

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 a 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 January 27, 2006. The Commission received written comment on the proposed amendment from a variety of sources, and on March 15, 2006, the Commission conducted a public hearing on the proposed amendments. On May 1, 2006, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2006.

In addition to these permanent amendments, the Commission promulgated one temporary, “emergency” amendment in response to the Anabolic Steroid Control Act of 2004, Pub. L. No. 109–358. On March 29, 2006, the Commission published in the *Federal Register* the temporary, “emergency” amendment that was adopted in response to these directives. The effective date of the amendment was March 27, 2006. The amendments promulgated by the Commission in fiscal year 2006 include amendments responding to congressional directives and enacted legislation and other areas of Commission interest.

Amendments In Response to Congressional Directives and Enacted Legislation

The amendments promulgated by the Commission in fiscal year 2006 that responded to congressional directives or otherwise addressed recently enacted legislation—

- re-promulgated as a permanent amendment the temporary, emergency amendment that increased the penalties in section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for offenses involving anabolic steroids;

Table 2

PUBLIC HEARING WITNESS LIST
San Antonio, TX — February 21, 2006

Honorable David Briones

*District Court Judge, Western District of Texas
(El Paso)*

Honorable Alia Moses Ludlum

*District Court Judge, Western District of Texas
(Del Rio)*

Honorable Xavier Rodriguez

*District Court Judge, Western District of Texas
(San Antonio)*

Joe Edward Canales

*Chief United States Probation Officer, Western
District of Texas*

Lucien B. Campbell

Federal Defender, Western District of Texas

Carmen D. Hernandez

Private Attorney, Washington, D.C.

Marjorie A. Meyers

*Federal Public Defender, Southern District of
Texas*

Elisabeth Brodyaga

Attorney, San Benito, TX

Fredilyn Sison

*Assistant Federal Defender, Western District of
North Carolina*

Matthew Friedrich

*Chief of Staff and Principal Deputy Assistant
Attorney General, Criminal Division, U.S.
Department of Justice*

Honorable Edith Hollan Jones

*Chief Judge, United States Court of Appeals for the
Fifth Circuit*

Honorable Hayden Head

Chief Judge, Southern District of Texas

Becky Burks

*Chief United States Probation Officer, Southern
District of Texas*

Table 2 (cont.)

PUBLIC HEARING WITNESS LIST
San Diego, CA — March 6, 2006

Honorable Irma Gonzalez
Chief Judge, Southern District of California

Honorable Marilyn Huff
District Court Judge, Southern District of California

Honorable Martha Vazquez
Chief Judge, District of New Mexico

Anita Chavez
Chief Probation Officer, District of New Mexico

Phillip Munoz
Assistant Deputy Chief Probation Officer, District of New Mexico

Johnny K. Sutton
United States Attorney, Western District of Texas

Jon M. Sands
Federal Public Defender, District of Arizona

Reuben Camper Cahn
Executive Director, Federal Defenders of San Diego

Honorable John M. Roll
District Court Judge, District of Arizona

Magdeline E. Jensen
Chief United States Probation Officer, District of Arizona

Mario Moreno
Assistant Deputy Chief Probation Officer, District of Arizona

Michelle Carey
Assistant Deputy Chief Probation Officer, Central District of California

David J. Sultzbaugh
Assistant Deputy Chief Probation Officer, Southern District of California

Table 2 (cont.)

PUBLIC HEARING WITNESS LIST

Washington, DC — March 15, 2006

Honorable Robert McCallum

*Associate Attorney General of the United States,
U.S. Department of Justice*

Richard Hertling

*Principal Deputy Assistant Attorney General
Office of Legal Policy, U.S. Department of
Justice*

Jodi L. Avergun

*Chief of Staff, Office of the Administrator
Drug Enforcement Administration, U.S.
Department of Justice*

Honorable Paul G. Cassell

*Professor of Law, University of Utah College of
Law; U.S. District Court for the District of
Utah*

Russell P. Butler

*Executive Director, Maryland Crime Victims'
Resource Center, Inc.*

Margaret Love

*Criminal Justice Section, American Bar
Association*

Susan Hackett

*Senior Vice President and General Counsel
Association of Corporate Counsel (ACC)*

Kent Wicker

*National Association of Criminal Defense Lawyers;
Reed Wicker PLLC*

Harley G. Lappin

Director, Federal Bureau of Prisons

Jon M. Sands

Federal Public Defender, District of Arizona

John Rhodes

*Assistant Federal Public Defender, District of
Montana*

Kathleen M. Williams

*Federal Public Defender, Southern District of
Florida*

Greg Smith

*Co-chair, Practitioners Advisory Group;
Sutherland Asbill & Brennan LLP*

David Debold

*Co-chair, Practitioners Advisory Group; Gibson,
Dunn & Crutcher LLP*

Cathy Battistelli

Chair, Probation Officers Advisory Group

- re-promulgated as a permanent amendment the temporary, emergency amendment to section 2B5.3 (Criminal Infringement of Copyright or Trademark) that provided increased penalties for distribution of pre-release works and for making an infringing item available on the Internet by storing it as an openly shared file, in response to the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109–9;
- re-promulgated as a permanent amendment the temporary, emergency amendment to section 2J1.2 (Obstruction of Justice) that provided increased penalties for obstruction of justice offenses involving terrorism, in response to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458;
- created a new guideline at section 3C1.4 (False Registration of Domain Names), that provided a two-level adjustment for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, in response to the directive in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, Pub. L. No. 108–482;
- responded to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, by (1) referencing the new offenses at 18 U.S.C. §§ 175c (Variola Virus), 832 (Participation in Nuclear and Weapons of Mass Destruction Threats in the United States), and 2332h (Radiological Dispersal Devices) to section 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy); (2) referencing the new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) to section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); (3) referencing the new offense at 18 U.S.C. § 1038 (False Information and Hoaxes) to section 2A6.1 (Threatening or Harassing Communications); and (4) increasing penalties in section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) for defendants convicted under 18 U.S.C. § 1324(a)(4);
- responded to the Veterans’ Memorial Preservation and Recognition Act of 2003, Pub. L. No. 108–29, by referring the new offense at 18 U.S.C. § 1369 to sections 2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), and broadening the application of the two-level enhancement under both sections 2B1.1(b)(6) and 2B1.5(b)(2) to include veterans’ memorials;
- responded to the Plant Protection Act of 2002, Pub. L. No. 107–171, by providing in section 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) that an upward departure may be warranted if a defendant is convicted under 7 U.S.C. § 7734;
- responded to the Clean Diamond Trade Act of 2003, Pub. L. No. 108–19, by referencing the new offense at 19 U.S.C. § 3907 to section 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property); and

- responded to the Unborn Victims of Violence Act of 2004, Pub. L. No. 108–212, by referencing the new offense at 18 U.S.C. § 1841(a)(2)(C) to sections 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), and 2A1.4 (Involuntary Manslaughter) and referring the provisions under 18 U.S.C. § 1841(a)(1) and (a)(2)(A) to 2X5.1 (Other Offenses).

Other Promulgated Amendments

Other guideline amendments promulgated in fiscal year 2006—

- increased the penalties in section 2L1.1 for (1) defendants who assist “inadmissible aliens” in illegally entering the United States, particularly aliens who are inadmissible because of national security or related grounds; (2) defendants who smuggle, transport, or harbor a minor unaccompanied by the minor’s parent or grandparent; (3) cases in which a person died as a result of the offense; and (4) cases in which an alien was involuntarily detained through coercion or threat after entering the United States;
- increased the penalties in sections 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law) and 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 or foreign passport;
- amended section 2K2.1 to (1) provide increased penalties for firearms trafficking; (2) provide increased penalties for cases involving an altered or obliterated serial number; (3) ensure proper application of the guidelines in cases involving a semi-automatic firearm capable of accepting a large-capacity magazine; and (4) address a circuit conflict by providing that sections 2K2.1(b)(6) and (c)(1) apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively;
- created a new policy statement at section 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) to implement 28 U.S.C. § 994(t);
- addressed guideline application issues in section 2D1.1 by (1) allowing the application of section 2A1.2 in cases in which the conduct involved is second degree murder, if the resulting offense level is greater than the offense level determined under section 2D1.1; and (2) clarifying that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marijuana equivalency for that controlled substance;
- created a new guideline at section 3C1.3 (Commission of Offense While on Release), that provided a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies;

- created a new guideline at section 2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise referenced to a more specific Chapter Two guideline; and
- addressed a circuit conflict by permitting application of section 3C1.1 (Obstructing or Impeding the Administration of Justice) to obstructive conduct that occurs prior to the start of the investigation of the instant offense.

Policy Issues

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); pertinent literature; public comment; and other information as appropriate. The teams also solicit input from the Commission's Practitioners Advisory Group and Probation Officers Advisory Group, and other interested persons and government agencies as appropriate.

Terrorism

The staff Terrorism Policy Team was created in response to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458. The Act (1) directed the Commission "to provide for an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." The Act also increased the statutory maximum penalties for offenses under 18 U.S.C. §§ 1001 (False Statements) and 1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees of the United States) from not more than five years to not more than eight years if the offense involves international or domestic terrorism; (2) created a number of new terrorism-related offenses; and (3) increased the statutory maximum penalty under 8 U.S.C. § 1324(a)(2)(A) for bringing in or harboring certain aliens from one year to up to ten years under certain circumstances.

Informed by the team's research, the Commission (1) provided enhancements for cases involving obstruction of justice and pertaining to international or domestic terrorism; and for cases involving smuggling, transporting, or harboring an unlawful alien; and (2) referenced new offenses to the appropriate guidelines designated in Appendix A.

Firearms

A staff Firearms Policy Team was formed to gather information on various issues pertaining to the primary firearms guideline, section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The team conducted a coding project and met with interested outside groups to determine which changes might be needed in the firearms guideline. The Commission promulgated an amendment effective November 1, 2006, that provided an enhancement if the defendant engaged in the trafficking of two or more firearms with the intent to transfer or dispose of firearms to another, and increased penalties for certain firearms-related offenses. The amendment also resolved a split in the circuit courts pertaining to offenses that involve the use of a firearm in connection with another offense. Lastly, the amendment addressed the semiautomatic assault weapon ban, which expired on September 13, 2004.

Compassionate Release

The Commission formed a policy team in response to Congress's directive at 28 U.S.C. § 994(t) to implement a policy statement to "describe what should be considered extraordinary and compelling reasons for sentence reduction" in the context of 18 U.S.C. § 3582 (c)(1)(A)(I). The team communicated with and received comment from the Department of Justice, the American Bar Association, the Federal Defenders, the Practitioners Advisory Group, Families Against Mandatory Minimums and other interested parties. Interested parties were also afforded the opportunity to address the Commission at a public hearing. The Commission promulgated a policy statement at section 1B1.13 that incorporates the language of section 3582 (c)(1)(A)(I).

Crime Victims' Rights Act

The Commission created a staff Crime Victims' Rights Policy Team in response to the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, as part of the Justice for All Act of 2004, Pub. L. No. 108-405. The team conducted a legislative history review, researched the judiciary's response to the act, performed data analysis, and contacted state guideline agencies. Additionally, interested parties were given the opportunity to address the Commission at two public hearings. Finally, the Commission received and reviewed public comment, including comment from the Commission's Practitioners Advisory Group and the Federal Public and Community Defenders. The Commission responded by promulgating a new policy statement at section 6A1.5 (Crime Victims' Rights), effective November 1, 2006, stating that in any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in the Act.

Steroids

In response to a congressional directive, the Commission formed a staff policy team to respond to the Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358. The Act directed the

Commission to review and consider amending the guidelines to provide for increased penalties for offenses involving anabolic steroids.

The staff team undertook a review of the Commission data; met with a roundtable group of experts from the courts, law enforcement, the defense bar, the health profession, and academia; researched the relevant scientific and legal literature; and received and reviewed public comment. The Commission ultimately promulgated an amendment to section 2D1.1 that eliminated the sentencing distinction between anabolic steroids and other Schedule III substances and also provided new enhancements for other harms often associated with anabolic steroid offenses.

Guideline Application Issues

A staff policy team was established by the Commission to address several guideline application issues. Informed by the team's research and outreach to interested parties in the criminal justice system, the Commission promulgated amendments concerning (1) offenses committed while on supervised release; (2) the determination of the base offense level for offenses involving a controlled substance not specifically referenced in the guidelines' Drug Quantity Table; and (3) the use of the cross reference to the second degree murder guideline under the drug trafficking guideline.

Immigration

In response to the growing concerns about illegal immigration, the Commission formed a staff policy team to examine the immigration-related guidelines. The Immigration Policy Team conducted a comprehensive review of the immigration guidelines, a review that included a roundtable discussion of immigration issues and two regional public hearings. This outreach effort included district and magistrate court judges, federal defenders, private attorneys, probation officers, assistant U.S. attorneys, and other Department of Justice representatives. Based on the findings of its outreach efforts, the Commission promulgated amendments to the guidelines related to the smuggling of unlawful aliens and the trafficking of naturalization documents and passports.

Intellectual Property

During fiscal year 2006, the Commission formed a staff policy team to review and consider an amendment to the intellectual property sentencing guideline (§2B5.3) in response to a directive in the Family Entertainment and Copyright Act, Pub. L. No. 109-9. The team conducted an empirical analysis of cases sentenced under section 2B5.3 along with a case law and literature review. The team also met with industry representatives and other interested groups in regard to the proposed amendment that became effective November 1, 2006.

This policy team also gathered information to respond to a directive in the Intellectual Property Protection and Courts Administration Act of 2004, Pub L. No. 108-482, and to respond to the new offense created by the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), Pub. L. No. 108-187. The Commission promulgated a

new guideline at section 3C1.4 (False Registration of Domain Names) to provide appropriate enhancements and references for cases involving the new offense created by the CAN-SPAM Act and for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies.

Miscellaneous Laws

During fiscal year 2006, the Commission formed a staff policy team to review and consider amending penalties for several new offenses created under the Veterans' Memorial Preservation and Recognition Act of 2003, Pub. L. No. 108–29, the Plant Protection Act of 2002, Pub. L. No. 107–171, the Clean Diamond Trade Act of 2003, Pub. L. No. 108–19, along with accompanying Executive Order 13312, and the Unborn Victims of Violence Act of 2004, Pub. L. No. 108–212. In addition, the team examined issues related to Class A misdemeanor offenses. As part of its examination of the issues, the team also conducted reviews of legislation and public comment.

In response, the Commission (1) expanded enhanced penalties under guideline sections 2B1.1 and 2B1.5 to include offenses involving destruction of veterans' memorials; (2) provided an upward departure at section 2N2.1 for cases in which a defendant is convicted under 7 U.S.C. § 7734; (3) promulgated a new guideline at section 2X5.2 to cover certain Class A misdemeanors; and (4) referenced new offenses to appropriate guidelines designated in Appendix A and added a special instruction that the most analogous guideline for these offenses is the guideline that covers the underlying offenses.

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 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 2006, the PAG had co-chairs: Mr. Todd A. Bussert from the Law Office of Todd A. Bussert, and Mr. David Debold, of counsel with the law firm of Gibson, Dunn & Crutcher LLP. Mr. Bussert replaced Mr. T. Mark Flanagan as co-chair in September 2006. Mr. Debold replaced Mr. Gregory S. Smith as co-chair in April 2006.

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 2006, 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 fiscal year 2006, 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 on federal sentencing trends in the wake of the *Booker* decision. These materials were delivered routinely to Congress and were made available through the Commission's website in order to assist Congress in its own analysis of the decision's impact on criminal justice issues. 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 March 2006, 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 addition, the Commission held numerous congressional briefings to discuss its *Final Report on the Impact of United States v. Booker on Federal Sentencing*, which the Commission released in March 2006.

In fiscal year 2006, 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 about 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 guidelines manuals, annual reports and sourcebooks, research reports, and other previously published materials.

