

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 also 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 February 23, 2005. The Commission received extensive written comment on the proposed amendments, and on April 12, 2005, the Commission conducted a public hearing on the proposed amendments. On April 29, 2005, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. The Commission established an effective date of November 1, 2005, for these amendments.

In addition to these permanent amendments, the Commission promulgated two temporary, “emergency” amendments in response to the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109–9, and the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458. The Commission published in the *Federal Register* on October 24, 2005, the temporary “emergency” amendments that were adopted in response to these directives. Both amendments became effective October 24, 2005.

The amendments promulgated by the Commission in FY 2005—

- responded to the Family Entertainment and Copyright Act of 2005 by increasing the penalties in section 2B5.3 (Criminal Infringement of Copyright or Trademark) for offenses involving a pre-release work and for offenses in which the copyrighted work is transferred through file sharing; and providing that the court may make a reasonable estimate of the infringement amount using any relevant information, including financial records, in cases in which the court cannot determine the number of infringing items;

Table 2

PUBLIC HEARING WITNESS LIST

Washington, DC — November 16 & 17, 2004

Honorable Emmet G. Sullivan
*Committee on Criminal Law, Judicial Conference
of the United States*

Honorable Patti B. Saris
*Chair, Committee on Defender Services,
Judicial Conference of the United States*

Honorable Susan C. Bucklew
*United States District Court Judge for the
Middle District of Florida; Judicial Conference of
the United States, Advisory Committee on Rules
of Criminal Procedure*

Stephanos Bibas
*Associate Professor, The University of Iowa College
of Law*

Stephen A. Saltzburg
*Professor, George Washington University School
of Law; Chair, American Bar Association –
Kennedy Commission*

Michael Goldsmith
*Professor, Brigham Young University School
of Law*

Susan Howley
*Director of Public Policy and Victim Services,
National Center for Victims of Crime*

David M. Porter
*Assistant Federal Defender, Federal Defender's
Office, Sacramento, CA*

Amy Baron-Evans
*Co-chair, Practitioners Advisory Group,
Dwyer & Collora, LLP*

Carmen Hernandez

*Second Vice President, National Association of
Criminal Defense Lawyers*

Nancy J. King
Professor, Vanderbilt University Law School

Susan R. Klein
Professor, University of Texas School of Law

Paul Rosenzweig
*Senior Legal Research Fellow, The Heritage
Foundation; Adjunct Professor, George Mason
University School of Law*

Douglas A. Berman
*Professor, Michael E. Moritz College of Law,
The Ohio State University*

Frank O. Bowman, III
Professor, Indiana University School of Law

David N. Yellen
Professor, Hofstra University School of Law

James E. Felman
Partner, Kynes, Markman & Felman, P.A.

Mark W. Osler
Associate Professor, Baylor Law School

Christopher A. Wray
*Assistant Attorney General, Criminal Division,
United States Department of Justice*

Table 2 (cont.)

PUBLIC HEARING WITNESS LIST

Washington, DC — February 15 & 16, 2005

Honorable Thomas F. Hogan

*Chief United States District Judge, District of
District of Columbia*

Honorable Lawrence Piersol

*Chief United States District Judge, District of
South Dakota; Chair, Federal Judges Association*

Honorable Paul G. Cassell

United States District Judge, District of Utah

Honorable Lynn S. Adelman

*United States District Judge, Eastern District
of Wisconsin*

Honorable Richard G. Kopf

United States District Judge, District of Nebraska

Mary Price

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

Collene (Thompson) Campbell

Memory Of Victims Everywhere (MOVE)

Paul Rosenzweig

*Senior Legal Research Fellow, The Heritage
Foundation; Adjunct Professor, George Mason
University School of Law*

Douglas A. Berman

*Professor, Michael E. Moritz College of Law,
The Ohio State University*

Lyle Yurko

*Member, North Carolina Sentencing and Policy
Advisory Commission*

Kim S. Hunt

*Director, District of Columbia Advisory
Commission on Sentencing*

Daniel F. Wilhelm

*Director, State Sentencing and Corrections
Program, Vera Institute of Justice*

Mark Bergstrom

*Executive Director, Pennsylvania Commission
on Sentencing*

Bruce Fein

Bruce Fein & Associates and The Lichfield Group

Stephen A. Saltzburg

*Professor, George Washington University School
of Law; ABA, Criminal Justice Section*

Daniel P. Collins

Partner, Munger, Tolles & Olson

Jon M. Sands

*Federal Public Defender for the District of
Arizona; Chair, Federal Defender Guideline
Committee*

Amy Baron-Evans

*Co-chair, Practitioners Advisory Group,
Dwyer & Collora, LLP*

Carmen Hernandez

*Second Vice President, National Association of
Criminal Defense Lawyers*

Robert G. McCampbell

*United States Attorney for the Western District of
Oklahoma; Chair, Attorney General Advisory
Sub-Committee on Sentencing, United States
Department of Justice*

Table 2 (cont.)

PUBLIC HEARING WITNESS LIST

Washington, DC — April 12, 2005

Richard D. Collins

National Association of Criminal Defense Lawyers (NACDL)

Donald C. Klawiter

*Partner, Morgan, Lewis & Bockius LLP
American Bar Association, Chair-Elect, Section of Antitrust Law*

James E. Felman

*Partner, Kynes, Markman & Felman, P.A.
Practitioners Advisory Group*

Jon L. Sands

Federal Defender, District of Arizona

Scott D. Hammond

*Deputy Assistant Attorney General, Antitrust Division
United States Department of Justice*

Robert G. McCampbell

*United States Attorney for the Western District of Oklahoma
Chair, Attorney General Advisory Sub-Committee on Sentencing
United States Department of Justice*

- responded to the Intelligence Reform and Terrorism Prevention Act of 2004 by increasing the penalties in section 2J1.2 (Obstruction of Justice) for obstruction offenses that relate to international or domestic terrorism;
- responded to the Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, by creating a new guideline at section 2B1.6 (Aggravated Identity Theft) to address new offenses created by the act; and amending section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to include a defendant who exceeds or abuses the authority of his or her position in order to obtain unlawfully or use without authority any means of identification;
- responded to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, by increasing the penalties in section 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) for antitrust offenses in a manner that is consistent with guideline penalties for sophisticated fraud;
- provided guidance in section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) regarding the sentencing of offenses involving drug analogues; and
- increased the penalties in section 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy) for gamma-butyrolactone (GBL) in a manner that provides that the amount of GBL, at any particular offense level, is the amount that provides 100 percent yield of gamma-hydroxybutyric acid (GHB).

Policy Teams

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).

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.

Antitrust Offense Policy Team

The Commission created a staff Antitrust Offense Policy Team in response to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237. The Act’s legislative history reflected congressional intent that the Commission would revise the antitrust guideline to reflect the new statutory maximum sentences imposed by the Act.

The team met with representatives of the Antitrust Division of the Department of Justice and conducted telephone conferences with representatives of the Practitioners Advisory Group. Public comment was received and considered from those entities and from the Antitrust Section of the American Bar Association, the Probation Officers Advisory Group, and the Federal Defender Guidelines Committee. Interested parties were afforded the opportunity to address the Commission at a public hearing convened April 12, 2005. The team also conducted a review of Commission sentencing data for antitrust offenses.

The major issues considered by the team were whether to retain the bid-rigging enhancement at section 2R1.1(b)(1), whether to increase the base offense level for antitrust offenses, and how to alter the volume of commerce table at section 2R1.1(b)(2) to provide appropriately enhanced sentences for large-scale antitrust offenders. The Commission subsequently promulgated an antitrust guideline amendment which took effect November 1, 2005.

Aggravated Identity Theft Policy Team

In response to Congress's creation of two new criminal offenses for aggravated identity theft in the Identity Theft Penalty Enhancement Act, a staff team explored ways in which to incorporate consecutive mandatory minima sentences of two and five years into the sentencing guidelines, depending on the underlying associated offense involving the misuse of identification means. The policy team also considered the expansion of the scope of section 3B1.3 (Abuse of Trust or Use of Special Skill) to include those defendants who exceed or abuse their authority to obtain or misuse identification means, in response to a specific directive from Congress in the Identity Theft Penalty Enhancement Act.

The team undertook a review of prior Commission data and research on identity theft, solicited public comment, and consulted with experts from executive agencies through the auspices of the Attorney General's Identity Theft Task Force. The Commission ultimately promulgated a new guideline for aggravated identity theft at section 2B1.6 and added a new application note to section 3B1.3 that expands and illustrates the types of abuse of trust and misuse of special skills subject to increased punishment.

Advisory Groups

The Commission has established a number of 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.

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 2005, the PAG had co-chairs: Mr. T. Mark Flanagan, a partner in the law firm of McKenna, Long &

Aldridge, LLP, and Ms. Amy Baron-Evans, a partner in the law firm of Dwyer & Collora, LLP. Mr. Gregory S. Smith, a partner in the law firm of Sutherland, Asbill & Brennan, LLP, replaced Ms. Baron-Evans as co-chair in March 2005.

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 POAG 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 United States Courts. In 2005, the POAG chair was Ms. Cathy Battistelli, supervising United States probation officer for the District of New Hampshire.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In 2005, the Commission continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses.

The Commission continued providing Congress (and others) with virtually “real-time” data collection, analysis, and reporting (a process implemented after the 2004 *Blakely* decision) on the impact of the *Booker* decision on federal sentencing after the Supreme Court issued that decision in January 2005. These materials were delivered routinely to Congress and made available on the Commission’s website in order to assist Congress in its own analysis of the decision. The Commission also held numerous briefings with congressional staff to explain the *Booker* decision, its impact on the work of the Commission specifically, and its impact on federal sentencing generally. In February 2005, the chair of the Commission testified before the House Subcommittee on Crime, Terrorism, and Homeland Security about the impact of *Booker* on the federal sentencing system and the steps the Commission had taken to respond to it.

In 2005, the Commission also responded to congressional requests for other federal sentencing and criminal justice data – including prison impact analyses – and provided technical assistance in drafting legislation. The Commission also corresponded with members of Congress about proposed legislation, offered explanations and training on guideline application to congressional staff, and provided regular updates on Commission action in response to recently enacted crime and sentencing-related legislation.

The Commission also continued to supply Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports (including its comprehensive reports on recidivism and ad hoc advisory group reports), and other published materials.