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BEFORE THE UNITED STATES SENTENCING COMMISSION

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Introduction

I am pleased to be here today to discuss the Sentencing Commission's proposed amendments to guidelines for offenses involving terrorism. Let me say at the outset how appreciative we are of the significant efforts you and your staff have devoted to this important matter. We appreciate the opportunity to participate in the process of ensuring appropriate sentences for terrorism offenses and hope to continue to work with you toward that important objective.

As you know, the Department of Justice will be submitting detailed comments on the Commission's proposals. Let me today focus on the more significant areas for proposed amendment.

Threats, Conveying False Information/Hoaxes

I would like to discuss first the Sentencing Commission's request for comment regarding the Guidelines' treatment of 1) certain offenses involving threats and the conveying of false information, and 2) hoaxes generally in the terrorism context. An issue for comment common to these types of offenses is, should the offense levels for these offenses mirror those applicable to the underlying substantive offenses.

In our view, the Guidelines should recognize some distinction, reflective of the relative dangerousness, between the actual commission of a terrorist act, and threats, conveying false

information and hoaxes of a terrorist nature. Reduced offense levels for the latter type of offenses are appropriate and reflect the reduced penalties frequently provided by Congress for those type of offenses.

At the same time, we think it critical to recognize, and for the Guidelines to reflect, the peculiar gravity of threats, conveying false information and hoaxes of a terrorist nature. Focusing on threats for a moment, the Guidelines currently treat most threat offenses by reference to the generic guideline for threats in §2A6.1, a guideline which embraces a particularly wide range of conduct, including threats to commit nonviolent acts. In our view, the base offense level of 12 provided in §2A6.1, which under some circumstances can be reduced to 8, does not adequately reflect the seriousness of threatened terrorism offenses, and needs to be bolstered by appropriate specific offense characteristics.

Unfortunately, most of the specific offense characteristics of §2A6.1 are not germane to terrorism cases (for instance, violation of a court order or the number of threats). While we believe that terrorist threats could be referred to §2A6.1, it would be appropriate to do so only if that guideline is modified to reflect the factors that typically cause terrorist threats to be more serious than other threats. We, therefore, suggest that the Commission consider adding specific offense characteristics to §2A6.1. Enhancements reflective of the heartland of terrorist threats would include: 1) an enhancement for offenses that involve an express or implied threat of death or bodily injury; 2) an enhancement for conduct evidencing an intent or apparent ability to commit the offense; 3) an enhancement for offenses that involve multiple victims; and 4) an enhancement for offenses that result in substantial disruption of public services or substantial expenditure of funds to respond to the offense. Threats considered terrorist in nature are typically directed at targets such as city and federal government facilities (courthouses, the FBI, DoD entities) or infrastructure

or public transportation. In general, terrorist threats impact upon a significant number of people, cause evacuations and displacements of many individuals, lead to significant disruptions in governmental and other services, and require emergency and special response by police and other first responders. Moreover, responding to terrorist threat offenses draws governmental resources away from investigating and preventing other possible attacks.

In our view, there are substantial benefits to modifying §2A6.1 in the manner we suggest. There are offenses of a non-terrorist nature which are prosecuted under statutes applicable to terrorist acts. This approach would provide a means of grading the seriousness of the threat offense based on the presence of dangerous or harmful circumstances as reflected in specific offense characteristics.

Finally, we believe that the guidelines should treat threats and offenses involving the intentional conveying of false information and hoaxes in a similar manner. In general, these offenses are similar (and we consider conveying false information and hoaxes as essentially the same) in that they involve conduct or information which by its nature serves to elicit the same response – by victims, the government, first responders – as would occur in response to an actual or genuine terrorist act. Further, we see no meaningful distinction in culpability between individuals who issue threats and those who commit hoaxes or convey false information.

New Offenses Relating To Biological Agents

The USA Patriot Act added two new offenses involving the unlawful possession of biological agents. Under 18 U.S.C. §175(b), it is a crime punishable by up to 10 years imprisonment to knowingly possess a biological agent, toxin, or delivery system of a type or in a quantity that is not reasonably justified by a peaceful purpose. Under 18 U.S.C. §175b, it is a crime punishable by up to 10 years imprisonment for specified classes of people, including felons,

fugitives, and illegal aliens, to knowingly ship or possess select biological agents. Select biological agents are extremely dangerous substances like ebola, anthrax, and the like, that have the potential to pose a severe threat to public health and safety.

We support the Commission's proposal to assign these offenses to 2M6.1, the guideline that applies to offenses involving biological agents, toxins, or delivery systems. The Commission has requested input on the proper base offense level for these offenses and on whether certain specific offense characteristics should apply to them.

The Commission has suggested that it is considering a base offense level of between 14 and 22 for these offenses. After considering the matter, we believe that 22 would be the most appropriate base offense level for both offenses.

We think that both offenses are more serious than an empty threat to use a biological agent, which is punishable by a base offense level of 20 under §2M6.1(a)(3). Indeed, both offenses involve serious offense conduct that needs to be appropriately deterred and punished.

The possession of biological substances that is not reasonably justified by a peaceful purpose is threatening to society at large. The defendant has the means at his disposal to cause potentially significant harm, and no reasonable explanation for his conduct. And the possession of select biological agents such as anthrax by persons that Congress has determined are unfit to possess them similarly poses grave potential risks to society. Moreover, in both cases, Congress provided for a significant, 10 year statutory maximum. In our view, a base offense level of 22 captures the seriousness of the offense conduct without being draconian.

In addition, we believe that the specific offense characteristics already set forth in the guideline at §§2M6.1(b)(1) and (b)(3) should be applicable to these offenses, as well. Section 2M6.1(b)(1) adds two levels for an offense involving select biological agents. This enhancement

is clearly appropriate with regard to a §175(b) offense, and would reflect the increased gravity of the conduct and greater potential harm when it involves agents such as ebola. As for section 175b offenses, the enhancement would apply automatically to every case, since the offense by definition involves select agents. The resulting offense level of 24 is a reasonable offense level for that offense.

Finally, existing section 2M6.1(b)(3) provides for an enhancement if the offense resulted in substantial disruption of public, governmental, or business functions, or a substantial expenditure of funds to respond to the offense. These factors are just as worthy of consideration in the context of these offenses as they are in the context of other offenses to which §2M6.1 applies, and thus this enhancement should be applicable to these new offenses where the facts support it.

Assignment of Guidelines to 18 U.S.C. §§ 2339A & 2339B

We strongly support the assignment of appropriate guidelines to 18 U.S.C. §§ 2339A and 2339B. Section 2339A criminalizes the provision of material support to terrorists, and section 2339B criminalizes the provision of material support to terrorist organizations. We think it will be helpful for courts to have guidelines explicitly assigned to these offenses.

We also think that the two offenses should be treated separately for purposes of the Guidelines. The section 2339A offense criminalizes the provision of material support which the defendant knows or intends will be used in connection with a specific enumerated offense, such as aircraft piracy, aircraft sabotage, or the use of a weapon of mass destruction. We believe that the most appropriate way to punish the section 2339A offense is by reference to the underlying offense that the defendant was supporting. This can be accomplished through referencing section 2339A to two existing guidelines.

The aiding and abetting guideline (§2X2.1) would apply when the defendant's conduct is

akin to aiding and abetting, i.e., when the defendant provides the material support in advance of or during the commission of the predicate offense. For example, the defendant who sells bomb components to a terrorist, knowing that the terrorist intends to use it to blow up a building, would be treated the same as the terrorist himself under Chapter Two of the Guidelines.

When the section 2339A defendant provides the material support subsequent to the commission of the predicate offense, that is, in connection with concealment of the offense or escape from it, then the defendant is essentially acting as an accessory after the fact, and the appropriate guideline would be §2X3.1. In that situation, the defendant's Chapter Two offense level would be linked to, but lower than, the offense level for the underlying offense.

In our view, there are reasons to treat section 2339B cases differently. Section 2339B offenses are not tied to specific predicate offenses. Rather, those offenses are based on the dangerous nature of the recipient, a designated foreign terrorist organization. Congress has found that any material support provided to such an entity facilitates its terrorist activity, regardless of whether the material support is directly or explicitly tied to a specific terrorist act.

There is an existing guideline that appears to be applicable by analogy to section 2339B cases. Section 2M5.1(a)(1) applies to the evasion of national security controls under the Export Administration Act. This Guideline seems analogous to section 2339B, which could be described as a kind of national security export control. That said, it would nevertheless be appropriate for the Commission to enact a new Guideline that is specific to section 2339B, including specific offense characteristics appropriate to such offenses that are not found in section 2M5.1.

In its published draft amendments, the Commission set forth two possible base offense levels for a section 2339B violation, either 26 or 32. In our view, a base offense level of 26 is adequate, provided that it is coupled with two specific offense characteristics. One of these

would enhance the base offense level if the material support involved the provision of weapons, explosives, or lethal substances. The rationale for this is obvious: such materials are inherently dangerous and facilitate the recipient organization's terrorist activity in a very direct and substantial way. The other specific offense characteristic would include an increase in the offense level if the offense resulted in the death of any person. This specific offense characteristic would be responsive to the USA Patriot Act, which amended section 2339B to increase the statutory maximum to life imprisonment if death results from the offense.

Infrastructure Facilities

The Commission has proposed certain guideline references for offenses involving the violation of 49 U.S.C. § 60123(b), relating to damaging or destroying an interstate gas or hazardous liquid pipeline facility. Infrastructure facilities of this kind are attractive targets for terrorists, primarily because acts against such inherently hazardous facilities could result in extensive casualties, damage and disruption. It is, therefore, important to ensure that the Guidelines reflect the seriousness of these offenses.

For the most part, the Guidelines reference offenses involving infrastructure facilities to §2B1.1 and §2K1.4, as the Commission is suggesting for 49 U.S.C. § 60123(b) offenses. We see two weaknesses in the application of these guidelines to this type of offense. First, §2K1.4, which would apply where the offense involved arson or explosives, has different base offense levels, and lacks specific guidance for offenses against infrastructure facilities. In our view, intentional acts involving explosives or arson against infrastructure facilities should in all cases be referenced to the highest offense level under §2K1.4. We suggest that a specific subparagraph be added to (a)(1) which would refer to offenses involving infrastructure facilities. Thus, in all cases, the defendant would receive the highest base offense level possible, under either (a)(1) or (a)(3).

Our second concern relates to §2B1.1, a guideline which would apply to offenses involving infrastructure, in general, when §2K1.4 does not. That guideline, in essence, provides for a two-level increase in the offense level and a floor of 14 where the offense involved a conscious or reckless risk of death or serious bodily injury. We have significant question as to whether that increase in offense level adequately reflects the gravity of offenses that involve infrastructure facilities and pose a risk of serious bodily injury or death.

Conspiracies and Attempts

Turning to penalties for terrorist conspiracies (Part (D) in the proposed amendments), we strongly support a modification to the Guidelines that would apply the same penalties to both terrorist conspiracies and the substantive offenses where the statutes treat them the same. Such a modification, in our view, would appropriately reflect the expressed will of Congress in providing that a conspiracy to commit the terrorism offense shall be subject to the same penalties prescribed for the substantive offense. In such cases, Congress has clearly indicated that the lesser penalty provided in the general conspiracy statute, 18 U.S.C. § 371, is insufficient to reflect the seriousness of the offense. Terrorist conspiracies, and attempts as well, are generally viewed as being of equal gravity to the commission of the substantive offense. Although the issue for comment does not address attempts, we believe that the same rule should apply to attempts. If the terrorism statute treats an attempt the same as the substantive offense, then so should the Guidelines.

We note that §2X1.1 recognizes this general principle with respect to solicitation offenses. Subsection (b)(3)(B) of that Guideline provides that if the statute treats solicitation of the substantive offense identically with the substantive offense, the offense level for solicitation is the same as that for the substantive offense. We believe that it is highly desirable to include a similar

provision with respect to both conspiracies and attempts.

The Terrorism Adjustment in Section 3A1.4

Currently, Chapter 3 of the Guidelines provides a significant enhancement if the offense was a felony that involved, or was intended to promote, a federal crime of terrorism. After September 11 in particular, no one could reasonably question the rationale behind such an enhancement: terrorists and terrorist offenses pose a unique threat to the United States. We think that there are important steps the Commission should take to strengthen that enhancement.

In its published draft amendments, the Commission notes that the current enhancement is tied to the statutory definition of a "federal crime of terrorism," and suggests an upward departure where the offense involved or was intended to promote a terrorist offense that arguably does not fit under the existing statutory definition of a "federal crime of terrorism." We strongly support that proposal, which is narrowly tailored to reach those offenses that involve or were intended to promote conduct that Congress has explicitly defined as terrorist under other statutory definitions. It makes sense for judges to be invited to apply an upward departure in these terrorist cases.

In addition, the Commission has also requested comment on whether it should amend the existing enhancement to clarify that it can apply to offenses that occur after the commission of the federal crime of terrorism. We strongly support such a clarification. Because terrorists and terrorist offenses constitute such a unique threat to the United States, an offender who, for instance, helps a terrorist flee the U.S. after the commission of the terrorist act, or who lies to an FBI agent or to a court in order to help the terrorist escape apprehension or conviction, ought to be treated far more harshly than if he or she had acted in a non-terrorist context. Thus, the terrorism enhancement should be applicable in such a case. Indeed, as the word "clarify" implies, the best reading of the current Guideline is that the enhancement already is applicable to such cases; but a

clarification is nevertheless advisable so as to remove any question.

These two changes would strengthen the existing Guideline and make it more useful from a counterterrorism perspective.

Supervised Release

Finally, I would like to briefly discuss the issue for comment relating to the length of the term of supervised release for offenses listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person. The Commission's proposed amendment is in response to section 812 of the USA Patriot Act which authorizes supervised release for any term of years or life for such offenses. The Commission has asked whether the applicable term should be 1) not less than three years, or 2) life.

In our view, the Guidelines should delineate a range for the term of supervised release for these offenses, similar to the existing approach reflected in §5D1.2(a)(1) and (2), the guideline relating to terms of supervised release. In light of Congress' judgement that a life term of supervised release should be an option available to courts, we suggest that the upper end of the range be life. As for the appropriate minimum term of supervised release, we believe that five years, the maximum term for other offenses, is appropriate given the serious nature of these offenses.

Although this is a wide range, we note that offenses falling within this provision may or may not have a terrorist motive. It is also worth noting that if a court were initially to impose a lengthy term of supervised release, pursuant to 18 U.S.C. § 3583(e), the court could subsequently modify or terminate the term of supervised release if appropriate.

Conclusion

Thank you for the opportunity to testify before you today about the proposed amendments to terrorism-related sentencing guidelines. I am happy to answer any questions you may have.