Chapter Two

Guideline Amendments

The legislation creating the Sentencing Commission provided that "[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. § 994(o). Given this congressional direction, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines and modifies the guidelines in light of district court sentencing practices, appellate decisions, research, congressional enactment of new statutes, and input from federal criminal justice practitioners.

Amendment Authority

By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise.

Amendments Promulgated

During 1995, the Commission made a number of amendments to the guidelines, most of which responded to the Violent Crime Control and Law Enforcement Act of 1994. Proposed amendments were published for public comment in the Federal Register of January 9, 1995. The Commission received extensive comment on the proposed amendments and conducted a public hearing (*see* Table 2) in Washington, D.C., on March 14, 1995.

After review of the written comment and hearing testimony, the Commission adopted 29 amendments to the sentencing guidelines, policy statements, and official commentary which, along with explanatory reasons, were reported to Congress on May 1, 1995. With the exception of two amendments concerning cocaine and money laundering that were disapproved by Congress, these amendments took effect on November 1, 1995, following the requisite 180-day period of congressional review. The legislation disallowing the cocaine and money laundering amendments included instructions to the Commission to submit revised recommendations to Congress "regarding changes to the statutes and sentencing guidelines governing sentences" for cocaine offenses. The new recommendations are to be based upon a number of listed considerations, including that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." Additionally, the legislation instructs the Department of Justice to submit a report by May 1, 1996, to the House and Senate Judiciary Committees "on the charging and plea practices of federal prosecutors with respect to the offense of money laundering." The Commission is instructed to comment on the Justice Department report.

Significant amendments adopted by the Commission in 1995 make the following changes in operation of the guidelines:

- authorize upward departures for repeat sex offenders;
- provide enhancements for drug trafficking inside prison;
- change the method of calculating the guidelines for Schedule I and II depressants and Schedule III, IV, and V controlled substances;
- repromulgate the "safety valve" guideline as a permanent amendment and provide a two-level reduction for safety-valve defendants whose offense level is level 26 or

greater;

- add a hate crime enhancement to the vulnerable victim guideline and consolidate civil rights guidelines;

- increase the base offense level for use of semiautomatic assault weapons;

- add an enhancement under the immigration and naturalization and passport guidelines in cases in which the defendant knew, believed, or had reasonable cause to believe the documents were to be used to facilitate another felony offense; and

- add Chapter Three enhancements for international terrorism and for using a minor to commit a crime.

The Commission passed two other amendments in the 1994-95 amendment cycle that did not require submission to Congress. First, the Commission amended policy statement §1B1.10 (Retroactivity of Amended Guideline Range) by listing two additional amendments for possible retroactive application to currently incarcerated defendants: (1) amendment 505 from the previous year, which caps the drug quantity table in the drug trafficking guideline at level 38; and (2) amendment 516, which changes the equivalency for marijuana plants from one kilogram per plant in cases involving 50 or more plants to 100 grams per plant regardless of the number of plants.

Second, the Commission amended §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to grant the court additional flexibility to impose a consecutive, concurrent, or partially concurrent sentence when the defendant, at the time of sentencing, is already subject to another sentence of imprisonment.

Working Groups

As part of its continuing analysis of the sentencing guidelines and related sentencing issues, the Commission annually identifies a number of priorities for the coming year and, in some cases, beyond. Each priority area is examined and analyzed by an interdisciplinary staff working group comprising a cross-section of the Commission staff (*e.g.*, legal staff may address case law issues; policy analysis staff may analyze current sentencing practice; and training staff may examine implementation issues).

Staff working groups typically study a specific guideline issue, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group reviews: monitoring data regarding sentencing practices and departures; case files of sentenced defendants; training and legal staff reports of frequent questions about guideline application (hotline calls) from probation officers, judges, and attorneys; previously considered draft amendment proposals; relevant court decisions; public comment; and legislative history and recent legislative enactments. The groups also solicit input from the Practitioners Advisory Group and the Probation Officers Advisory Group.[1]

[1] The Probation Officers Advisory Group, organized in June 1992, provides input from field officers on Commission priorities and proposed amendments. The 15-member group is composed of one probation officer from each circuit, plus an additional officer from the Fifth, Ninth, and Eleventh Circuits (due to their size). In addition, a probation officer in each district is designated as a liaison to his/her respective circuit representative.

The Practitioners Advisory Group (PAG), a voluntary membership organization composed of approximately 45 practicing attorneys, provides defense bar perspectives on Commission policies, sentencing procedures, and proposed guideline amendments. Representatives of the National Association of Criminal Defense Lawyers (NACDL) and the American Bar Association Federal Sentencing Guidelines Committee attend

In 1995, existing staff working groups continued work on substantial assistance, food and drug offenses, money laundering, and cocaine and federal sentencing policy. In addition, the Violent Crime Control and Law Enforcement Act of 1994 directed the Commission to prepare reports to Congress on cocaine and federal sentencing policy, victim-related adjustments for fraud offenses against elderly victims, sentencing in federal rape cases, and willful exposure to HIV. The Commission convened working groups to study these issues.

Cocaine Working Group

The 1994 Act expanded the scope of a previously initiated Commission study of crack and powder cocaine offenses and called for a report to Congress containing recommendations for changes in sentencing policy. The directive stemmed from a concern, voiced by many in Congress and the public, about the different penalty levels for various forms of cocaine. At the heart of this concern was the 100-to-1 quantity ratio, which requires 100 times more powder cocaine than crack cocaine to trigger five- and ten-year mandatory minimum penalties.

Responding to this directive, the Commission submitted its report, Cocaine and Federal Sentencing Policy, to Congress on February 28, 1995. In preparing the report, the Commission examined all aspects of cocaine and federal sentencing policy. Beginning with the pharmacology of cocaine, its different forms, and its methods of use, the Commission assessed trends in cocaine use, the effects of cocaine on public health, available treatment strategies, trafficking and distribution patterns, and profitability. In addition, the Commission explored the national law enforcement response to cocaine, including the history of enforcement efforts, current federal enforcement policies, and current state sentencing laws. Finally, the Commission used its monitoring database to perform a statistical analysis of drug cases and defendants sentenced in federal courts.

The Commission unanimously concluded in the report that it could not support the current penalty scheme. "Research and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended."

In April 1995, the Commission decided by a 4-3 vote that, while there may be factors associated with crack cocaine distribution that make it more harmful, the guidelines system can respond to that greater harm, and base penalties for similar quantities of crack and powder should be similar. The Commission proposed to amend the drug guideline to add enhancements for weapon use, victim injury, and other changes designed to ensure higher penalties to more dangerous drug offenders. On May 1, 1995, the Commission transmitted to Congress its guideline amendments along with a legislative proposal to amend the statutory minimum penalties.

Subsequently, the House Judiciary Subcommittee on Crime and the Senate Judiciary Committee held hearings on federal cocaine sentencing. On October 30, 1995, pursuant to the procedures set out in the Sentencing Reform Act, Congress passed and President Clinton signed into law legislation disallowing the powder cocaine/crack cocaine and money laundering amendments. In a written statement, the President recognized that unwarranted disparities result from the current law and that an adjustment in the current penalty scheme was justified. He nonetheless rejected the Commission's approach and endorsed further review of the issue by the Commission.

Money Laundering Working Group

most meetings to keep their members informed of major Commission developments. In addition, a representative from the Federal Defenders' office in Washington, D.C., is invited to each meeting.

As part of the Anti-Drug Abuse Act of 1986, Congress created the federal offense of money laundering that prohibits financial transactions using proceeds from unlawful activity. In response, the Sentencing Commission developed guidelines 2S1.1 and 2S1.2 and included them in the initial set of sentencing guidelines that took effect Novem-ber 1, 1987.

The Commission subsequently received public comment criticizing the application of the money laundering guidelines. Some commentators asserted that guideline sentences in money laundering cases were often disproportionately high relative to the seriousness of the offense and, because of inconsistent charging practices by the government, led to unwarranted sentencing disparity. In 1992, the Commission convened the Money Laundering Working Group to assess these concerns.

The working group analyzed relevant statutes, case law, and a sample of presentence reports from cases sentenced during fiscal year 1991 under the money laundering guidelines and issued a detailed report to the Commission in October 1992. In light of the working group's findings, the Commission amended §§2S1.3 and 2S1.4, relating to structuring offenses, effective November 1, 1993. Amendments to §§2S1.1 and 2S1.2, relating to money laundering, were considered by the Commission in that year and again in 1994, but no action was taken.

Meanwhile, the working group continued its analysis of the application and operation of the money laundering guidelines, reviewing subsequent case law and presentence reports that had become available since completion of the initial report. A report of this additional analysis was presented to the Commission in February 1995. In this report, the working group concluded that the anomalies in the operation of the money laundering guidelines were primarily attributable to reliance on inflexible and somewhat arbitrarily determined base offense levels – 20 for "traditional" money laundering cases (*i.e.*, concealment of the illegal source of the funds) and 23 for offenses that "promote" criminal conduct. The group concluded that the inherent rigidity of this approach means that offense levels for the money laundering conduct and for the crime from which the laundered proceeds derived may bear little relationship to each other.

To assure that sentencing under the money laundering guidelines accurately reflects the seriousness of the offense, the working group recommended that the Commission amend §2S1.1 to tie the base offense level to the actual or approximate offense level applicable to the crime from which the laundered proceeds derived. In addition, the working group recommended that this revised base offense level should be increased through specific offense characteristics, where applicable, for concealment, sophistication, and the promotion of additional criminal conduct.

In late April 1995, the Commission voted to amend the money laundering guidelines as recommended by the working group. This amendment, along with other unrelated amendments, was sent to Congress for the statutorily required 180 days of review. Prior to expiration of this review period, Congress passed and the President signed legislation to disallow implementation of the money laundering amendment.

Regarding money laundering, the legislation directs the Department of Justice to submit to Congress a study of its charging and plea practices no later than May 1, 1996. The Commission is directed to comment on the Department's study.

Food and Drug Working Group

The Commission established the Food and Drug Working Group in 1993 to study the application of the guidelines to food and drug offenses and to assess the feasibility of developing organizational guidelines for these offenses. During its first year, the group studied food and drug offenses and the operation of §2N2.1 as it applied to individual defendants. In its second year, the group focused

its attention on the development of organizational guidelines.

In 1995, the group continued its review of the Commission's Monitoring data and case files, expanding its analysis to food and drug defendants sentenced in 1993. Presentence reports were examined for information on how the guidelines operated and whether §2N2.1 would be appropriate for sentencing organizational defendants. In February 1995, the working group submitted to the Commission its final report, which continued the group's findings and conclusions.

On September 5, 1995, the Commission voted to publish for comment the working group's proposals for handling food and drug offenses under the guidelines. The working group concluded that, with minor changes to the fraud guideline, food and drug cases for individuals and organizations could be sentenced appropriately using that guideline. The working group's proposal would delete existing §2N2.1 in its entirety and replace references to that guideline in the statutory index with references to the fraud guideline. To address concerns about risk of harm associated with these offenses, the working group recommended adding an application note to the fraud guideline inviting an upward departure if the offense placed a large number of persons at risk of serious bodily injury.

The Commission also voted to invite comment on whether "gain" should be a substitute for "loss" when the essence of the offense is fraud against regulatory authorities with no economic loss.

Sex Crimes Working Group

The Violent Crime Control and Law Enforcement Act of 1994 directed the Sentencing Commission to submit two reports on sexual crimes to Congress, one analyzing federal rape sentencing and the other willful exposure to HIV. The Commission formed a staff working group to assist in conducting the necessary analyses and preparing the reports.

The working group reviewed relevant case law and legislative history, studied current guideline application, coded and analyzed new information regarding 235 offenders sentenced during fiscal year 1993, and sought information from the general public as well as interested organizations. In March 1995, the Commission submitted to Congress the following two reports: Analysis of Penalties for Federal Rape Cases and Adequacy of Penalties for the Intentional Exposure of Others, through Sexual Activity, to the Human Immunodeficiency Virus.

Principal findings from the report on federal rape cases are: (1) federal rape cases involving multiple assailants are rare; (2) approximately 15 percent of federal sexual assault defendants had a prior conviction for sexual misconduct; (3) comparison of current federal rape sentences with state sentences indicates that federal offenders can expect to serve a longer period of prison confinement; (4) expert comment received to date has indicated that sentence length should be determined by the severity of the attack and the extent of the injury to the victim regardless of whether the assailant was known or unknown to the victim. Additionally, the comment indicates that there appears to be no justification for an increase in federal sentences for rape and other sex offenses above current levels.

Principal findings from the report on willful exposure to HIV are: (1) because intentional exposure of others to HIV occurs so infrequently, it presently does not pose a significant problem for federal sentencing; and (2) current federal law does not specifically criminalize the knowing, intentional exposure of others to HIV through sexual activity. However, if such conduct occurs within federal jurisdiction and is determined to constitute aggravated assault or attempted murder, or occurs during the course of another crime such as sexual assault, it may be punishable under current law.

The Elderly and Child Victims' Working Group

The Commission established an Elderly and Child Victims staff working group to analyze provisions of the 1994 Act regarding assaults against children, crimes of violence against the elderly, telemarketing fraud, and fraud against the elderly.

The Act directed the Commission to: (a) review and, if necessary, amend the sentencing guidelines to ensure that victim-related adjustments for fraud offenses against victims over the age of 55 are adequate; and (b) report to Congress the results of that review. The working group reviewed the legislative history leading to the statutory directive, case law, the operation of the guidelines, and conducted an empirical analysis of relevant sentencing data.

In its report to Congress, the Commission made the following preliminary observations and conclusions: (1) lack of consistently reported information on victim age in case files prevents a comprehensive assessment of the adequacy of guideline sentences in fraud offenses involving older victims; (2) when older victims are defrauded, there is some evidence that courts are using existing sentence enhancement mechanisms under the guidelines, particularly the upward adjustment for offenses involving vulnerable victims; (3) in older victim fraud cases in which the vulnerable victim enhancement applies, courts apparently find the magnitude of the enhancement to be adequate; and (4) based on court sentencing decisions, the threshold at which fraud victims generally are perceived to be vulnerable because of age appears to be substantially greater than age 55.

After review of the group's report and public comment, the Commission added a specific offense characteristic to the simple assault guideline (§2A2.3) requiring a four-level enhancement if the offense resulted in substantial bodily injury to an individual under the age of 16 years.

The Commission also adopted amendments that clarified and broadened the applicability of the Vulnerable Victim guideline and amended its commentary. The Commission added an application note in the Vulnerable Victim guideline providing for an upward departure if the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim.

Substantial Assistance Working Group

As part of its mandate to study sentencing practices under the guidelines, the Commission, in 1995, continued its multi-stage study of substantial assistance practices in the federal courts. The study was prompted by a series of empirical findings, including: (1) a significant increase in the national rate of departure for substantial assistance since 1989 (from 5.8% of all cases in 1989 to 19.5% in 1994); (2) a wide variation in the rate of substantial assistance departures among circuits and districts; and (3) considerable differences in the extent of departures granted by the courts at sentencing for these cases.

The working group's 1995 efforts included:

- concluding the last six site visits of a planned eight-site tour of selected districts to interview judges, probation officers, prosecutors, and defense attorneys about substantial assistance practices;
- completing telephone interviews with assistant U.S. attorneys to obtain additional information about a random sample of substantial assistance cases;
- completing an extensive case review and analysis of a random sample of conspiracies in which at least one codefendant received a substantial assistance departure;
- completing a detailed analysis of substantial assistance departures based on Commission data; and
- concluding an analysis of case law and a review of relevant literature.

The working group spent several months analyzing the data from the various sources and drafting a preliminary report. In the fall of 1995, the group presented orally its initial findings to the Commission.

Guideline Simplification

In the Spring of 1995, the Commission identified comprehensive review of the sentencing guidelines as a top agency priority. The Commission believes such a review is timely, given the vast amounts of information available from the more than 250,000 cases sentenced under the guidelines during the past eight years, numerous appellate opinions on various guidelines issues, the growing body of academic literature and public comment, and the extensive empirical analysis of the guidelines conducted to date.

The objective of this comprehensive review of the guidelines is to improve federal sentencing by working closely with the judiciary and others to simplify and refine the guidelines. In this process, Commission staff will assess each major section of the guidelines, critique application complexities, and develop options for commissioner consideration.

Guideline complexity derives, in part, from fundamental decisions made by the original Commission in its effort to meet the Sentencing Reform Act's twin goals of assuring that the purposes of sentencing are met (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation) and providing certainty and fairness in meeting the purposes of sentencing while avoiding unwarranted disparities between similarly situated defendants (*see* 28 U.S.C § 991(b)(1)). To ensure that the ramifications of all options for change are clear, staff will highlight the broader policy implications of all options (*e.g.*, its effect on proportionality or a judge's ability to individualize sentences).

In the first phase of the simplification process, staff working groups are preparing concise briefing papers on major guideline topics to provide a foundation for Commission consideration of relevant issues and possible options for refinement. Each paper will: (1) review the history behind the original policy decision so as to ensure that the Commission is sensitive to the underlying principles and the impact of any revisions on these principles; (2) assess how the particular guideline is working; (3) identify how state sentencing commissions have addressed similar issues; (4) summarize information that might assist the Commission's decisionmaking; and (5) outline broad options for refinement.

These papers will provide sound bases for commissioners, staff, and the public to understand the current guidelines and assess any proposals for change. In 1995, Commission staff planned papers on the following topics:

- Sentencing Reform Act and Subsequent Sentencing Legislation
- Relevant Conduct
- Criminal History
- Level of Detail in Chapter Two
- Chapter Three Adjustments
- Departures/Offender Characteristics
- Drug Sentencing
- Sentencing Options
- Multiple Counts

As one part of its review, the staff will examine how state guideline systems have addressed issues that judges and practitioners have found particularly complex in the federal system. Throughout the process, the Commission plans to consult closely with judges and practitioners and solicit a wide variety of public comment from the Criminal Law Committee of the Judicial Conference, Practitioners and Probation Officers Advisory Groups, Department of Justice, Federal and Community Defenders, the private defense bar, and others.

Guideline Assessment

The Commission began a program of assessment in 1995 to help inform its simplification efforts. Apart from the Commission's own 1991 evaluation and a study by the General Accounting Office, both of which were conducted shortly after full guideline implementation, there have been few comprehensive assessments of the guideline system. As the ten-year anniversary of the guidelines approaches, the Commission thinks it appropriate to undertake a systematic look at the effectiveness of the guidelines.

A primary purpose of the Sentencing Reform Act is to reduce unwarranted disparity. The Commission has undertaken two new studies to assess whether this goal has been achieved. Research in the preguidelines era showed that judges with different sentencing philosophies imposed different sentences. The Commission is comparing sentences in the preguidelines and guidelines eras among judges who receive similar cases. This comparison will help the Commission assess whether the guidelines have reduced variations in sentences due to different judicial philosophies.

In addition, there was, and continues to be, widespread public concern over whether racial stereotypes or unconscious bias may distort sentences unfairly against minorities. Under the guidelines, race, gender, or socio-economic status are not appropriate sentencing factors nor are they permissible bases for choosing a point in the sentencing range or for departing from the guidelines. In 1995, the Commission received research from its own staff and from others that showed that Whites and Blacks continue to show differences in average sentences of between five to ten percent, even after controlling for differences in the criminal histories and in the seriousness of the offenses committed by these groups.

Some commentators have suggested that these differences might not represent unwarranted disparity, but instead be due to some legally relevant factor that was not adequately measured in the studies. For example, differences in the way that persons use weapons while committing crimes may help explain some of the differences that have been found. Accordingly, the Commission determined that further assessment was needed before it could conclude that any action was required to remedy the situation. A multivariate analysis of differences in sentences among racial and gender groups that controls for additional explanatory factors has been undertaken for completion in 1996.

The relevant conduct guideline has been one of the most controversial provisions in the sentencing guidelines. Critics have noted that criminal conduct beyond the offense of conviction can in some cases greatly increase sentences. To assess the magnitude of this effect, the Commission is examining a large sample of cases and comparing the sentence under the current relevant conduct guideline with the sentence that would apply to the offense of conviction alone. This will allow the Commission to learn how frequently sentences are enhanced for non-conviction conduct and the typical magnitude of enhancements when they occur.

Implementation of the guidelines significantly affected the use of sentencing options in the federal courts. The numbers of offenders receiving probation dropped while the use of imprisonment climbed. The guidelines were promulgated during a time when intermediate sanctions, such as home confinement, were becoming increasingly available but were still untested. The Commission is assessing whether the sentencing options provided in the guidelines are working to ensure efficient use of prison resources and to ensure effective punishment for offenders, such as white collar criminals, who often received only probation in the preguidelines era. This research measures the number of offenders who receive alternatives to imprisonment. It also examines how many offenders who are eligible for alternatives do not get them, and investigates why.

Criminal history, along with offense seriousness, is a primary basis for sentences under the guidelines. It serves an important purpose – identifying of-

fenders who are most likely to commit new offenses so that they can be kept in prison longer. The Commission is assessing the current system for assigning offenders to criminal history categories to ensure that the system (1) is accurate in identifying the most dangerous and violent offenders, and (2) has not incorporated in its criminal history measure racial or gender disparities of the past.

To assess the guidelines in terms of these and other important issues, the Commission began planning for an intensive study of a large random sample of 1995 cases, to be completed in 1996. This Intensive Study Sample will supplement routinely collected monitoring data with detailed data on offenders' criminal history, the characteristics of their present crimes, and procedural features of their cases. This database will enable the Commission to conduct the most comprehensive evaluation of the guidelines yet undertaken.

Table 2
WITNESS LIST: PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES
Public Hearing – Washington, D.C.
March 14, 1995

Judge Gladys Kessler
Judge Patricia Wald
Judge Brenda Murray
National Association of Women Judges

Ambassador Anthony C.E. Quainton
U.S. Department of State

Abe Clott
Federal Public and Community Defenders

Jay McCloskey
U.S. Department of Justice

Arthur Curry
Francis Kay Meade
Renee Patterson
Robert Lantz
Families Against Mandatory Minimums

Juanita Hodges
Seekers of Justice Equality and Truth

Fred Richardson
Society for Equal Justice

Nicole Isom

Patrick Brown

Angela Jordan Davis
National Rainbow Coalition

Nkechi Taifa
American Civil Liberties Union
Committee Against the Discriminatory Crack Law

Mary Lou Soller
American Bar Association

James Wyatt
North Carolina Academy of Trial Lawyers

Jack Tigue
New York Council of Defense Lawyers

Barry Taylor
Lambda Legal Defense and Education Fund

Jeffie Massey

Barbara Goodson

Isaac Jaroslawicz
The Aleph Institute

David Webber
National Association of People with AIDS

Julie Stewart
Families Against Mandatory Minimums

David Yellen
Hofstra University School of Law

Mary Shilton
International Association of Residential and Community Alternatives

Dr. Nancy Lord
Lawyers for Liberty

Lennice Werth

Ed Rosenthal
Marvin Miller
National Organization for the Reform of Marijuana Laws

Robert Kampia
Marijuana Policy Project

Peggy Edmundson
Jeff Stewart
David Boaz
Families Against Mandatory Minimums

Lyle Yurko

Reverend Andrew Gunn

Teresa Aviles