

Chapter Two

The Sentencing Guidelines

The legislation creating the 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 directive, 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 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 Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Policy Issues

Alternatives to Incarceration

The Commission continued to study alternatives to incarceration. The Commission initiated the study in 2007 as a result of increased interest in alternatives to incarceration by all branches of the federal government, public debate about the size of the federal prison population, and the need for alternatives to incarceration for certain non-violent offenders.

The Commission reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback from federal judges. The Commission’s study included a two-day symposium in 2008 at which the Commission reviewed comment from experts on alternatives to incarceration, including federal and state judges, congressional staff, professors of law and the social sciences, prosecutors,

members of the defense bar, prison officials, and others involved in the criminal justice system.

As a result of the study, the Commission promulgated a two-part amendment that provides a greater range of sentencing options to courts with respect to certain offenders. First, the amendment expands Zones B and C of the Sentencing Table in Chapter Five (Determining the Sentence) of the *Guidelines Manual* by one level each across all criminal history categories. Second, the amendment illustrates, at USSG §5C1.1 (Imposition of a Term of Imprisonment), certain cases in which the court may depart from a sentence of pure imprisonment in order to accomplish a specific treatment purpose.⁵ Guidance is also provided to help the court determine the factors that may support a departure for treatment purposes.

Departures

The Commission began a review of the departure provisions in the *Guidelines Manual*. The Commission undertook this review, in part, in response to an observed decrease in reliance on departure provisions in the *Guidelines Manual* in favor of an increased use of variances. As part of its review of departures, the Commission studied the relevance of specific offender characteristics to sentencing, with a particular focus on specific offender characteristics addressed in Chapter Five, Part H (Specific Offender Characteristics), that are not listed in 28 U.S.C. § 994(e).⁶

The Commission reviewed recent federal sentencing data, district court and appellate court case law, scholarly literature, public comment, state

⁵ See USSG §5C1.1, Application Note 6.

⁶ Section 994(e) directs the Commission to ensure that the guidelines and policy statements reflect the “general inappropriateness” of considering five specific offender characteristics: education, vocational skills, employment record, family ties and responsibilities, and community ties.

practices, and feedback in various forms from federal judges. The Commission also heard testimony on departures and specific offender characteristics at regional public hearings during fiscal year 2010 and at a public hearing in March 2010, in Washington, D.C.

As a result of the review, the Commission promulgated a multi-part amendment to Chapter Five, Part H, that provides sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. The amendment provides that courts must consider the history and characteristics of the defendant among other factors but, in order to avoid unwarranted sentencing disparities, courts should not give specific offender characteristics excessive weight. The amendment also sets forth a new departure standard for age, mental and emotional conditions, physical condition or appearance (including physique), and military service. Under the new departure standard, these specific offender characteristics “may be relevant in determining whether a departure is warranted,” if the offender characteristic, “individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”

As another part of its review of departures, the Commission studied when, if at all, a downward departure may be appropriate in an illegal reentry case sentenced under USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of “cultural assimilation,” that is, the defendant’s cultural ties to the United States. Several circuits have upheld departures based on cultural assimilation, while other circuits have declined to rule on whether such departures may be warranted. The Commission reviewed federal sentencing data, case law, and public comment and testimony (including testimony at regional hearings in Austin, Texas, and Phoenix, Arizona). To promote uniform consideration of cultural assimilation by courts, the Commission added commentary to USSG §2L1.2 providing that a downward departure may be appropriate on the basis of cultural assimilation if three specified criteria are met.

In addition, the Commission studied a circuit conflict on the consideration of departure provisions by sentencing courts in light of *United States v. Booker*⁷ and subsequent case law. After reviewing case law and public comment, the Commission resolved the circuit conflict by promulgating an amendment to USSG §1B1.1 (Application Instructions) to reflect the three-step process followed by a majority of circuits in determining the sentence to be imposed.

Recency

The Commission studied whether the imposition of recency points under USSG §4A1.1 (Criminal History Category) is necessary to adequately account for criminal history in cases in which the defendant recidivates less than two years after release from confinement pursuant to a previous sentence. The Commission undertook this study because sentencing data indicated that courts often impose non-government sponsored below-range sentences in cases in which recency points apply.

The Commission analyzed the extent to which recency points contribute to the predictive value of the criminal history score to measure the likelihood of recidivism. This research indicated that recency scoring minimally impacted predictive ability. The Commission also received public comment and testimony to the effect that recency often reflects challenges to successful reentry after imprisonment rather than increased culpability.

After consideration of this research and testimony, the Commission promulgated an amendment to delete the recency provision, USSG §4A1.1(e), and to strike references to it in the commentary to USSG §4A1.1.

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Act)⁸ created two new offenses and amended a 1994 directive to the Commission regarding hate crimes. To respond to the Act, the Commission reviewed federal sentencing data, case law, and public comment. The Commission promulgated an amendment to ensure

⁷ 543 U.S. 220 (2005).

⁸ Pub. L. No. 111-84.

that the two new offenses had appropriate guideline references in Appendix A (Statutory Index). In addition, because the Act expanded the definition of “hate crime” in the 1994 directive to include crimes motivated by actual or perceived gender identity, the Commission amended USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim) to include crimes motivated by actual or perceived gender identity.

Sentencing of Organizations

The Commission studied several aspects of Chapter Eight (Sentencing of Organizations) of the *Guidelines Manual*, including whether to provide more guidance on the remediation efforts required by the guidelines to qualify as an effective compliance and ethics program, the recommended conditions of probation for organizations, and whether to encourage direct reporting to the board by responsible compliance personnel.

The Commission reviewed public comment received from its advisory groups, the Department of Justice, the Department of Health and Human Services, the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, the National Association for Criminal Defense Lawyers, the Ethics Resource Center, and various independent practitioners in the field of corporate compliance and ethics law, and received testimony at a public hearing in March 2010 in Washington, D.C. The Commission promulgated an amendment to Chapter Eight that (1) clarifies the steps an organization should take after criminal conduct has been detected, (2) provides a mechanism in the guidelines to encourage compliance and ethics policies that provide operational compliance personnel with access to the governing authority when necessary, and (3) augments and simplifies the recommended conditions of probation for organizations.

Amendment Promulgation Process

Proposed amendments were published in the *Federal Register* on January 21, 2010. The Commission received written comment on the proposed amendments from a variety of sources. The Commission also conducted a public hearing on March 17, 2010, on the proposed amendments. See Table 2. On April 29, 2010, 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, 2010.

In addition to these permanent amendments in fiscal year 2010, the Commission proposed a temporary, “emergency” amendment in response to the directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. No. 111–220. This proposed temporary, “emergency” amendment was published for comment in the *Federal Register* on September 8, 2010.⁹

The amendments promulgated by the Commission in fiscal year 2010 —

- expanded the availability of alternatives to incarceration by (1) expanding Zones B and C of the Sentencing Table by one level each to provide a greater range of sentencing options to courts with respect to certain offenders; and (2) amending commentary to USSG §5C1.1 (Imposition of a Term of Imprisonment) to clarify and illustrate certain cases in which a departure may be appropriate to accomplish a specific treatment purpose;
- amended policy statements in Chapter Five, Part H (Specific Offender Characteristics), including (1) revising the introductory commentary to Chapter Five, Part H, to explain that the purpose of Part H is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner; (2) amending USSG §§5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling

⁹ The Commission’s work on the Fair Sentencing Act of 2010 continued into fiscal year 2011. The Commission promulgated a temporary, “emergency” amendment in response to the Act and published that temporary, “emergency” amendment in the *Federal Register* on October 27, 2010, with an effective date of November 1, 2010. The Commission anticipates submitting to Congress a permanent amendment on the Fair Sentencing Act of 2010 not later than May 1, 2011.

Table 2

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Sentencing Guidelines
Washington, D.C.
March 17, 2010

Tristram J. Coffin
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District of Vermont

Teresa M. Brantley
Member
Probation Officers Advisory Group
Central District of California

Susan Smith Howley
Chair
Victims Advisory Group
Washington, D.C.

Eric A. Tirschwell
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Practitioners Advisory Group
New York City, New York

Marianne Mariano
Federal Public Defender
Western District of New York

James E. Felman
Co-Chairman
Committee on Sentencing, American Bar Association
Tampa, Florida

Cynthia Hujar Orr
President
National Association of Criminal Defense Lawyers
Washington, D.C.

Thomas J. Berger
Senior Analyst for Veterans' Benefits and Mental Health
Issues
Vietnam Veterans of America
Silver Spring, Maryland

Elmore T. Briggs
Clinical Director
Kolmac Clinic
Washington, D.C.

Scott H. Decker
Professor and Director
School of Criminology and Criminal Justice
Arizona State University

Marvin D. Seppala
Chief Medical Officer
Hazelden Foundation
Center City, Minnesota

Andrea Smith
Assistant United States Attorney
District of Maryland

Margy Meyers
Federal Public Defender
Southern District of Texas

David Debold
Chair
Practitioners Advisory Group
Washington, D.C.

Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel
Washington, D.C.

Karen Harned
Executive Director of the Small Business Legal Center
National Federation of Independent Business
Washington, D.C.

Tim C. Mazur
Chief Operating Officer
Ethics & Compliance Officer Association
Waltham, Massachusetts

Patricia J. Harned
President
Ethics Resource Center
Arlington, Virginia

Joseph E. Murphy
Director of Public Policy
Society of Corporate Compliance and Ethics
Minneapolis, Minnesota

Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Federal Mandatory Minimum Sentencing Policy
Washington, D.C.
May 27, 2010

Sally Quillian Yates

United States Attorney, Northern District of Georgia
United States Department of Justice

Michael S. Nachmanoff

Federal Public Defender
Office of the Federal Public Defender, Eastern District of Virginia
Alexandria, Virginia

Jeffrey B. Steinback

Member
Practitioners Advisory Group to the United States Sentencing Commission
Chicago, Illinois

James E. Felman

American Bar Association
Tampa, Florida

Cynthia Hujar Orr

President
National Association of Criminal Defense Lawyers
San Antonio, Texas

Jiles H. Ship

Second Vice President
National Organization of Black Law Enforcement Executives
University City, Missouri

David Hiller

National Vice President
Fraternal Order of Police
Grosse Point Park, Michigan

Maxwell Jackson

Harrisville City Police Chief
National Center for Rural Law Enforcement
Harrisville City, Utah

Laurie L. Levenson

Professor of Law
Loyola Law School
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Stephen A. Saltzburg

Professor of Law
The George Washington University
Washington, D.C.

Stephen J. Schulhofer

Professor of Law
New York University School of Law
New York, New York

Cory Andrews

Senior Litigator
Washington Legal Foundation
Washington, D.C.

David B. Muhlhausen

Senior Policy Analyst
The Heritage Foundation
Washington, D.C.

Erik Luna

Adjunct Scholar
Cato Institute
Lexington, Virginia

Marc Mauer

Executive Director
The Sentencing Project
Washington, D.C.

Julie Stewart

President
Families Against Mandatory Minimums
Washington, D.C.

Jay Rorty

Director of the Drug Law Reform Project
American Civil Liberties Union
Santa Cruz, California

Thomas Hillier II

Member of the Sentencing Initiative's Blue-Ribbon Committee
The Constitution Project
Seattle, Washington

Addiction), and 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) to provide that age, mental and emotional conditions, physical condition or appearance (including physique), and military service “may be relevant in determining whether a departure is warranted,” if the offender characteristic, “individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”

- amended USSG §2L1.2 (Unlawfully Entering or Remaining in the United States) to provide that a downward departure in an illegal reentry case may be appropriate on the basis of cultural assimilation if (1) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (2) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (3) such a departure is not likely to increase the risk to the public from further crimes of the defendant.
- amended USSG §1B1.1 (Application Instructions) in light of *United States v. Booker* and subsequent case law to reflect the three-step approach followed by a majority of circuits in determining the sentence to be imposed, so that USSG §1B1.1 addresses (1) how to apply the provisions in the *Guidelines Manual* to properly determine the kinds of sentence and the guideline range, (2) the need to consider the policy statements and commentary to determine whether a departure is warranted, and (3) the need to consider the applicable factors under 18 U.S.C. § 3553(a) taken as a whole in determining the appropriate sentence.
- addressed a factor included in the calculation of the criminal history score in Chapter Four (Criminal History and Criminal Livelihood) by eliminating the use of “recency” points

provided in subsection (e) of USSG §4A1.1 (Criminal History Category).

- responded to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act by (1) amending USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim) so that the enhancement in USSG §3A1.1(a) covers crimes motivated by actual or perceived gender identity, as required by the Act; and (2) ensuring that the new offenses created by the Act are referenced to the appropriate guidelines in Appendix A (Statutory Index).
- made several changes to Chapter Eight (Sentencing of Organizations), including (1) amending the commentary to USSG §8B1.2 (Effective Compliance and Ethics Program) by adding an application note that clarifies the remediation efforts required to satisfy the seventh minimal requirement for an effective compliance and ethics program under subsection (b)(7); (2) amending subsection (f) of USSG §8C2.5 (Culpability Score) to encourage the internal and external reporting of criminal conduct by allowing an organization to receive the 3-level decrease for having an effective compliance and ethics program, even in a case in which the organization’s high-level or substantial authority personnel are involved in the offense, if the organization meets four specified criteria; and (3) amending USSG §8D1.4 (Recommended Conditions of Probation — Organizations) to augment and simplify the recommended conditions of probation for organizations.

Other guideline amendments promulgated in fiscal year 2010 made various technical and conforming changes to the guidelines that —

- responded to legislation and administrative action by (1) amending the commentary to USSG §2B1.1 to ensure that commodities fraud offenses committed under 18 U.S.C. § 1348 are subject to the commodities fraud enhancement at USSG §2B1.1(b)(17)(B), reflecting the statutory changes to 18 U.S.C. § 1348 made by the Fraud Enforcement and

Recovery Act of 2009, Pub. L. No. 111–21; (2) ensuring that the new offenses created by the Omnibus Public Land Management Act of 2009, Pub. L. No. 111–11, and the Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111–3, are referenced to the appropriate guidelines in Appendix A (Statutory Index); and (3) addressing a regulatory change in which iodine was upgraded from a List II chemical to a List I chemical by amending USSG §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to increase the maximum base offense level for offenses involving iodine.

- made various technical and conforming changes to the guidelines to promote accuracy, completeness, and stylistic consistency.

Regional Hearings

In conjunction with the 25th anniversary of the SRA, the Commission in fiscal year 2010 continued with its nationwide series of regional public hearings on federal sentencing policy. The Commission held three hearings during this fiscal year (October 20–21, 2009, in Denver, Colorado; November 19–20, 2009, in Austin, Texas; and January 20–21, 2010, in Phoenix, Arizona). At the hearings, the Commission heard from sentencing experts and stakeholders who had been invited to discuss federal sentencing policy and the implementation of the SRA over the past 25 years. Witnesses testifying at the hearings included circuit and district court judges, representatives from the U.S. Department of Justice, defense attorneys, probation officers, law enforcement, and members of the academic community and community interest groups. See Table 3.

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 2010, the Commission worked closely with members of Congress and their staffs, providing them with timely and valuable sentencing-related information and analyses.

The Commission continued providing Congress with extensive real-time data collection, analysis, and reporting on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission’s website in order to assist Congress in its work on criminal justice issues. The Commission also held numerous briefings with congressional staff to explain the Commission’s amendment process; developing sentencing case law; the case law’s impact on the Commission’s work and on federal sentencing generally; and information received by the Commission during its regional hearings.

Throughout the year, the Commission conducted numerous congressional briefings and answered congressional inquiries related to the penalty structure for crack and powder cocaine offenses. The Commission worked closely with Congress throughout passage of the Fair Sentencing Act of 2010 and promulgation of the Commission’s temporary, “emergency” amendment implementing the statutory changes and directives contained in the Act.

The Commission also conducted congressional briefings and answered congressional inquiries in other areas of criminal law, including health care and other white collar frauds, statutory mandatory minimum penalties generally, terrorism offenses, sex offenses, drug offenses, and general sentencing policy.

The Commission also routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports, and other published materials.

The year 2010, as used in this report, refers to the fiscal year 2010 (October 1, 2009, through September 30, 2010).

Table 3

**REGIONAL PUBLIC HEARING WITNESS LIST
Denver, Colorado
October 19–20, 2009**

Honorable James B. Loken

*Chief Circuit Judge
Eighth Circuit Court of Appeals*

Honorable Deanell Reece Tacha

*Circuit Judge
Tenth Circuit Court of Appeals*

Honorable Harris Hartz

*Circuit Judge
Tenth Circuit Court of Appeals*

Honorable John Thomas Marten

*United States District Judge
District of Kansas*

Honorable John L. Kane

*Senior United States District Judge
District of Colorado*

Kevin Lowry

*Chief United States Probation Officer
District of Minnesota*

Ronald Schweer

*Chief United States Probation Officer
District of Kansas*

David M. Gaouette

*United States Attorney
District of Colorado*

B. Todd Jones

*United States Attorney
District of Minnesota*

Diane Humetewa

*Principal, Public Advocacy
Squire, Sanders & Dempsey L.L.P.
Phoenix, Arizona*

Paul Cassell

*Ronald N. Boyce Presidential Professor of Criminal Law
S.J. Quinney College of Law, University of Utah
Salt Lake City, Utah*

Ernie Allen

*President and Chief Executive Officer
National Center for Missing and Exploited Children
Washington, D.C.*

Honorable Robert W. Pratt

*Chief District Judge
Southern District of Iowa*

Honorable Fernando Gaitan, Jr.

*Chief District Judge
Western District of Missouri*

Honorable Joan Ericksen

*United States District Judge
District of Minnesota*

Raymond P. Moore

*Federal Public Defender
Districts of Colorado and Wyoming*

Nick Drees

*Federal Public Defender
Northern and Southern Districts of Iowa*

Thomas Telthorst

Kansas City, Kansas

Table 3 (continued)

REGIONAL PUBLIC HEARING WITNESS LIST
Austin, Texas
November 19–20, 2009

Honorable Robin J. Cauthron

*United States District Judge
 Western District of Oklahoma*

Honorable Keith Starrett

*United States District Judge
 Southern District of Mississippi*

Honorable Jay C. Zainey

*United States District Judge
 Eastern District of Louisiana*

Diana Dinitto

*Professor
 University of Texas School of Social Work
 Austin, Texas*

Adam Gelb

*Director
 Public Safety Performance Project
 Pew Center on the States
 Washington, D.C.*

Eric J. Miller

*Associate Professor Of Law
 Saint Louis University School of Law
 Saint Louis, Missouri*

Craig Watkins

*Criminal District Attorney
 Dallas County District Attorney's Office
 Dallas, Texas*

Becky Burks

*Chief United States Probation Officer
 Southern District of Texas*

Joe E. Sanchez

*Chief United States Probation Officer
 Western District of Texas*

Julia O'Connell

*Federal Public Defender
 Northern District of Oklahoma*

Jason Hawkins

*Supervisory Assistant Federal Public Defender
 Northern District of Texas*

William Gibbens

*CJA Panel Attorney District Representative
 Eastern District of Louisiana*

Honorable Edith Jones

*Chief Circuit Judge
 Fifth Circuit Court of Appeals*

Honorable Fortunato P. Benavides

*Circuit Judge
 Fifth Circuit Court of Appeals*

Honorable J. Leon Holmes

*Chief District Judge
 Eastern District of Arkansas*

Honorable Micaela Alvarez

*United States District Judge
 Southern District of Texas*

Honorable Kathleen Cardone

*United States District Judge
 Western District of Texas*

Harley G. Lappin

*Director
 Federal Bureau of Prisons*

Joyce W. Vance

*United States Attorney
 Northern District of Alabama*

Table 3 (continued)

REGIONAL PUBLIC HEARING WITNESS LIST
Phoenix, Arizona
January 20–21, 2010

John Morton

*Assistant Secretary
U.S. Immigration and Customs Enforcement
Department of Homeland Security*

Dennis Burke

*United States Attorney
District of Arizona*

Honorable Audrey B. Collins

*Chief District Judge
Central District of California*

Honorable Martha Vazquez

*Chief District Judge
District of New Mexico*

Honorable Marilyn L. Huff

*United States District Judge
Southern District of California*

Mario Moreno

*Chief United States Probation Officer
District of Arizona*

Kenneth O. Young

*Chief United States Probation Officer
Southern District of California*

Anita L. Chavez

*Chief United States Probation Officer
District of New Mexico*

Honorable John M. Roll

*Chief District Judge
District of Arizona*

Honorable Jennifer Guerin

*United States Magistrate Judge
District of Arizona*

Henry J. Bemporad

*Federal Public Defender
Western District of Texas*

Heather Williams

*Assistant Federal Public Defender
District of Arizona*

Brian Anthony Pori

*Inocente, P.C.
District of New Mexico*

Kevin K. Washburn

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Alison Siegler

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University of Chicago School of Law
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Doris Marie Provine

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Senior Researcher, Immigration and Local Policing Project
Arizona State University
Tempe, Arizona*

Malcolm Lewis

*Assistant Chief of Police
Tohono O'odham Nation
Sells, Arizona*