



# Guidelines

News from the U.S. Sentencing Commission

March 2003

## Nominations Pending Before Senate

President George W. Bush has nominated United States District Court Judge Ricardo H. Hinojosa and former Deputy Assistant Attorney General Michael E. Horowitz to six-year terms as members of the U.S. Sentencing Commission. Mr. Horowitz, currently a partner with the law firm of Cadwalader, Wickersham & Taft, was also chief of staff for the Criminal Division of the U.S. Department of Justice and served in various posts at the U.S. Attorney's Office in New York. He has been named to fill the position vacated by United States District Court Judge Sterling Johnson, Jr., whose term expired on November 22, 2002.

Judge Hinojosa, who has served on the U.S. District Court for the Southern District of Texas since 1983, is also currently an adjunct professor at the University of Texas at Austin Law School. He graduated with honors from the University of Texas at Austin and earned his law degree from Harvard Law School. He has been named to fill the position vacated by Joe Kendall, former United States district court judge from the Northern District of Texas, whose term also expired on November 22, 2002.

By statute, the Sentencing Commission is composed of seven voting members and two nonvoting ex-officio members. No more than four commissioners may be members of the same political party, and at least three shall be federal judges selected after considering a list provided to the President by the Judicial Conference of the United States. ■

## Sentencing Commission Stiffens Penalties for White Collar Crime

### Agency Also Addresses Campaign Finance Reform

Acting under emergency authority granted by Congress in the Sarbanes-Oxley Act of 2002, the Commission on January 8, 2003, voted unanimously to stiffen penalties significantly for corporate fraud and other serious white collar fraud offenses. The Sentencing Commission worked diligently to respond to Congress in an abbreviated time frame, and the emergency amendments to the sentencing guidelines became effective January 25, 2003.

The emergency amendments provide significant sentencing enhancements for white collar offenses that affect a large number of victims or endanger the solvency or financial security of publicly traded corporations, other large employers, or 100 individual victims. Officers and directors of publicly traded corporations who commit securities violations are targeted for particularly substantial increases in penalties. For example, an officer of a publicly traded corporation who defrauds more than 250 employees or investors of more than \$1 million will receive a sentence of more than 10 years in prison (121-151 months) under the emergency amendment, almost double the term of imprisonment previously provided by the guidelines. "These are just emergency amendments to be in effect until November 1," said Judge Murphy. "Congress gave the Commission a brief period to create them, but we also have an ongoing separate process to create permanent

*Penalties Continued on page 3*



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Judge Sterling Johnson, Jr. (left) and Joe Kendall (right) receive thanks for their service to the Commission from Judge Diana E. Murphy, Commission chair (center).

# Message from the Chair



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Honorable Diana E. Murphy, chair of the United States Sentencing Commission; judge, United States Court of Appeals for the Eighth Circuit

The Commission largely does its work away from the spotlight of major media, but recent action attracted considerable national coverage on emergency guideline amendments on corporate crime and the Commission's report and recommendations to Congress on cocaine sentencing policy. In January of this year the Commission voted to increase penalties for white collar crime and campaign finance violations, acting on emergency amendment authority under the Sarbanes-Oxley Act of 2002 and the Bipartisan Campaign Finance Act of 2002, and reporters from *The New York Times*, *The Washington Post*, the Associated Press, the *Financial Times*, and CBS all attended the public meeting at which the Commission voted. In October I had a half hour appearance on CSPAN to discuss the Commission's work on cocaine sentencing and its comprehensive study released last May. Several of the callers asked particularly knowledgeable questions and reflected the public interest in the impact of our work on many lives.

The Commission's ad hoc advisory group on Native American sentencing issues has met regularly by conference call since its organizational meeting in Washington on June 18, 2002, and they will meet in Arizona in February. The group has divided into four subgroups examining issues related to murder and manslaughter, sex offenses, assault, and drafting. The group's work is especially timely in light of inquiries the Commission recently received from Senators Hatch, Kyl, Feinstein, and Reid regarding manslaughter penalties.

The ad hoc advisory group on the organizational guidelines received numerous letters of public comment in response to its August 22, 2002 solicitation, and held an impressive public hearing in Washington, D.C. on November 14, 2002. Copies of the public comment, speaker testimony, and a transcript of the hearing are available on the Commission's website at [www.ussc.gov/corp/advgrp.htm](http://www.ussc.gov/corp/advgrp.htm). A preliminary report from the group is expected in the spring of 2003.

The Commission's 15 year review of the guidelines, which includes the report on cocaine sentencing policy, is well under way. Articles in this newsletter describe two other important components – the Commission's survey of federal judges and a comprehensive examination of recidivism data on federal offenders. The Commission recently published a summary of the judicial survey results and has received positive feedback on it. The Commission is also working on updating its 1992 report to Congress on mandatory minimum penalties.

The commissioners continue to speak about guidelines issues in a variety of fora. Vice Chairs Castillo and Steer will speak at the Practising Law Institute advanced seminars on corporate compliance, and Vice Chair Steer will also speak to the Defense Research Institute. Vice Chair Castillo also will speak to the Health Care Compliance Association in February and the American Bar Association (ABA) white collar crime symposium in March. Judge Castillo has just published an article on federal sentencing in *Litigation* magazine, and appeared at a Florida Bar Association seminar in January. Vice Chair Sessions will speak to Bureau of Prisons treatment providers at a conference in Baltimore. Commissioner O'Neill will speak about sentencing and recidivism at an American Law Institute program at the University of Pennsylvania in March and is scheduled to speak about criminal history at the University of Wisconsin. Finally, I recently spoke about the guidelines to the Iowa State Bar Association. ■

## Guidelines

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Penalties *continued from page 1*

amendments, which we will be voting on in April of this year. Interested people will get another bite at the apple.”

As part of its response to the emergency directives contained in the Sarbanes-Oxley Act, the Commission also voted to increase penalties significantly for offenders who obstruct justice by destroying documents or records. Under the emergency amendments, defendants who substantially interfere with the administration of justice by shredding a substantial number of documents or especially probative documents will receive a guideline sentencing range of approximately three years' imprisonment (30-37 months). Prior to this amendment, such an offender could receive a sentence as low as 18 months of imprisonment.

The increase in penalties comes in addition to those generated by the Commission's comprehensive, economic crime package, effective November 2001. That package of amendments increased penalties for high-dollar frauds or thefts and helped reduce unwarranted sentencing disparity by consolidating earlier guidelines on theft, fraud, tax offenses and property destruction. In addition, in February 2002, the Commission formed an ad hoc advisory group of national experts to review the general effectiveness of the federal sentencing guidelines for organizations. The advisory group is expected to complete its work in the summer of 2003.

The Commission also promulgated a new emergency guideline to be used in calculating sentences of violators of the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002. These offenses generally constitute violations involving the amount of money an individual, corporation, political action committee, or national political committee may contribute to a federal political candidate or campaign. In response to a congressional directive, the Commission established a new guideline that provides significantly increased sentences for such campaign finance offenders. For an update on the Commission amendment process for 2003, log in at [www.ussc.gov](http://www.ussc.gov). ■

## Commission Training Efforts Continue

Commissioners and staff continue to respond to an ever-increasing number of requests to provide training and educational programs on the sentencing guidelines and related sentencing issues. During the past year, the Commission presented numerous in-district programs for judges, probation officers, defense attorneys, and prosecutors. In addition, the Commission has worked collaboratively with other agencies to present academy-based training such as educational seminars at the Department of Justice's National Advocacy Center and the Federal Judicial Center's orientation programs for new judges and probation officers. University students, paralegals, U.S. Senate interns, law clerks, corporate compliance officers, and foreign dignitaries have all benefitted from educational opportunities provided by commissioners and staff.

A highlight of the coming year's training schedule is expected to be the Twelfth Annual National Seminar on the Federal Sentencing Guidelines, to be held in Miami, Florida, May 28-30. Co-sponsored by the Commission and the Federal Bar Association, attendance at these annual seminars typically exceeds 400 persons.

Training *continued on page 4*

## Commission's Recidivism Study Underway

Data from more than 6,000 cases have now been extracted from federal sentencing documents as part of the Commission's ongoing Criminal History/Recidivism Study. The study's goal is to measure the relationship between the guideline's criminal history computation and offender recidivism. The study hopes to identify the types of offenders more and less likely to recidivate and to assess the guidelines' Criminal History provisions as predictors of future criminal behavior.

The study is using pre-sentence reports to obtain data on each offender's personal characteristics and criminal history (including dates, offense characteristics, and sentence information). The project will obtain recidivism measures from federal agencies that are involved with post-sentencing activities. From the FBI's National Criminal Information Center's "rap sheet" data, the study will obtain post-release arrests and convictions; from the Bureau of Prisons SENTRY datafile, the study will get prison release dates and information about offenders while in prison; and from the Administrative Office of the U.S. Courts's supervision datafile, the study will obtain data on offender behavior during probation or supervised release.

The data extraction phase of the study has been completed, and the project will now turn its attention to developing a final recidivism model. The Commission will consider the following when designing a final methodology for the review, including (1) assessments of the predictive power of the current guidelines' Criminal History Category, (2) measures of the best predictors of recidivist behavior, and (3) redefinitions of the criminal history score to improve recidivism predictions. ■

## Judges Surveyed About Sentencing Guidelines

In December 2002, the Commission released the results of a survey of judges regarding the guidelines. The survey was sent to all Article III judges; 51.8 percent of district judges and 33.9 percent of circuit judges responded. The survey found that both district and circuit judges believed that the guidelines have been relatively effective in –

- providing punishment levels that reflect the seriousness of the offense,
- providing adequate deterrence to criminal conduct,
- protecting the public from further crimes of the defendant, and
- avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

A majority of both district and circuit judges indicated two areas in which the guidelines were less effective:

- providing defendants with training, medical care, or treatment in the most effective manner, where rehabilitation was appropriate and
- maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.

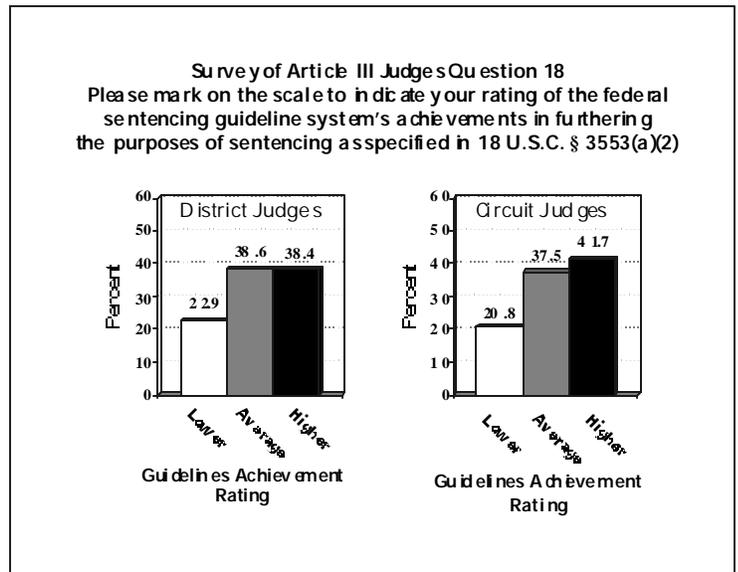
Most judges believed that the sentencing guidelines “almost always” maintained neutrality regarding the offender’s religion or creed (approximately 90%), while fewer judges believed that there was “almost always” neutrality with regard to offender race (62%-68%) and socioeconomic status (54%-60%). Substantially less than 30 percent of responding judges reported that the guidelines “almost always” avoided unwarranted disparity. Most of the judges were positive about the availability of alternatives to incarceration and did not want to see this availability reduced. The survey results also demonstrated that district and circuit court judges often hold strikingly similar opinions about how the guidelines reflect the Commission’s legislative mandates. ■

Training *continued from page 3*

The Commission’s in-district training effort continues to focus on circuit-wide training as the model for reaching the greatest number of participants while delivering high quality training in the most cost-effective manner. A circuit-wide program will often include more than 100 participants such as judges, probation officers, defense attorneys, and prosecutors, representing several districts within a circuit. During the past two years, the Commission has provided circuit-wide training in most of the judicial circuits. Most recently, training has been conducted in the Second, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits.

Sentencing commissioners have joined Commission staff at many of the circuit-wide programs to address recent amendments to the guidelines and to share their perspectives and views on the guidelines and related sentencing issues. Training topics have included new guideline amendments relating to economic crimes, money laundering, and immigration offenses as well as sentencing guidelines and case law issues pertaining to drug and sex offenses. Participants have the opportunity to discuss these issues in depth with commissioners and staff, with the use of fact-based scenarios. In addition, participants are provided with the most current Commission training materials.

If you would like to obtain more information about the Sentencing Commission’s training programs, please contact Margaret Olaghere, training coordinator at the Commission’s Office of Education and Sentencing Practice, at (202) 502-4540. ■



To read the summary report, which includes tables for all survey responses, please access [www.ussc.gov/publicat/jsurvey02.pdf](http://www.ussc.gov/publicat/jsurvey02.pdf).