

# Report of the United States Sentencing Commission to the Judicial Conference of the United States

March 1999

## **Introduction**

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This brief report outlines Commission activities and developments regarding (1) Commissioner vacancies, (2) recent guideline amendments, (3) the ongoing work of the agency, and (4) the increase in reported cases during the past fiscal year of 1998. Should you have any questions regarding these or any matters pending before the Commission, please contact the Commission's Office of the Staff Director at your convenience.

## **Commissioner Vacancies**

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The United States Sentencing Commission is composed of seven voting members, at least three of whom "shall be federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States," and two non-voting *ex officio* members. See 28 U.S.C. § 991. No more than four commissioners may be members of the same political party, and no voting member may serve for more than two full six-year terms.

In late October 1996, the hold-over status of Commissioners A. David Mazzone and Julie Carnes expired. Seven months later, Commissioner Wayne Budd resigned after the Commission completed work on its 1997 amendments submission to Congress. On October 21, 1998, the hold-over status of Commissioners Michael S. Gelacak, Michael Goldsmith, and Deanell R. Tacha expired with the adjournment *sine die* of the 105<sup>th</sup> Congress. Finally, effective October 31, 1998, Judge Richard P. Conaboy stepped down as chair of the Commission after submitting his resignation to the President. As a result, only the two *ex officio* members, Laird C. Kirkpatrick of the United States Department of Justice and Michael J. Gaines of the United States Parole Commission, remain on the Commission.

Although the Judicial Conference has submitted recommendations in a timely manner to the President as required by the Sentencing Reform Act, no formal nominations have been put forth to fill any of the seven vacancies. Moreover, there has been a change in congressional oversight of the Commission. Traditionally, the United States Senate

Judiciary Committee has retained oversight under the direct chairmanship of Senator Orrin Hatch (R-UT). This session, however, it was announced that a new Subcommittee on Crime under the Senate Judiciary Committee had been formed to oversee the United States Department of Justice and the United States Sentencing Commission. Chaired by Senator Strom Thurmond (R-SC), other members of the Subcommittee are Senators Mike DeWine (R-OH), Spencer Abraham (R-MI), John Ashcroft (R-MO), Jeff Sessions (R-AL), Charles Schumer (D-NY, Ranking Minority Leader), Joseph Biden (D-DE), Robert Torricelli (D-NJ), and Patrick Leahy (D-VT).

Anticipating a possible delay in appointments, Judge Conaboy met with the Commission's interim staff director and senior staff prior to his departure to develop a detailed work plan to guide the Commission well into 1999. Several staff policy development teams were formed to address crime legislation passed by the 105<sup>th</sup> Congress and to advance ongoing work, such as the refinement of the definition of loss and the loss tables requested by the Committee on Criminal Law of the Judicial Conference of the United States. These initiatives will be discussed below under the "Ongoing Work of the Commission."

### **Recent Guideline Amendments**

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On May 1, 1998, the Sentencing Commission sent to Congress 11 amendments to the federal sentencing guidelines. These amendments took effect November 1, 1998, after a six-month congressional review period. Some of these amendments respond to recently enacted law and other congressional initiatives. Most notably, in response to increased congressional concerns, the Commission adopted an amendment that provides (1) a sentence increase for fraud that involves mass marketing, and (2) an additional sentence increase for fraud that is committed substantially outside the United States, involves relocating to another jurisdiction to evade law enforcement, or otherwise involves sophisticated concealment.

After these amendments were submitted, Congress passed the Telemarketing Fraud Prevention Act of 1998, which generally directed the Commission to provide substantially increased sentences for telemarketing fraud offenses. As a result, the Commission on September 17, 1998, adopted amendments to the sentencing guidelines that build upon the May amendments – by expanding the "sophisticated concealment" enhancement to cover all forms of sophisticated means and by providing an enhancement if the offense impacted large numbers of vulnerable victims. These amendments also became effective November 1, 1998, under a delegation of emergency amendment authority by Congress. Commission research staff estimate that the combined effect of the May and September amendments will be to increase sentences in telemarketing fraud cases from a current average of 21 months to a minimum of 33 months.

In response to congressional initiatives, the Commission also adopted an amendment to increase penalties for anyone convicted of transferring a gun to a felon or any other person prohibited from owning a firearm. In addition, the Commission implemented the Veterans' Cemeteries Protection Act of 1997 by adopting an enhancement in the theft, property destruction, and arson guidelines for offenses involving the desecration of property in national cemeteries.

As part of the regular amendment submission cycle, a number of circuit conflicts were resolved. In addressing these conflicts, the Commission adopted amendments that –

- (1) clarify the procedure for determining the sentence of a defendant convicted of both failure to appear and an additional offense, while also ensuring a procedure that complies with the statutory mandate to impose a consecutive sentence on the failure to appear count;
- (2) apply the two-level sentence increase for abuse of a position of trust to an imposter as well as to a person who legitimately holds and abuses a position of trust;
- (3) apply the two-level sentence increase for obstruction of justice to a defendant who obstructs justice in cases closely related to his own;
- (4) specify that the two-level sentence increase for obstruction of justice does not apply to a defendant who falsely denies drug use while on pre-trial release; and
- (5) clarify the circumstances under which a departure below the guideline range is permitted for diminished capacity.

In addition, the Commission adopted an amendment that incorporates into the general policy statement on guideline departures the principal holding and key points from the United States Supreme Court's decision in *Koon v. United States*.

### **Ongoing Work of the Commission**

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While the 105<sup>th</sup> Congress did not enact an “omnibus” crime bill, it did pass a number of crime and sentencing-related laws focused on discrete issues that likely will necessitate guideline amendments. Included among these laws are some that contain directives to the Commission relating to copyright infringement, the cloning of wireless telephones, identity theft and assumption, and the sexual abuse of children. Before Congress adjourned (thereby ending the service of three of the four remaining commissioners), the Commission voted to publish proposed amendments and issues for comment pertaining to several of these matters. Additionally, looking ahead to the appointment of new commissioners, outgoing Chairman Richard P. Conaboy worked

closely with staff to develop a comprehensive plan to guide staff preparatory work on all of the various issues growing out of the recently enacted legislation.

A number of these new sentencing-related laws deal with economic crimes. For example, the No Electronic Theft Act directs the Commission to (1) provide that the guideline range for intellectual property offenses is sufficiently stringent to deter those offenses; and (2) ensure that the pertinent guideline considers the retail value of the intellectual property infringed upon. In the summer of 1998, the Commission published for comment amendment options for implementing this directive. The Commission solicited additional input on the issue throughout the fall and winter.

Additionally, Congress enacted the Wireless Telephone Protection Act, which directs the Commission to review and amend the guidelines to provide an appropriate penalty for offenses involving the cloning of wireless telephones, and the Identity Theft and Assumption Deterrence Act of 1998, which directs the Commission to review and amend the guidelines to provide an appropriate penalty for offenses involving fraud in connection with assuming another person's identity. Because both of these provisions pertain to types of fraud, Commission staff is examining their impact on the guidelines in conjunction with a group of proposed amendments to the fraud, theft, and property destruction guidelines. In November, the Commission published for comment this amendment package which contains several elements: (1) proposed consolidation of the guidelines for theft, fraud, and property destruction; (2) revisions to the loss tables for theft, fraud, and tax offenses; (3) deletion of the provision for more-than-minimal planning; and (4) a revised definition of loss for the guidelines proposed for consolidation. Those familiar with the Commission's policy development work will recognize these elements as the principal components of the "economic crime package" extensively considered, but ultimately not adopted, by the Commission last year.

With regard to the proposed comprehensive rewrite of the loss definition, over the summer the Commission "field tested" last spring's amendment proposal in conjunction with the Criminal Law Committee of the Judicial Conference. For this test, Committee members and other judges, with the assistance of probation officers, "applied" the new definition to a hypothetical fact scenario and to a group of recently sentenced, actual cases. Participants then completed a survey regarding loss definition issues.

Test participants then traveled to Washington, D.C., for a day-long debriefing session in September to discuss their findings and make recommendations. Representatives of the federal defenders, the Commission's Practitioners' Advisory Group, and the Department of Justice also attended. Commission staff is now in the process of analyzing these findings and recommendations.

Another of the recent congressional initiatives is the Protection of Children from Sexual Predators Act of 1998, which contains several directives to the Commission to

review and amend the guidelines relating to the sexual abuse of children. Among other requirements, those directives mandate that the Commission provide a sentencing increase if the defendant used a computer in connection with a sexual abuse offense against a minor or engaged in a pattern of sexual abuse or exploitation of a minor.

Several other pieces of newly-enacted legislation do not contain explicit directives to the Commission but nevertheless may necessitate changes to the guidelines. The Methamphetamine Trafficking Penalty Enhancement Act of 1998 increases penalties for manufacturing, importing, or trafficking in methamphetamine by reducing by one-half the quantity of methamphetamine required to trigger various statutory minimum sentences. Changes to the drug quantity table in the drug guidelines will be needed if the guideline is to remain consistent with the new statutory quantities for methamphetamine.

In the firearms area, Congress enacted legislation to (1) prohibit certain aliens who are lawfully present in the United States under a non-immigrant visa from possessing a firearm; and (2) amend 18 U.S.C. § 924(c) to prohibit “possession” of a firearm in furtherance of a drug trafficking or violent crime (in addition to using or carrying a firearm during and in relation to such a crime). This latter bill also creates a tiered system of sentencing enhancement ranges, each with a mandatory minimum and presumed life maximum, in lieu of the former, fixed penalty of five years.

Finally, Congress created a number of new tax offenses apparently aimed at protecting the privacy interests of the taxpayer in certain situations, and it urged the Commission to examine guideline penalties for offenses involving nuclear, biological, and chemical weapons and materials.

As part of its ongoing effort to engage the public in sentencing issues, Commission staff held a February 1999 briefing on the various issues currently under study. Congressional staff, members of the defense bar, staff representatives of the Judicial Conference’s Criminal Law Committee, members of the Commission’s Practitioners’ Advisory Group and Probation Officers Advisory Group, and community and public defenders were among those in attendance. At the briefing, members of Commission staff policy development teams made presentations on the status of their ongoing work, much of which is designed to assist new commissioners develop and evaluate Commission responses to these issues.

### **Case Submission Rate Increases in 1998**

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The fiscal year 1998 Commission datafile, a compilation of information on federal sentencings for felonies and Class A misdemeanors, is the largest such file to date. A preliminary analysis of the data received through December 1998 indicates that approximately 51,000 cases were sentenced during the past year. This figure is

approximately 2.7 percent greater than the number of cases received in 1997. This increase may be due to better reporting or an increase in actual case processing.

Drug trafficking remains the most frequently sentenced federal offense, continuing to account for approximately 40 percent of the federal caseload. A notable increase was experienced in the number of immigration cases sentenced in 1998, boosting it approximately 18 percent above the 1997 levels. With this increase, immigration cases are now the second most frequently sentenced offense type. And for the first time since the federal sentencing guidelines have been in effect, the number of immigration cases sentenced during a single year exceeds the number of fraud cases.

This work is preliminary as Commission staff continue to evaluate the completeness of reporting and work to check the dataset. The full Commission analysis will be available in the *1998 Sourcebook of Federal Sentencing Statistics* to be published in the summer of 1999.

## **Conclusion**

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While the Commission awaits the appointment of new commissioners, the staff continue to thoroughly research issues involving recently passed crime legislation and the remaining directives identified by the commissioners as priorities before their terms expired. The Commission will use this research and public input to prepare material and policy options for the new commissioners to review upon their appointment.

In the interim, staff continue to perform routine functions in the area of legal and social science research, guideline training, public information, and data collection. The Commission on a continual basis inputs into its comprehensive sentencing datafiles more than 200 items of information from each of the approximately 50,000 criminal case files it receives annually from the federal courts. Moreover, the agency continues to maintain its HelpLine and training services and recently assisted the Federal Judicial Center and the Administrative Office of the United States Courts at the biennial Sentencing Institute. In May, the Commission is co-sponsoring with the Federal Bar Association the Eighth Annual National Seminar on Federal Sentencing Guidelines. In the area of research, Commission staff are finalizing for publication a variety of criminal law papers presented at the American Society of Criminology conference. Finally, the legal staff continue to monitor legislative developments and draft a broad array of amendment options and possible responses to congressional directives for consideration by new commissioners.

While the Commission continues its routine functions, the agency is stymied by the lack of commissioners in completing its core and crucial responsibilities. Without commissioners, guideline amendments cannot be proposed nor can key policy decisions be made to address congressional directives or implement legislation. No circuit conflicts can

be resolved nor can major internal policy initiatives be addressed. It is our continued hope that the current impasse will be resolved quickly and appointments made without further delay.