



Guidelines

News from the U.S. Sentencing Commission

July 2001

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Guidelines Covering 26 Areas Submitted to Congress

Commission Completes Aggressive Agenda; Resolves 19 Circuit Conflicts in First Full Amendment Cycle

On May 1, 2001, the Commission completed its first full amendment cycle and submitted to Congress a large package of guideline amendments covering 26 areas. These amendments will become effective November 1, 2001, absent congressional action. The package of amendments completes an aggressive agenda for the Commission this year that was more than twice as large as the previous cycle. The amendments include responses to nine new congressional directives (five with emergency amendment authority) and, for the first time in years, leave no directives awaiting implementation by the Commission. The Commission also resolved 19 circuit conflicts.

The amendments generally are designed to promote greater proportionality by targeting the worst and most culpable offenders, while allowing for sentencing flexibility for first-time, nonviolent, and less culpable defendants. This approach was evident in a number of amendments related to economic crimes. A multi-part, comprehensive economic crimes package includes a new loss table that significantly increases penalties for high-dollar loss amounts, but

Amendments *continued on page 4*

The official text of the proposed amendments sent to Congress is available on the Commission's website at:

<http://www.ussc.gov/2001guid/congress2001.PDF>.

A "reader-friendly" version is also available. The web address is:

<http://www.ussc.gov/2001guid/userfriendly2001.pdf>.

[Photos not available online. To receive a copy of this newsletter, including all graphics, please contact the Publications Request Line: (202) 502-4568.]

Message from the Chair

The new Sentencing Commission has been working together for approximately 19 months. We have become a seasoned Commission, and the commissioners now have a clearer understanding of each other, the amendment process, and the complexity of our work. We have learned the importance of fostering a cooperative environment, of listening to one another's views before becoming set on our own, and of working together to arrive at consensus where possible. This is no easy task. As chair, it has been my most important responsibility to keep us moving forward together as one body. Any success we have had is due to our joint commitment to make the guideline system better, in keeping with the goals of the Sentencing Reform Act.

On May 1, 2001, the Commission submitted to Congress a very large group of amendments covering 26 areas. They are described in some detail in this newsletter, and you may see the complete amendment package on our website. Since our appointment, the Sentencing Commission has followed a demanding schedule in order to clear the backlog of work that accumulated during the long period of vacancies and to address other priority issues. We have become ever more convinced that we need to set priorities for those topics we think most important to address to fulfill the goals of the Act.

Generally, the public hearings held by the Commission are in Washington, D.C., but on June 19, 2001, we held a public hearing in Rapid City, South Dakota, in response to a request from the South Dakota Advisory Committee to the United States Commission on Civil Rights. The Committee, in its report to the Civil Rights Commission, expressed concern about the impact of the federal sentencing guidelines on Native Americans in Indian Country who are prosecuted in federal court for crimes that otherwise would be brought under state law. The Commission heard testimony from seven tribal chairs and other tribal representatives and witnesses with various perspectives of the sentencing process, including judges, prosecutors, defenders, and victim advocates. The speakers were well prepared and informative. We will follow up in a number of ways, starting by tailoring a guideline training program to meet needs expressed at the hearing.

—Judge Diana E. Murphy

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

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Tentative Calendar of Public Meetings

For your convenience, meeting agendas and materials can be accessed via the Commission's website: www.ussc.gov/meeting.htm. All meetings are held in Washington, DC, unless otherwise noted. Dates may be subject to change.

- August 28
- September 25
- October 26
- November 14
- December 4
- January 9, 2002

Commission Holds Public Hearing in South Dakota

On June 19, 2001, the Sentencing Commission held a public hearing in Rapid City, South Dakota, in response to the March 2000 Report of the South Dakota Advisory Committee to the United States Commission on Civil Rights, which recommended that an assessment of the impact of the United States sentencing guidelines on Native Americans in South Dakota be undertaken. The recommendation was based on the widespread perception in South Dakota that Native Americans, by virtue of being subject to federal prosecution and sentencing rather than state prosecution and sentencing, receive harsher sentences under the federal guidelines than they would under a similar state sentence. The purpose of the hearing was to provide the Commission with an opportunity to hear from various witnesses who have first-hand experience with the process of criminal investigation, prosecution, and sentencing in South Dakota and the federal sentencing guidelines. Approximately 100 people attended the hearing.

Testimony was presented by four panels of witnesses. The first panel, moderated by Elsie Meeks, commissioner on the U.S. Commission on Civil Rights, was comprised of four of the nine tribal chairs from the state: John Yellow Bird Steele, president of the Oglala Sioux Tribe; William Kindle, president of the Rosebud Sioux Tribe; Gregg Bourland, chair of the Cheyenne River Sioux Tribe; and Tom Ranfranz, chair of the Flandreau Santee Sioux Tribe. Three tribal elders testified on the second panel: Germain E. Means from the Cheyenne River Sioux Tribe, Denver American Horse of the Lakota Traditional Government, and Harold Frazier of the Cheyenne River Sioux Tribe. The third panel, moderated by Chief U.S. District Judge Lawrence L. Piersol, included Michelle G. Tapken, interim U.S. attorney for South Dakota; Marlys Pecora, victim witness specialist from the U.S. Attorney's Office; Ted McBride, a private attorney; Robert Van Norman, federal public defender; and Lisa Thompson, executive director of the Child Advocacy Center at Fort Thompson. Professor Frank Pommersheim of the University of South Dakota School of Law, Terry Pechota, a private attorney, and Marty Hansford, district manager of the Bureau of Indian Affairs testified on the fourth panel.

Several common themes were presented by the witnesses, including examples of disparate sentencing, the need for federal judges to have more flexibility or discretion in sentencing, the notion that tribal courts should have jurisdiction over some felonies, and the idea that first-time offenders receive suspended or deferred sentences in conjunction with drug/alcohol treatment. The victims rights witnesses cautioned that the victims of crime, many of whom are Native American, should not be forgotten in the discussion of any proposed changes to the guidelines. One victims rights witness testified that she had never worked with a victim who believed that the federal guidelines were too harsh. At the conclusion of the hearing, Chair Diana E. Murphy said that the Commission would take under advisement all testimony and written comment. She also stated that the Commission would contemplate providing additional training on the federal sentencing guidelines for defense lawyers. ■

"The purpose of the hearing was to provide the Commission with an opportunity to hear from various witnesses who have first-hand experience with the process of criminal investigation, prosecution, and sentencing in South Dakota and the federal sentencing guidelines."

Amendments *continued from page 1*

gives judges greater discretion in sentencing defendants with relatively low loss amounts so that they may be eligible for a split sentence, perhaps allowing them to continue working to pay restitution. The package also simplifies guideline application for economic crimes by consolidating the guidelines for theft, property destruction, and fraud into one guideline that has one unified definition of loss for these crimes that includes all “reasonably foreseeable pecuniary harm” and by resolving 12 circuit conflicts. These changes are expected to make sentencing economic crime offenders simpler and fairer.

Money Laundering Guideline Revamped

The Commission also passed a comprehensive change to the money laundering guidelines by consolidating two previous guidelines into one guideline that applies to convictions of both 18 U.S.C. § 1956 and § 1957. This amendment promotes proportionality by resulting in increased penalties for defendants who launder funds derived from more serious underlying criminal conduct (*e.g.*, drug trafficking, crimes of violence, and fraud offenses that generate relatively high loss amounts) and decreased penalties for defendants who launder funds derived from less serious underlying criminal conduct (*e.g.*, basic fraud offenses that generate relatively low loss amounts). In order to achieve this objective, the new guideline separates money laundering offenders into two categories: direct money launderers (offenders who commit or would be accountable under guideline section 1B1.3(a)(1)(A) (Relevant Conduct) for the underlying offense that generated the criminal proceeds) and third-party money launderers (offenders who launder the proceeds generated from underlying offenses committed by others). The guideline also contains enhancements specifically applicable to each type of offender.

The economic crimes amendment package simplifies guideline application for economic crimes by consolidating the guidelines for theft, property destruction, and fraud into one guideline.

Counterfeiting Penalties to Reflect Advances in Technology

The Commission also amended the counterfeiting guideline to account for recent technological advances that have made committing this offense easier and more widespread. Specifically, the amendment provides greater punishment for manufacturers of more than \$70,000 of counterfeit currency and for specific statutory violations that make the counterfeit item more passable and the offense more sophisticated. The amendment also deleted language stating that manufacturing does not include “merely photocopying” because passable counterfeit currency now can be made with digital photocopying equipment.

Adjustments in Drug Offenses Answer Congressional Directives

The amendments respond to several congressional directives relating to drugs. Specifically, the Commission significantly increased penalties for the manufacture, importation, exportation, or trafficking of MDMA, commonly known as ecstasy. The new penalty structure targets serious traffickers and high-level traffickers and reflects the powerful pharmacological effects of the drug, the physical harm that can result from its use, and the fact that it is marketed to our youth. The Commission also modified the drug guideline so

that the same quantities of amphetamine and methamphetamine will result in the same base offense levels because the two drugs are chemically similar, are produced and trafficked similarly, and have similar effects. The Commission also added a new enhancement for methamphetamine and amphetamine manufacturers who cause substantial risk of harm to human life, the environment, minors, or incompetents, and increased penalties for List I chemical precursors to these two drugs. Also included are increased penalties for Schedule I and Schedule II depressants, including the “date rape drugs” GHB and flunitrazepam.

Also in the drug area, the Commission expanded the availability of the two-level reduction in guideline 2D1.1 for less serious drug offenders who meet the criteria for the safety valve. In the past, the reduction was available only to offenders who received an offense level of 26 or greater. The Commission deleted the level 26 requirement because it determined that prohibiting defendants with a lower offense level from the benefits of this reduction is inconsistent with the purpose of the safety valve which is to provide less punishment for first-time, nonviolent offenders.

Circuit Conflicts Resolved

One circuit conflict that the Commission resolved concerned the eligibility for a mitigating role adjustment in the context of a drug offense. Some courts had held that a defendant who is sentenced only for the amount of drugs the defendant personally handled is not eligible for a mitigating role adjustment under guideline 3B1.2 (Mitigating Role), but other courts did not automatically preclude a defendant from consideration for a role reduction in such a case. The Commission adopted an approach that allows the court to apply traditional analysis on the applicability of a reduction pursuant to section 3B1.2, even in a case in which the defendant is held liable under relevant conduct only for the drug quantities in which the defendant was personally involved. Although the circuit conflict arose in the context of a drug offense, the amendment resolved it in a manner that makes the rule applicable to all types of offenses.

Illegal Re-Entry Guideline Amended

The Commission also passed an amendment to the illegal re-entry guideline in response to concerns raised by judges, probation officers, and defense attorneys, particularly along the southwest border, that disproportionate penalties often resulted from the 16-level enhancement that applied to all defendants who had a prior conviction for an aggravated felony, regardless of the seriousness of that prior offense. This amendment provides a more graduated sentencing enhancement of between eight and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. In doing so, the Commission determined that the full 16-level enhancement is warranted if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for certain serious offenses (specifically, a drug trafficking offense for which the sentence imposed exceeded 13 months, a crime of violence, a firearms offense, a national security or terrorism offense, a human trafficking offense, and an alien smuggling offense committed for profit).

Now Available Online at

http://www.ussc.gov/PDF/mdma_final2.PDF:

Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendments – May 2001.

(This report was submitted to Congress pursuant to section 3663(e) of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. No. 106-310.)

Amendments *continued from page 5*

Crimes Against Persons to Receive Stiffer Penalties

The amendments also address several crimes that deal with abuse of persons. The Commission completed its response to several directives pertaining to sexual offenses against children. The amendment creates a new Chapter Four criminal history guideline (4B1.5) that creates a tiered approach to punishing repeat child sex offenders and significantly increases penalties for offenders who engage in a pattern of activity of sexual abuse or sexual exploitation of a minor. The Commission also added sentencing enhancements and encouraged upward departure provisions for human trafficking offenses and increased the base offense level for stalking and domestic violence offenses. ■

Tenth Annual National Guidelines Seminar Well Attended

More than 400 federal judges, U.S. probation officers, and attorneys attended the Tenth Annual National Seminar on the Federal Sentencing Guidelines. The seminar, co-sponsored by the United States Sentencing Commission and the Federal Bar Association, was held May 16-18, 2001, in Palm Springs, California.

The seminar was highlighted by a plenary panel entitled “Meet the Sentencing Commission” in which the sentencing commissioners discussed the work of the agency (including the proposed amendments to the sentencing guidelines sent to Congress on May 1, 2001). In a second plenary panel, four district court judges shared their views from the bench on the topic of effective guidelines advocacy. On a third, a panel of experts discussed the impact of the Supreme Court’s decision in *Apprendi v. New Jersey* and reviewed the case law that continues to develop as a result of the opinion. The seminar also featured concurrent presentations on a variety of topics including the fraud and theft guidelines, restitution, relevant conduct, drug offenses, multiple counts, pornography offenses, organizational guidelines, firearms, immigration offenses, criminal history, tax and money laundering offenses, plea bargaining, technology offenses, appellate advocacy, Chapter Three adjustments, and Bureau of Prisons issues. This year’s agenda also included a presentation on the goals of sentencing reform as well as a session on criminal justice research focused on sentencing data and trends in federal sentencing practice.

Although the seminar was primarily geared toward the experienced practitioner, its first day offered introductory sessions on how to apply both the guidelines for individuals and the guidelines for organizations. The seminar also afforded the opportunity for probation officers, defense attorneys, and prosecutors to meet in their respective groups to discuss issues of special concern. Welcoming remarks were delivered by the Commission’s chair, Judge Diana E. Murphy, and Mr. James E. Felman, Esq., of the Federal Bar Association. Mr. Felman, along with Pamela G. Montgomery, director and chief counsel of the Commission’s Office of Education and

Practitioners and Probation Officers Advisory Groups Take Active Roles

The Commission's Rules of Practice and Procedure (Rule 5.4) designate the Practitioners Advisory Group and the Probation Officers Advisory Group as standing advisory groups to the Commission. These groups were formed in an effort to obtain systematic input on how the guideline system is working and how the guidelines might be improved.

The Practitioners Advisory Group (PAG), composed of approximately 50 practicing attorneys, provides defense bar perspectives on Commission policies, sentencing procedures, proposed guideline amendments, and Commission initiatives generally. Representatives of the National Association of Criminal Defense Lawyers (NACDL), the American Bar Association Committee on Corrections and Sentencing, and the Federal Defender office in Washington, D.C., attend most meetings to keep their constituencies informed of major Commission developments.

The current co-chairs of the PAG are Barry Boss, a partner with Asbill, Junkin, Moffitt & Boss, in Washington, D.C., and James Felman, a partner with Kynes, Markman & Felman, in Tampa, Florida. Contact information about the PAG can be found on their website at www.geocities.com/usscpag.

During the annual amendment cycle, the most active 15-20 group members meet monthly at the Commission's offices, often with several of the members participating by conference call from other cities. A Commission staff representative serves as a liaison with the group, keeping members up to date on the Commission's activities, priorities, and major initiatives. The leaders of Commission staff policy teams provide substantive briefings to PAG members as requested.

PAG plays an active role in the amendment process, assigning a group member (or subcommittee) to track the progress of each of the Commission's staff policy teams. This group member later takes the lead in preparing proposed input to the Commission on that subject matter for full PAG consideration as it readies its response to the Commission's call for public comment in the *Federal Register*. One or more PAG members, usually including at least one of the co-chairs, attend the Commission's public meetings and provide formal and informal input as appropriate. Traditionally during the amendment cycle, PAG has at least one meeting with the full Commission to provide more interactive input on pending or upcoming issues.

The Probation Officers Advisory Group (POAG) was established in June 1992 to assist the Commission in carrying out its statutory responsibilities and to represent U.S. probation officers (USPOs) in the area of sentencing. The group reports to the Commission its observations on the operation of the sentencing guidelines, any proposed amendments, and other sentencing issues.

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POAG also provides feedback and disseminates information regarding sentencing issues to the probation officers.

The group generally meets twice per year at the offices of the Commission. A meeting is held during the summer to provide the Commission with information for setting its agenda for the upcoming amendment cycle. A meeting is also held in February or March to allow for comment on specific amendments under consideration by the Commission.

POAG is composed of one representative from each judicial circuit, plus an additional officer from the Fifth, Ninth, and Eleventh Circuits (due to the size of these three circuits). POAG also has two non-voting members: one representative from the Federal Corrections and Supervision Division of the Administrative Office of the U.S. Courts and one representative from the Federal Probation and Pretrial Officers Association (FPPOA). The members serve three-year terms (or at least six POAG meetings). At the end of a representative's term, the outgoing circuit representative will solicit a candidate from each district in his or her circuit. The candidates will submit letters of interest to the outgoing member who then consults with the Commission to select a successor.

The following is a list of the current representatives to the Probation Officers Advisory Group. The list may also be found on the U.S. Sentencing Commission website (www.ussc.gov). POAG has a link on the Commission's homepage which contains the charter, a list of representatives with their contact information, and minutes of POAG's meetings. ■

2001 Probation Officers Advisory Group Members

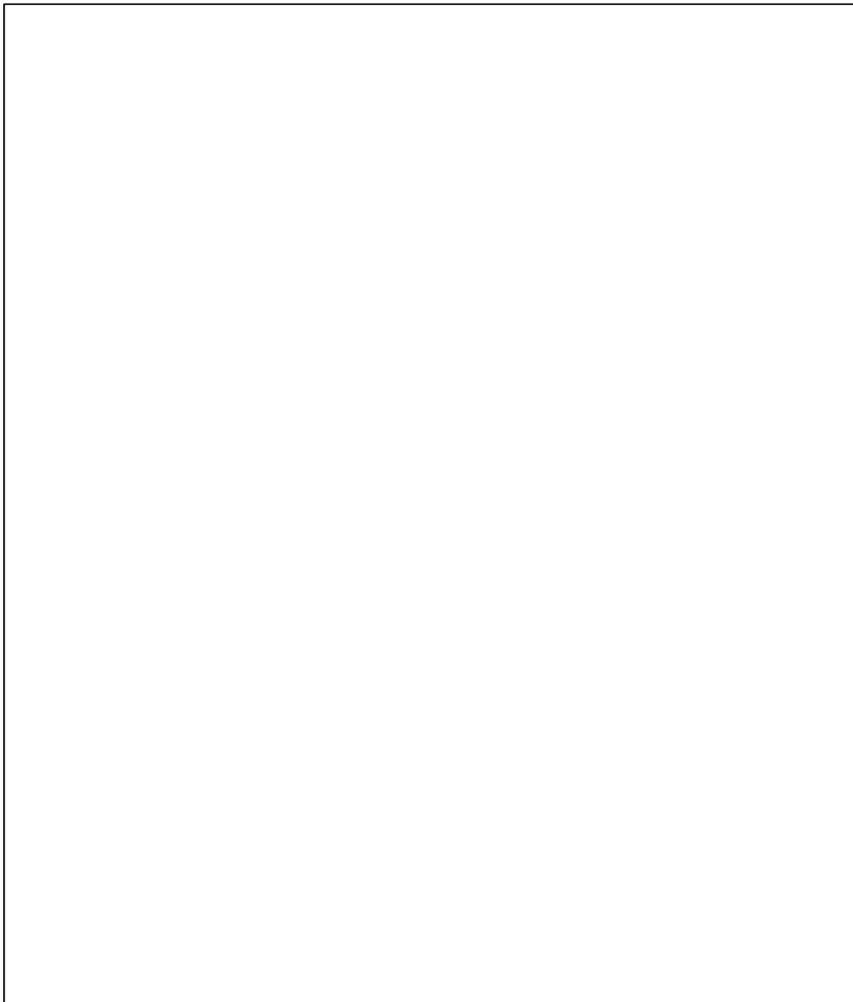
Ellen Moore, Sentencing Guideline Specialist, Chairperson (1st Circuit)
Joseph Napurano, CUSPO, Vice Chair (3rd Circuit)
Theresa Brown, USPO (D.C. Circuit)
Cathy Battistelli, Sentencing Guideline Specialist (1st Circuit)
Colleen Rahill-Beuler, Sentencing Guideline Specialist (2nd Circuit)
Elisabeth Ervin, SUSPO (4th Circuit)
Barry Case, SUSPO (5th Circuit)
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Ken Ramsdell, SUSPO (9th Circuit)
Debra Marshall, Sr., USPO (10th Circuit)
Ray Owens, SUSPO (11th Circuit)
Cindy Easley, FPPOA

Obtaining Statistical Information From the Commission's Website

As part of its statutory mandate to monitor federal guideline sentencing practices, the United States Sentencing Commission collects court documents and creates a database of guideline application, sentencing, and demographic information about individual criminal offenders, corporations, and appellate defendants. In addition to publishing the *Sourcebook of Federal Sentencing Statistics* and the *Annual Report*, the Commission also provides federal sentencing information on its website, *USSC OnLine*, at www.ussc.gov.

On the Commission's homepage, one of the menu choices is a bar entitled "Federal Sentencing Statistics." Anyone wishing to access sentencing statistics should click on this bar to receive menu choices for tables and charts of district and circuit data for the last five years. A data report containing nine tables and one chart (stored in Adobe Acrobat format) can be accessed for

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For an up-to-date listing of Commission projects and proposed amendments, log on to www.ussc.gov and see our Federal Register Notices.

USSC OnLine features numerous other Commission documents. In addition to its federal sentencing statistics and its general publications, the web site contains materials organized into the following categories:

- What's New
- General Information
- Federal Register Notices
- Reports to Congress
- Guidelines Manuals and Amendments
- Guideline Training and Education
- Organizational Guidelines and Compliance
- Commission Meeting Information
- Hearing Transcripts and Testimony

The web site also displays links to other federal judicial agencies and provides information about state sentencing commissions and Commission employment opportunities.

Website *continued from page 9*

each federal district and circuit. These reports compare the district or circuit data with national data in regards to offense type, drug type, mode of conviction, type of sentence imposed, incarceration rate, sentence length, and departure rate.

The homepage menu also includes a link where one can view or download electronic copies of numerous publications, including the last five years of the Commission's *Sourcebook of Federal Sentencing Statistics* and its *Annual Report*. The *Sourcebook* contains more than 50 tables and charts that display national data on demographic characteristics, guideline application, sentence type and length, and departures for individual criminal offenders. The *Sourcebook* also reports on organizations sentenced under the guidelines, federal appeals cases, and select sentencing statistics for each judicial district. The *Annual Report* briefly details the Commission's mission, history, and organizational structure, and discusses guideline amendments, Commission policy teams, legal issues, and training efforts. The last chapter of the *Annual Report* briefly discusses the major data trends and findings reported in its corresponding *Sourcebook*. ■

Commission Welcomes New Judicial Fellow; Bids Farewell to Another

The Sentencing Commission has announced Dr. Karl B. Brooks as its 2000–2001 judicial fellow to succeed Dr. Jennifer Segal, who returns this fall to the University of Kentucky where she is a tenured associate professor of political science. “We greatly appreciate all Dr. Segal’s hard work and dedication,” said Commission Director Timothy B. McGrath. “In her one year here, she made a significant contribution to the Commission’s work, and we wish her all the best as she returns to Lexington.”

During her stay, Dr. Segal served as a member of the Commission’s policy team on sexual predators, where she played a primary role in organizing a panel of experts to present to the Commission. Working with Dr. Paul Hofer of the Commission staff, she also conducted a literature review for the Commission’s 15-Year Study and conducted research on family ties as a reason for departures.

Dr. Brooks begins his term at the Commission this August. He is an associate professor of history and environmental studies at the University of Kansas. Prior to that, he was the executive director and legislative liaison for the Idaho Conservation League, an attorney in private practice, and an associate general counsel for Boise Cascade Corporation.

“We are delighted that Dr. Brooks will be joining us,” said Director McGrath. “We intend to take full advantage of the skills and experience he has to offer as the Commission sets its agenda for the coming year.” Dr. Brooks received his B.A. *summa cum laude* in history from Yale University, his M.Sc. in international relations from Yale University, his J.D. from Harvard Law School, and his Ph.D. with honors in history from the University of Kansas. ■

Commissioners Horowitz and Reilly are Named *Ex-Officio* Members

The designation of new *ex-officio* members of the Commission occurred recently, following appointments made by the new administration. The two non-voting commissioners are—

(Representing the Office of the Attorney General, U.S. Department of Justice)

Mr. Michael E. Horowitz, of Chevy Chase, Maryland. Mr. Horowitz currently serves as chief of staff to the assistant attorney general for the Criminal Division of the Department of Justice. Mr. Horowitz also has served as deputy assistant attorney general in the Criminal Division. Prior to coming to Main Justice, he was an assistant United States attorney in the Southern District of New York, having served as the deputy chief of the Criminal Division and the chief of the Public Corruption Unit. Mr. Horowitz received his B.A. from Brandeis University, *summa cum laude* and his J.D. from Harvard Law School, *magna cum laude*.

(Representing the U.S. Parole Commission)

Mr. Edward F. Reilly, Jr., of Leavenworth, Kansas. Mr. Reilly was designated as chair of the U.S. Parole Commission by President George W. Bush on May 31, 2001. Prior to his appointment, he served one year in the Kansas House of Representatives and 28 years in the Kansas Senate. In the Legislature, he served as assistant majority leader, chairman of the Senate Committee on Federal and State Affairs, chairman of the Senate Insurance Subcommittee, and vice chairman of the Senate Elections Committee. Mr. Reilly has served four presidential administrations in various capacities.

The Commission sincerely thanks former *ex-officio* commissioners Mr. Laird C. Kirkpatrick and Mr. Michael G. Gaines for their dedicated service and

For the past year, Kevin Blackwell, a senior research associate at the U.S. Sentencing Commission, has been serving as secretary of the Executive Board of the National Association of Sentencing Commissions. He was elected to the position by the membership of the NASC. Blackwell has been with the Commission for the past 11 years and has particular interest in disparity in sentencing and state guideline systems.



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