

*Nuclear, Biological, and Chemical
Weapons Policy Team*

Report to the Commission



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NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS POLICY DEVELOPMENT TEAM

Report to the Commission

I. Introduction

This Final Report is submitted pursuant to the charter for the Nuclear, Biological, and Chemical Weapons Policy Development Team. The team was formed in May 1999, to assist Commissioners in evaluating possible options for addressing sentencing issues related to criminal offenses involving nuclear, biological, and chemical weapons, materials, and technologies. Building on the work of the prior working group and as directed by its charters, the team analyzed the legislative history of the pertinent acts, reviewed the history of the 2M guidelines, conducted an empirical analysis of cases sentenced under the 2M guidelines, conducted a comprehensive literature review to assist in defining the issues, researched federal regulations, researched and summarized pertinent international agreements, and conducted a proportionality review of the national defense offense guidelines (§§2M1.1 - 2M6.2). The team also met with representatives from the Department of Justice (DOJ) Domestic Terrorism Division, and the Federal Bureau of Investigation's Domestic Terrorism/Counter Terrorism Planning Section, and Weapons of Mass Destruction Operations Unit to learn more about the nature of the offense conduct and the policy concerns they wanted to bring to the attention of the Sentencing Commission (hereinafter "Commission"). This report details the background, legislative history, congressional and law enforcement concerns, analysis, findings, and policy options identified by the team.

II. Background

Within the past few years Congress, the intelligence community, the law enforcement community, and the public generally have become increasingly concerned with addressing the threat posed by criminal behavior that involves nuclear, biological and chemical weapons, materials, and technologies, and Congress has held a number of hearings addressing these issues.¹ After several hearings in 1996, Congress set forth a Sense of Congress in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997² that "the Sentencing Guidelines prescribed by the United States Sentencing Commission for the offenses of importation, attempted importation, exportation, and attempted exportation for nuclear, biological, and chemical weapons materials constitute inadequate punishment for such offenses." In section 1423(b), of the Act, Congress urged the Commission to "revise the relevant sentencing guidelines to provide for increased penalties for the offenses relating to importation, attempted importation, exportation, attempted exportation of nuclear, biological, or chemical weapons or related materials and technologies" under the following provisions of law:

- (1) Section 11 of the Export Administration Act of 1979 (50 U.S.C. § 2410),
- (2) Sections 38 and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778 and 2780),

¹On June 28, 2000, Ambassador Paul Bremer, Chair of the National Commission on Terrorism, testified before the Senate Subcommittee on Technology, Terrorism and Government Information that the FBI reports a dramatic increase in the number of threats in the last four years, from 37 reported threats in 1996 to more than 250 reported threats in 1999. The majority of the threats were anthrax hoaxes.

²Pub. L. 104-201 (1996).

- (3) The International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.),
- (4) Section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. § 2156a(c)).³

Congress also passed several statutes creating new offenses, making it necessary for the Commission to consider their appropriate treatment under the guidelines. Specifically, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996⁴ incorporating attempts and conspiracy into the prohibition in 18 U.S.C. § 175 against possessing, acquiring, transferring, and stockpiling biological weapons, and created a new offense codified at 18 U.S.C. § 229, prohibiting various acts such as attempts, conspiracy, possession, development, use or threats to use any chemical weapon.

The Commission responded by forming a working group in 1997 which analyzed the statutes and guidelines, prepared memoranda examining the issues, and prepared issues for public comment which the Commission published in the Federal Register on January 28, 1999. The Commission invited comment on whether the guidelines, “particularly §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) provide inadequate penalties for these offenses” and if so, how the Commission should address that inadequacy. The Commission also invited comment on how the guidelines should be amended to cover the new provision to 18 U.S.C. § 175, and the new offense at 18 U.S.C. § 229. The Commission received comment from the Practitioners Advisory Group and the Federal Public and Community Defenders. Both groups recommended that no action be taken to amend the guidelines with respect to offenses involving biological and chemical agents. Their rationale was that such offenses occur infrequently, and can be handled by the general provision providing for use of the most analogous guideline in the absence of a designated guideline.

III. The Sense of Congress Resolution, Section 1423 of the National Defense Authorization Act of 1997, Pub. L. 104-201 (Sept. 23, 1996)

A. Legislative History

1. Congressional Concerns

Section 1423 of the Act apparently was the outgrowth of six days of hearings in the fall of 1995 and spring of 1996 conducted by the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs. Those hearings were chaired by Senator William Roth (R-Del.), but Senator Sam Nunn (D-Ga.) was the principal architect of the hearings. These hearings were held in the wake of – and were billed as a case study of – the sarin gas attack on a Tokyo subway station in 1995 by the Japanese cult known as Aum Shinrikyo. Nonetheless, domestic cases were also of concern to the Subcommittee. In his opening statement, Chairman Roth noted two domestic cases: the conviction of two men in Minneapolis for possession of ricin, a biological toxin

³The United States Code cite is incorrect. The code reference for section 309(c) is 42 U.S.C. § 2139a.

⁴Pub. L. 104-132 (1996).

twice as lethal as the deadliest cobra venom, and the case of a Columbus, Ohio man who obtained three vials of the bubonic plague from a private supplier of biological cultures.⁵

The findings from these hearings are summarized in the Conference Report:

Since the end of the Cold War, materials and technologies related to weapons of mass destruction – nuclear, radiological, chemical, and biological weapons – have become increasingly available to rogue states, terrorist groups, and unstable individuals. Controls over nuclear materials in the former Soviet Union continue to require significant improvement. Easy access to dual-use materials and technologies to fabricate chemical and biological weapons make the proliferation of these weapons arguably the most urgent and serious threat to the United States faces today.

House Conf. Rep. No. 104-724 (p. 817). The Report concluded that the United States government must improve and make comprehensive the way it addresses this threat. *Id.* To this end, Congress agreed to a series of provisions – by and large appropriations provisions – to address all aspects of the threat of the proliferation of weapons of mass destruction. These provisions generally fall into the categories of:

- (i) domestic preparedness (enhancing the nation’s ability to prevent and, if necessary, to respond to a terrorist incident involving nuclear, radiological, chemical or biological weapons or materials);
- (ii) interdiction of weapons of mass destruction and related materials;
- (iii) control and disposition of weapons of mass destruction and related materials threatening the United States (specifically assisting the states of the former Soviet Union to better control and/or eliminate their stockpiles of weapons of mass destruction and related materials); and
- (iv) better coordination within the Executive Branch of policy and countermeasures against proliferation of weapons of mass destruction.

Id. at 818-821.

Of particular interest is the lack of any mention of sentencing policy in the Conference Report. Sentencing policy, however, was addressed during the hearings referenced above, albeit very briefly, and by the Staff Statement of the Subcommittee. At the hearings, Senator Nunn questioned Connie Fenchel, Assistant Director for Operations of the Office of Investigations of the Customs Service about the adequacy of the penalties in this area:

Senator Nunn: . . . What is the average length of prison terms for someone convicted of exporting weapons of mass destruction materials? From what I have read and

⁵S. Hrg. 104-422, Part I, at 3.

some of the investigations that we have followed and so forth, the penalties seem to be very light.

Ms. Fenchel: Mr. Chairman, this is a particular problem for the U.S. Customs Service. The sentences do not have to be light. In fact, there are strict sentences spelled out for violating our export control laws.

For example, a violation of the Arms Export Control Act calls for a fine of not more than \$1 million or imprisonment for not more than 10 years, or both. Violations of the Export Administration Act and the International Emergency Powers Act, IEEPA, call for sentences up to \$1 million fines again and 10-year sentences, depending upon whether the violations were willfully egregious.

Senator Nunn: That is in theory. What is really happening out there?

Ms. Fenchel: In reality, in the last 3 years, we have experienced a wide range of sentencing, low sentences, primarily due to the provisions of the U.S. Sentencing Guidelines that prevent departure from the minimum that is imposed. Departures from the guidelines can be granted by judges due to sentences based on defendants' conduct, cooperation with investigators, seriousness of the offense in the judges' eyes, intended recipients of illegal exports, and whether the illegal exports were going to pariah nations.

I have examples. A defendant in Newark, New Jersey, was convicted of conspiring to export 250 tons of Sarin nerve gas to Iraq in bomb form. The quantity, if actually exported, could have resulted in over a billion lethal doses. . . . The defendant in this case was sentenced to 30 months' imprisonment.

. . . In a recently concluded case, which resulted in a defendant pleading guilty to violating the IEEPA for exporting a bomb shelter to Iraq, he received 10 months' imprisonment and 3 years' probation.

In a similar case, a defendant who provided technical services to Libya, which violated IEEPA, received 3 years' probation.

Senator Nunn: Are the prosecuting attorneys, Federal attorneys, asking for stiffer penalties? Is this a matter of judges just not granting it, or is it being treated seriously by the prosecutors?

Ms. Fenchel: In most cases, it is treated seriously by the prosecutors. The departures are happening in the judges' decisions.

Senator Nunn: So you are saying that the sentencing guidelines are too flexible in this regard?

Ms. Fenchel: I believe so, yes.

Senator Nunn: All the Federal judges now I hear from, they want more flexibility, but you are saying that the flexibility given in this area is resulting in light sentences, disproportionate to the danger to our country?

Ms. Fenchel: That is correct, and I believe the judges may be talking about other issues involving maybe narcotics, maybe gun possession . . . [W]hat we are talking about here are national security issues. The problem is that many of these cases you have white-collar businessmen involved and judges tend to be more lenient on white-collar businessmen regardless of the national security implications.

S.Hrg. 104-422, Part II, at 181-82.

Subsequently, the Minority Staff of the Subcommittee submitted a statement calling for increased sentences: “Guidelines for the imposition of prison sentences under the Arms Export Control Act, the Export Administration Act and IEEPA are not adequate when the exports involve weapons of mass destruction or their components.” 1996 WL 145564 (F.D.C.H.). Minority staff cited two cases involving the export of terrorist-related materials where the defendants were only sentenced to a few months because of the sentencing guidelines. In U.S. v. Juwhan Yun and Charles Caplan, (D.C. N.J. 1989), the defendant was convicted of conspiracy to export 250 tons of sarin nerve gas to Iraq for use in making military weapons and was sentenced to 30 months. In U.S. v. Sultan El Gawli, et al., (D.C. N.J. 1986),⁶ the defendant was convicted of conspiracy to send 150 pounds of C-4 plastic explosives and radio frequency detonating equipment to the West Bank. He was sentenced to 24 months, but served only 18. Of interest, however, is the Minority Staff’s assessment that the sentences of smugglers convicted in foreign countries is even less.

The exchange between Senator Nunn and Ms. Fenchel is noteworthy for a number of reasons. First, it is the only piece of legislative history that addresses criminal penalties. Second, there seems to be some confusion about the role of departures. Ms. Fenchel’s later remarks seem to conflict with her opening remarks. Third, the criticism levied appears aimed at departures, not at the guideline ranges.

Although sentencing policy was not discussed any further at these hearings, several important issues were raised:

2. *Fall of the Soviet Union*

The fall of the Soviet Union was a primary concern of the Subcommittee. Senator Nunn stated that “while the fall of the Soviet Union has certainly diminished the risk of a major war between the United States and a would-be challenger, it has also created new risks which could have a very

⁶This case preceded the effective date of the federal sentencing guidelines.

severe impact on the United States. Never before has an empire collapsed leaving some 30,000 nuclear weapons, hundreds of tons of fissile material, at least 40,000 tons of chemical weapons, advanced biological weapons, huge stores of sophisticated conventional weapons, and literally thousands of scientists with the knowledge to make all of these very sophisticated weapons. . . . [T]he challenge facing Russians, and the entire world, is to ensure that the former Soviet Union does not become a vast supermarket for the most deadly instruments known to man.” S.Hrg. 104-422, Part I. At 4-5.

3. *Availability of Information and Ingredients*

Congress also was concerned that technology has made these ingredients available to an ever-widening audience. Even in 1995, the ingredients for sarin and other chemical weapons were easily accessible over the Internet, as is information about biological weapons and instructions as to how to make a nuclear device. *Id.* at 5, 215.

4. *Dual-Use Agents*

The Subcommittee heard extensive testimony about the problem of monitoring dual-use chemicals. Many of the chemicals that can be used to make weapons of mass destruction also can be used to make such legitimate products as pharmaceuticals, textile dyes, and pesticides. For this reason, the Chemical Weapons Convention contains verification provisions that control such precursor chemicals and require reporting and inspection within the commercial chemical industry. While these procedures help international inspectors track and assess commercial activities with dual-use chemicals, the ingredients, equipment, and know-how to make chemical weapons will be on the open market indefinitely. *Id.* at 163.

To provide an idea of how large the task is, in 1993 the global market for chemical and allied products totaled \$1.26 trillion. No U.S. company manufactures chemical weapons (or biological weapons), but the precursors and components used to manufacture these agents are still available in the U.S. and exported because they have other legitimate and necessary purposes. *Id.* at 225, 233. In the U.S. economy, these products constitute the largest exporting sector. The value of exports from the developed world to the developing world increased from \$33 billion to \$57 billion between 1980 and 1991. There is also a growing trade in biomedical applications. Microorganisms and toxins are exported by the United States and others and the number of licenses issued for the export of such materials grew from 90 in 1991 to 531 in 1994. Every year virtually every country in the world receives shipments of biologics including pathogenic materials, presumably for medical diagnostic and treatment purposes related to controlling the outbreak of infectious disease. As further indication of the challenge, in 1991 the United States issued 38,000 dual-use export licenses.

Of particular concern to Congress was the success some rogue nations have had in tapping into the global dual-use market. One survey of unconventional weapons programs of Iran, Syria, and Libya revealed that over 300 suppliers in 38 countries had provided dual-use items to them. *Id.* at 197-98.

5. *Attractiveness of NBC weapons*

Terrorist interest in chemical and biological weapons is not surprising, given the relative ease with which some of these weapons can be produced, the large number of casualties they cause, and

the residual disruption of infrastructure. Although much attention often is given to nuclear weapons, chemical and biological weapons are more likely choices for such groups because they require little equipment and can cause massive casualties. *Id.* at 215.

Many developing countries view biological weapons and chemical weapons as a “poor man’s atomic bomb” that, at a relatively cheap price, can both deter attacks and compensate for shortcomings in conventional arsenals. Because much of the same biotechnology equipment employed by modern pharmaceutical laboratories can be used to develop biological weapons, identification of an offensive biological warfare program can be extremely difficult. *Id.* at 219.

B. Statutory Provisions and Applicable Guidelines Targeted in the Sense of Congress Resolution in Section 1423 of the National Defense Authorization Act for Fiscal Year 1997⁷

Congress urged the Commission to revise the relevant sentencing guidelines to provide for increased penalties for offenses under the criminal provisions discussed below. This section examines the elements of the statutory offenses, the applicable guideline provisions, Commission data, including demographic information, and a sample of offense conduct and sentences taken from case files. There is very little data to assist the Commission in its examination of sentencing issues for these offenses. During the nine-year period from 1991-1999, only 226 cases were sentenced for a violation of these statutes. The large majority of these cases (190 of the 226 cases) involved one statute, 22 U.S.C. § 2778, the section of the Arms Export Control Act that authorizes the President to control exportation of defense articles through a licensing system administered by the State Department.⁸ The next largest number of cases were the 20 cases sentenced for violation of 50 U.S.C. § 2410, the Export Administration Act. Finally, eight cases were sentenced for violations of 50 U.S.C. § 1701, the International Emergency Economic Powers Act. No cases were brought under 22 U.S.C. § 2780 of the Arms Export Control Act or under 42 U.S.C. § 2139a of the Nuclear Non-Proliferation Act of 1978.

1. Section 11 of the Export Administration Act of 1979 (50 U.S.C. § 2410)

a. Synopsis of the Statutory Provision

This section prohibits the exportation of certain controlled commodities without a valid license from the U.S. Department of Commerce. The criminal penalties for violations of various export controls imposed “in the national interest” under 50 U.S.C. §§ 2401-2420 are (1) not more than five years for a knowing violation of any of the export controls, (2) not more than 10 years if the violation is willful and the defendant knows that the exports involved will be used for the benefit of, or the destination is, a country to which the exports are controlled under law, (3) not more than five years for the failure to report an export done in violation of a valid export license, (4) not more than

⁷Appendix A (attached) provides Tables illustrating the statutory penalties and guideline ranges for the national defense guidelines and a proportional comparison of national defense guidelines with other types of offenses.

⁸The controlled articles include an array of arms from handguns to military aircraft, listed in the United States Munitions List, 22 C.F.R. Part 121.1. (See Appendix G, attached.)

five years if the defendant possesses goods or technology in violation of an export license and knows the goods or technology will be exported in violation of the terms of the license, and (5) not more than five years for evasion of the export controls. Section 2410 also provides for criminal fines and forfeitures, and civil penalties. The maximum fine for an individual is \$250,000, and for a corporation, five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, the defendant is also subject to forfeiture of any interest in, security of, or claim against any goods subject to the violation, and any proceeds obtained directly or indirectly from the violation.

b. Applicable Guideline Provision

The applicable guideline is §2M5.1, the guideline for evasion of export controls. The Base Offense Level is 22 (41-51 months if Criminal History Category I) if national security or nuclear proliferation controls were evaded, or Base Offense Level 14 (15-21 months if Criminal History Category I) otherwise. The guideline also provides for an upward departure (1) in the case of a violation during time of war or armed conflict; or (2) if the following factors (ordinarily available to the court in determining the sentence within the guideline range) were present in an extreme form: (a) the degree to which the violation threatened a security interest of the United States; (b) the volume of commerce involved; (d) the extent of planning or sophistication, and (e) whether there were multiple occurrences.

c. Sentencing Commission Data

During the past nine years (fiscal years 1991-1999) only twenty cases have been prosecuted and sentenced as violations of 50 U.S.C. § 2410. Eighteen cases were sentenced using guideline §2M5.1 (Evasion of Export Controls), one using guideline §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and one using guideline §2S1.1 (Laundering of Monetary Instruments). Under guideline §2M5.1, the median sentence for defendants was 13.5 months, 94 percent of the defendants were in Criminal History Category I, 89 percent were male, 68 percent were white, 81 percent were college graduates, 68 percent were male, and 72 percent were U.S. citizens, downward departures were granted in three cases, downward departures for substantial assistance were granted in four cases, and no cases received upward departures.

Table 1: Demographic and Sentencing Data - 50 U.S.C. § 2410 and §2M5.1

TOTAL	Gender	Race	Education	Citizenship	Median Age
18 Cases	16 Male 2 Female	12 White 0 Black 1 Hispan. 5 Other	1 Less Than H.S. 1 H.S. Diploma 1 Some College 13 College Graduate	13 U.S. Citizen 5 Non-U.S.	49
TOTAL	Criminal History	Mode of Conviction	Departure Status	Type of Sentence	Median Sentence

18 Cases	16 Category I 1 Category II	13 Plea 5 Trial	11 No Departure 0 Upward Depart 3 Downward Depart 4 Substantial Assistance	8 Prison Only 4 Prison + Alt. 3 Probate + Alt. 2 Probation Only	13.5 months
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¹The total number of cases for each characteristic may add to less than the overall total due to missing information for that variable.

d. Case Review

The following two cases were taken from the Commission’s files and provide examples of the types of offense conduct, guideline application, and sentence:

Case #1

50 U.S.C. § 2410 (Export Administration Act)
18 U.S.C. § 371 (Conspiracy to violate Trading with the Enemy Act)
50 U.S.C. § 3 (a), 5(b) (Trading with the Enemy).

Defendant pleaded guilty to shipping foodstuffs and other goods to Cuba in violation of the Cuban Assets Control Regulations, an embargo against Cuba (see 31 C.F.R. §515.101-.901) that prohibits all commercial transactions with Cuba or Cuban nationals except those authorized by the Secretary of the Treasury.

Guideline §2M5.1 was used. Pursuant to §3D1.2(b), the counts were grouped. The base offense level was 14, subtracting 2 levels for acceptance of responsibility, for a total offense level of 12, Criminal History Category I. The sentencing range was 10 -16 months.

Sentence: One year of imprisonment.

Case #2

50 U.S.C. § 2410 (Export Administration Act and Export Administration Regulations)
50 U.S.C. § 1705 (International Emergency Economic Powers Act).

Defendant pleaded guilty to shipping and attempting to ship miscellaneous regulated military and police products (including handcuffs, bullet proof vests, riot helmets with visors, firearms laser sights, military ballistic helmets, and an infrared detection system) to Macedonia, in violation of the Export Administration Regulations.

Guideline §2M5.1 was used. Pursuant to §3D1.2(b), the counts were grouped. The base offense level was 14, subtracting 2 levels for acceptance of responsibility, for a total offense level of 12, Criminal History Category I. The Court departed from offense level 12 to offense level 8 based upon the defendant’s substantial assistance pursuant to §5K1.1.

Sentence: The defendant was sentenced to three years probation.

2. Sections 38 and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2780)

Section 2778 is the most important provision to address in considering a revision to the guidelines, inasmuch as 190 of the 226 cases sentenced in this area in the past nine years have been brought under this statute. The team has sought input from DOJ to determine what issues and concerns underlie the Attorney General's determination that the sentences are inadequate for these types of offenses, in order to inform the Commission's policy decisions. From a strictly empirical analysis, there is no indication from the data that the courts have found the guidelines to be inadequate for these particular offenses.

a. Synopsis of the Statutory Provisions

Section 38 of the Arms Export Control Act provides authority for the President to control exports and imports of defense services and articles, and makes it a crime for anyone to willfully export from the United States any defense article listed on the U.S. Munitions List without first obtaining a license or written approval from the State Department. *See* 22 C.F.R. §127.1(a). The criminal penalty for willfully violating an export or import control issued under this section is not more than 10 years. Section 40 of the Act prohibits certain munitions exports to, and the giving of financial assistance with respect to munitions acquisitions by, countries that support acts of international terrorism. The criminal penalty for a violation of section 38 or section 40 is up to a \$1,000,000 fine and/or up to 10 years in prison. *See* 22 U.S.C. §§ 2778(c), 2780(j).

b. Applicable Guideline Provision

The applicable guideline is §2M5.2, the guideline for exportation of arms, munitions, or military equipment or services without required validated export license. That base offense level is 22 (41-51 months in Criminal History Category I) or 14 (15-21 months in Criminal History Category I) if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten. The commentary provides for the same two departure provisions listed above for §2M5.1.

c. Sentencing Commission Data

During the past nine years (fiscal years 1991-1999) 190 cases have been prosecuted and sentenced as violations of 22 U.S.C. § 2778. No cases have been brought under 22 U.S.C. § 2780. One hundred sixty-six cases were sentenced using guideline §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), one case was sentenced under guideline §2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property),⁹ one case was sentenced under §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), two cases were sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or

⁹Guideline 2B1.2 was deleted by consolidation with §2B1.1 effective November 1, 1993. *See* Appendix C, amendment 481.

Conspiracy), twelve cases were sentenced under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2 cases under §2M5.1 (Evasion of Export Controls), and five under §2S1.1 (Laundering of Monetary Instruments). Under guideline §2M5.2, the median sentence for defendants was 12 months, 89 percent of the defendants were in Criminal History Category I, 97 percent were male, 46.3 percent were hispanic and 41 percent white, 34 percent did not have high school diplomas, 62 percent were non-citizens and 38 percent were U.S. citizens, downward departures were granted in forty-three cases (28 percent of the cases), downward departures for substantial assistance were granted in thirty cases (19 percent), and two cases received upward departures.

Table 2: Demographic and Sentencing Data - 22 U.S.C. § 2778 and §2M5.2

TOTAL	Gender	Race	Education	Citizenship	Median Age
166 Cases	161 (97%) Male 5 (3%) Female	67 (41%) White 6 (8%) Black 76(46%)Hispanic 15 (9%) Other	60 Less Than H.S. 37 H.S. Diploma 36 Some College 31 College Grad.	63 (38%)U.S. Cit. 102 (62%) Non-U.S.	38
TOTAL	Criminal History	Mode of Conviction	Departure Status	Type of Sentence	Median Sentence
166 Cases	134 (89%) Category I 10 (7%) Category II 7 (5%) Category III	44 (88%) Plea 19 (12%) Trial	80 (52%) No Depart 2 (1%) Up Depart 43(28%)Down.Depart 30 (19%) SubstAsst.	119 (73%) Prison 12 (7%) Pris. +Alt. 14 (9%) Prob.+Alt. 9 (12%) Probation	12 months

¹The total number of cases for each characteristic may add to less than the overall total due to missing information for that variable.

d. Case Review

These cases provide examples of types of offense conduct typical at base offense level 22 and at base offense level 14 :

Base Offense Level 22:

Case #1

Offense Conduct: Defendant pleaded guilty to attempting to purchase 60 hand grenades, 5 grenade launchers, 10 “LAW” rockets, 4 automatic weapons with silencers, 1 rifle, and assorted ammunition for shipment to El Salvador.

Sentence: Criminal History Category I, sentencing range 41-51 months. The Court departed downward to 36 months as part of the plea bargain.

Case #2

Offense Conduct: Defendant pleaded guilty to attempting to purchase “cathode assemblies” used in Hawk antiaircraft missiles for export to Iran.

Sentence: Criminal History Category I, sentencing range 41-51 months. The Court departed downward to 11 months. The reasons for departure were not available in the file.

Base Offense Level 14:

Case #1

Offense Conduct: Defendant attempted to smuggle 21 firearms and ammunition into Mexico.

Sentence: The defendant received a two-level downward adjustment for acceptance of responsibility. Base Offense Level 12, Criminal History Category I, sentencing range was 10-16 months. Defendant was sentenced to 12 months imprisonment.

Case #2

Offense Conduct: Defendant pleaded guilty to attempting to smuggle 9 handguns and ammunition into the Philippines via a commercial airline.

Sentence: The defendant received a two-level downward adjustment for acceptance of responsibility. Base Offense Level 12, Criminal History Category I, sentencing range 10-16 months. Defendant was sentenced to 10 months imprisonment.

3. The International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*)

a. Synopsis of the Statutory Provision

This Act gives the President authority to respond to any unusual and extraordinary threat which has its source “in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” Many executive orders are issued under the authority of the Act. (For example, in 1987, President Reagan prohibited imports from Iran under this authority.) The criminal penalty for a violation of any order or regulation issued under the Act is not more than 10 years and/or up to a \$50,000 fine.

b. Applicable Guideline Provision

The International Emergency Economic Powers Act is not referenced in the Statutory Index of the guidelines.

c. Sentencing Commission Data

During the past nine years (fiscal years 1991-1999) only eight cases have been prosecuted and sentenced as violations of 50 U.S.C. § 1701. Six of the cases were sentenced using guideline §2M5.1 (Evasion of Export Controls), one using guideline §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). Under guideline §2M5.1, the median sentence for defendants was 10 months, 100% of the defendants were male, college graduates, and in Criminal History Category I. Five were white and one was other, four were U.S. citizens and two were not, and no departures were granted.

Table 3: Demographic and Sentencing Data - 50 U.S.C. § 1701 and §2M5.1

TOTAL	Gender	Race	Education	Citizenship	Median Age
6 Cases	6 Male 0 Female	5 White 0 Black 0 Hispanic 1 Other	0 Less Than H.S. 0 H.S. Diploma 0 Some College 6 College Graduate	4 U.S. Citizen 2 Non-U.S.	54
TOTAL	Criminal History	Mode of Conviction	Departure Status	Type of Sentence	Median Sentence
6 Cases	5 Category I	5 Plea 1 Trial	4 No Departure 0 Upward Depart 0 Downward Depart 0 Subst. Assistance	3 Prison Only 1 Prison + Alt. 1 Probation + Alt. 1 Probation Only	10 months

¹The total number of cases for each characteristic may add to less than the overall total due to missing information for that variable.

4. Section 309(c) of the Nuclear Non-Proliferation Act of 1978 (42 U.S.C. § 2139a).

a. Synopsis of the Statutory Provision

Section 309(c) requires the President to publish procedures regarding control by the Department of Commerce over all export items “of significance for nuclear explosive purposes.” However, that section does not include a penalty provision, which presumably would be for violation of the procedures established pursuant to that section.

b. Applicable Guideline Provision

Section 309(c) is not referenced in the Statutory Index of the guidelines inasmuch as it does not provide for a criminal penalty.

c. Sentencing Commission Data

Sentencing Commission data reveals no cases under this statute for fiscal years 1991-1999.

C. Options

In the Five-Year Plan submitted to Congress in December 1998, the Attorney General concurred with the Sense of Congress Resolution that the sentencing guidelines constitute insufficient punishment for these offenses. The team has requested DOJ's input regarding the inadequacy of the guidelines and the specific concerns DOJ proposed to have considered in any revision to the guidelines.¹⁰ The policy concerns of DOJ and the law enforcement community such as the United States Customs Department are especially relevant because there is so little data to guide the Commission's discussion. The small number of cases means there is no significant statistical model for the Sentencing Commission to use. Based on the team's case review, there are no unusual numbers of upward departures or sentences in the upper quartile of the guideline range to form an empirical basis for a decision to increase the guidelines. The main inadequacy DOJ has related to the team is that the current guideline ranges as applied (the median sentences range from 10 to 13.5 months of imprisonment) do not provide a sufficient sentence to deter these offenses, compared with the guideline sentences for other national defense offenses that carry a ten-year statutory maximum penalty.

1. Base Offense Level Increase

One option is to increase the offense levels by two levels, or by four levels to be in line with several other national security offenses that have 10 year maximum sentences. If the offense levels were increased by four offense levels, the higher alternative Base Offense Level would be increased to 26, and the lower Base Offense Level would be increased to 18. If DOJ information indicates that their specific concern is primarily the import or export of NBC weapons and materials, the Commission may want to create an alternate Base Offense Level 26 for those offenses only. In the majority of cases, the defendant will receive a three-level downward adjustment for acceptance of responsibility, and the resulting offense levels will be 23 and 15. At Base Offense Level 26, the sentencing range at Criminal History Category I would be 63-78 months, and the 120 month statutory maximum would be reached at Criminal History Category V. A defendant who receives the three-level downward adjustment for acceptance of responsibility would be sentenced at Base Offense Level 23, Criminal History Category I (46-57 months imprisonment). For those defendants sentenced at alternative Base Offense Level of 18, the sentencing range at Criminal History Category I would be 27-33 months. If the defendant received the three levels off for acceptance of responsibility, the sentencing range at Base Offense Level 15, Criminal History Category I would be 18-24 months.

Base

¹⁰Guideline §2M5.1 (Evasion of Export Controls), the guideline that addresses offenses under 50 U.S.C. §§ 2401-2420, became effective November 1, 1987, and has never been amended. Guideline §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), the guideline for offenses under 22 U.S.C. 2778 (Control of arms exports and imports), became effective November 1, 1987, and was amended effective November 1, 1990 to also cover offenses under 22 U.S.C. §2780 (Transactions with countries supporting acts of international terrorism). The amendment also deleted the concept of "sophisticated weaponry" and substituted its current language and structure, starting at base offense level 22 unless "the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten," in which case the base offense level is 14.

Offense Level	I	II	III	IV	V	VI
15	18-24	21-27	24-30	30-37	37-46	41-51
18	27-33	30-37	33-41	41-51	51-63	57-71
23	46-57	51-63	57-71	70-87	84-105	92-115
26	63-78	70-87	78-97	92-115	110-137	120-150

Appendix A applies the two and four offense level increases to actual cases to provide a comparison with the current guideline.

2. Add Additional Base Offense Levels and/or Specific Offense Characteristics

A second option would be to add additional base offense levels and/or specific offense characteristics to account for the more aggravated forms of the offense conduct. One method would be to provide additional alternate base offense levels. For example, the current alternate Base Offense Level of 14 for §2M5.2 applies “if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.” A higher Base Offense Level of 16, for example, could be added for an increased number of weapons (number of non-fully automatic small arms was more than 10 but did not exceed 30 or some other number). An example of the use of alternate base offense levels and specific offense characteristics is guideline 2K2.1, the firearms guideline. That guideline has eight alternate base offense levels, six specific offense characteristics, and cross references. For example, and , an additional two levels are added if the firearms were stolen, or had altered or obliterated serial numbers, and additional levels are added to a base offense level depending upon the number of firearms involved.

3. Increase the Base Offense Level and Subtract Offense Levels

A third option is to have a higher base offense level and subtract offense levels for lesser types of harms. For example, the base offense level could be raised to level 26, and the guideline could subtract four, six, or eight levels if the offense involved 20, 15, 10, or fewer non-fully automatic small arms. The team does not recommend making the guideline turn on too many fine distinctions. The earlier version of guideline 2M5.2 was amended to the current version in part because it was difficult to apply the term “sophisticated weaponry” in a uniform manner. *See* Amendment 336 (“This amendment revises this guideline to better distinguish the more and less serious forms of offense conduct covered.”).

There is insufficient case data for these offenses to allow the team to make detailed assessments, which is why the team has met with and invited DOJ to provide input to help inform these issues.¹¹

IV. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132

A. Legislative History

Only a few provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are relevant to the Commission's work. The Act principally concerns habeas corpus reform, mandatory victim restitution, provisions for deportation of terrorists and criminal aliens, as well as modifying certain criminal law provisions to counter terrorism.

1. Biological Weapons

Title V of the Act contains the relevant provisions regarding biological weapons. Section 511(c) of the Act amends 18 U.S.C. § 2332a (Use of certain weapons of mass destruction) to specify that the prohibitions and penalties set forth therein apply to the use of any biological agent, toxin, or vector (as those terms are defined in section 178 of title 18).¹² The statutory penalties for violation of this section are “any term of years or for life, and if death results, shall be punished by death or [imprisonment] for any term of years or for life.” 18 U.S.C. § 2332a(a).

¹¹In *United States v. Sicken*, 223 F.3d 1169 (10th Cir. 2000), the Tenth Circuit addressed an issue of first impression concerning guideline 2M2.3, the guideline that addresses violations of 18 U.S.C. § 2155 (destruction of national defense materials and premises) and 18 U.S.C. § 2155(a) (sabotage). The case illustrates the difficulties in addressing national defense cases where there is little or no guiding precedence. The defendants were anti-nuclear protesters who broke into a nuclear missile facility and used sledgehammers and chisels to damage an electrical junction box, the concrete blast door to the underground missile silo, and the rails used for moving the blast door. They also sprayed a mixture of paint and blood on the premises, and caused approximately \$21,000 in damages to the premises. The district court departed downward four levels, stating that there is a clear difference between an act of protest in peacetime and an act of sabotage during war. The district court also noted that there was no risk of death or injury to persons and no “truly significant or substantial” risk to national security. In affirming the district court’s departure, the appellate court discussed the fact that there is no historical record to determine a heartland or “set of typical” sabotage cases, and there are no offense severity gradations in the guideline to distinguish between major destructive acts in wartime and destruction which caused little or no harm to national security interests during peacetime.

¹²Section 511(b) also expanded the definitions of “biological agent” to include biological products that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product and “toxin” to include toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule. *See* 18 U.S.C. § 178.

Section 511(b)(1) also expanded the prohibition against development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin or delivery system for use as a weapon to include attempts, threats, or conspiracies to do so. *See* 18 U.S.C. § 175(a). Violators of this provision may be fined or “imprisoned for life or any term of years, or both.” *Id.*

Regulatory Scheme Imposed

Section 511 also contained several regulatory provisions directed at the Department of Health and Human Services. In brief, the Act directs the Department to establish and maintain a list of each biological agent that has the potential to pose a severe threat to public health and safety and to develop and enforce safety procedures for the transfer of such biological agents to ensure: (i) proper training and appropriate skills to handle such agents; (ii) proper laboratory facilities to contain and dispose of such agents; (iii) safeguards to prevent access to such agents for use in domestic or international terrorism or for any other criminal purpose; (iv) adequate domestic response procedures are in the event of a violation; and (v) appropriate availability of biological agents for research, education, and other legitimate purposes.

2. *Chemical Weapons*

Section 521 of the Act created a new section of title 18, 18 U.S.C. § 2332c. That section has since been repealed and re-designated as 18 U.S.C. § 229 *et. seq.* See Pub.L. 105-277, Div. I, Title II, §201(c)(1), Oct. 21, 1998. The effect of these laws has been to increase both the scope of conduct that is unlawful as well as the penalties for violations involving chemical weapons. Former section 2332c prohibited the use, or attempt or conspiracy to use, chemical weapons against a national of the United States, regardless of whether the national is in the United States, any person within the United States, and any property owned or used by the United States, regardless of whether the property is in the United States. The prohibition has since been expanded to include the development, production, acquisition, transfer, receipt, stockpiling, retention, possession, use, and threat to use any chemical weapon. See 18 U.S.C. § 229(a), Pub. L. 105-277. It also is unlawful to assist or induce, in any way, another person to engage in such conduct, or to attempt or conspire to do so. *Id.*

The definition of what constitutes a “chemical weapon” also has been expanded, thereby further increasing the scope of prohibited conduct. Former § 2332c defined chemical weapons as “any weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals.” Under 18 U.S.C. § 229F, “chemical weapon” means, together or separately:

- (A) a toxic chemical and its precursors (except where intended for a non-prohibited purpose);
- (B) a munition or devise, specifically designed to cause death or harm through toxic properties which would be released as a result of the employment of such a munition or device; and
- (C) any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in the preceding paragraph.

Under former section 2332c, any person who violated its provisions was subject to imprisonment for any term of years. Section 229 now includes provisions for fines as well. 18 U.S.C. § 229A(a)(1). Under former section 2332c, if death of another person resulted, the defendant was subject to imprisonment for any term of years or for life, or punishment by death. However, under new section 229A(a)(2), if death results, the defendant shall be punished by death or imprisoned for life.

3. *Legislative History*

The Antiterrorism and Effective Death Penalty Act of 1996 does have a rich legislative history, but most of it concerns the other subject matters covered by the legislation. No Senate or House Report was submitted with this legislation. House Conference Report No. 104-518 was submitted and provides brief descriptions of the provisions detailed above but adds little insight

for our purposes. *See id.* at 119-120. However, the bill itself includes several findings of Congress that should guide our work.

With respect to nuclear materials, Congress made findings, among others, that:

1. nuclear materials, including byproduct material, can be used to create radioactive dispersal devices that are capable of causing serious bodily injury as well as substantial damage to property and to the environment;
2. the potential use of such materials enhances the threat posed by terrorist activities and thereby has a greater effect on the security interests of the United States;
3. due to the widespread hazards presented by the threat of nuclear contamination, the United States has a strong interest in ensuring that persons who are engaged in the illegal acquisition of such nuclear materials are prosecuted for their offenses;
4. the threat that nuclear materials will be obtained and used by terrorists and other criminal organizations has increased substantially since the enactment in 1982 of legislation that implemented the Convention on the Physical Protection of Nuclear Material (18 U.S.C. § 831);
5. the successful efforts to obtain agreements from other countries to dismantle nuclear weapons has resulted in increased packaging and transportation of nuclear materials, thereby decreasing the security of such materials by increasing the opportunity for unlawful diversion and theft;
6. the trafficking in the relatively more common, commercially available, nuclear materials creates the potential for significant loss of life and environmental damage; and
7. reports of trafficking incidents in the early 1990s suggest that the individuals involved in trafficking in these materials from Eurasia and Eastern Europe frequently conducted their black market sales of these materials within Germany, the Baltic States, the former U.S.S.R., Central Europe, and the Middle European countries.

Pub. L. 104-132, Section 501.

With respect to biological weapons, Congress made findings that:

1. certain biological agents have the potential to pose a severe threat to public health and safety;
2. such biological agents can be used as weapons by individuals or organizations for the purpose of domestic or international terrorism or for other criminal purpose;
3. the transfer and possession of potentially hazardous biological agents should be regulated to protect public health and safety; and
4. efforts to protect the public from exposure to such agents should ensure that individuals and groups with legitimate objectives continue to have access to such agents for clinical and research purposes.

Pub. L. 104-132, Section 511.

Even though no Senate or House reports were filed with this piece of legislation, several reports accompanied related bills. *See, e.g.*, H Rpt. 104-383 (Judiciary Committee), H. Rpt 104-23 (Judiciary Committee), H. Rpt. 104-22 (Judiciary Committee); H. Rpt. 104-16 (Judiciary Committee); and S. Rpt. 104-179 (Judiciary Committee). Of these reports, the most relevant is H. Rpt. 104-383, which accompanied H.R. 1710, the Comprehensive Antiterrorism Act of 1995. Congress reported in H. Rpt. 104-383 that “[t]errorism potentially affects all Americans, both at home and abroad. It threatens our public safety, restricts the freedom of travel, and reduces our sense of personal security. Nothing is more potentially threatening or destructive. . . . [V]ictims of terrorism typically have no relationship to the cause motivating the crime. Because of America’s successes economically and militarily, the United States is a particularly attractive target for terrorists. Terrorists hope that their attacks on U.S. citizens or U.S. military personnel will bring publicity and attention to their cause.” *Id.* at 41-42.

The report cites several examples for the need to recognize the ever-changing face of terrorism and its technologies, including the bombing of a German discotheque killing American military personnel, the bombing of the U.S. embassy in Beirut, the bombing of Pan Am Flight 103, the hostage takings of Americans in the Middle East, the torture and murder of U.S. Marine Colonel William Higgins, the murder of American tourist Leon Klinghoffer, the murders of CIA employees at the gates of the CIA, and others.

V. Statutory Provisions and Applicable Guidelines Affected by the Antiterrorism and Effective Death Penalty Act of 1996

In the Attorney General’s Five-Year Interagency Counter-Terrorism and Technology Crime Plan, the Department of Justice recommended that the Sentencing Commission adopt sentencing guidelines for the criminal laws concerning biological and chemical weapons. The plan stated that “even though the use of a biological agent as a weapon can be deadly or even catastrophic, current

federal sentencing guidelines do not always promote sentences that reflect this potential harm.” The Biological Weapons Anti-Terrorism (BWAT) Act of 1989, codified at 18 U.S.C. § 175, permits a sentence of life or any term of years. “However, the federal Sentencing Guidelines, which determine the actual sentence imposed, do not contain specific, significant penalties for violations of the BWAT statute, unless the government can prove that the defendant intended to use the weapon in a federal crime of terrorism, 18 U.S.C. § 2332b(g). *See* USSG §3A1.4. It may be impossible to prove terrorist intent, even though use of a biological weapon for any reason could have catastrophic consequences.”¹³

The plan further stated that application of the current guidelines can “result in seemingly disparate and sometimes disproportionately low sentences for persons convicted under these laws.” Examples cited were of a conviction under 18 U.S.C. § 175 involving possession of ricin, where the sentencing court, using an analogous guideline, applied the guideline for unlawful possession of a firearm or destructive device, which resulted in a 33-month sentence. In comparison, in another case of ricin possession, the district court used the firearms guideline as the most analogous guideline, but made an upward departure because the guideline did not accurately reflect the seriousness of the potential harm such as the possibility of mass homicides if the substance had been used as a weapon. The departure sentence was 151 months imprisonment. The Department of Justice concluded that “we cannot effectively deter criminal possession of dangerous biological and chemical substances unless the penalties are sufficiently clear, certain, and proportionate to the potential harm caused by the unlawful activity.”

A. Biological Weapons, 18 U.S.C. § 175¹⁴

1. Synopsis of the Statutory Provision

Section 511(b)(1) of the Act expanded the prohibition against development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin or delivery system for use as a weapon or knowingly assisting a foreign state or any organization to do so, to include attempts, threats, or conspiracies to do so. *See* 18 U.S.C. § 175(a). The criminal penalties provide that violators may be fined or imprisoned for life or any term of years, or both. The fine is up to \$250,000 for an individual, and up to \$500,000 for an organization. *See* 18 U.S.C. § 3571(b)(3), (c)(3).

2. Applicable Guideline Provision

¹³To alleviate the problems of proving terrorist intent, Senator Biden introduced a bill, S. 3202, on October 12, 2000, that would prohibit simple possession of “any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, or other peaceful purpose.”

¹⁴Biological agent, toxin, and vector are defined at 18 U.S.C. § 178 (attached at Appendix E). The Secretary of Health and Human Services has identified biological agents and toxins which have a potential to pose a severe threat to public health and safety as “select agents,” listed at Appendix A to 42 C.F.R. Part 62. (*See* Appendix E, attached.)

There is no reference for this statute in the Statutory Index of the guidelines. The team has proposed several options discussed below.

3. Sentencing Commission Data

Sentencing Commission data indicates that eight cases have been brought under 18 U.S.C. § 175. Four cases did not include guideline application information. Of the remaining four cases, two were sentenced under guideline §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), one was sentenced under guideline §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), and one was sentenced under guideline §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides, or Other Pollutants). A review of the four available case files follows.

4. Case Review

Case #1

Offense Conduct: This 1992 case was the first case brought under the Act. Defendant Baker, who professed violent, anti-government sentiments, was found in possession of .7 gram of 5% pure ricin (enough to kill 126 people), which had been manufactured by his co-defendant, Wheeler.

Sentence: The district court reasoned that ricin was a poisonous substance, analogous to a destructive device under §2K2.1(a), the firearms guideline. The base offense level was 18, sentencing range 27-33 months. The defendants were sentenced to 33 months, but Baker served 17 months (his case was remanded for a new trial on the ground that the district court erred in denying his motion for severance, and he agreed to plead guilty and forgo a new trial in exchange for time served).

Case #2

Offense Conduct: Defendants Olerich and Henderson had supplied Baker with the ricin. They were convicted by a jury of violating 18 U.S.C. § 175.

Sentence: The district court followed the reasoning of the judge in Baker and Wheeler's case, applying §2K2.1. Both received sentences of 37 months.

Case #3

Offense Conduct: Defendant Leahy was found in possession of .67 gram of 4.1% pure ricin, (enough to kill 125 people). He pled guilty to a violation of 18 U.S.C. § 175, and the government stipulated that §2K2.1 was the most analogous guideline.

Sentence: The district court agreed that §2K2.1 was the most analogous guideline, and his adjusted offense level was 21 (41-51 months). The court departed upward based on the seriousness of the offense, analogizing to the terrorism guideline at §3A1.4. Rather than adding 12 levels and increasing the criminal history category to VI under that guideline, the court added 10 levels and did not increase the criminal history category (which was category II). The court sentenced the defendant at the top of the range, to 151 months imprisonment. Leahy appealed the upward departure, and the Seventh Circuit overturned the departure because his acts were not “calculated to influence or affect the conduct of government” as required by the terrorism guideline, such that there was not sufficient linkage to use that guideline as an analogy. On re-sentencing, Leahy was sentenced to 78 months imprisonment.

Case #4

Offense Conduct: Defendant Mettetal was a neurology resident at Vanderbilt University Hospital in 1984. He became convinced that the head of the department was trying to harm his career. Mettetal resigned from the hospital staff. Eleven years later, in 1995, he was found loitering in the hospital’s parking garage, and was questioned by the university’s police, and arrested for criminal trespass. A search of a storage locker he had rented in Virginia revealed a quantity of ricin sufficient to kill 3,600 people. A jury found him guilty of one count of violating 18 U.S.C. § 175, and one count of possessing false identification documents in violation of 18 U.S.C. § 1028(a)(3). The district court reasoned that the most analogous guideline was guideline 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), with a base offense level of 24 (sentencing range 51-63 months). The district court departed upward based on the extreme lethality and potential for mass casualties associated with ricin. The district court reasoned that the case was similar to a defendant who possessed a large number of machine guns, and looked to guideline 2K2.1(b)(1), which adds a six-level enhancement for possession of 50 or more firearms. The district court arrived at an adjusted offense level of 30, with a sentencing range of 97 to 121 months, and imposed a sentence of 120 months. [Note: Defendant’s conviction was overturned on appeal upon a finding that the police lacked probable cause to arrest him. See *United States v. Mettetal*, 213 F.3d 634 (4th Cir. 2000) (unpub.).]

B. Chemical Weapons, 18 U.S.C. § 229¹⁵

1. Synopsis of the Statutory Provision

Section 521 of the Act created a new section, 18 U.S.C. § 2332c, which has been re-designated as 18 U.S.C. § 229. Congress expanded the scope of the prohibitions in former section 2332c to also prohibit the development, production, transfer, receipt, stockpiling, retention, possession, use, and threat to use any chemical weapon, or to assist or induce another person to engage in such conduct, or to attempt or conspire to do so. Section 229A provides criminal penalties of a fine or imprisonment for any term of years, or both, and death or life imprisonment is provided if the death of another results from the offense. The fine is up to \$250,000 for an individual, and up to \$500,000 for an organization. *See* 18 U.S.C. § 3571(b)(3), (c)(3).

2. Applicable Guideline Provision

There is no reference for this statute in the Statutory Index of the guidelines. The team has proposed several options discussed below.

3. Sentencing Commission Data

Sentencing Commission data reveals no cases under this statute for fiscal years 1991-1999.

C. Options

The Attorney General's plan quoted *infra*, stated that "we cannot effectively deter criminal possession of dangerous biological and chemical substances unless the penalties are sufficiently clear, certain, and proportionate to the potential harm caused by the unlawful activity." With these goals in mind, the team examined several options for creating a guideline or guidelines to address these offenses. The DOJ representatives who met with the team emphasized the importance of deterrence, and the need for a "serious" sentence in Criminal History Category I, inasmuch as most of these offenders have no prior record. The first issue may be whether to create one combined guideline to cover nuclear, biological or chemical weapons offenses, or whether to maintain the existing guideline at §2M6.1 that addresses nuclear materials, and create a new guideline for the chemical and biological weapons offenses.

¹⁵"Chemical weapon" is defined in 18 U.S.C. § 229F (*see* Appendix D, attached). The Appendix also provides the schedule of chemicals listed in the Annex on Chemicals of the Chemical Weapons Convention referenced in 18 U.S.C. § 229F(6)(B) and (8)(B).

Appendix B illustrates guideline application for case scenarios involving biological weapons and chemical weapons¹⁶ under the current guideline provisions¹⁷ and under two options – Option 1, which features a separate guideline 2M6.3 for biological and chemical weapons with a base offense level of 37 for biological weapons and 35 for chemical weapons, and Option 2, which features a combined guideline for nuclear, biological, and chemical weapons offenses, and has a base offense level of 28 for both types of weapons, a lower alternate base offense level of 18 for threats, and several specific offense characteristics including an increase for a demonstrated intent or ability to carry out a threat, bodily injury, and the use of select agents.

1. Create a New Guideline 2M6.3 for Biological and Chemical Weapons Offenses

A separate guideline 2M6.3 could be created to address “unlawful production, development, acquisition, stockpiling, alteration, use, transfer, or possession of certain biological and chemical agents and non-nuclear radiological devices.” The guideline could have one base offense level or separate base offense levels for biological, chemical, and non-nuclear radiological materials. A cross reference to the murder guideline could be included if death resulted. A separate offense level could be included for threat only cases, or a cross reference could be made to the threat guideline at 2A6.1.

2. Amend Guideline 2M6.1 to Address Biological and Chemical Weapons Offenses

The Commission will need to consider whether the interests and types of offenses are sufficiently similar. One option is to amend guideline 2M6.1 to address biological and chemical weapons offenses, and revise the guideline as necessary¹⁸ to address key concerns such as the number and extent of any casualties, the amount of effort and cost of special units and equipment required to decontaminate the area, the extent of the area at risk, the disruption to governmental or commercial activities,¹⁹ the actual injury and risk of injury to personnel, including law enforcement, medical, fire

¹⁶The biological weapons scenarios are taken from case files. The chemical weapons scenarios are based on hypothetical situations provided by the FBI.

¹⁷Because no guideline has been promulgated for these offenses, §2X5.1 directs the court to apply the most analogous guideline or if there is no sufficiently analogous guideline, to impose sentence following the provisions of 18 U.S.C. § 3553(b) which sets forth the general purposes of sentencing.

¹⁸Guideline 2M6.1(nuclear materials) has a base offense level of 30, and a specific offense characteristic that adds 12 levels if the offense was committed with intent to injure the United States or to aid a foreign nation.

¹⁹The President’s Commission on Critical Infrastructures (*see* Executive Summary, p. iii, *infra*), noted that the sentencing guidelines do not adequately address the severity of consequential damages resulting from the “downstream” effects of a “denial-of-service attack.” The Commission may wish to add a specific offense characteristic to encompass the loss suffered by the government or a commercial activity that is closed for inspection and decontamination or for other contingencies caused by the offense. The specific offense characteristic could refer to the loss table at guideline 2F1.1 or provide some other method to address these consequences.

and rescue workers, whether the attack was an act of terrorism or was intended to aid a foreign nation, or was a hate crime, the nature and the toxicity of the substance involved, and other concerns. The FBI has also specifically mentioned the need to sanction for the increased psychological harm caused by these offenses.

3. Add or Subtract Offense Levels

Another consideration is whether to build the harms into a higher base offense level and then subtract offense levels for lesser harms (*e.g.*, Base Offense Level 30, but subtract 6 offense levels if the conduct consisted solely of a threat with no evidence of intent or ability to carry out the threat); whether to start with a base offense level and increase the offense levels by using specific offense characteristics (*e.g.*, Base Offense Level 28, add 3, 4, or 5 offense levels for degree of bodily injury); whether to use a combination of increasing and decreasing specific offense levels; or whether to have one or two alternative base offense levels and invite departures for specific occurrences.

4. Amend Guideline 2A6.1 to Include Threats to Use Nuclear, Biological, or Chemical Weapons or Materials

Guideline 2A6.1 is the guideline that applies to threatening or harassing communications, stalking, and domestic violence. Because a large number of reported offenses involving biological and chemical weapons involve threats to use this technology, one option would be to add a new base offense level to that guideline. For example, a base offense level of 18 could be added for threats to use these materials when no nuclear, biological, or chemical weapons material was actually involved. This higher base offense level would take into account the heightened psychological harm caused by this type of threat.²⁰ The guideline commentary could also be amended to invite an upward departure where hazardous materials units responded to the threat, actual decontamination was undertaken as a precaution, persons were subjected to decontamination as a precaution, buildings were forced to be closed for inspection or decontamination, etc. A cross reference could be added in any primary NBC guideline directing that threats that did not have any actual substance involved should be sentenced under the threat guideline.

²⁰Barbara Martinez, Chief of the FBI's Weapons of Mass Destruction Operations Unit, characterized the heightened psychological distress involved in these threat situations by explaining that an individual can leave a building if there is a bomb threat, but when the threat involves exposure to nuclear, biological, or chemical weapons material, the individual cannot escape, but must wait for test results to learn whether they have been infected or contaminated.