Comment 2 - We believe the enhancement in § 2A3.5 for crimes against minors should be for all offenses committed against minors, and as noted above, suggest that it should be 12 levels. We also recommend, as noted above, that the enhancement for sex offenses (against non-minors) should be 8 levels, not 6. Ideally, the enhancement should provide for a minimum offense level for all cases where the offender committed either an offense against a minor or a sex offense against a non-minor. The proposal contemplates that this minimum offense level would be between level 24 and 28. We believe this offense level should be level 28.

Issue for Comment 3 - With respect to the proposed reduction for offenders who voluntarily attempted to correct their failure to register, we do not believe it is necessary for the

guideline to cover circumstances in which it was impossible for the defendant to register, because such circumstances would be covered by the affirmative defense at 18 U.S.C. § 2250(b). Moreover, prosecutors exercise their discretion soundly and it is extremely unlikely that a case would be prosecuted in which an offender was prevented from registering due to uncontrollable circumstances, debilitating illness, or severe mental impairment.

We recommend that the reduction for voluntary attempts to comply with registration requirements should not apply in cases where offenders actually commit qualifying offenses. Simply put, unregistered offenders who commit these offenses are precisely the reason that the registration requirements are in place, and it would be unjust to provide these offenders – who victimized others yet again, while unregistered – a windfall reduction in their sentences.

Issue for Comment 4 - We believe new 18 U.S.C. § 2244(a)(5) is already covered by § 2A3.4, which accounts for offenses that would have violated § 2241(c) had the sexual contact been a sexual act via its specific offense characteristics.

Issue for Comment 5 - As noted above, we recommend a 6 level enhancement under § 2G2.5 for cases where offenders refuse to permit inspections under applicable provisions of 18 U.S.C. §§ 2257 and 2257A. That said, it would also be appropriate to provide in an application note that when warranted by the facts of the refusal, in cases where that 6 level enhancement does not adequately account for the offenders' misconduct, an upward departure as well as application of § 3C1.1 may be appropriate.

Issue for Comment 6 - As noted above, among the proposal's options ranging from a base offense level of 34 to 37 for § 2G2.6 offenses, we recommend 37, as it is the only one which encompasses the 20 year mandatory minimum for 18 U.S.C. § 2252A(g) offenses for a criminal history category I offender. However, as we recommend that the best approach for addressing mandatory minimums is to set the base offense level at the guideline range in excess of the statutory minimum, level 39 (262-327 months for a criminal history category I offender) would be more appropriate. We do not believe a separate specific offense characteristic for 18 U.S.C. § 1591 offenses is necessary. As noted above, however, we support a 2 level enhancement for use of a computer or interactive computer service.

We do not recommend a decrease for conduct that is limited to possession or receipt of child pornography without the intent to traffic or distribute that material. Those who receive and possess child pornography contribute to the demand for child pornography, thereby causing other offenders to sexually exploit children to supply that demand. Accordingly, those who receive and possess child pornography do not merit any sentence reduction, as their conduct fuels child sexual exploitation committed by other offenders. Moreover, those who receive and possess child pornography also harm the child victims depicted in the child pornography they receive and possess, even if they themselves were not physically involved in the child sexual abuse depicted in those images. Additionally, often these offenders' receipt and possession of child pornography drives them to sexually abuse children themselves, as their receipt and possession of child

pornography to satisfy their desires is part of a cycle that leads to their own sexual abuse of children. Simply put, it is appropriate to use all available means to deter this conduct.

As if that were not enough, we anticipate that violations of this statute may involve offenders who receive and possess child pornography produced or distributed by other members of the child exploitation enterprise, often at the request of those who receive and possess it. In these cases, there is an even more direct causal link between receivers/possessors' conduct and the sexual exploitation of the child victim. It would thus be wholly inappropriate to afford these receivers/possessors a sentence reduction in these circumstances. Finally, it appears that Congress intended to punish all members of these enterprises equally. For all these reasons, we strongly recommend that receivers/possessors not receive a windfall sentence reduction.

Issue for Comment 7 - We have no comment on whether an enhanced penalty at § 2G3.1 should be provided for those who deceive a person other than a minor into viewing obscene material.

Issue for Comment 8 - As noted above, we recommend that the specific offense characteristic at § 2G1.3(b)(5) applicable in cases where the victim is under 12 be kept at 8 levels. This is appropriate because while certain of the offenses at issue include enhanced penalties based on the age of the victim, none of these enhanced penalties apply to cases where the victim is under 12.

Issue for Comment 9 - It does not appear that any change is necessary to address proportionality between §§ 2G1.3 and 2A3.1 in cases where the cross-reference at § 2G1.3(c)(3) applies because the cross-reference only applies in cases where the offense level under § 2A3.1 is higher than that reached under § 2G1.3. It appears that the offense levels contemplated by the current proposals under §§ 2G1.3 and 2A3.1 are appropriate.

3. Technical and Clarifying Amendments to the Sentencing Guidelines

We have no comments on these technical and clarifying amendments.

4. Miscellaneous Laws

We have no comments on these amendments reflecting recently enacted legislation - *Respect for America's Fallen Heroes Act, Pub L. 109-228* and *Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. 109-162.*

5. Intellectual Property Re-Promulgation

USSG §2B5.3 We support making permanent the amendments promulgated on an emergency basis concerning counterfeit trademarked labels, documentation and packaging pursuant to the *Stop Counterfeiting in Manufactured Goods Act ("SCMG Act"), Pub. L. 109-181.*

The *Digital Millennium Copyright Act (DMCA), (17 U.S.C. §§ 1201-1205)* criminalizes three types of conduct: (1) circumventing an *access* control (17 U.S.C. § 1201(a)(1)); (2) trafficking in technology to circumvent an *access* control (§ 1201(a)(2)); and (3) trafficking in technology to circumvent a *copy* control (§ 1201(b)(1)).

We support new application note 2(A)(viii) with two minor drafting changes. Because "circumvention" itself is prohibited only under 17 U.S.C. § 1201(a), but not § 1201(b), the note should be limited to cases where a defendant circumvented a technological measure in violation of "17 U.S.C. Secs. 1201(a)(1) and 1204," rather than "17 U.S.C. Secs. 1201 and 1204." We also would suggest that the clause "the 'retail value of the infringed item' is the price the user would have paid to access lawfully the copyrighted work" should be reworded to move the adverb "lawfully" to follow "copyrighted work."

For the trafficking crimes, there are three options. Option 1 would use a specific offense characteristic that increases the offense level by 2, regardless of how many devices the defendant trafficked in. In our view, this is the worst of the alternatives because: (1) it does not differentiate between small- and large-scale traffickers; (2) it does not specify how to calculate the "infringement amount" in trafficking cases, which was the very question on which the Department sought clarification (when it drafted the SCMG Act provision); and (3) it limits its applicability to defendants "convicted under 1201(b) and 1204," thereby leaving out 1201(a)(2) trafficking crimes entirely. The latter can easily be corrected by simply referring to convictions under "1201 and 1204," as is done with Option 2.

Option 2 would calculate the infringement amount in all trafficking cases by using the retail value of the circumvention device(s), multiplied by the number of devices involved in the offense. This would underestimate the economic harm for cases in which the circumvention device was not sold (as in the classic warez example of a barter transaction) and had no legitimate retail value. The department's proposal would use *the greater of* the retail value of the circumvention device *or* the price a person using the device to access or make use of a copyrighted work would have had to pay to access or use the work legitimately.

Option 3 is closest to what the Department would suggest, but we propose a few changes. First, as with Option 1, § 1201(a)(2) trafficking crimes are not covered. Again, this could be easily remedied by simply substituting "1201" for references to "1201(b)." Second, the phrase "the price a person legitimately using the device to access or make use of a copyrighted work would have paid" needs to be changed because of the placement of the word "legitimately." In most or all DMCA trafficking cases, there is no "legitimate" use of the circumvention device. Therefore, that phrase should be replaced with a phrase such as "the price a person using the device to access or use a copyrighted work would have had to pay to access or use the work lawfully."

Finally, for each of the DMCA-related proposals, the Proposed Amendment defines the term "circumvent a technological measure" as having the same meaning as that term in 17 U.S.C.

§ 1201(a)(3)(A). This definition applies to the circumvention of access controls, prohibited by 17 U.S.C. Sec. 1201(a)(1), and trafficking in devices for such circumvention, under 1201(a)(2). However, it should be noted that the operative term in DMCA trafficking cases involving devices for circumventing copy controls (i.e., those under 17 U.S.C. § 1201(b)), rather than access controls, is somewhat different: "to circumvent protection afforded by a technological measure...." The definitions of these operative terms also differ slightly. In order to avoid confusion and make clear that the amended application notes are intended to apply to both § 1201(a) and § 1201(b) trafficking offenses, we recommend the Commission include a separate definition of "device for circumventing a technological measure," such as the following: "'Device for circumventing a technological measure' includes any technology, product, service, device, component, or part thereof for circumventing a technological measure (as defined in 17 U.S.C. § 1201(a)(3)) or for circumventing protection afforded by a technological measure (as defined in § 1201(b)(2))."

6. Terrorism

USSG § 2K1.4 (18 U.S.C. § 2282B): Congress enacted 18 U.S.C. § 2282B to address violence against aids to maritime navigation, and the Sentencing Commission has referred the new statute to USSG § 2K1.4 (Arson; Property Damage by Use of Explosives). The Department agrees with the offense level of 16 if the offense involved conduct under 18 U.S.C. § 2282B, which has a statutory maximum of 20 years. A lesser offense level would not adequately reflect the statutory maximum or the seriousness of the conduct, which must be done intentionally and must endanger or be likely to endanger the safe navigation of a ship. The Commission has proposed two alternative phrasings of the guideline (USSG § 2K1.4(a)(3)); the Department favors the guideline describing the offense conduct, rather than the guideline simply referencing the statute. There are other statutes that could address damage to aids to maritime navigation, and describing the conduct generally in the guideline would provide a clearer reference for the same conduct that might be charged under other statutory provisions.

7. Drugs (not including crack cocaine)

21 U.S.C. § 841(g) (Adam Walsh Child Protection and Safety Act): With regard to the new offense in 21 U.S.C. §841(g), which provides a penalty of not more than 20 years for distributing a date rape drug over the internet knowing or with reasonable cause to believe it would be used to commit criminal sexual conduct, or to any unauthorized purchaser, the Department supports Option Three. That option provides a six level enhancement with a floor of 29 if the person knew the drug would be used to commit criminal sexual conduct, a three level increase with a floor of 26 if the person had reasonable cause to believe the drug would be used to commit criminal sexual conduct, and a two level increase if the drug were sold to an unauthorized purchaser.

Option Three is preferable to Options One and Two for the following reasons. First, Option Three establishes a significant sentencing floor (29), whereas Options One and Two do not. The Department believes that situations involving knowing distribution of a drug over the

internet to commit a criminal sexual act require a significant minimum offense level and a mere two or four level increase is not sufficient to adequately reflect the severity of the offense. Second, Option Three provides a more appropriate enhancement (six levels) than the smaller enhancements in Options One and Two (two or four levels). Again, the severity of the offense requires a six level, rather than a two or four level enhancement. Third, while providing an appropriately severe penalty for the most egregious conduct, Option Three also provides a tiered approach that punishes less severe conduct – such as distribution with reasonable cause to believe the date rape drug would be used for illicit purposes – less severely than distribution knowing the date rape drug would be used for illicit purposes. In general, the Department favors tiered approaches that establish more stringent guidelines for the most culpable and allow lesser sentences for less culpable individuals. Finally, Option Three provides the appropriate two level enhancement for illegal distribution to an unauthorized purchaser. This enhancement is similar to the enhancement applicable to those who use the internet for mass marketing.

We believe floor levels of 26 and 29 are appropriate based on a comparison with the various gradations for sexual offenses under Criminal Sexual Abuse Guideline Section 2A3.1.

- 18 USC § 2241 (USSG §2A3.1) (aggravated sex abuse -- i.e., actual use of force or threat of death or serious bodily injury or kidnapping, or by rendering the victim unconscious by some means, including by drug) has a base offense level of 30 plus an SOC of 4 for subsections (a) and (b) which means effectively an offense level of 34.

- 18 USC § 2242 (USSG 2A3.1)(sex abuse, i.e., a sexual act committed by threat less aggravated than 2241, or where the person is incapable of declining permission) has a base offense of 30.

The 29/26 proposal falls below those levels. Given that a conviction under 21 U.S.C. § 841(g) would demonstrate that the probable intent of the defendant selling the drugs over the internet was to further the purchaser's intent to render a victim unconscious, incapacitated, or at least less resistant to a sexual assault, the choice of a base offense level on the higher end of the range in Section 2A3 is justified. From this perspective, a level 29/26 base offense is rather modest. Moreover, cases where the drug seller can actually be shown to "know" of the intended use of the drug will doubtless be rare; prosecutions for "reasonable cause to believe" -- subject to base offense level 26 -- are likely to be more frequent. The guidelines provide a 3 level differential for the "knowing" versus "reasonable cause to believe" in the context of prohibited listed chemical distribution under 841(c)(2) and 2D1.11, thus allowing a comparison and basis for the 3 level differential between level 29 and 26 for the two distinct mens rea states.

21 U.S.C. § 860a (USA PATRIOT Act): With regard to the new offense in 21 U.S.C. §860a, which provides a mandatory consecutive term of imprisonment of not more than 20 years for manufacturing, distributing (or possession with intent thereof) methamphetamine on premises in which a minor is present or resides, the Department supports Option Two, which provides a six

level increase with a floor of 29 for a manufacturing offense and a three level increase with a floor of 15 in distribution cases.

Option Two establishes a tiered, measured response which properly punishes at a significant level offenders who manufacturer methamphetamine in the presence of minors, while imposing a lesser offense level for defendants who distribute methamphetamine on premises. In our view, Option Two appropriately reflects the severity of the offense, while protecting the public from further crimes of the defendant.

Option Two is preferable to Option One for the following reasons. First, manufacturing offenses inherently involve a risk of harm to a minor and expending the resources to demonstrate actual risk in each and every case by presenting expert testimony at the sentencing phase should not be required particularly given the dictates of Congress. Since Option One provides a six level enhancement with a level 30 floor, it is appropriate to provide for near parity through Option Two (six level increase with floor of 29). Second, in situations where the Government did not present evidence of risk of harm to the minor (even in manufacturing cases), Option One only provides a two level increase with no floor. This paltry enhancement fails to reflect the severity of the offense, e.g., the actual or potential harm caused by manufacturing methamphetamine where young people are present. Finally, in addition, all distribution convictions under Section 860a would only be subject to the two level increase, as opposed to a three level increase with a 15 floor. Again, the meager two level enhancement fails to adequately reflect the harm caused by distribution on premises with a minor.

In the event the Commission adopts Option One, the Department respectfully requests that the six level enhancement with a 30 floor be applicable to distribution, and possession with intent to distribute and manufacture cases. This would allow the Government to obtain meaningful sentences for a broader range of offenses. The establishment of a floor is important. In many of these cases the Government will be unable to establish a drug amount, for example when a lab blows up or is destroyed by fire. Thus the small increases proposed, without a significant minimum offense level, would result in little jail time.

21 U.S.C. § 960a (Narco-Terrorism): The Government believes that 21 U.S.C. § 960a is an important provision designed to target the insidious connection between drug trafficking and terrorism and punish proportionately. The Government agrees with the basic approach of calculating the drug quantity first, then increasing the sentence by an appropriate number of levels so that the sentence is twice the mandatory minimum punishment. The Government strongly believes, however, that a six-level (6) increase would effectuate congressional intent more than a four-level (4) increase, because the six-level increase consistently produces a doubling of the mandatory minimum sentence. Moreover, using a four-level increase to allow for the specific offense characteristics to increase the base offense level to the statutory double range is counterintuitive. The specific offense characteristics are designed to increase the base offense level found in § 2D1.1(a) due to the presence of conduct in § 2D1.1(b), which were deemed independently worthy of an increase by the Commission. Thus, a four-level (4) increase designed

to allow specific offense characteristics to "make up" any shortcomings of a four-level (4) increase defeats the enhancement mechanism of § 2D1.1(b). The specific offense characteristics should be in addition to, not in lieu of, the intent of Congress to punish those convicted of narco-terrorism harshly.

The Government does not have a strong preference on whether the new provision should be incorporated into § 2D1.1 or be placed in a new and separate section § 2D1.14, so long as the result is the same.

Finally, the Government suggests a few minor changes to ensure that the provisions are clear. First, the language in § 2D1.14 eliminates all of § 2D1.1(a)(3), including the base offense level. This should be clarified to simply eliminate the safety valve and mitigating role reduction. Second, the heading for § 2D1.14 should read: § 2D1.14 Narco-terrorism; ***attempt or conspiracy.*** This would appear to be consistent with the rest of the provisions in § 2D.

8. Immigration

USSG §§ 2L1.1 and 2L2.1: With regard to the proposed amendments to the tables in §§ 2L1.1 and 2L2.1, that provide for increases in sentence based on the number of aliens or the number of documents, the Department strongly supports the idea of amending both tables to cover a broader numerical range. Our experience reveals that the tables do not adequately address the scale of the more serious alien smuggling and immigration fraud offenses we now regularly encounter. The challenges we face in enforcement in this area have grown dramatically since these guidelines went into effect. Offenses involving hundreds of fraudulent immigration documents have become common, and offenses involving a thousand or more documents are not unique. Reform is needed in order to provide a uniform mechanism for handling cases of this size in place of the current undefined upward departure process. This, in our view, serves the twin purpose of proportionality and uniformity.

We think both of the options under consideration are an improvement over the existing Guidelines. We favor option two because it offers a more discriminating approach to the escalating seriousness of offenses involving 6 to 99 aliens or documents. Our experience reveals that the degrees of misconduct between the extremes of 6 and 99 aliens or documents are more significant than the present tables acknowledge. For instance, a smuggling offense involving 23 aliens generally is indicative of greater culpability than one involving 8 aliens, but the current table treats the offenses identically.

Second, option 2 is superior because it provides greater offense-level increases for smuggling and fraud offenses involving larger numbers of aliens or documents. We welcome such increases because organized alien smuggling and immigration fraud are two of the most serious enforcement problems we face today. Alien smuggling, for example, is a global affair with estimated annual profits in the billions. The increasing scale of immigration fraud is similarly alarming. In a recent prosecution in the Eastern District of Virginia, several U.S. members of an

international network of visa brokers–including a former CIA officer–were prosecuted for selling 1,400 fraudulent applications for U.S. visas to Chinese and Russian citizens abroad. One particular application was offered for an astonishing $120,000. If we are to turn this tide, it is very important that the Guidelines provide adequate punishment and deterrence to those who violate the law on such a grand scale.

USSG § 2L1.2: We believe that in contrast to the other guidelines, 2L1.2 is in dire need of major change. The Courts, the probation offices, defense attorneys, law enforcement officers and prosecutors are unnecessarily expending significant time and effort parsing over words and statutory construction of state and local laws without any real benefit to the ultimate outcome, namely, a fair, predictable and appropriate sentence. In FY 2006, the Courts handled over 17,000 immigration cases (24.2% of its cases). We must do more, however, to ensure that we are fully utilizing the resources that have been given to us by Congress to enforce our immigration laws. The simple reality is that the current immigration guidelines provide a significant barrier to doing more. The Department favors a variation of either Option 6 or Option 7.

We do not favor either of these options as a means to increase the overall sentences for illegal re-entry cases. Rather, we favor these as a means to achieving fair sentences more efficiently, thereby allowing all participants in the process to make better use of their limited resources. We originally offered the potential triggers in Option 6 as examples only, and recognize that the Commission may need to employ different triggers to develop a balanced Guideline with the goal of increased simplicity and net neutrality in terms of the total number of defendants who would receive the particular adjustments to their base offense level. The triggers in Option 7 were based on a subsequent analysis of a sample of cases and are the levels that would produce little change in the over all length of sentences. Of the 108 cases reviewed, 85 received the same sentence under option 7 as they would under existing § 2L1.2. Of the 23 that did not "neutralize," 14 were increased, and 9 were reduced.

In its current form, § 2L1.2 encourages endless litigation over whether convictions qualify for enhancement under the "categorical approach" outlined in the Supreme Court's *Taylor* decision. This litigation has become a major impediment to efficient sentencing and places a significant strain on the courts, the probation office, the prosecution, and the defense. This burden falls disproportionately on the five Southwest Border judicial districts, which prosecute the overwhelming majority of immigration related cases.

Making the Guidelines simpler will in turn make the system stronger and allow these cases to be handled more efficiently. Prosecutors, agents and probation officers spend an inordinate amount of time identifying, documenting, and researching prior convictions to determine whether they qualify as aggravated felonies or trigger specific offense characteristics under § 2L1.2. Defense attorneys must perform the same analysis, and eventually judges must do so as well. Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results, allowing bad actors to avoid appropriate punishment on seemingly technical grounds. For example, even when documents show what looks like a

qualifying conviction, the outcome remains subject to litigation and the courts reach inconsistent results on whether convictions will qualify. For example, in *United States v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005), the Ninth Circuit held shooting at an occupied dwelling is a "crime of violence." However, in *United States v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006), the same court, relying on a different State statute, declared such an offense is not a crime of violence, requiring proof that the residence actually was occupied at the time of the shooting–a fact one scarcely could glean from court records. The Fifth Circuit, based on yet another State statute, also found shooting at an occupied dwelling is not a crime of violence. *United States v. Alfaro*, 408 F.3d 204 (5th Cir. 2005). Further, the problem of the categorical analysis is not limited to crimes of violence. For example, the Supreme Court's *Lopez* v. *Gonzalez, 126 S. Ct. 625 (2006)* decision and the Ninth Circuit's *United States v. Corona-Sanchez, 291 F.3d. 1201 (9th Cir. 2002) (en banc)* decisions did not involve crimes of violence.

Options 6 and 7 would largely obviate the categorical approach in re-entry cases and substantially reduce the time needed to litigate and resolve these cases – an extremely important consideration given the increasing volume of cases. It is important to emphasize also that the benefit will not be felt in just the cases prosecuted but also in the cases that we review and decline to prosecute criminally because it will make it far easier for prosecutors to ascertain the possible sentence and, therefore, whether the case merits the expenditure of federal resources. The Guideline calculation would be driven primarily by the length of sentence imposed for prior convictions. Although state sentencing regimes are not entirely uniform, we believe the length of sentence imposed provides a far more objective and readily-determined basis for an increased offense level under 2L1.2 than does the current categorical approach which is governed entirely by varying practices in charging and record-keeping among the 50 states and thousands of counties and parishes throughout the United States. After all, the present criminal history categories in the Guidelines are largely based on sentence length, and extensive study by the Commission has shown that there is a direct relationship between recidivism and these same criminal history categories. We also note that present Guideline 4A1.3, (Criminal History) provides judges with the flexibility to address prior sentences that overstate the seriousness of an underlying offense.

While we are in favor of a shift away from the categorical approach, we do believe that convictions for certain specified offenses (murder, rape, for a child pornography offense or an offense involving sexual abuse of a child, or for conspiracies or attempts to commit such offenses), regardless of the length of sentence, should merit a 16 level increase to the base offense level.

We also recognize that in making such a major change, and despite the fact that there will be general neutrality in the effect on sentences imposed, in specific cases a defendant may receive a greater sentence or lesser sentence depending upon their particular record. We believe that these changes are a necessary result of a need to shift to a far more efficient, predictable, and rational system for determining the seriousness of the prior record.

We urge the Commission not to wait to amend 2L1.2 until Congress considers again this year possible amendments to the Immigration and Nationalization Act. The system needs relief now. First, as the media has repeatedly reported there is a good chance that nothing will happen and we will be in the same position we were last year at the end of the Commission cycle. Second, even if legislation is passed, it would most likely have little, if any, impact on the changes proposed in option 6 or 7. The compromise Senate bill, S 2611, which was passed by the Senate last year and has been the basis for discussions this year, amends the sentencing scheme for illegal entry and re-entry violations so that they are based for the most part on the length of sentence imposed for prior convictions rather than the type of offense. We would submit that delaying change to 2L1.2 for another year only prolongs the expenditure of unnecessary resources and continues time consuming litigation. We urge the Commission to act this year to shift away from the use of the categorical approach, an approach we believe ill-serves all involved.

Finally, with regard to the request for comment regarding whether the Department believes the base offense levels for §§ 2L1.1, 2L2.1, and 2L2.2 should be increased. With respect to § 2L1.1, we do not believe the Commission should increase the current base offense level of 12, assuming the Commission adopts either option 1 or 2 to amend the table governing the number of aliens involved in the offense. Regarding § 2L2.1, last year we recommended that the Commission raise the current base offense level from 11 to 12 to match the base offense level in 2L1.1, and we stand by that recommendation here. As for § 2L2.2, we believe the base offense level of 8 should be increased, especially for offenses involving immigration or naturalization documents. Under the present Guideline, most offenders face a zone A sentence of 0 to 6 months upon conviction for an offense involving a green card, naturalization certificate, or asylum claim – this is insufficient punishment in light of the seriousness of the offense.

9. Compassionate Release

We reiterate the comments included in our letter to the Commission on July 14, 2006.

We do not believe that the Commission should provide examples of extraordinary and compelling reasons but if it does so, they should be limited to the inmate's medical condition. These medical conditions may be terminal, with a life expectancy of one year or less, or medical conditions that are profoundly debilitating in nature. While the statute itself does not define "extraordinary and compelling," the Bureau of Prisons (BOP) has always narrowly interpreted the statutory language, established medical criteria for reduction in sentence consideration, and limited motions for reduction in sentence to circumstances where an inmate has either been diagnosed with a terminal illness with a life expectancy of one year or less, or a profoundly debilitating and irreversible medical condition that severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others.

With respect to consideration of terminal medical conditions, BOP considers cases where the inmate has entered into the "terminal phase" of his/her disease, which medically is usually

measurable as one year or less. The prognosis in these patients is based on the medical expertise and clinical judgment of the physician, based upon his or her knowledge of the disease. An essential element associated with the terminal phase of an illness is that medical care becomes focused on palliation or comfort care, as there are no available therapeutic measures that can prolong the patient's life or alter the course of the disease. The terminal phase of a disease is experienced by an individual over a period of days to months and is characterized by a decline in physical functioning, while cognitive functioning may be preserved in some patients until death.

To expand consideration to medical conditions where the life expectancy is greater than one year would result in the inclusion of many chronic diseases which can broadly be defined as "terminal," will predictably shorten an individual's life, but has not progressed beyond the chronic stage. In treating a chronic illness, available medical treatment options have not been exhausted and treatment remains focused on managing and stabilizing the disease. In addition, treatment therapies may often improve functional status and prevent or significantly slow the progression of the disease to the terminal phase.

The BOP has not approved reduction in sentence for inmates who have chronic medical conditions (e.g. advanced heart disease or AIDS) unless the inmate is also significantly functionally impaired. In assessing these inmates, it is often the degree of functional impairment paired with the exhaustion of treatment options that gives rise to a determination that the individual has entered the terminal phase of his or her illness.

With respect to BOP motions for medical conditions, the BOP feels that 1B1.13 should allow the court the opportunity to consider cases where the circumstance fall under options (i) or (ii). Clearly, the court should be able to consider a BOP motion for a reduction in sentence where the medical condition did not exist at the time of sentencing, or the court was simply unaware of the inmate's medical condition at the time of sentencing. In addition, the court should also be able to consider a BOP motion where it may have been aware of a medical condition at the time of sentencing, but that condition has significantly deteriorated during the inmate's incarceration and the inmate's condition has entered the terminal phase of his or her illness, or his or her condition has become profoundly debilitating.

Finally we would like to note that Page 8 of the ABA's letter to the Commission provides compelling substantiation of the possible adverse consequences, noted in the Department's letter, if the Commission were to adopt (pursuant to 28 U.S.C. 994(t)) standards for the judicial granting of reduction in sentence motions which were broader than the grounds on which the Department has traditionally (and currently) sought such reductions. Specifically, the ABA argues that it would be unconstitutional for BOP to continue to apply their current standards, and that BOP would be constitutionally required to make its decisions whether to seek sentence reductions instead on the basis of the Commission's policy statement for judicial granting of sentence reduction motions. This directly confirms the concern raised in the Department's letter that such discrepancies "would be an incitement to prisoners to file more suits seeking to compel the Department to exercise its authority under section 3582(c)(1)(A)(i) -- in contravention of its own

policies, judgment, and discretion -- in order to get them out of prison before they have served their sentences as imposed by the court."

We submit that this current effort to persuade the Commission to adopt standards which would effectively treat the 3582(c)(1)(A)(i) reduction in sentence authority as an open-ended parole-like early release mechanism, thereby undermining the fundamental premises and operation of the determinate sentencing system established by the Sentencing Reform Act of 1984 is just the first step. If successful, the next step would be the bringing of injunctive suits against the Department of Justice which would seek to compel the use of these parole-like standards in deciding whether to file 3582(c)(1)(A)(i) motions, and force the Bureau of Prisons to function as a de facto Parole Commission for this purpose. As noted in our letter last year, the potential result -- the undermining of the abolition of parole and determinate sentencing -- would be "exactly the evil . . . that Congress sought to avoid by vesting exclusive authority to seek reductions of sentence for prisoners under section 3582(c)(1)(A)(i) in the executive agency responsible for their custody."

10. Criminal History

The Department believes that the criminal history sentencing guidelines have created an effective and workable system that identifies offenders who have a greater risk of recidivism and provides progressively higher penalties as that risk of recidivism increases. Before the Commission moves forward with any proposal that excludes additional offenses from the criminal history score, it should be very confident that such additional exclusions will improve (and not worsen) the guidelines' effectiveness in identifying and appropriately punishing offenders with higher recidivism risk. Further, we believe that just because certain records may not be uniformly available does not mean that those that can be obtained are not useful in determining the risk of a particular offender. With regard to the offense of driving while suspended we would suggest that the Commission may well want to examine if the basis for the suspension may be an important criteria. It is clearly one thing if the person was suspended for what has been described as an "economic offense." It is a far different and more serious situation if the defendant had been suspended for driving under the influence, vehicular manslaughter, or even reckless driving.

11. Pretexting

USSG §2H3.1 (18 U.S.C. § 1039): The Department supports the Commission staff's proposal to refer 18 U.S.C. § 1039 to §2H3.1, but we recommend that it be modified to properly take into account the victims of these offenses. In particular, pretexting crimes can violate the privacy of many people. While some offenses involve one person obtaining the records of another (in furtherance of a stalking crime, for instance), others involve offenders who obtain the records of many individuals. For example, by data brokers may obtain confidential records of many people in order to resell them. Additionally, where the crime is committed through a computer intrusion, there may be thousands of victims.

Moreover, in general, the seriousness of the offense is directly related to the number of victims. An offense that violates the privacy of ten people is simply much more serious than one that involves only one. Consequently, the USSC should consider adding to §2H3.1 a victim table similar to that currently found in §2B1.1 in order to ensure that pretexters (as well as those committing related privacy offenses referenced to §2H3.1) are rationally sentenced based on the scope of their offense.

The current proposal makes an offense that involves "a large number of customers" grounds for an upward departure. While this approach is not without merit, we believe that the use of a table like that in §2B1.1 would be more appropriate. Like financial crimes, pretexting offenses become more serious as the number of victims increases.

We also suggest that the USSC contemplate adding a definition of "victim" to §2H3.1 that includes those suffering privacy invasions whether or not they suffer a measurable monetary loss. Because §2H3.1 is used for sentencing offenses, including pretexting, where invasion of privacy is the core harm, existing definitions of "victim" that require pecuniary loss would fail to account for much of the damage caused by privacy offenders. A revised definition would improve the application of other privacy offenses to be referred to §2H3.1 in addition to § 1039. Courts will not have a problem identifying who is a victim under the expanded definition as it is easy to determine whose confidential records were disclosed.

12. Crack Cocaine

In 2002, Deputy Attorney General Larry Thompson testified before the Commission on behalf of the Administration opposing proposals, then under consideration, to lower penalties for crack cocaine offenses. The existing policy – including statutory mandatory minimum penalties and sentencing guidelines – has been an important part of the Federal government's efforts to hold traffickers of both crack and powder cocaine accountable, including violent gangs and other organizations that traffic in crack cocaine and operate in open air crack markets that terrorize neighborhoods, especially minority neighborhoods. The problems that crack brought to our communities have not gone away.

That said, the Department recognizes that the Commission and many others have been especially concerned that the 100-to-1 quantity ratio appears to many to be an example of unwarranted racial disparity in sentencing. We believe it may very well be appropriate to address the ratio between the drug weight triggers for mandatory minimum and guidelines sentences for the trafficking of crack and powder cocaine, and we hope over the next months, the Commission, the Administration, and the Congress will continue its work together to determine whether any changes are indeed warranted. We think this collective work is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We are committed to continuing our participation in this collective work. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates at historic lows. Addressing the debate over federal cocaine sentencing policy is part of this effort.

We continue to stress that changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place first and foremost in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. The Commission, however, has a critical role to play. We think the Commission should continue to provide Congress, the Department of Justice, and the general public updated information on the current overall sentencing environment, crack and powder cocaine sentences being imposed in district courts around the country, and other research and data that will assist in the consideration of federal cocaine sentencing policy. We think all of this information will help ensure that federal policy will be crafted in a way that best achieves the purposes of sentencing. While we look forward to continuing all of this work with the Commission, we reiterate here that we would oppose any sentencing guideline amendments that do not adhere to enacted statutes clearly defining the penalty structure for federal cocaine offenses.

* * * * * * *

Thank you for the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to our continuing work with the Commission in the important area of sentencing guidelines and policy.

Sincerely,

Benton J. Campbell
Acting Principal Deputy Assistant Attorney
General and Chief of Staff

March 30, 2007

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

Re: Issue for Comment: Cocaine Sentencing Policy

Dear Judge Hinojosa:

We write on behalf of the board and members of Families Against Mandatory Minimums (FAMM). For twenty years the 100:1 ratio has punished low-level crack offenders, many of whom are first-time offenders, far more severely than their wholesale drug suppliers who provide the powdered cocaine from which crack is produced. Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration. The Commission has reported that local street-level crack offenders receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and interstate crack sellers receive average sentences longer than international powder cocaine traffickers[1]. Despite the enormous cost to taxpayers and society, the crack-powder ratio has resulted in no appreciable impact on the cocaine trade. Results such as these are surely not what The Sentencing Reform Act of 1984 intended to stem the tide of crack cocaine abuse.

We recognize that two decades ago little was known about crack other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analysis by the Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect. Four previous inquiries, reaching back to 1995, produced research and findings from diverse fields. You have heard, repeatedly and most recently in November 2006, from psychologists, criminologists, law enforcement personnel, pharmacologists, treatment providers, defense and prosecuting attorneys, prisoners' families, and interest groups such as ours. For the most part they do not support the current penalty structure. Your reports, most recently the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, exhaustively detail their findings and in all your reports you have reached the same conclusion "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."[2]

The documentation could not be more complete. That opposition to the unbalanced penalty structure for crack cocaine is widespread and unsurprising; your work has done so much to demonstrate that the penalty structure is unconscionable, unsupportable and its demise is years

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overdue.

And yet, year after year, the Commission and all of us who struggle to dismantle the crack penalty structure, have failed. We have failed because ultimately, amending the crack guideline rests in the hands of Congress. The Sentencing Reform Act of 1984 provided that amendments sent it by the Commission would become law unless disapproved by an Act of Congress.[3] In 1995 the Commission proposed to raise the crack penalty triggers to correspond with those for powder cocaine. Congress exercised its §994(p) option and disapproved the amendment.[4] In that Act, Congress directed the Commission to report on the crack cocaine penalty and address a series of considerations. The ensuing research resulted in the April 1997 report to Congress that included recommendations in lieu of a proposed amendment.[5] That report and the one from 2002 were met by a deafening silence on the Hill.

But today, it might have a chance. The new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences. You have built an impressive battery of evidence to support an amendment. And, we believe you could gain bi-partisan support for amending the crack penalty. We are not naïve enough to think that a Congress controlled by Democrats is the panacea for a broken sentencing system. We do believe however that there is a fresh opportunity to develop bi-partisan support on the Hill for a new look at one of the most broken penalty structures. And we think the Commission is best suited to lead off with a proposed guideline.

FAMM supports an end to the sentencing disparity between crack and powder cocaine. We believe that the penalty structure for crack cocaine should not differ from the penalty structure for powder cocaine. The overwhelming impact of the evidence points to the correctness of parity indexed at the current powder cocaine penalty structure.

We urge you to propose an amendment that promises genuine relief, promotes justice and brings an end to the unconscionable results produced by the current penalty structure. If you do so, you will not be alone going to the Hill. Given the right amendment, you could be joined by many of the groups that have written and testified and conducted research and come to Commission meetings and sat through congressional debates year after year.

Thank you for considering our views.

Sincerely,

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[1] U.S. Sentencing Commission, 104th Congress, 2nd Session, Special Report to Congress: Cocaine and Federal Sentencing Policy (1995) at 175-77 (Figures 10 & 11).
[2] U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing 132 (2004).

Julie Stewart
President

Mary Price
Vice President and General Counsel

[3] 28 U.S.C. § 994(p).
[4] *See* Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).
[5] *See* Special Report to Congress: Cocaine and Federal Sentencing Policy - April 29, 1997.

LETTER FROM UNIVERSITY PROFESSORS AND SCHOLARS REGARDING REFORM OF THE 100:1 CRACK AND POWDER COCAINE FEDERAL SENTENCING DISPARITY

March 30, 2007

VIA EMAIL
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

Re: USSC Federal Register request for public comment, January 30, 2007

We the undersigned professors and scholars, representing a variety of disciplines, join to express our concern with the current federal crack and powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986. We are writing to you to support efforts to equalize sentencing for crack and powder cocaine at the current level of powder cocaine.

Currently under federal law, distribution of 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine carries the same sentence. It takes 5000 grams of powder cocaine—about 11 pounds—to trigger a 10-year sentence, while it takes only 50 grams of crack to get the same.

This disparity creates the false implication that crack is 100 times more dangerous and destructive than the powder form of the drug. Two decades of research, however, has uncovered that the effects of the two forms of cocaine are the same. A 1996 study in the *Journal of the American Medical Association* found that "the physiological and psychoactive effects of cocaine are similar regardless" of its form.[1]

The myths of crack babies, instant addiction, and super-violent users and traffickers—which in great part led to the 1986 Act—have been dispelled. Researchers have found that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. Recent data also indicates that significantly less trafficking-related violence is associated with crack than was previously assumed.

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[1] D. K. Hatsukami & M. W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are The Differences Myth or Reality?*, 279 Journal Of American Medicine , No. 19, Nov. 1996, at 1580.

For example, in 2000 only 2.3% of crack offenders actively used a weapon.[2] As the Commission has established over the last 13 years, there is little rationale for disparate treatment of two forms the same drug, and no rational basis for that treatment to differ by 100 times.

The crack and powder cocaine sentencing disparity has resulted in alarmingly disproportionate incarceration rates for African Americans. African Americans comprise the overwhelming majority of those convicted for crack offenses, while the majority of those convicted for powder offenses are white.[3] This is disturbing given that whites and Hispanics make up the majority of crack users in the country. Indeed, in 2003 whites represented only 7.8% and African Americans represented more than 80% of defendants sentenced under the federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[4]

Drug sentencing laws have also resulted in drastic increases in the number of women in federal prison. In 2003, more than half of the women in federal prison were there for drug offenses. African American women's incarceration rates for all crimes, largely driven by drug convictions, has increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period.[5] Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, such as domestic violence and financial dependency.

The effect of mandatory minimums, especially in the instance of simple possession or low-level involvement with crack cocaine, is devastating, not just for the accused, but for their entire family. Mandatory minimums, such as the federal crack cocaine sentencing law, result in the deterioration of communities by incarcerating parents for minor possession crimes and separating them from their children. Felony convictions prohibit previously incarcerated people from receiving social services such as welfare, food stamps,[6] and access to public housing[7] that are vital to their ability to support their families.

Felony convictions have also resulted in massive disfranchisement. Approximately 1.4 million African American males—13% of all adult African American men—are

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[2] *See* U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 102-103 (2002), at 54, 100, Table 17.

[3] Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

[4] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34 (2003), available at http://www.ussc.gov/ANNRPT/2003/table34.pdf.

[5] ACLU Et Al., Caught In The Net: The Impact of Drug Policies on Women and Families 17 (2005) (Citing Susan Boyd, From Witches To Crack Moms: Women, Drug Law, And Policy 208-09 (2004)).

[6] P.L. 104-193, sec.115, 42 USC 862a.

[7] P.L. 100-690, sec. 5101, 102 Stat. 4300.

disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average.[8]

Perhaps most jarring of all, in 2000, there were more African American men in prison and jails in this country than there were in colleges and universities across the country.[9] Standing alone, this comparison of incarceration and education reasonably leads to the conclusion that the criminal justice system is a major contributor to the disruption of the African American family and community.

During the November 2006 Commission hearing, many witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity which continues to produce a racially disparate incidence of incarceration. The quantities of crack cocaine that trigger federal sentencing should be increased to equal the current levels for powder cocaine.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

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[8] Human Rights Watch & The Sentencing Project, Losing The Vote: The Impact of Felony Disenfranchisement Laws in the United States 8 (1998).

[9] Justice Policy Institute, Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men 10 (2002).

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LETTER FROM LAW SCHOOL PROFESSORS REGARDING REFORM OF THE 100:1 CRACK AND POWDER COCAINE FEDERAL SENTENCING DISPARITY

March 30, 2007

VIA EMAIL
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Dear Commissioners:

Re: USSC Federal Register notice requesting public comments, January 30, 2007

We, the undersigned law school professors, write to express our deep concern with the current 100:1 federal sentencing disparity between crack and powder cocaine. Distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while distribution of 500 grams of powder cocaine—100 times the amount of crack cocaine—carries the same sentence. October 2006 marked the twentieth anniversary of the Anti-Drug Abuse Act of 1986, the law establishing much tougher sentences for crack cocaine offenses than for powder cocaine offenses. During the last two decades this law has had a disparate impact on minorities and women. In addition, over the past twenty years, experts have established that there is no penological or scientific rationale for such vastly different treatment under law for the two forms of the drug. We urge the United States Sentencing Commission (USSC) to make a formal recommendation to Congress that equalizes the trigger for federal prosecution of crack offenses at the current levels for powder cocaine.

The current 100:1 drug quantity ratio promotes unwarranted racial disparities in sentencing. African Americans comprise the overwhelming majority of those convicted for crack cocaine offense, while the majority of those convicted for powder cocaine offenses are white.[1] This is startling given that whites and Hispanics make up the majority of crack users in the country. For example, in 2003 whites represented 7.8% and African Americans represented more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.[2] The 100:1 disparity between crack and

[1] Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* (American Constitution Society for Law and Policy, May 2006).

[2] U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing, Table 34(2003), available at http://www.ussc.gov/ANNRPT/2003/table34.pdf.

powder cocaine has resulted in African Americans serving considerably longer prison terms than whites for drug offenses. The average sentence for a crack cocaine offense in 2003 was 123 months, 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug.[3] African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months.[4]

Judges, federal prosecutors, medical professionals, and other experts have all joined the USSC in calling for a reassessment of the current standards. Recently, federal judges across the country in roughly two dozen district courts have issued lower sentences than those suggested by the 100:1 ratio, thus questioning the wisdom of the sentencing guidelines set forth by this Commission.

During the November 2006 Sentencing Commission hearing, witnesses testified that there is no rational basis for the crack and powder cocaine sentencing disparity, which continues to produce racially disparate levels of incarceration. The quantities of crack cocaine that trigger federal prosecution and sentencing should be equalized with and increased to the current levels for powder cocaine. Thank you for your time and attention to this very important matter.

Sincerely,

(Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named institutions.)

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[3] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85 (1998); Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

[4] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2004).

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students for sensible drug policy

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March 26, 2007

Attention: Public Affairs
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Re: USSC Federal Register notice requesting public comment on cocaine sentencing

As an organization representing thousands of American college students concerned with the negative impact that both drug abuse and overly-punitive drug policies have on our campuses and communities, Students for Sensible Drug Policy (SSDP) strongly urges the U.S. Sentencing Commission to equalize sentencing for crack and powder cocaine to the current level for the latter.

As you know, the amount of crack that currently triggers an automatic felony charge and a mandatory minimum sentence upon conviction (5 grams) is 100 times lower than the amount necessary to trigger a felony charge and mandatory minimum for powder cocaine (500 grams).

Students have a particular interest in seeing these penalties equalized because the current sentencing scheme can hamper their eligibility for the Hope Scholarship Credit. The credit, which is unavailable to taxpayers with felony drug convictions, can be applied to the first $1,000 of a student's education expenses and half of the next $1,000 over the first two years of college. In 2003 alone, just under 3.5 million taxpayers took advantage of the credit.

By equalizing the penalties for crack and powder cocaine, fewer students convicted of possessing relatively small amounts of crack cocaine for personal use will be deemed ineligible for the Hope Credit. Low- to middle-income students who are unable to take advantage of the credit may be more likely to leave school and never return. Such individuals are increasingly disposed to develop serious drug problems, commit crimes, or rely on costly social service programs, instead of becoming law abiding and productive members of society.[1]

Young people also suffer collateral damage when their parents are convicted of drug offenses. Youth whose parents are incarcerated are often left without the familial

[1] Institute for Higher Education Policy. *The Investment Payoff: A 50-State Analysis of the Public and Private Benefits of Higher Education.* February 2005.

grounding and/or financial resources needed to get accepted to, and stay enrolled in, college. Adolescents and children can also lose access to housing, food stamps, or other government assistance programs when their parents are convicted of drug offenses.

Students are also very concerned with the racial implications of the sentencing disparity. In 2000, there were more African American men incarcerated in prisons and jails than there were enrolled in colleges and universities, thanks in large part to our nation's drug sentencing policies.[2]

In 2003, 80% of defendants sentenced under crack cocaine laws were African Americans, despite the fact that greater than 66% of crack cocaine users in the United States are Hispanic or white.[3]

The disparity in sentencing between powder and crack cocaine has had a devastating impact on African American individuals, communities, and families by inhibiting educational opportunity and by breaking up families through incarceration.

For these and other reasons, we respectfully urge the Commission to eliminate the disparity between sentences for powder and crack cocaine by aligning both penalties to the current level of the former.

Sincerely,
Kris Krane, Executive Director
Students for Sensible Drug Policy

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[2] Justice Policy Institute, Cellblocks Or Classrooms?: The Funding Of Higher Education And Corrections And Its Impact On African American Men 10 (2002).
[3] U.S. Sentencing Commission, 2003 Sourcebook Of Federal Sentencing, Table 34 (2003), available at http://www.ussc.gov/ANNRPT/2003/table34.pdf.

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HUMAN RIGHTS WATCH

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March 20, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

Please replace the enclosed letter with the one that was inadvertently sent to you last week. Unfortunately, due to a processing error that version had not been fully proofed and finalized. Please accept my apologies.

Thank you,

Ashoka Mukpo
Associate, US Program

HUMAN RIGHTS WATCH

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March 14, 2007

Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Dear Judge Hinojosa:

We welcome the Commission's continued efforts to eliminate the current disparities in sentences for crack cocaine and powder cocaine offenses. As the Commission's prior reports have revealed and as testimony at the Commission's November 2006 hearings on federal cocaine sentences reaffirmed, there is no empirical or principled basis for the far harsher sentences for crack cocaine offenders than for powder cocaine offenders. Arbitrarily severe sanctions cannot be justified. The unjustifiable becomes unconscionable when, as is the case here, the sentences disproportionately burden a racial minority.

Human Rights Watch acknowledges the public's legitimate interest in curtailing the sale and use of dangerous drugs. But the importance of drug control should not be permitted to override fundamental principles of justice and equality. These universally accepted principles are affirmed in international human rights treaties to which the United States is a party, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

By seeking to eliminate the sentencing disparity between crack and powder cocaine offenses, the Commission upholds the US commitment to protect fundamental human rights.