

# CHAPTER TWO

## The Sentencing Guidelines

### **Guideline Amendments**.....

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

### *Amendments Promulgated*

Proposed amendments were published in the *Federal Register* on December 30, 2003, and January 14, 2004. The Commission received extensive written comment on the proposed amendments, and on March 17, 2004, the Commission conducted a public hearing on the proposed amendments. On April 30, 2004, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. The Commission established an effective date of November 1, 2004, for these amendments.

The amendments promulgated by the Commission in fiscal year 2004 include amendments responding to congressional directives and areas of congressional interest. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary, set out by these two categories.

### **Congressional Directive and Interest Amendments**

The amendments responding to congressional directives and addressing congressional interest—

- responded to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”) regarding child sex offenses by (a) increasing the base offense levels in section 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor) for offenses related to trafficking, receipt, and possession of child pornography to correspond to new statutory mandatory minimum penalties and increases in statutory maxima; (b) increasing the base offense levels in section 2G2.1 (Sexually

Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to correspond to an increase in the statutory maximum penalty; (c) providing new specific offense characteristics in section 2G2.1 pertaining to the production of child pornography; (d) creating a new guideline, section 2G1.3, specifically to address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes); (e) addressing proportionality concerns between Chapter Two, Part A (Criminal Sexual Abuse) offenses and Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of a Minor, and Obscenity); (f) increasing the custody, care, or supervisory control enhancement in section 2A3.2 (Criminal Sexual Abuse of a Minor under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts); and (g) increasing the base offense level in section 2A3.3 (Criminal Sexual Abuse of a Ward) to ensure such offenses are punished near the statutory maximum;

- responded to the CAN-SPAM Act of 2003 by (a) referring the new offense at 18 U.S.C. § 1037 to section 2B1.1 (Theft, Fraud, and Property Destruction); (b) providing that the mass-marketing enhancement in section 2B1.1(b)(2) applies to section 1037 offenses; and (c) creating a two-level enhancement in section 2B1.1 for section 1037 offenses that involved obtaining electronic mail addresses through improper means;
- responded to the PROTECT Act by increasing the penalties for offenses involving GHB;
- provided a new two-level enhancement in sections 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), and 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy) for offenses that involved the mass marketing of controlled substances, listed chemicals, or prohibited equipment, respectively, through the use of an interactive computer service;
- responded to the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act by (a) increasing the penalties for assault offenses committed against federal officers, officials, and employees; and (b) creating a new guideline, section 2K2.5 (Purchasing, Possession of Body Armor by Violent Felons), that applies to offenses involving the unlawful possession of body armor.

Table 2

**PUBLIC HEARING WITNESS LIST**

Presentation of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines  
Washington, DC — October 7, 2003

**B. Todd Jones**

*Partner, Robins, Kaplan, Miller & Ciresi  
(Group Chair)*

**Richard Bednar**

*National Coordinator, Defense Industry Initiative  
on Business and Ethics Conduct and Senior  
Counsel, Crowell & Moring LLP*

**Mary Beth Buchanan**

*United States Attorney,  
Western District of Pennsylvania*

**Paul Fiorelli**

*Director, Xavier Center for Business Ethics  
and Social Responsibility*

**Richard Gruner**

*Professor of Law, Whittier Law School*

**Eric H. Holder, Jr.**

*Partner, Covington & Burling*

**Charles Howard**

*Partner, Shipman & Goodwin*

**Ron James**

*President and CEO,  
Center for Ethical Business Cultures*

**Lisa A. Kuca**

*Director of Corporate Compliance,  
Corporate Integrity Service*

**Jane Adams Nangle**

*St. Joseph's/Candler Health System*

**Julie O'Sullivan**

*Professor of Law,  
Georgetown University Law Center*

**Edward S. Petry**

*Executive Director and Member of the Board of  
Directors, Ethics Officer Association*

**Gary R. Spratling**

*Partner, Gibson, Dunn & Crutcher*

**Winthrop M. Swenson**

*Partner, Compliance Systems Legal Group;  
Coalition for Ethics & Compliance Initiatives*

**Gregory J. Wallace**

*Partner, Kaye Scholer*

**Table 2 (cont.)**

**PUBLIC HEARING WITNESS LIST**

Presentation of the Final Report of the Native American Ad Hoc Advisory Group  
Washington, DC — November 4, 2003

**Lawrence E. Piersol**

*Chief Judge, United States District Court for the District of South Dakota  
(Group Chair)*

**Diane Humetewa**

*Assistant U.S. Attorney, District of Arizona*

**Tom Peckham**

*Partner, Nordhaus Law Firm, Albuquerque, NM*

**Marlys Pecora**

*Victim Witness Specialist, U.S. Attorney's Office, South Dakota*

**Celia Rumann**

*Assistant Professor of Law, University of St. Thomas School of Law*

**Tracy Toulou**

*Director, Office of Tribal Justice, U.S. Department of Justice*

Table 2 (cont.)

**PUBLIC HEARING WITNESS LIST**

Proposed Amendments to the Sentencing Guidelines  
Washington, DC — March 17, 2004

**Patrick Gnazzo**

*Corporate Member, Ethics Resource Center Fellows Program; Vice President Business Practices, United Technologies Corporation*

**Kenneth Johnson**

*Director, Ethics and Policy Integration Centre*

**Dov L. Seidman**

*Chair and CEO, LRN*

**Mary Beth Buchanan**

*United States Attorney for the Western District of Pennsylvania; Chair, Attorney General's Advisory Committee; Member, USSC Ad Hoc Advisory Group for Organizational Guidelines*

**Linda A. Madrid**

*Managing Director, General Counsel & Corporate Secretary, CarrAmerica Realty; Member, Board of Directors of the Association of Corporate Counsel (ACC)*

**Gregory J. Wallace**

*Partner, Kaye Scholer LLP; Member, USSC Ad Hoc Advisory Group for Organizational Guidelines*

**David Uhlmann**

*Chief, Environmental Crimes Section, United States Department of Justice*

**James W. Conrad, Jr.**

*Counsel, American Chemistry Council*

**Ronald A. Sarachan**

*Ballard Spahr Andrews & Ingersoll*

**Steven P. Solow**

*Hunton & Williams; Association of Oil Pipe Lines*

**Barry J. Pollack**

*Member, Board of Directors, National Association of Criminal Defense Lawyers; Co-Chair, White Collar Crime Committee*

**Mary Price**

*General Counsel, Families Against Mandatory Minimums (FAMM)*

**Jon M. Sands**

*Federal Public Defender, District of Arizona*

**Thomas Colantuono**

*United States Attorney for the District of New Hampshire*

**Jodi Avergun**

*Chief, Narcotic and Dangerous Drug Section, United States Department of Justice*

**Raymond N. Hulser**

*Public Integrity Section, United States Department of Justice*

**James E. Felman and L. Barrett Boss**

*Co-Chairs, United States Sentencing Commission Practitioners Advisory Group*

**Cathy Battistelli**

*Chair, Probation Officers Advisory Group*

## **Commission Interest Amendments**

The amendments addressing Commission interest—

- increased the penalties in sections 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Government Functions) and 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) for offenses involving bribery, gratuities, and “honest services” and provided new enhancements to address certain aggravating factors inherent in these offenses;
- addressed circuit conflict issues by (a) amending sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to add a condition permitting the court to limit the use of a computer or an interactive computer service for defendants who used such items in the commission of sex offenses; and (b) clarifying that distribution of child pornography includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material;
- increased the penalties in section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for offenses involving man-portable air defense systems, portable rockets, missiles, and devices used for launching rockets or missiles;
- increased the penalties for homicide and manslaughter;
- provided a uniform method in section 2D1.1 for determining the offense levels for offenses involving a controlled substance analogue;
- increased the penalties in section 2D1.12 for offenses involving the transportation or stealing of anhydrous ammonia;
- increased the penalties in section 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for pollution offenses under 49 U.S.C. § 5124 and § 46312, and provided an upward departure if the offense was calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct;
- increased the penalties in section 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) for defendants who fraudulently use or obtain a United States passport;
- amended the “mitigating role cap” to address proportionality concerns by providing a graduated reduction for defendants whose offense level under section 2D1.1(a) is greater than level 30 and who also qualify for a mitigating role adjustment; and

- substantially modified the provisions of Chapter Eight (Organizations) to strengthen the existing criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its criminal culpability.

## **Policy Teams**

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

Policy teams generally study a specific subject area, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group typically reviews legislative history and recent legislative enactments; relevant court decisions; sentencing data regarding current practices; case files of sentenced defendants; reports of frequent questions about guideline application related to that specific area (based on HelpLine calls from probation officers, judges, and attorneys); and public comment. The teams also solicit input from the Practitioners Advisory Group, the Probation Officers Advisory Group, and other interested persons and government agencies as appropriate.

### ***Drug Policy Team***

The Commission established this team in response to section 608 of the PROTECT Act, Pub. L. 108–21, which required the Commission to review and consider amending penalties for offenses involving gamma hydroxybutyric acid (GHB). In addition, the team examined a number of other issues related to drug offenses. The team conducted a legislative review, analyzed existing case law, reviewed public comment, and met with interested parties.

As a result of its study and analysis, the Commission approved a ten-part amendment to the drug guidelines which included: enhanced penalties for GHB offenses, increased penalties for cases involving mass marketing of drugs over the Internet, a special instruction to apply the vulnerable victim adjustment in section 3A1.1(b)(1) (Hate Crime Motivation or Vulnerable Victim) in certain circumstances, and the addition of white phosphorous and hypophosphorous acid to the Chemical Quantity Table.

### ***Hazardous Materials Policy Team***

During the 2003-2004 amendment cycle, the Commission formed a policy team to review the penalties for offenses related to the unlawful transportation of hazardous materials based on concerns that such transportation presented a potential terrorist vulnerability in the aftermath of the terrorist attacks of September 11, 2001. The team was instructed to review and consider amendment of the environmental crimes sentencing guidelines that cover unlawful hazardous materials transportation offenses.

The team conducted an extensive empirical study of offenders sentenced under the environmental crimes guidelines that spanned fiscal years 2001 and 2002, focusing on cases in which there were convictions under 49 U.S.C. §§ 5124 or 46312 (the hazardous materials transportation penalty provisions). The team also conducted an extensive literature and case law review, which included review of several GAO reports on hazardous materials transportation. The team reviewed the entire legislative record regarding unlawful hazardous materials transportation, including the Hazardous Materials Transportation Act, the Federal Aviation Act, and several environmental protection statutes. Members of the team also attended a congressional briefing focused on terrorism, mass transportation, and the transportation of hazardous materials. The team also received and reviewed public comment from a number of interest groups, and in March 2004, the Commission received written and oral testimony from interested groups regarding proposed amendments to the environmental crimes guideline. As a result of the team's work, the Commission promulgated a new specific offense characteristic enhancement for violations of the hazardous materials statutes, taking effect November 1, 2004.

### *Homicide and Assault Policy Team*

In response to new proportionality issues created by changes to certain Chapter Two guidelines pursuant to the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21 (the "PROTECT Act"), and to address longstanding proportionality issues in the homicide guidelines, the team focused on the murder, manslaughter, and assault guidelines. The team was aided by a report from the Commission's Native American Ad Hoc Advisory Group, data, and public comment indicating perceptions that the guideline penalties for homicides other than for first degree murder were inadequate. The amendment to the assault guidelines and the adjustment at section 3A1.2 (Official Victim) implements a congressional directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (the "Act").

The team examined several years of data and found a high upward departure rate for second degree murder and other homicide offenses, such as voluntary manslaughter. An increase in the base offense levels for several guidelines was indicated to be in order to provide more appropriate punishment, and to restore the proportionality found in the original guidelines. The Commission's amendment provides a new alternative base offense level in section 2A1.4 (Involuntary Manslaughter) of level 22 for reckless involuntary manslaughter offenses that involved the reckless operation of a means of transportation. This addresses concerns raised by some members of Congress and comports with a recommendation from the Native American Ad Hoc Advisory Group that vehicular manslaughter involving alcohol or drugs should be sentenced at offense level 22.

The amendment also makes a number of changes to the assault guidelines and the Chapter Three adjustment relating to official victims to implement the congressional directive and the increased statutory maximum terms of imprisonment in the Act.

### *Immigration Policy Team*

In fiscal year 2004, the Commission addressed specific concerns raised by the Department of State and others that the fraudulent use of United States passports threatens our border protection and homeland security efforts. An enhancement of four levels was provided in section 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, etc.) for defendants

who fraudulently use or obtain United States passports. In his public comment, Secretary of State Colin Powell stated that “maintaining the integrity of United States passports and visas is a critical component of our global effort to fight terrorism, in addition to ensuring that our immigration policies and laws are enforced.” Citing the United States passport as the “gold standard” of all passports, Secretary Powell stated that this amendment “will be a clear signal that the United States Government recognizes the severity of passport and visa fraud and the importance of maintaining our border security.”

### *MANPADS Policy Team*

The team was tasked with examining section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to assess the adequacy of the two-level destructive device enhancement at section 2K2.1(b)(3). The team met with, among others, representatives of the Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms, and considered public comment. MANPADS and similar weapons are highly regulated under chapter 53 of title 26, United States Code, and chapter 44 of title 18, United States Code, and are classified as “destructive devices” under 26 U.S.C. § 5845(f). The amendment responds to concerns that these types of weapons, which have been used in terrorist attacks overseas, have the ability to inflict death or injury on large numbers of persons if fired at an aircraft, train, building, or similar target. Because of the inherent risks of these types of weapons and the fact that there is no legitimate reason to possess them, the Commission determined that the statutory maximum penalty for possession of such devices should apply in all such offenses. The amendment provides a 15-level enhancement for MANPADS type devices, and increases guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved MANPADS or similar destructive devices.

### *Mitigating Role Cap Policy Team*

The Commission established a policy team to review proportionality concerns arising from the “mitigating role cap” amendment effective November 1, 2003, limiting the base offense level in certain drug offenses to level 30. After reviewing public comment and analyzing the sentencing and prison impact of various proposals, the Commission revised the “mitigating role cap” to provide a graduated reduction in base offense level to drug offenders whose base offense level exceeds level 30 but receive an adjustment under section 3B1.2 (Mitigating Role). The original offense level cap was limited to offenders sentenced under section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). This revision applies to both sections 2D1.1 and 2D1.11 (Unlawful Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy) offenses.

### *Public Corruption Policy Team*

In fiscal year 2004, the Commission established the Public Corruption Policy Team to respond to comment from the Department of Justice that identified the public corruption guidelines as an area “in which a comprehensive review of the guidelines is in order.” In the course of evaluating whether the public corruption guidelines (Chapter Two, Part C) required change, the team conducted an historical review of Chapter Two, Part C, performed an analysis of all 799 public

corruption cases sentenced in fiscal years 1999 through 2001, and obtained comment from the Public Integrity Division of the Department of Justice, the Department of Homeland Security, the Probation Officers Advisory Group, and the Practitioners Advisory Group.

After the team reported its findings and recommendations, the Commission increased base offense levels for all bribery and gratuity cases, redefined “high position of public trust,” and created a new enhancement for public corruption cases involving border security or unlawful procurement of passports or other government-issued identification documents.

### *Sex Offense Policy Team*

The Sex Offense Policy Team was formed to assist the Commission in addressing the congressional directives regarding child pornography and sexual abuse offenses contained in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT” Act), Pub. L. 108–21. This Act made a number of changes to the sex offense statutes, including increasing a number of statutory maxima, increasing some existing mandatory minimum penalties, and adding some new mandatory minimums.

In the course of its work, the team examined two years of Commission data and met with interested outside groups. The result was the Commission’s promulgation of an amendment that substantially increases sentences for individuals who possess, receive, traffick in or produce images of child pornography. Furthermore, the amendment increases penalties for defendants who travel to engage in sexual activity with minors, and increases penalties for individuals who sexually abuse both minors and adults.

### *Body Armor Policy Team*

This amendment implemented a new offense at 18 U.S.C. § 931 which was created by section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273. The Commission decided after review of section 2K2.1 that it would be most appropriate to create a new guideline at section 2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons). The Commission reviewed the Firearms Team Report, dated October 6, 1998, to aid in making this decision.

### *CAN-SPAM Policy Team*

This policy team was responsible for developing an amendment to respond to the directive contained in the CAN-SPAM Act, Pub. L. 108–187. Following the team’s work, the Commission promulgated an amendment that (1) referenced the new offense at 18 U.S.C. § 1037 to section 2B1.1; (2) added to section 2B1.1 a two-level enhancement if a defendant is convicted under 18 U.S.C. § 1037 and the offense involved obtaining electronic mail addressed through improper means; and (3) provided an instruction in section 2B1.1 to apply the mass marketing enhancement in any case in which the defendant either is convicted under 18 U.S.C. § 1037 or committed an offense that involves conduct described in 18 U.S.C. § 1037.

## **Advisory Groups**

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The Commission has established several advisory groups in an effort to obtain systematic input on ways to improve the guidelines. The two standing advisory groups to the Commission are the Practitioners Advisory Group and the Probation Officers Advisory Group. In fiscal year 2004, the Organizational Guidelines Ad Hoc Advisory Group and the Native American Ad Hoc Advisory Group completed their work.

### ***Practitioners Advisory Group***

The Practitioners Advisory Group (PAG) provides defense bar perspectives on Sentencing Commission policies, sentencing procedures, and proposed guideline amendments. The advisory group, consisting of approximately 50 criminal defense attorneys, also disseminates information regarding sentencing issues to the criminal defense community through its membership. In 2004, the Practitioners Advisory Group had co-chairs: Ms. Amy Baron-Evans, a partner in the law firm of Dwyer & Collora, LLP, and Mr. Mark Flanagan, a partner in the law firm of McKenna, Long & Aldridge, LLP.

### ***Probation Officers Advisory Group***

The Probation Officers Advisory Group (POAG) was established by the Commission to assist the Commission in carrying out its statutory responsibilities under the Sentencing Reform Act of 1984 and to represent U.S. probation officers in the area of sentencing. Throughout the year, the group continued to assist the Commission by providing input on guideline application and sentencing-related issues. The group consists of approximately 15 probation officer representatives, including one representative from the Federal Probation/Pretrial Services Officers Association and one representative from the Office of Probation and Pretrial Services in the Administrative Office of the U.S. Courts. In 2004, the POAG chair was Ms. Cathy Battistelli, supervising U.S. probation officer for the District of New Hampshire.

### ***Organizational Guidelines Ad Hoc Advisory Group***

On October 8, 2003, the Organizational Guidelines Ad Hoc Advisory Group presented its final report to the Commission regarding the general effectiveness of the federal sentencing guidelines for organizations. The advisory group was comprised of 15 industry representatives, scholars, and experts in compliance and business ethics who examined the guidelines' criteria for an effective program to ensure an organization's compliance with the law. Mr. B. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, served as chair of the group.

During its 18-month tenure, the advisory group conducted extensive research, solicited public comment, and held a public hearing. In concluding its service to the Commission, the advisory group recommended that the Commission amend the existing organizational guidelines in order to make the criteria for mitigation credit under the organizational guidelines more rigorous by incorporating contemporary legislative, regulatory, and corporate governance requirements into the

guideline framework. The Commission adopted a substantial number of the advisory group's recommendations in the final amendments that it promulgated in 2004.

### *Native American Ad Hoc Advisory Group*

In May 2002, the Sentencing Commission formed the Native American Ad Hoc Advisory Group to consider viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act. The Native American advisory group was composed of 16 members representing a variety of interested groups, including the National Congress of American Indians, the U.S. Commission on Civil Rights, the Bureau of Indian Affairs, tribal members, the federal judiciary, and law enforcement officials. The Native American advisory group was chaired by the Honorable Lawrence Piersol, chief judge of the U.S. District Court of South Dakota. The group's final report, issued November 4, 2003, concludes that the impact on Native Americans resulting from federal criminal jurisdiction and the application of the federal sentencing guidelines varies both from offense to offense and between jurisdictions.

### **Assistance to Congress**

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The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. To fulfill this responsibility, the Commission in 2004 continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses. The Commission worked closely with Congress to analyze the impact of the Supreme Court decision in *Blakely v. Washington*. For example, the Commission provided Congress (and others) with virtually "real-time" data on the *Blakely* decision's impact on federal sentencing practice. In July 2004, Commission Vice Chair John R. Steer and Vice Chair William K. Sessions III testified before the U.S. Senate Committee on the Judiciary about *Blakely v. Washington* and the federal sentencing guidelines. The Commission also worked with members of Congress and staff in preparation for brief submission and oral argument in *United States v. Booker* and *United States v. Fanfan*.

During 2004, the Commission routinely responded to congressional requests for federal sentencing and criminal justice data, provided technical assistance in drafting legislation, and provided explanations of guideline application. The Commission also promulgated guideline amendments in response to congressional legislation including the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act), the CAN-SPAM Act of 2003, and the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act. Throughout the year, the Commission provided regular updates on Commission action in response to recently enacted crime and sentencing-related legislation, including the PROTECT Act, which required implementation by the Commission by October 27, 2003.

The Commission also supplied Commission publications and resource materials (*e.g.*, the *Guidelines Manual*, the *Report of the Ad Hoc Advisory Group on the Organizational Guidelines*, and the *Final Report of the Native American Advisory Group*) to members of Congress and their staffs. The Commission also distributed copies of the *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* issued pursuant to the PROTECT Act in October 2003.

