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REVISED DRAFT SENTENCING GUIDELINES

104618

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Published to comply with statutory requirements and to elicit analysis and comment.

THE UNITED STATES SENTENCING COMMISSION
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LETTER FROM THE COMMISSION

This revised draft of sentencing guidelines differs significantly in format and substance from the preliminary draft published by the Commission in September 1986. The revisions are due in part to suggestions from hundreds of judges, prosecutors, defense attorneys, probation officers, victim advocates, and other individuals who analyzed and commented on the preliminary draft. In its deliberations and redrafting, the Commission has been sensitive to these concerns.

The primary purpose of publishing a preliminary draft of guidelines in September was to provide a vehicle for extensive public comment. The Commission was under no statutory requirement to publish draft guidelines at that early date. The alternative, however, would have severely limited public comment, and the Commission found this unacceptable. The decision to publish a preliminary draft early proved to be correct. We learned a great deal and at the same time informed many people about guidelines and the positive effect they will have on our system of justice.

Guideline sentencing is an evolutionary process. We are developing a working framework for a system of guidelines that, over time, will be refined and amended as practical experience, analysis, and logic dictate. The Commission realizes that it cannot produce a perfect system. However, what will be accomplished is significant improvement in our system of justice through a progressive, informed, and just set of sentencing guidelines.

Once again we seek your critical analysis and comments.

Thank you.

Sincerely,

Billy Wilkins

William W. Wilkins, Jr.
Chairman

U.S. Department of Justice
National Institute of Justice

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TABLE OF CONTENTS

NCJRS
FEB 27 1987
ACQUISITIONS

CHAPTER ONE - INTRODUCTION AND OVERVIEW

I. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes.

Created by the sentencing reform provisions of the Comprehensive Crime Control Act, Pub. L. No. 98-473 (1984), the Commission's authority and duties are set out in Chapter 58 of Title 28, United States Code. Procedures for implementing guideline sentencing are prescribed in a new Chapter 227 of Title 18, United States Code. The statutory authority affecting the Commission has been amended several times by Congress (See Appendix B).

As specified in 28 U.S.C. § 991(b), the policies, practices, and sentencing guidelines established by the Commission are designed to:

1. effectuate the purposes of sentencing enumerated in 18 U.S.C. § 3553(a)(2) (in brief, those purposes are just punishment, deterrence, incapacitation, and rehabilitation);

2. provide certainty and fairness in sentencing practices by avoiding unwarranted sentencing disparities among offenders with similar characteristics convicted of similar crimes, while permitting sufficient judicial flexibility to take into account relevant aggravating or mitigating factors; and

3. provide honesty in sentencing so that the sentence given by the judge will be the sentence actually served; and

4. reflect, to the extent practicable, advancements in knowledge of human behavior as related to the criminal justice process.

II. Administrative Procedure Act

In accordance with the directive in 28 U.S.C. § 994(x) and the rulemaking provisions of 5 U.S.C. § 553, this revised draft of sentencing guidelines was published in the Federal Register. In addition, these guidelines have been mailed to each Member of Congress, Article III Judge, United States Attorney, Federal Public Defender, United States Magistrate, Chief United States Probation Officer, United States Probation Office, and Federal Correctional Library. Copies were also sent to hundreds of other individuals and groups on the Commission's mailing lists, including defense attorneys, scholars, victim advocates, and private and professional membership groups.

Comments: The public comment period on the revised draft of guidelines extends until March 16, 1987. The Commission encourages all groups and individuals with an interest in criminal justice to study the revised draft and submit written comments to the Commission. All comments should be mailed to the following address:

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Guideline Comments

Public Hearings: Public hearings on the revised draft of sentencing guidelines are scheduled for March 11 and March 12, 1987, in Washington, D.C. Further information on the hearings may be obtained from the Commission.

Under statute, the deadline for submission of the initial set of sentencing guidelines to Congress is April 13, 1987. In addition to the guidelines, the Commission shall submit to Congress a report stating the reasons for its recommendations. Upon submission of the guidelines, the General Accounting Office shall conduct a study assessing the potential impact of the guidelines in comparison with the operation of the existing sentencing and parole release system.

Congress has six months from the date the guidelines are submitted to study the guidelines and impact analysis. The guidelines become effective at the conclusion of the six month review period if no contrary action is taken.

III. Principles of Sentencing

The Commission bases its work on the premise that the fundamental objective of the Comprehensive Crime Control Act is to prevent crime and protect the public from criminal activity. In its deliberations, the Commission gives full consideration to the four purposes of criminal sentencing - - just punishment for the offense, deterrence, incapacitation, and rehabilitation. In applying these purposes, we adopt neither a pure utilitarian crime control nor a pure retributivist just punishment model. Instead, our approach reflects both the need for just punishment and crime control.

Five general principles form the core of our policy:

1. sentences should be commensurate with the seriousness of the offense, reflecting the physical, economic and psychological harms to the victim and society caused by the offense;

2. sentences should aim to control crime through general deterrence, special deterrence, incapacitation, and rehabilitation;

3. sentences should be sufficiently punitive so as to make clear to offenders and to society that crimes does not and will not pay;

4. to the extent that principles derived from retributive and crime control models conflict, justice for the public is the overreaching goal; and

5. sentences should be effective, just, and efficient for the defendant, the victim and society.

IV. Historical Overview

The Commission has explored the strengths and potential viability of three different approaches to the development of a sentencing guideline system. The Commission first examined a pure real offense system that would essentially hold defendants accountable for the actual conduct in which they engaged regardless of the charge of conviction or the negotiated plea agreement. Conduct was divided into elements (e.g., taking money, striking a bank teller, using a gun), and each element was assigned a numerical point value. Points were ultimately combined according to mathematical formula to arrive at a sentence. The focus was on elements rather than on offense categories. Although the Commission devoted a great deal of time and resources to this effort, by mid-July 1986 it concluded that, as a practical matter and for policy reasons, this kind of approach was not viable.

Subsequently, the Commission examined the potential of a modified real offense approach, a version of which it published for comment in September 1986. Under this approach, the court would initially look to the elements of the crime of conviction to determine the offense value, but would modify that number dependent upon the presence or absence of certain specified aspects of actual conduct found in cross references to other offenses. This approach was organized around traditionally defined offense categories. Many who commented on the preliminary draft guidelines found virtue in this approach, but also noted considerable procedural complications and a certain amount of rigidity, complexity, and difficulty of application.

The modified real offense approach was also limited in its sophistication, moving in one step from identification of additional conduct relevant at sentencing to counting this cross-referenced conduct at the same value as if it were the subject of a separate prosecution and conviction. The effect was essentially to treat unadjudicated misconduct as a suitable object of punishment in itself, rather than as a circumstance in aggravation of the appropriate penalty for the offense of conviction.

In addition, the September draft approach created a potential for extensive litigation over disputed harms and a hearing procedure that was perceived as encouraging fact or charge bargaining by which discretion in the determination of sentences would pass from the judiciary to prosecutors and defense attorneys.

In light of extensive comment, continued research, and constant re-examination of the critical points of debate, the Commission devised the approach herein adopted. The revised draft uses traditional offense categories and takes as its base the offense of conviction. Related conduct not included in the offense of conviction may still be used to aggravate or mitigate a sentence, but it does not carry the weight of a separately charged and convicted offense. The goals of reducing disparity and permitting individualization where it is appropriate have simultaneously been pursued.

The approach taken is based on our presumption that sentencing guidelines will be evolutionary. The Commission expects to engage in a continuing process over many years to develop more precise categories as it learns more about the operation of the initial system and each succeeding iteration, as well as more about what are just and efficient sentences. It is empirically guided in that the Commission will monitor and measure actual sentencing practices and assessments of the effectiveness and fairness of those practices. The numerical assessments appearing in this draft were decided upon after an extensive review of available data relevant to present sentencing practice, data from a number of other sources, a review of Congressional action with respect to mandatory minimum sentences and statutory maximums, public comment, and other relevant materials and sources brought to the attention of the Commission.

V. Overview of the Guidelines

The Commission finds that the standard considered at sentencing must be realistic, predictable, and based upon concepts and terminology familiar to judges, prosecutors, defense attorneys, and probation officers. Towards that end, a relevant conduct standard has been adopted. The standard is defined and explained in the Overview of Chapter Two, Offense Conduct.

The guidelines are presented in numbered chapters that are divided into alphabetical parts. The parts are subdivided into sections and subsections. Each guideline is identified by a letter and a number that correspond to the chapter and part where the guideline is located. The letter represents the part of the chapter, the first number is the chapter, the second number the section, and the final number is the subsection. Section B211, for example, is the first subsection of the first section in Part B of Chapter Two. Or, §A312 is the second subsection of the first section in Part A of Chapter Three. Policy statements are similarly identified.

A commentary is provided within sections where necessary to explain the guideline in greater detail or to inform the reader of the statutory provisions governing the subject matter. Commentary also explains policy decisions made by the Commission in formulating the guidelines.

This draft differs substantially in format and substance from the September draft. It used offense values; this revised draft uses offense levels. The change is more than merely one in nomenclature.

The reasons for the use of the offense level approach are chiefly: (1) The presentation is clearer because the numbers representing the terms of imprisonment are smaller and more clearly associated with a range. (2) Adjustments that were multiplicative under the earlier system can be represented as simple increases or decreases in the offense level, thus eliminating all but the simplest mathematical calculations. (3) The effects of the various adjustments are readily apparent and more easily understood.

In this draft, offenses are assigned levels from 1 to 43. Each level corresponds with a potential imprisonment range. Level definitions satisfy three criteria: (1) In order to limit factual disputes, levels overlap substantially. The minimum of any range should be at or below the midpoint of the next lower range; ranges that are two levels apart should have at least one point in common. (2) Except at the lowest levels, ranges are generally as wide as legally permitted. (3) The adjustments to offense values that were made through multiplication under the preliminary draft should correspond closely to fixed increases or decreases in the level number. An increase of one level corresponds to an upward adjustment of the offense value by approximately 12 percent; two levels, 25 percent; three levels, 40 percent; four levels, 56 percent; and five levels, 75 percent.

In the September draft, prior record adjustments were calculated by using an arithmetical formula to increase the offense value. Prior record is now determined by columns in the sentencing table that correspond to a prior record category.

The chief advantages of using offense levels are clearer presentation and the virtual elimination of complex mathematical calculations. The overlapping ranges of the levels tend to make factual disputes less important. An increase or decrease of one or even two levels will not necessarily result in a different sentence. This is especially important in writing guidelines that depend upon continuous variables, such as dollar value or drug volume. By including each

intermediate level in the table, the guidelines ensure that small changes in or disagreements over the precise value of these factors will not have a significant impact on the sentence. The need to litigate minor controverted factual issues is minimized.

A possible disadvantage is that the level system may not be graduated finely enough to take all relevant factors into account in determining the appropriate sentence. However, the distinctions made by 43 offense levels are fine enough that a change of one level only shifts half of the sentencing range. Factors that are not significant enough to call for aggravation or mitigation by at least one level can be taken into account within the range.

Guidelines have been drafted primarily for those federal criminal statutes generally prosecuted. As the Commission monitors the guidelines after implementation, additional guidelines will be written. When defendants are convicted of offenses not covered by these guidelines, the sentencing judge should use the guideline most analogous to the offense. A statutory index will be available for the final draft.

In no case shall a sentence imposed exceed the statutory maximum sentence. If a sentence determined by the guidelines is greater than the statutory maximum, the sentence imposed shall be the statutory maximum. However, when the guideline sentence exceeds the statutory maximum, imposition of consecutive sentences is warranted to adequately serve the purposes of sentencing. See Chapter Five, §A562(b).

In no case shall a sentence imposed be less than a statutory minimum sentence. If a sentence determined by the guidelines is less than the statutory minimum, the sentence imposed shall be the statutory minimum.

VI. Application Instructions

In general, the application of the guidelines is straightforward. A sentence is determined for each count of conviction by reference to specific offenses in Chapter Two, and adjusted by General Provisions and Role in the Offense, Chapter Three.

Specifically, the following abbreviated steps are applied (detailed instructions and worksheets are currently being prepared).

1. Compute the defendant's criminal history total from Chapter Three, Part A. Determine the appropriate criminal history category column by reference to the Sentencing Table.

2. Using the statute of conviction, turn to the part of Chapter Two that appropriately describes and references the offense of conviction (e.g., for 18 U.S.C. § 111, Assaulting a Federal Officer, apply the assault section of Part A). (Note, the final draft will include a Statutory Index for easy reference.)

3. Adjust the base offense level by applying specific offense characteristics from the appropriate offense section.

4. Refer to the General Provisions, Chapter Two, and make any appropriate adjustments to the offense level.

5. Refer to Role in the Offense, Chapter Two, and make any appropriate adjustments to the offense level.

6. Refer to sections on Obstruction of Justice and Perjury, Acceptance of Responsibility, and Cooperation in Chapter Three, and make any appropriate adjustments to the offense level.

7. Determine the length of sentence from the Sentencing Table, Chapter One, the appropriate type of sentence from Chapter Five.

8. Determine the appropriate fine from the Fine Table in Chapter Five.

9. Repeat steps 1 through 8 for each count of conviction.

10. If sentencing on multiple counts, refer to Chapter Five, §§A561, et. seq. Work is currently being done to refine this section to give greater guidance to assist in resolving the complex issue of concurrent/consecutive sentences.

VII. The Sentencing System

The easiest way to understand the proposed system is to compare it with the preliminary guidelines issued in September. The three major criticisms of that draft were that it was inflexible, difficult to administer, and overly harsh compared to present practice. The revised draft addresses these criticisms in the following ways:

1. Application: The present draft is simple to administer. By and large, individualized offense categories are tied to specific statutes or generic terms familiar to judicial personnel. The number of general adjustments is fewer and reflects those major factors that judges presently take into account when sentencing.

Moreover, the vast majority of judges, prosecutors and defense lawyers have testified that plea agreements must be permitted to continue. The Commission seeks to bring rationality to this process by requiring judges to ascertain that plea agreements fully and accurately reflect the seriousness of offense behavior, and that sentences imposed under the agreements conform with the legislatively mandated purposes of sentencing.

2. The Guideline Numbers: The September draft specifically cautioned the reader that the numerical values assigned to various offenses did not reflect any Commission decision, but were intended only to assist comprehension through illustration. Nonetheless, commentators expressed concern that some of the numbers deviated substantially from the sentences that many judges consider appropriate. In the revised draft, the Commission has used numbers that, while still tentative, represent a closer approximation of sentences the Commission may ultimately determine are appropriate.

In arriving at these numbers, the Commission began with the purposes of sentencing, as defined by statute, and an analysis of present practices. Commission staff, assisted by United States Probation Officers, reviewed hundreds of presentence investigation reports and derived qualitative information about the nature of the offense, the importance of specific offense characteristics, and the types of sentences given. Data on approximately 10,000 presentence reports for offenders sentenced during fiscal year 1985 were analyzed to estimate the effect of various offense and offender characteristics on the sentence imposed.

This process was necessarily imperfect in producing measures of current practice because of the limitations of the available data and existing statistical procedures. Furthermore, because judges are not currently required to state reasons for the sentences imposed, the explanation of

the great disparities in existing sentencing practices must be based upon hypotheses and projections.

The guideline ranges used by the United States Parole Commission provided an additional data source for estimating current practices. However, the parole guidelines are not dispositive of current sentencing practices, since they do not govern sentences imposed below the parole guidelines nor sentences of less than one year. Neither are parole guidelines a measure of time served currently, since they are only presumptive, and provide no information on cases that result in time in custody above or below the parole guideline ranges.

Studies by the Federal Judicial Center, the Administrative Office of the United States Courts, crime statistics, information received from law enforcement agencies, and written and oral testimony from judges, probation officers, prosecutors, defense attorneys, and victim's advocates were also considered before the Commission made its policy decisions with respect to relative severity of offenses and the appropriate level of punishment.

Changes in current sentencing practices might be mandated by Congressional statute, as in the case of the mandatory prison terms required by new drug laws. In some instances where present sentencing data are virtually nonexistent (as is true of a vast number of federal statutes for rarely prosecuted offenses), the Commission has created a range to call attention to the need for public comment on these values.

3. Flexibility: Through Section 1, General Provisions, the Commission elaborates upon (and seeks to guide) the courts' power to depart from the guidelines when special factors such as particularly heinous behavior or provocation are present. Other unusual circumstances may also warrant departure from the guidelines sentence. In these case, a judge must provide reasons for departure.

4. Resolution of Sentencing Disputes: Issues regarding disputed sentencing factors "important to the sentencing determination" are to be resolved in accordance with Rule 32(a)(1), Federal Rules of Criminal Procedure (effective November 1, 1987), and applicable case law. In resolving sentencing issues, the court may consider all reliable information concerning the defendant's background, character, and conduct. 18 U.S.C. § 3661. In cases involving significant disputed sentencing factors, the Commission recommends that the court notify the parties of its tentative findings and provide a reasonable time for the submission of written objections before imposition of sentence.

5. Conclusion: The Commission is aware that by creating guidelines that are simpler and more flexible it risks losing certain beneficial qualities of the preliminary draft. For example, the simplicity achieved by reducing the number and complexity of different categories means that each category will contain larger numbers of different offenders.

The Commission nonetheless has concluded that the need for simplicity and flexibility warrants this approach. Through commentary and specific guideline provisions, the Commission offers objective criteria to guide the exercise of structured discretion by the judge. Appellate review of departures from the guidelines will provide significant control.

The Commission's immediate task is to prevent significant and unwarranted deviations, not to seek the impossible goal of ending all disparity. Finally, and most importantly, the Commission, as a permanent body, sees its task as ongoing. It will continue to gather and analyze information about actual practice under the guidelines and promulgate new guidelines interactively over the years.

VIII. Probation and Sentencing Options

Chapter Five, Determining the Sentence, discusses the use of probation and sentencing options other than imprisonment. In some cases, the court will have discretion to impose probation rather than a term of imprisonment. If the guidelines call for a minimum term of imprisonment of six months or less, the sentencing judge may substitute non-incarcerative options for imprisonment. Those options include probation with conditions of intermittent confinement (e.g., weekends in jail), community confinement, home detention, or combinations of these conditions.

The guidelines encourage the courts to use other sentencing options. Imposition of a fine is required unless the court determines that the defendant is unable to pay a fine even on an installment schedule. The court must consider the use of other sanctions, preferably community service, with respect to those defendants who lack the ability to pay a fine.

Restitution is required if an identifiable victim has suffered a financial loss as a result of the offense, unless calculation of the loss would unduly prolong or complicate sentencing. The guidelines reflect the mandatory imposition of special assessments established by the Victims of Crime Act of 1984 and establish procedures and policies for notice to victims.

Chapter Six establishes policies for revocation of probation and supervised release. The guidelines classify violations of probation and supervised release into categories of seriousness. The probation officer and the court respond on the basis of the category of the violation and the number of the defendant's previous violations.

IX. Research Program

The objectives of the research program are to assist in the development, implementation, monitoring, and evaluation of sentencing guidelines. The research staff is evaluating detailed information on current sentencing and correctional practices and the post-conviction activities of probationers and parolees. In addition to performing qualitative and quantitative studies, the research staff reviews criminal justice research, advises the Commission about the application of scientific theory and knowledge to sentencing practices, and provides general technical support.

To determine which factors currently are used to distinguish sentences among those convicted of the same offense, the research staff used qualitative techniques to 1) review federal statutes to determine factors that by law enter into the sentencing process; 2) read, with the assistance of United States Probation Officers, a sample of more than 10,000 presentence investigation reports to identify offender and offense factors considered by participants in the federal criminal justice system; and 3) review papers, critiques, and responses from judges, attorneys, probation officers, scholars, and other criminal justice authorities. The purpose of this research was to classify offense and offender characteristics that either do or should distinguish defendants convicted in federal district courts.

Drawing on the results of this exercise, the research and legal staffs developed empirical models to explain the variation in time served among federal offenders convicted of similar offenses. A key to developing these models was collecting detailed information about current sentencing and correctional practices. The starting point was a data file (FPSSIS) provided by the Probation Division of the Administrative Office of the United States Courts that contained basic data on defendants, their offenses, and their sentences. A representative sample of

10,000 cases was drawn from all offenders sentenced during fiscal year 1985. Detailed information concerning cases in this sample was provided by United States Probation Offices across the country and used to augment the Commission's database. These data were merged with records from the Parole Commission and the Bureau of Prisons to obtain detailed information on time actually served in federal prisons.

Standard statistical techniques were used to analyze these data. As a result, the Commission was provided with a series of reports that identified and quantified factors that appear to influence current sentencing.

The research staff is responsible for determining the effect guidelines will have on the federal justice system in general and correctional resources in particular. If past trends continue, prison population will climb even without sentencing guidelines. Recent legislation mandates significant minimum terms of imprisonment for drug violators. And, as part of the statutory provisions that will become effective with the guidelines, mandatory terms of imprisonment will be required for certain repeat offenders. Each of these factors may increase prison population independent of any effect the guidelines may have.

To answer questions about impact, the research group is using the enhanced time served data supplemented with detailed information about offenders sentenced to prison or probation since 1984. Because these data contain detailed information about offenders and their offenses, it is possible to estimate the sentences of these offenders if recent changes in sentencing practices, including mandatory terms for certain drug law and repeat offenders, had been effective in 1984. These data also suggest trends in federal prosecutions. Thus, a baseline can be established against which the impact of guidelines can be assessed, assuming crime and prosecution patterns do not change. Once the baseline has been established, the sentencing guidelines can be applied to the data and the resulting impact on prisons can be estimated.

The data have been collected to test the guidelines and analysis of the impact of the sentencing provisions has begun. Final analysis will be completed during the next three months as the guidelines are refined.

SENTENCING TABLE

Guideline Range in Months of Imprisonment

Offense Level	Criminal History Category I (0)	II (1 or 2)	III (3 or 4)	IV (5 or 6)	V (7 or 8)	VI (9 or more)
1	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 127	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

CHAPTER TWO - OFFENSE CONDUCT

OVERVIEW

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level. When a particular offense warrants a more individualized sentence, specific offense characteristics are provided within the guidelines. Factors relevant to criminal conduct that are not provided in specific guidelines are set forth in Part Y, General Provisions, and Part Z, Role in the Offense.

SENTENCING FACTORS

To determine the sentence, all conduct, circumstances, and injuries relevant to the offense of conviction and all relevant offender characteristics shall be taken into account. "Relevant to the offense," unless otherwise specifically limited or excluded under the guidelines, means:

1. acts or omissions committed, caused, or aided and abetted by the defendant (a) in preparation for the offense of conviction, (b) during or in the furtherance of the offense of conviction, or (c) during efforts to conceal or avoid detection or prosecution for the offense of conviction; or

2. acts or omissions committed, caused, or aided and abetted by the defendant that (a) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (b) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (c) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

Injury that is relevant to the offense includes all intended or foreseeable harm that resulted from the offense conduct.

Commentary

Prior to sentencing, a judge should consider all relevant offense and offender characteristics. Relevant offender characteristics, which may include other similar misconduct, are determined under Chapter Three. Injury or loss resulting from the defendant's conduct is relevant to sentencing if it was intended or criminally negligent. For purposes of sentencing, the meaning of relevant defendant conduct is restricted to the following:

1. *conduct relevant to the offense of conviction, including preparation, commission, or efforts to avoid detection and responsibility for the crime;*

2. *conduct that is relevant to the offense of conviction insofar as it indicates to some degree a broader purpose, scheme, or plan of which the offense of conviction was a part;*

3. *conduct that is relevant to the state of mind or motive of the defendant in committing the crime;*

4. *conduct that is relevant to the defendant's involvement in crime as a livelihood.*

The first three criteria are derived generally from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes "of the same or similar character," and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in favor of considering information generally appropriate to sentencing. This construction is consistent with the existing rule that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3577, so long as the information "has sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D.C. Wis. 1981), affirmed 719 F.2d 887 (7th Cir. 1983).

The last of these criteria is intended to assure that a judge may at sentencing consider information that, although not specifically within other criteria of relevance, indicates the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. § 994(d)(11).

PART A - OFFENSES INVOLVING THE PERSON

1. HOMICIDE

18 U.S.C. § 111
18 U.S.C. § 113(a)
18 U.S.C. § 115
18 U.S.C. § 351
18 U.S.C. § 373
18 U.S.C. §§ 1111 - 1114
18 U.S.C. §§ 1116 - 1117
18 U.S.C. § 1153
18 U.S.C. § 1751
18 U.S.C. § 1952A
Also See Statutory Index

INTRODUCTION

Homicide offenses are organized into several sections beginning with first degree murder, the most serious form of homicide, and ending with involuntary manslaughter. Each section includes base offense levels that take into account culpability and conduct that is inherent in the commission of the offense, current practices in sentencing for such behavior, and the effectiveness of imprisonment in protecting social interests addressed by federal laws against homicide.

In crimes of violence, the base offense levels reflect the assumption that some psychological injury occurred to the victim or to members of the victim's family. For cases in which psychological injury has been extreme, the court shall consider the injury under Part Y, General Provisions.

§A211. First Degree Murder. The base offense level is 43.

§A212. Second Degree Murder. The base offense level is 32.

§A213. Conspiracy or Solicitation to Commit Murder. The base offense level is 31.

(a) Specific Offense Characteristic

(1) If a solicitation included a payment or tender of money or other thing of value, increase by 2 levels.

§A214. Attempted Murder (Assault with Intent to Kill). The base offense level is 28 to 33, depending upon the degree of preparation and planning.

(a) **Specific Offense Characteristic**

(1) If the attempt included a payment or tender of money or other thing of value, increase by 2 levels.

§A215. Voluntary Manslaughter. The base offense level is 25.

§A216. Involuntary Manslaughter. The base offense level is 10 to 14, depending upon the circumstances of the offense and the degree of recklessness involved.

Commentary

§A211. First degree murder is subject to a mandatory sentence of life imprisonment unless the death penalty is imposed, as set forth in 18 U.S.C. § 1111 for premeditated murder and some felony murders.

§A212. Second degree murder is subject to substantial punishment for those who cause death under circumstances not covered by first degree murder. The base offense level reflects time specified by the parole guidelines. The penalty when death results is not aggravated for the use of a weapon because the presence of a weapon is assumed in the base offense level. As a practical matter, a defendant who knowingly causes death during the course of a felony will be subject to life imprisonment, whether or not the felony is included in the list of felony murder predicates found in 18 U.S.C. § 1111. Persons involved in lesser predicate offenses will be punished at proportionally lower levels.

At the federal level homicides frequently involve domestic violence and alcohol and drug abuse. While the Commission does not find that either of these conditions, per se, warrant mitigation of the penalty, there are cases where significant victim participation should be taken into account. In the case of domestic violence where one partner has suffered prolonged abuse and retaliation results in death, mitigation under Part Y, §Y214, is warranted due to significant provocation. Where alcohol is involved and the context of the crime suggests that the roles of victim and defendant are essentially a matter of chance, §Y214 should be considered.

Penalties for second degree murder, as well as all remaining homicide offenses, may be enhanced or diminished by reference to Part Y, General Provisions. For §A212, the general provisions provide for an increase in the offense level for offenses that involve the President, President-elect, other high level government officials, and law enforcement and corrections personnel as victims. §Y224, General Provisions. This provision extends to members of the immediate families of such officials as reflected in 18 U.S.C. § 115. When disruption of governmental functions results from the offense, a departure above the guidelines may be warranted. §Y212, General Provisions.

If the victim was vulnerable due to age or physical or mental condition and the defendant exploited this vulnerability, an enhancement under general provisions applies. Should the court find that unusual psychological injury to members of the victim's immediate family resulted

from the defendant's behavior, the court shall consider this factor in enhancing the sentence according to Part Y, §223.

On rare occasions, homicide results from the victim's consent, as in euthanasia or "mercy killings." These unusual cases present circumstances that might justify departure from the guidelines.

§A213. This section combines the offenses of conspiracy to commit murder and solicitation to commit murder. Conspiratorial conduct proscribed by 18 U.S.C. § 1117 allows for a statutory maximum sentence of life imprisonment. Solicitation to commit murder applies to conduct proscribed by 18 U.S.C. § 373, a provision that generally punishes solicitation to commit a crime of violence, defined as "conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States." The maximum sentence of imprisonment under this statute is one-half the maximum term for the crime solicited; or twenty years if the punishment for the crime solicited is death. The base offense level reflects time in custody specified for conspiracy and solicitation by the parole guidelines, and is relevant to the completed act. Conspiracy and solicitation would therefore apply only to first degree murder, and the base offense level should reflect a relationship to that offense.

Where conspiracy or solicitation has resulted in the completion of the conduct agreed upon (here, murder), the defendant is sentenced only for the completed underlying offense, in accordance with Congressional intent. 28 U.S.C. § 994(l)(2). In those cases where other injuries occur as an intended or foreseeable result of the conspiracy or solicitation, but do not constitute the object of that behavior, enhancements under general provisions for those injuries shall be added to the defendant's sentence.

If the victim of the conspiracy or solicitation is the President or other government official, including law enforcement and corrections personnel, an enhancement under general provisions is warranted to reflect the additional danger posed to the administration of government. An enhancement is similarly warranted where the defendant conspires or solicits the murder of foreign officials or guests.

Solicitations of murder-for-hire, 18 U.S.C. § 1952A, by payment of money or something else of value, warrant an increased penalty.

§A214. Punishment for attempted murder, or assaults with intent to commit murder or manslaughter, varies widely according to the statutes under which a defendant is prosecuted. Under 18 U.S.C. § 1113, an attempt to commit murder or manslaughter carries a maximum sentence of three years imprisonment. However, assault with intent to commit murder is punishable under 18 U.S.C. § 113(a) by up to twenty years imprisonment. An attempted assassination of certain essential government officials is, under 18 U.S.C. § 351(c), subject to imprisonment for any term of years or for life. An attempted murder of foreign officials carries a maximum sentence of twenty years under 18 U.S.C. § 1116. Since there is insufficient data currently available to estimate current practices, the base offense level from the parole guidelines is adopted and is represented as a range to reflect distinctions in the degree of planning and preparation. In other words, the range reflects the relationship between the attempt and the nature of the underlying offense. Where no planning was involved, the minimum of the range is recommended. Where first degree murder was attempted, the maximum of the range is more appropriate.

An assault with intent to kill accomplished by means of a firearm, explosive, or other dangerous weapon, instrument, or substance, results in an enhancement under Part Y, General Provisions. This enhancement applies only when the use of a firearm has not been separately charged.

The general provisions provide for enhancements due to the nature and seriousness of injuries suffered in the commission of an attempted murder. The precise enhancement should reflect the true nature of the injuries. However, in designating the category of injury, the court shall support that decision with reasons specifying all reliable information considered. The information may include, but is not limited to, medical records, expert or other reliable testimony, victim impact statements, employment records, and the sentencing judge's observations of the victim.

An enhancement for payment of money or something else of value reflects the seriousness of murder-for-hire. This enhancement is supported by current practices under the parole guidelines, as well as a systematic examination of approximately 250 presentence investigation reports.

§A215. The statutory recognition, 18 U.S.C. § 1112, that voluntary manslaughter should not be punished as severely as murder is reflected in the lower base offense level. Data limitations preclude Commission estimation of current practices, but the base offense level for voluntary manslaughter is consistent with time specified by the parole guidelines. The same general provision factors that enhance a murder sentence also apply to voluntary manslaughter.

§A216. In accordance with 18 U.S.C. § 1112, the guideline for involuntary manslaughter does not provide a distinction between reckless and negligent homicide. Sentencing judges should therefore look to state practices for guidance. The base offense level is represented as a range to allow the sentencing judge to apply higher penalties for serious or reckless conduct. In recognition of the seriousness of felony drunk driving, the Commission recommends a maximum sentence within the sentencing range for involuntary manslaughter when drunk driving results in a homicide.

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2. ASSAULT

18 U.S.C. §§ 111 - 115
18 U.S.C. § 351
18 U.S.C. § 1751
Also See Statutory Index

INTRODUCTION

The same interests protected by federal laws involving homicide, physical security, and the ability of the government to function effectively and without disruption, are fostered by federal laws concerning assault and battery. Physical injury provisions may, of course, be applicable where there is a battery. Other general provisions may be applicable in determining the seriousness of the offense.

§A221. Assault. The base offense level is 15.

(a) **Specific Offense Characteristics**

(1) If a dangerous weapon was discharged, displayed, or used to threaten, increase by 1 to 4 levels, depending upon the use made of the weapon.

(2) If the assault involved planning or preparation, increase by 3 levels.

(3) If bodily injury resulted, increase the offense level depending upon the seriousness of the injury:

Degree of Physical Injury	Increase in Level
Bodily Injury	add 2
Serious Bodily Injury	add 4
Permanent Bodily Injury	add 6

(4) If there were multiple victims of the assault, increase by 2 levels.

§A222. Simple Assault. The base offense level is 3; where minor bodily injury results, the base offense level is 6.

Commentary

Definitions applicable to the assault section are found at 18 U.S.C. §§ 111, 113, 115, 31(f)(3), and 2245, except definitions for physical injury. For convictions under the Assimilative Crimes Act, it is the nature of the conduct that is relevant. The federal code provides broad descriptions that encompass the variety of terms different jurisdictions use to describe similar conduct.

§A221. There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar defendant conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of ... official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum sentence is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum sentence under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum sentence under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes "maiming" by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

Definitions of various degrees of bodily injury are found in different parts of the federal code, see, 18 U.S.C. § 1365; 18 U.S.C. § 1515; 21 U.S.C. § 802(25), as amended, as well as under the presumptive parole guidelines.

For sentencing purposes the levels of physical injury are:

1. Permanent Bodily Injury. Permanent bodily injury means that the victim suffered a substantial risk of death from the injury, major disability, impairment, or loss of a bodily function or significant disfigurement.

2. Serious Bodily Injury. Serious bodily injury means that the victim suffered extreme pain from the injury, suffered substantial impairment of a bodily function, required medical intervention, such as surgery, hospitalization, or physical rehabilitation.

3. Bodily Injury. Bodily injury means any other physical injury.

The definitions for physical injury are meant to be suggestive only. If the injury lies between permanent and serious bodily injury, the sentencing judge shall increase by 5 levels. If the injury lies between serious and bodily injury, the sentencing judge shall increase by 3 levels.

The base offense level reflects current sentencing practices estimated by the Commission as well as parole guidelines. The enhancements for weapon, intent, and injury reflect statutory requirements. 18 U.S.C. §§ 113(c) and 113(f). The enhancement range for a dangerous weapon reflects the manner in which the weapon was used. The range for injury reflects a need for flexibility where all injury is not the same.

An enhancement is provided when multiple acts of assault occur and have not been separately charged or when the assault involves more than one victim. For example, when a defendant assaults three customs agents but is only charged and convicted of one assault, a single enhancement for the multiple victims is appropriate rather than adding levels for each victim. The enhancement reflects current practices in a systematic analysis of presentence investigation reports.

Although all general provisions shall be considered, specific attention to enhancements for vulnerable victims and victim officials is warranted in assault cases.

§A222. Assaults represent a danger to personal safety whether or not bodily injury results to the victim. The base offense level for simple assault reflects the potential seriousness of any behavior that evidences a disregard for the physical security of others. The base offense level is the statutory maximum penalty for the least serious assault. 18 U.S.C. §113(e). The additional penalty when minor bodily injury results reflects a statutory distinction that allows a six month term of imprisonment for striking, beating, or wounding. 18 U.S.C. § 113(d). The reference to minor bodily injury assumes that striking, beating, or wounding results in some minimal injury.

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3. CRIMINAL SEXUAL CONDUCT

18 U.S.C. § 113(a)
18 U.S.C. § 1153
18 U.S.C. § 1203
18 U.S.C. §§ 2031 - 2032
18 U.S.C. §§ 2241 - 2245
Also See Statutory Index

INTRODUCTION

The interest protected in guidelines for unlawful sexual conduct is the physical, emotional, and psychological security of the person. A number of offenses involving such acts are subject to federal jurisdiction under assimilative crimes provisions. Recent legislation to reform federal provisions governing criminal sexual conduct provides the basis for sentencing under this section of the guidelines. The general provisions for physical injury, unusual psychological injury, unlawful restraint, and weapons may be applicable.

§A231. Criminal Sexual Conduct or Attempt to Commit or Assault with the Intent to Commit Criminal Sexual Conduct. The base offense level is **28**.

(a) **Specific Offense Characteristics**

(1) If the victim had not attained the age of twelve years, increase by **5** levels; otherwise, if the victim was under the age of sixteen, increase by **2** levels.

(2) If the criminal sexual conduct was accomplished through aggravated force or coercion, increase by **3** to **5** levels, depending upon the degree of force and the circumstances of the offense.

(3) If the victim was in the custody, care, or supervisory control of the defendant, or was a corrections personnel or a person held in the custody of a correctional facility, increase by **2** levels.

(4) If multiple criminal sexual acts occurred or more than one perpetrator participated, increase by **2** levels.

(5) If the victim was subjected to acts of perversion increase by **3** to **5** levels, depending upon the nature of the conduct.

§A232. Criminal Sexual Conduct with a Minor or Ward (Statutory Rape). If the defendant committed criminal sexual conduct with a minor, or a ward in official detention, the base offense level is **10**.

(a) **Specific Offense Characteristics**

(1) If the victim was under age sixteen, increase **1** to **3** levels, depending upon the age and immaturity of the victim.

(2) If the victim was under age sixteen and in the custody, care, or supervisory control of the defendant, increase by **1** level.

§A233. Unlawful Sexual Contact. If the defendant engaged in or attempted to engage in unlawful sexual contact not covered by §§A231 or A232, the base offense level is **6**.

(a) **Specific Offense Characteristics**

(1) If the victim had not attained the age of twelve years, increase by **5** levels; otherwise, if the victim was under the age of sixteen, increase by **2** levels.

(2) If the defendant used aggravated force or coercion, increase by **3** to **5** levels, depending upon the degree of force or coercion and the circumstances of the offense.

Commentary

This section of the guidelines is modeled after the recent federal legislation dealing with criminal sexual abuse, 18 U.S.C. §§ 2241 to 2245. The language of the section, e.g., criminal sexual conduct, is left intentionally broad to include assimilated crimes. Definition of terms applicable to this section are set forth by Congress under 18 U.S.C. § 2245. Regardless of the specific language in the definitions, however, it is the nature of the conduct expressed that is of consequence for sentencing.

§A231. Sexual offenses addressed in this section are crimes of violence. Under the new legislation, attempts are treated the same as completed acts of criminal sexual abuse. The statutory maximum penalty is any term of years or life imprisonment. The base offense level is three levels higher than the parole guidelines suggest. However, the new legislation reflects an intent that more serious penalties be imposed. The base offense level of 28 reflects that intent.

The Commission requests public comment on the advisability of sentencing attempted criminal conduct in the same manner as completed acts of criminal sexual conduct.

The primary factors that differentiate criminal sexual conduct offenses for sentencing purposes are the circumstances or means by which the act is accomplished and the vulnerability of the victim. Thus, the greatest sentence should be imposed for a sexual offense that is accomplished under circumstances of violence and coercion, or where a weapon is used, or where such conduct is directed to a victim particularly vulnerable to both the conduct and its foreseeable results. These distinctions are provided within 18 U.S.C. § 2241.

Although actual force of an aggravated nature is a primary consideration in determining seriousness of conduct, coercion by the threat of death or bodily injury, or use of a deadly weapon poses a danger to the victim that is similar to physical violence. This conduct is therefore punished to the same extent as the actual use of force. Section Y226, General Provisions, does not apply if the defendant used a weapon because that conduct is assumed in the base offense level.

An enhancement for a custodial relationship between defendant and victim is warranted in cases of criminal sexual conduct. Often, young victims must live within the same dwelling as defendants who present continuing threats. Whether the custodial relationship be transitory or permanent, the defendants in these cases are persons the victims trust or to whom the victims

are entrusted. This sentencing aggravation represents the potential for greater and prolonged psychological damage.

When a sexual assault occurs within the privacy of one's home, it might well result in an unusual degree of psychological injury due to lasting fear of the loss of a safe shelter. If physical injury, unlawful restraint, or unusual psychological injury result from the conduct, these factors should be reflected in the sentence by application of the general provisions.

Criminal sexual conduct that occurs without aggravated force or coercion retains a relatively high base offense level. Regardless of the means, criminal sexual conduct results in physical and psychological trauma and a serious violation of the person. Means other than aggravated force or coercion include the use of force that would equate to simple assault and battery or when drugs, intoxicants, or similar substances are used to initiate the commission of the offense, or perpetuate it in the case of interstate transportation for immoral purposes or prostitution.

An enhancement is provided when multiple acts of criminal sexual conduct occur or when more than one offender participates. Each additional act of sexual assault, for example, creates increased trauma for the victim. Victims suffer additional trauma when assaulted by more than one offender or when forced into additional acts amounting to sexual perversion. One of the motivating factors for group participation of this nature is the potential for anonymity and safety in numbers that hinder victim recognition. Deterrence considerations compel enhancement for multiple offender behavior such as gang rape.

One of the important distinctions Congress has made under the new legislation (18 U.S.C. § 2241) involves the victimization of children under age twelve. Any criminal sexual conduct, including statutory rape, with children under twelve is punished more seriously than in the past and for sentencing purposes is governed by §A231.

§A232. Under recent legislation, 18 U.S.C. § 2243, a new category of persons unable to give consent for sexual conduct is created. In addition to prohibiting sexual conduct with a minor, this legislation prohibits sexual conduct with a ward; i.e., a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant. The statutory maximum sentence for criminal sexual conduct with a ward is one year. The base offense level includes this statutory maximum. With a minor, the statutory maximum is five years. An additional enhancement is provided for defendants who victimize minors under their supervision or care. This enhancement applies to wards only in the event that they are minors as well. The levels of enhancement reflect statutory distinctions between minors and wards.

If the defendant committed the criminal sexual act in furtherance of a commercial sex scheme such as pandering, transporting prostitutes, or pornographic materials, the court may consider this factor in imposing a sentence above the otherwise applicable offense level.

§A233. Within this section, unlawful sexual contact addresses improper touching or fondling. If any sexual intrusion occurs, consult §§ A231 or A232. The base offense level reflects the statutory maximum penalty for the least serious distinction provided under 18 U.S.C. § 2244(a)(4). The enhancements for youthfulness of the victim and the use of aggravated force or coercion reflect the additional statutory penalties.

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4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT

18 U.S.C. § 115
18 U.S.C. § 351
18 U.S.C. § 1201 - 1202
18 U.S.C. § 1751
18 U.S.C. § 2422 - 2423
See Also Statutory Index

INTRODUCTION

The principal interests protected by federal laws against unlawful restraint are the physical security of the person and the ability of the government to function effectively and without disruption.

§A241. Kidnapping, Abduction, Unlawful Restraint. If any victim was kidnapped, abducted, or unlawfully restrained, the base offense level is **24**.

(a) **Specific Offense Characteristics**

(1) If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense, increase by **3** to **6** levels, depending upon the nature and seriousness of the other offense.

(2) If a ransom demand or a demand upon government was made, increase by **6** levels.

(3) If the victim was released unharmed (prior to any ransom or governmental demand), decrease by **1** to **4** levels, depending upon the duration of the offense.

§A242. Ransom Money. If the defendant received, possessed, or disposed of any ransom money, the base offense level is **23**.

§A243. Attempt, Conspiracy, or Solicitation to Kidnap, Abduct or Restrain. The base offense level is **20** to **24**, depending upon the circumstances of the offense and the reason the crime was not completed.

Commentary

§A241. The seriousness of this offense is reflected in the high base offense level. Although limited, Commission data on current practices provide an average sentence at level 30 (97 to 121 months). However, careful examination of presentence investigation reports on federal kidnapping cases identifies three categories: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand. Current practices, as reflected in the presentence investigation reports and parole guidelines, provide these distinctions. The specific offense characteristics provide mitigation for limited

duration kidnappings and enhancements for the other two types. General provisions enhancements are available for particularly heinous conduct that often occurs in kidnapping offenses that include criminal sexual conduct.

A life sentence is possible if the President or President-elect is abducted. 18 U.S.C. § 1751(b). An enhancement for high level government officials and members of their immediate families may be appropriate under the general provisions, depending upon the circumstances of the offense. Sentences should reflect the disruption of government operations. See §Y212, General Provisions.

§A242. This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom is reflected in §A241. The base offense level reflects an average of the federal parole guidelines for either (1) a ransom demand where a kidnapping occurred but the defendant did not participate in the kidnapping, or (2) a demand for ransom by threat or extortion where no kidnapping took place.

§A243. Attempted kidnapping refers to conduct proscribed by 18 U.S.C. § 1201(d). The statutory maximum sentence for attempts to kidnap, abduct, or unlawfully restrain is twenty years. Also covered under this section are conspiracy and solicitation to kidnap, abduct, or unlawfully restrain. Conspiracy is generally proscribed by 18 U.S.C. § 1201(c). The statutory maximum sentence for these offenses is life imprisonment. Solicitation to kidnap, abduct, or unlawfully restrain is generally proscribed by 18 U.S.C. § 373. The maximum sentence of imprisonment under that section is one-half the maximum term of the crime solicited, or life imprisonment for conspiring to kidnap, 18 U.S.C. § 1201(c).

The base offense level for attempt, conspiracy, or solicitation to kidnap is represented as a range in order to permit adequate consideration of seriousness of the offense, the degree to which the offense approached completion, and the reason the offense was not completed. The range of base offense levels reflects a similar range of sentences specified by the federal parole guidelines. For sentencing within the range, the court shall state reasons that may include the circumstances of the offense and reasons the offense was not completed.

In kidnapping cases, particular attention should be given to the general provisions for weapons and dangerous instrumentalities, physical and psychological injury, and victim officials. The danger presented by use of a weapon warrants a significant increase in the defendant's sentence. The likelihood of at least initial resistance by an intended kidnapping victim, and the increased possibility that severe physical injury or death may result or the attempt may succeed, also justifies significant additional punishment.

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5. AIR PIRACY

49 U.S.C. § 1472(c), (i), (j), (l), (m), (n)
Also See Statutory Index

INTRODUCTION

While aircraft piracy is the most serious of the offenses considered under the various subsections of 49 U.S.C. § 1472, Congress has identified other criminal offenses involving air transportation. Provisions involving offenses against the person are considered within this section of the guidelines.

§A251. Aircraft Piracy or Attempted Aircraft Piracy. The base offense level is 38.

(a) Specific Offense Characteristic

(1) If death results, increase by 5 levels.

§A252. Interference with Flight Crew Member or Flight Attendant. The base offense level is 10.

(a) Specific Offense Characteristic

(1) If the defendant assaulted a crew member or flight attendant, increase by 1 to 5 levels, depending upon the circumstances of the offense and the degree of interference with the operation of the flight.

Commentary

§A251. This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. § 1472(i), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. § 1472(n). Both of these offenses carry a mandatory minimum sentence of twenty years imprisonment as reflected in the base offense level. Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is considered in the base offense level. If death occurs during the commission of aircraft piracy, either a mandatory minimum term of life imprisonment or the death penalty should be imposed. 18 U.S.C. § 1472(i).

§A252. The base offense level is set so that probation with special conditions may be available in cases not involving serious conduct. However, incarceration is also available at this level should the circumstances of the offense warrant more serious penalties.

If the defendant's interference consists of an assault, an enhancement is provided to reflect the seriousness of the conduct. The range for the enhancement allows the sentencing judge to grade the nature of the assault and the degree of danger presented. This guideline does not contemplate sentences for aggravated assault. Section Y225 provides for enhancement should physical injury occur.

Carrying a weapon or explosive aboard an aircraft is behavior proscribed by 49 U.S.C. § 1472(l). This offense is covered in Part K, Offenses Involving Public Order and Safety, §K216.

PART B - OFFENSES INVOLVING PROPERTY

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION

18 U.S.C. § 553(a)(1)
18 U.S.C. § 641
18 U.S.C. §§ 656 - 657
18 U.S.C. § 659
18 U.S.C. § 661
18 U.S.C. §§ 1361 - 1363
18 U.S.C. §§ 1702 - 1703
18 U.S.C. § 1708
18 U.S.C. § 2113(b)
18 U.S.C. §§ 2312 - 2317
Also See Statutory Index

§B211. Larceny, Embezzlement, and Other Forms of Theft. The base offense level is 4.

(a) Specific Offense Characteristics

(1) If undelivered United States mail was taken, increase by 1 level.

(2) If a firearm, destructive device, or controlled substance was taken, increase by 1 to 3 levels, depending upon the nature and quantity of the property taken.

(3) If the theft was from the person of another, increase by 2 levels.

(4) If the offense was planned or sophisticated, increase by 1 to 3 levels, depending upon the degree of planning and sophistication.

(5) If the offense involved multiple transactions or occurrences, increase by 1 to 6 levels, depending upon the number of transactions or occurrences. Do not apply this adjustment if adjustment (6) is greater.

(6) If the value of the property taken exceeded $1,000, increase the offense level as follows:

Estimated Value	Increase in Level
less than $1,000	**no increase**
$1,000 - $2,000	add **1**
$2,001 - $5,000	add **2**
$5,001 - $10,000	add **3**
$10,001 - $20,000	add **4**
$20,001 - $50,000	add **5**
$50,001 - $100,000	add **6**
$100,001 - $200,000	add **7**
$200,001 - $500,000	add **8**
$500,001 - $1,000,000	add **9**
$1,000,001 - $2,000,000	add **10**
over $2,000,000	add **11 or more**

Do not apply this adjustment if adjustment (5) is greater. Value credit cards at $1,000 each.

§B212. **Receiving or Transporting Stolen Property.** The base offense level is **4**.

(a) **Specific Offense Characteristics**

(1) If the property was received or transported for resale, increase by **4** levels.

(2) If the property included a firearm, destructive device, or a controlled substance, increase by **1** to **3** levels, depending upon the nature and quantity of the property taken.

(3) If the offense involved multiple transactions or occurrences, increase by **1** to **6** levels, depending upon the number of transactions or occurrences. Do not apply this adjustment if adjustment (4) is greater.

(4) If the value of the property stolen exceeded $1,000, increase by the appropriate number of levels from the Property Table (§B211). Do not apply this adjustment if adjustment (3) is greater.

§B213. **Property Damage or Destruction.** The base offense level is **4**.

(a) **Specific Offense Characteristics**

(1) If the property destroyed was undelivered United States mail, increase by **1** level.

(2) If the amount of the property damage or destruction, or the cost of restoration was more than $1,000, increase by the appropriate number of levels from the Property Table (§B211).

Commentary

These sections address the simplest forms of property offenses: theft, embezzlement, transactions in stolen goods, and property damage or destruction. Arson is dealt with separately in Part K, Offenses Involving Public Order and Safety. This guideline also applies to conversion offenses that arise under the Assimilated Crimes Act, such as unauthorized use of a motor vehicle.

Section B211 applies to theft and embezzlement offenses. Embezzlement is treated as equivalent to theft. Current practices under the presumptive parole guidelines treat embezzlement of less than $2,000 more severely than theft of the same amount; however, actual sentences for embezzlement tend to be lower than for theft of the same amount. The two crimes are essentially equivalent and one guideline should apply to both. The base offense level assumes that one credit card (treated as worth $1,000) or property worth no more than $1,000 was taken, and provides for a sentencing range from probation to four months imprisonment. This sentence is equal to the time served under the presumptive parole guidelines for these thefts.

Consistent with statutory distinctions, aggravation of the sentence is provided for the theft of mail. Theft offenses receive enhanced sentences if they involved multiple occurrences. This is consistent with the Commission's authorizing legislation, providing that guidelines reflect the appropriateness of imposing incremental penalties for multiple offenses committed in the same course of conduct. 28 U.S.C. § 994(l). This factor reflects the perception of practitioners that a defendant is more culpable and likely to be a professional thief if the theft was accomplished in multiple acts rather than in one (possibly fortuitous) instance. It is particularly important when there are repeated small thefts, or when the value of the property taken is difficult to estimate. A complex scheme or related incidents of theft are indicative of an intention and potential to do considerable harm, and is often related to increased difficulties of detection and proof. Because this adjustment is one of degree and cannot be easily quantified, the guideline provides for a range of adjustments.

Public policy considerations compel additional punishment for the theft of drugs, firearms, and destructive devices, as defined in 18 U.S.C. § 921. Independent studies show that stolen firearms are used disproportionately in the commission of crimes. The guidelines provide an enhancement for these cases in an effort to deter and incapacitate those involved in potentially violent and harmful criminal activity. Apply separate guidelines if the offense of conviction was possession of drugs, Part D, Offenses Involving Drugs, or stolen firearms, Part K, Offenses Involving Public Safety.

Theft from the person of another, such as pickpocketing or purse-snatching, also receives an aggravated sentence. Inclusion of this factor is supported by current practices data and is recognized in the presumptive parole guidelines. It is designed to punish thefts from persons more severely than thefts from buildings, because of the elements of stealth, fear, or force that these offenses entail. The aggravation added here results in a sentencing range for pickpocketing or purse-snatching of zero to five months. The presumptive parole guidelines for pickpocketing and purse-snatching are zero to ten months, and twenty-four to thirty-six months, respectively.

The value of property taken plays an important role in determining sentences for theft and embezzlement offenses. The property table provides an enhancement based on reliable information of the value of the property taken. Value is determined by the replacement cost to the victim, or the market value of the property, whichever is higher. Each stolen credit

card should be treated as worth $1,000. A sentence above the guideline range may be appropriate when the amount of property stolen or embezzled exceeds $2 million. Theft from the mails, in violation of 18 U.S.C. § 1708, disrupts the integrity of a basic government function. The statute provides up to five years imprisonment for stealing or receiving stolen mail. The court may impose a sanction higher than would be accorded the dollar loss alone since the public harm may be an intangible factor. Some property, such as an archeological treasure or government investigative reports, cannot be reasonably valued in a dollar amount, and has significance or worth beyond monetary value. A sentence above the guideline range may be appropriate in unusual instances.

Receiving or transporting stolen property is treated like theft. The base offense level provides for a sentencing range of probation to four months imprisonment. This range is somewhat lower than current practices under presumptive parole guidelines (zero to six months). Section B212 generally provides the same aggravating factors for these offenses as for theft. Public policy considerations suggest inclusion of an additional aggravating factor to address offenses involving the receipt or transportation of stolen property for resale. By providing a market for stolen property, fencing activities provide an incentive for theft. Deterrence considerations support a significant additional sanction beyond that applied to the defendant who purchases stolen property for personal use.

The property table for theft and embezzlement enhances the sentence if the amount of property involved exceeded $1,000. The same considerations mentioned with regard to the theft of property difficult to value also apply to receipt and transportation of stolen property.

Section B213 addresses property damage or destruction, involving conduct such as malicious mischief and vandalism. Arson is provided for in Part K, Offenses Involving Public Order and Safety. The base offense level is the same as for theft and is below the zero to six months provided in the presumptive parole guidelines for property destruction not involving arson or explosives. There is no compelling reason to treat vandalism differently from theft. The willful destruction of government property in violation of 18 U.S.C. § 1361, is also covered by this subsection. The guidelines provide for aggravation of the sentence where destruction of United States mail is an element of the offense, because of the disruption of a basic public function. The relevant statute, 18 U.S.C. § 1703, provides a maximum term of imprisonment of five years for postal service personnel convicted of destruction of the mails and a one year maximum for others.

In cases of property damage involving public facilities, the monetary value of the property damaged or destroyed may not reflect the extent of the injury inflicted. For example, the destruction of a $500 telephone line may cause an interruption in service to thousands of people for several hours. Five hundred dollars worth of damage to the entrance of a post office may result only in inconvenience to workers and patrons for a few hours. The court shall refer to the general provisions and apply any provision warranted by the offense.

Consideration was given to the inclusion of a guideline to deal with offenses involving unauthorized use of property. Such a guideline would cover offenses such as unauthorized use of an automobile as assimilated crimes (e.g., "joy-riding" and late return of rental cars). A decision was made not to provide guidelines for this narrow range of offenses. Similar offenses involving conversion of government property in violation of 18 U.S.C. § 641 are covered by §B211.

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2. BURGLARY AND TRESPASS

18 U.S.C. § 1382
18 U.S.C. § 2113(a)
18 U.S.C. § 2115
18 U.S.C. § 2117
18 U.S.C. § 2118(b)
Also See Statutory Index

§B221. Burglary. The base offense level is **14**.

(a) **Specific Offense Characteristics**

(1) If the building was a dwelling, increase by **7** levels.

(2) If the building was a pharmacy or other structure where controlled substances were legitimately manufactured or stored, increase by **4** levels.

(3) If the offense resulted in the theft or destruction of property worth more than $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

§B222. Trespass. The base offense level is **4**.

(a) **Specific Offense Characteristic**

(1) If the trespass occurred at a secured government facility, a nuclear energy facility, or upon the premises of a dwelling, increase by **2** levels.

Commentary

Burglary is unlawful entry with intent to commit a felony, and therefore often occurs in connection with other offenses. The risk of other crimes is included in the base offense level for burglary, which applies to bank burglary as well as burglaries of other structures. Pursuant to 18 U.S.C. § 2113(a), burglaries and attempted burglaries of financial institutions carry a maximum sentence of twenty years imprisonment, increased to twenty-five years if an assault occurred or if life was threatened by the use of a dangerous weapon. If someone was killed or abducted in the commission of a burglary, attempted burglary, or avoidance of apprehension for a burglary of a financial institution, the statute provides for a minimum of ten years imprisonment and a maximum of the death penalty. Because the risk to other persons is especially high when a dwelling is involved, the guidelines reflect this factor in determining an appropriate sentence.

A specific offense factor is included to aggravate burglaries of businesses where drugs are likely to be found. Those who burglarize the business premises of Drug Enforcement Administration registrants may be sentenced up to twenty years, pursuant to 18 U.S.C. § 2118, if the value of the drugs the burglar intended to steal was at least $500, the defendant engaged in interstate travel or commerce to facilitate the offense, or death or significant bodily injury resulted. If an assault occurred or if life was threatened by the use of a

dangerous weapon, a term of imprisonment of twenty-five years may be imposed. If death occurred, the statute authorizes up to life imprisonment. Additional sentence enhancement is provided in the guidelines for theft or destruction of property worth more than $1,000.

Presumptive parole guidelines provide zero to six months imprisonment for burglary of an unoccupied structure, and twenty-four to thirty-six months for burglary of an inhabited dwelling involving property loss of $1,000 or less. When other structures are burglarized, current practice under parole guidelines treats burglary as theft. Current parole guidelines do not distinguish burglary of a financial institution or the premises of a Drug Enforcement Administration registrant.

Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass in a dwelling. There is obvious danger of personal injury in these trespasses, as well as greater actual harm through loss of personal security to the owner or occupant. The base offense level provides for a sentencing range of probation to four months imprisonment. There are no current practices data available for offenses involving trespass.

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3. ROBBERY, EXTORTION, AND BLACKMAIL

18 U.S.C. § 873
18 U.S.C. §§ 875 - 877
18 U.S.C. § 1951
18 U.S.C. §§ 2113 - 2114
18 U.S.C. § 2118(a)
Also See Statutory Index

§B231. Robbery and Attempted Robbery. The base offense level is 20.

(a) **Specific Offense Characteristics**

(1) If a weapon or dangerous instrumentality was used, displayed, or possessed in the commission of the offense, increase by 3 to 6 levels, depending upon the use made of the weapon.

(2) If the robbery or attempted robbery involved a financial institution or a federal facility or institution, increase by 2 levels.

(3) If the object of the robbery or attempted robbery was a controlled substance and the offense occurred in a pharmacy or other location where controlled substances were legitimately manufactured or stored, increase by 2 levels.

(4) If the value of the property taken exceeds $10,000, increase the offense level as follows:

Estimated Value	Increase in Level
less than $10,000	**no increase**
$10,000 - $100,000	add **1**
$100,001 - $1,000,000	add **2**
$1,000,001 - $10,000,000	add **3**
over $10,000,000	add **4**

Commentary

The application of the same base offense level to both robbery and attempted robbery is designed to punish an attempted robbery equally with a completed robbery of up to $10,000, and is consistent with the statute pertaining to robbery of a financial institution. 18 U.S.C. § 2113(a). Robbery combines the elements of an assault and larceny. The base offense level for robbery is consistent with the combination of the offense levels for larceny and assault with intent to commit a felony in violation of 18 U.S.C. § 114. The use of a firearm or dangerous weapon constitutes the most serious aggravating characteristic of a robbery. Since possession of a weapon during a robbery adds significantly to the potential danger of injury, the guidelines provide an enhancement where a weapon was present. This enhancement is supported by current practices data. The base offense level provides a sentencing range of thirty-three to forty-one months imprisonment for unarmed robbery or attempted robbery involving less than $10,000. Presumptive parole guidelines are twenty-four to thirty-six months imprisonment for unarmed robbery. Sentences for robbery, particularly armed robbery, should be increased relative to current practice to serve as a deterrent.

The mail robbery statute, 18 U.S.C. § 2114, provides for a higher maximum term of imprisonment for assaults with intent to rob the mails resulting in injury, or involving use of a dangerous weapon, or involving a defendant with a prior record. The maximum increases from ten to twenty-five years in these instances. If death occurred, the statute authorizes up to life imprisonment. If persons were killed, injured, or unlawfully restrained in the course of the robbery or attempted robbery, the court shall refer to the general provisions.

Drugs or other controlled substances are often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. The specific offense characteristic dealing with robberies from Drug Enforcement Administration registrants is designed to take into consideration the dangers and security problems involved, and Congressional intent expressed in 18 U.S.C. § 2118(a) with regard to punishing such robberies more severely.

Although the amount of money taken in robbery cases does affect sentence length, its importance is small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of one or two levels brings about a considerable increase in sentence length in absolute terms. Accordingly, a separate property table, which increases more slowly than that used in theft offenses, is utilized.

§B232. Extortion, Attempted Extortion, and Conspiracy to Extort. The base offense level is 18.

Commentary

Section B232 provides the sanction for extortion in violation of 18 U.S.C. § 1951 (the Hobbs Act). Extortion is an offense affecting interstate commerce that involves obtaining property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. The Act prohibits extortion, attempted extortion, and conspiracy to extort.

The maximum term of imprisonment for violations of 18 U.S.C. § 1951 is twenty years. The color of official right involved in an extortion may be an elected or appointed public office, or a position with a labor union or political party. Guidelines for extortion and bribery involving public officials are found in Part C, Offenses Involving Public Officials. Extortion carried out by officials of labor unions is covered under the labor racketeering provisions of Part E, Offenses Involving Criminal Enterprise.

The base offense level for extortion involving up to $10,000 in property or property damage provides for a sentencing range of twenty-seven to thirty-three months imprisonment. This treatment is consistent with presumptive parole guidelines for extortion involving threat of injury to a person or property. If property valued at more than $10,000 was extorted, damaged, or destroyed, the court shall use the general provisions to aggravate the offense level by the appropriate amount. If the offense involved the use of firearms or other dangerous weapons, or if persons were killed, injured, or unlawfully restrained in connection with the offense, the court shall also refer to the general provisions.

§B233. **Blackmail.** If the offense involved:

(1) The threat of reporting an illegal act, the base offense level is **10**.

(2) The communication of a threat to kidnap or injure, the base offense level is **20**.

(3) The communication of a ransom demand for the release of a kidnapped person, the base offense level is **25**.

Commentary

Section B233 applies to acts prohibited by 18 U.S.C. §§ 873, 875-877. While blackmail is a form of extortion and should be treated similarly, the base offense level is determined by the nature of the threat or demand. 18 U.S.C. § 873 prohibits threats to disclose a violation of United States law in consideration for money or some other item of value, and provides a maximum one year term of imprisonment. The base offense level provides for a sentencing range of four to ten months imprisonment. Time served under presumptive parole guidelines is zero to ten months for the offense.

Violations of 18 U.S.C. §§ 875-877 are distinguished only by the method of communication of the extortionate demand. The maximum penalty under each statute varies from two to twenty years, depending upon the defendant's state of mind and whether the object of the demand was ransom for a kidnapped person or other property. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats involving personal injury,

property damage, kidnapping, or ransom demands. Section 877 sets out parallel provisions, but prohibits the mailing of threatening communications from foreign countries.

Communication of an extortion threat to kidnap or inflict personal injury results in a sentencing range of twenty-four to thirty months. Presumptive parole guidelines provide a range of twenty-four to thirty-six months for the offense. Communication of a ransom demand for the release of a kidnapped person results in a sentencing range of fifty-seven to seventy-one months. Presumptive parole guidelines provide a range of fifty-two to eighty months for the least serious offense.

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4. COMMERCIAL BRIBERY AND KICKBACKS

15 U.S.C. §§ 78dd-1, 78dd-2
15 U.S.C. § 78ff
18 U.S.C. § 215
18 U.S.C. § 224
18 U.S.C. § 1954
26 U.S.C. § 9012(e)
26 U.S.C. § 9042(d)
41 U.S.C. §§ 51 - 52
41 U.S.C. § 54
42 U.S.C. §§ 1395nn(b)(1),(2)
42 U.S.C. §§ 1396h(b)(1),(2)
49 U.S.C. § 11904
49 U.S.C. §§ 11907(a),(b)
Also See Statutory Index

§B241. **Bribery in Procurement of Bank Loan.** The base offense level is 9.

(a) Specific Offense Characteristic

(1) If the value of the bribe, or the value of the improper benefit to the borrower, exceeded $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

§B242. **Other Commercial Bribery.** The base offense level is 9.

(a) Specific Offense Characteristic

(1) If the value of the bribe or improper benefit to the briber exceeded $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

§B243. Bribery in Consignment or Transportation of Property by a Common Carrier or Rail Carrier. The base offense level is 9.

(a) Specific Offense Characteristic

(1) If the value of the bribe or the improper benefit to the briber exceeded $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

Commentary

This subsection applies to commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government. See Part C, Offenses Involving Public Officials. Because commercial bribery involves an expectation of financial gain on the part of one or more parties, the guidelines direct the use of the property table at §B211 to aggravate the offense level. The amount to be used is the value of the bribe, or the monetary benefit of the action to be taken or effected in return for the bribe, if the value can be reasonably ascertained. If the amount of the benefit cannot be ascertained, the court should apply at least the amount of the bribe. For example, if a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan, aggravation of the base offense level from the property table would provide for imposing a sentence on the bank officer based on the $25,000, and the sentence for the briber would be based on the benefit received, e.g. the savings in interest over the life of the loan compared with alternative lending sources. In no case would the amount be less than the value of the bribe. If, in another instance, a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler is the amount he and his confederates won or stood to gain. If that amount is not ascertainable, the amount of the bribe is used to determine the appropriate increase in offense level from the property table. If drugs were an element of the bribery, the sentence may be aggravated further.

Section B241 applies to violations of 18 U.S.C. § 215. The statute prohibits the offer or acceptance of a fee in connection with the procurement of a loan from a financial institution, and authorizes up to five years imprisonment. The base offense level shall be enhanced by application of the property table, based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

Section B242 applies to illegal behavior as defined in diverse federal bribery statutes, each authorizing up to five years imprisonment. Included are violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), that involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.

The section also relates to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

Violations of the Foreign Corrupt Practices Act of 1977 are explicitly covered by §B243. The statute relating to these offenses is codified in Title 15 with securities violations. Domestic concerns are prohibited from bribing foreign officials in connection with obtaining or

retaining business. 15 U.S.C. § 78dd-1 applies to issuers of a class of registered securities, and 15 U.S.C. § 78dd-2 applies to other domestic concerns. This section also applies to violations of 18 U.S.C. § 224, sports bribery.

Section B243 applies to violations of the Interstate Commerce Act involving the offer or taking of bribes or kickbacks to discriminate in the transportation of property by common carrier or rail carrier. 49 U.S.C. § 11904(a)(3) provides a maximum of two years imprisonment for paying a common carrier to discriminate against another consignor or consignee. 49 U.S.C. § 11907(a) and (b) cover the parallel situation with respect to the offer or acceptance of a payment involving a rail carrier. Similarly, bribery involving subcontractors on federal projects is prohibited under 41 U.S.C. §§ 51 and 54. Violations of these statutes carry a maximum of two years imprisonment.

Presumptive parole guidelines treat commercial bribery as fraud based on the greater of the value of the bribe or the financial loss to the victim, with a base of zero to six months time served. Sports bribery is treated as theft and time served is based on the amount of the bribe, with zero to ten months as a base, subject to enhancement for aggravating circumstances. For bribes involving more than $500,000, presumptive parole guidelines provide forty to fifty-two months imprisonment.

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5. COUNTERFEITING AND FORGERY

17 U.S.C. § 506(a)
18 U.S.C. §§ 471 - 473
18 U.S.C. § 495
18 U.S.C. §§ 500 - 501
18 U.S.C. § 510
18 U.S.C. § 1003
18 U.S.C. §§ 2314 - 2315
18 U.S.C. §§ 2318 - 2320
Also See Statutory Index

§B251. Counterfeiting. The base offense level is 6.

(a) Specific Offense Characteristics

(1) If the defendant possessed or had custody or control over counterfeiting devices and materials for use in illegally printing or coining any currency, obligation, or security of the United States, increase by 6 to 9 levels, depending upon the number and nature of the devices or materials.

(2) If the offense involved multiple transactions or occurrences, increase by 1 to 6 levels, depending upon the number of transactions or occurrences. Do not apply this adjustment if adjustment (3) is greater.

(3) If the greater of the face value or the market value of the counterfeit items exceeded $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

§B252. Forgery. The base offense level is 4.

(a) **Specific Offense Characteristics**

(1) If the offense involved multiple transactions or occurrences, increase by 1 to 6 levels, depending upon the number of transactions or occurrences. Do not apply this adjustment if adjustment (2) is greater.

(2) If the greater of the face value or market value of the forged, altered, or fraudulently endorsed items exceeded $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

§B253. Criminal Infringement of Copyright. The base offense level is 6.

(a) **Specific Offense Characteristics**

(1) If the offense involved the reproduction or distribution of at least one thousand phonograph records or copies infringing the copyright in one or more sound recordings, increase by 10 levels; or, if the offense involved the reproduction or distribution of more than one hundred but less than one thousand phonograph records or copies infringing the copyright in one or more sound recordings, increase by 4 levels.

(2) If the offense involved the reproduction or distribution of at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works, increase by 10 levels; or, if the offense involved the reproduction or distribution of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works, increase by 4 levels.

(3) If the offense is a second or subsequent offense under either (b)(1) or (b)(2) of 18 U.S.C. § 2319, where a prior offense involved a sound recording, or a motion picture or other audiovisual work, increase by 6 levels.

Commentary

Section B251 applies to offenses involving counterfeiting or passing of counterfeit items. Federal law protects a variety of items from counterfeiting, including United States currency and coins, food stamps, postage stamps, foreign bank notes, labels for phonograph records, and 'itary discharge papers.

The more serious counterfeiting offenses are aggravated by application of the Property Table in §B211, to reflect the greater of the face value (if any) or market value of the counterfeit item. To the extent that the acceptance of counterfeit documents as genuine

results in losses to private individuals, the amount of the loss should be taken into account at sentencing.

Possession of counterfeiting devices to copy obligations and securities of the United States are treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations or securities and the public policy interest in protecting the integrity of government obligations.

Section B252 treats forgery and fraudulent endorsement in violation of 18 U.S.C. § 495, in a manner similar to counterfeiting offenses. Aggravation is warranted where the greater of the face value or market value of the forged item exceeds $1,000, or where the loss to private parties resulting from accepting the forged item as genuine exceeds $1,000. A defendant who forged or cashed one United States Treasury check for $500 is subject to a sentence ranging from probation to five months imprisonment. If the offense involved forgery or cashing of ten checks totalling $5,000, the offense level is six to ten, depending upon the court's assignment of additional levels for multiple occurrences. While federally prosecuted forgery offenses run the gamut in complexity and sophistication, a typical case may involve the forgery of a deceased payee's signature on a check issued by a federal agency. The base offense level and the amount of property loss are designed to provide adequate sanctions to deter these offenses. If a forgery involved less than $5,000, the court generally has a choice of imposing probation or a term of incarceration up to six months.

Section B253 applies to violations of 17 U.S.C. § 506(a) punished under 18 U.S.C. § 2319. Copyright infringements to which the base offense apply are misdemeanors. The aggravating factors reflect the statutory distinctions that make felonies of offenses involving sound recordings, and motion pictures and other audiovisual works. Specific offense characteristics §B253(a)(1) and (2) apply to offenses punished under 18 U.S.C. § 2319(b)(1) and (2), which allows for a maximum term of either two or five years imprisonment, depending upon the number of copies and the nature of the item copied. The statute provides a sentencing enhancement to allow for a maximum sentence of five years imprisonment if the offense is a second or subsequent violation of the statute.

Consideration was given to the inclusion of a specific offense characteristic in the counterfeiting and forgery guidelines that would take into account any losses experienced by private individuals who accepted the counterfeit or forged articles as genuine. This factor was not included since it might result in double counting, because the greater of the face value or the market value of the counterfeit or forged document is already included as a factor.

Presumptive parole guidelines distinguish between passing counterfeit currency and manufacturing counterfeit currency, while forgery offenses are distinguished only on the basis of the value of the object of the forgery. The minimum parole guidelines for passing counterfeit currency provide for time served of zero to ten months, compared with the guidelines sentencing range of zero to six months. Similarly, presumptive parole guidelines for more sophisticated counterfeiting offenses provide average time served of twenty-four to thirty-six months, compared with the guideline sentencing range of eighteen to twenty-four months. Time served for forgery of an item worth up to $5,000 is zero to ten months under presumptive parole guidelines, compared to a guideline sentence of zero to six months. The guideline range is narrower to allow for the possibility of probation for first offenders, while adhering to the Congressional mandate that the maximum sentence not exceed the minimum by more than six months or 25 percent, whichever is greater.

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6. MOTOR VEHICLE IDENTIFICATION NUMBERS

18 U.S.C. § 511
18 U.S.C. § 553(a)(2)
18 U.S.C. § 2320

§B261. Altering or Removing Motor Vehicle Identification Numbers. The base offense level is 10.

§B262. Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers. The base offense level is 10.

(a) Specific Offense Characteristic

(1) If the value of the motor vehicles or parts involved is over $1,000, increase the offense level by the appropriate number of levels from the Property Table (§B211).

Commentary

Section B261 applies to violations of 18 U.S.C. § 511, which provides for a maximum of five years imprisonment. The base offense level provides for a sentence ranging from probation to six months imprisonment. The presumptive parole guidelines treat the value of the parts or the vehicle involved in the offense as the determining factor. The value of the vehicle or parts is not included as an aggravating factor in determining the sentence under §B261 since it would be included in sentencing for any related theft or receiving stolen property charges.

Section B262 applies to violations of 18 U.S.C. §§ 553(a)(2) and 2320. The statutes prohibit importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. § 553(a)(2) carry a maximum of five years imprisonment for the import or export of motor vehicles or parts. Violations of 18 U.S.C. § 2320 carry a maximum of twenty years imprisonment. In some instances, violations of 18 U.S.C. § 553(a)(2) occur where violations of 18 U.S.C. § 553(a)(1), (import or export of motor vehicles known to be stolen) have also been charged. The base offense level provides for a sentencing range of six to twelve months imprisonment. The property table aggravates the sentence above the base offense level. Presumptive parole guidelines treat this offense as trafficking in stolen property, with the value of the vehicles or parts determining time served. The minimum average time served for this offense under the parole guidelines is zero to six months.

PART C - OFFENSES INVOLVING PUBLIC OFFICIALS

18 U.S.C. §§ 201 - 214
18 U.S.C. §§ 216 - 219
18 U.S.C. § 371
18 U.S.C. § 872
18 U.S.C. § 1341
18 U.S.C. § 1343
18 U.S.C. § 1909
18 U.S.C. §§ 1951 - 1952
18 U.S.C. § 1962
Also See Statutory Index

INTRODUCTION

Because public officials are vested with authority, power, and trust over public matters, they are generally held to higher standards of conduct. Violation of an oath of office may seriously erode the values of a community and confidence in the integrity and fairness of governmental functions. The harm caused by corrupt public officials may be tangible: awarding a contract to an unqualified bidder or improper reduction of property taxes. Frequently the harm caused by the corruption of public officials is intangible, and therefore difficult to measure empirically. Sentences in these cases should reflect the seriousness of the offense, provide adequate and certain punishment, and provide a deterrent for those who would corrupt government processes.

Fifty-two percent of bribery defendants and nearly 20 percent of extortion defendants received probationary sentences during fiscal year 1985. On average, current sentencing practices do not adequately reflect the seriousness of public corruption offenses. Commission estimates of average time served for bribery ranges from one month to two years, depending principally upon the amount of the bribe. Therefore, with respect to the more serious bribery and extortion offenses, the guidelines provide the sentencing judge with sufficient latitude to impose a significant sentence. Systematic or pervasive corruption of a governmental institution, office, or function may justify a sentence above the applicable guideline range.

§C211. Payment of a Bribe or Gratuity, Conspiracy, Solicitation, or Attempt. If the offense involved a gratuity for performing an official act, the base offense level is 10 to 15, depending upon the extent and duration of the offense. 18 U.S.C. § 201(f).

(a) **Specific Offense Characteristic**

(1) If the offense involved a bribe for the purpose of influencing an official act, or for committing a fraud against the United States, or any other unlawful purpose, increase by 1 to 8 levels, depending upon the nature and extent of the public interest or injury involved and the defendant's expected benefit. 18 U.S.C. § 201(b).

§C212. Receipt of a Bribe or Gratuity, Conspiracy, Solicitation and Attempts. If the defendant was a public official who sought or received money or anything of value as a gratuity for performing an official act, the base offense level is **10** to **15**, depending upon the extent and duration of the offense. 18 U.S.C. § 201(g).

(a) **Specific Offense Characteristic**

(1) If the payment was sought or received as a bribe for the purpose of influencing an official act, or for committing a fraud against the United States, or any other illegal purpose, increase by **1** to **8** levels, depending upon the defendant's position, the nature and extent of the public interest or injury involved, and the personal benefit the defendant expected to derive from the offense. 18 U.S.C. § 201(c).

§C213. Extortion, Conspiracy or Attempt to Extort under Color of Official Right. The base offense level is **18** to **23**, depending upon the defendant's position, the nature of the conduct and any personal benefit derived or expected to be derived from the offense. 18 U.S.C. §§ 872, 1951.

§C214. Conflict of Interest. The base offense level is **8** to **12**, depending upon the defendant's position and the nature and circumstances of the offense. 18 U.S.C. §§ 207-208.

§C215. Payment or Receipt of Unauthorized Compensation. The base offense level is **6** to **10**, depending upon the nature, extent, and duration of the offense, and the defendant's position. 18 U.S.C. §§ 203, 209.

§C216. Purchase or Sale of Appointive Public Office. The base offense level is **6** to **10**, depending upon the nature of the office and the circumstances of the offense. 18 U.S.C. §§ 210-211.

§C217. Offer or Acceptance of Loan or Gratuity to Bank Examiner; Bank Examiner Performing Other Services for Compensation; Offer or Receipt of Payment for Procuring Bank Loans, Discount of Commercial Paper or Financial Transaction, or Adjustment for Farm Indebtedness. The base offense level is **6** to **10**, depending upon the defendant's position and the nature and extent of the offense. 18 U.S.C. §§ 212-214, 217, 1909.

Commentary

The term "public official" may have broad or limited application under public integrity statutes. For example, the federal bribery statute, 18 U.S.C. § 201(a), defines a public official to include not only federal officers and employees, but also any "person acting for or on behalf of the United States" in any governmental function or by authority of any federal agency, department, or branch of government. United States v. Dixson, 104 S.Ct. 1172 (1984). Thus, jurisdiction under the federal bribery statute has been extended to persons entrusted with

expenditure of federal funds, even though they may not be technically employed by the federal government. United States v. Hollingshead, 672 F.2d 751 (9th Cir. 1982). However, the conflict of interest statutes explicitly limit application to certain present and former officials or employees of the United States. 18 U.S.C. §§ 207 and 208.

A conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, may involve corrupt activities by a public official. United States v. Thompson, 366 F.2d 167 (6th Cir.), cert. denied, sub. nom. Campbell v. United States, 385 U.S. 973 (1966). The Hobbs Act, 18 U.S.C. § 1951(b)(2), applies in part to any person who acts "under color of official right." This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974); United States v. Martin, 751 F.2d 258 (8th Cir. 1984). Corrupt activities prosecuted under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, may involve either federal or local officials in schemes to defraud the public of its right to honest government. United States v. Mandell, 602 F.2d 663 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); United States v. Price, 788 F.2d 234 (4th Cir. 1986); Similarly, violations of the Travel Act, 18 U.S.C. § 1952, and the federal racketeering statute, 18 U.S.C. § 1962, may involve corruption of public officials covered by the guidelines in this section. When the offense of conviction is the general conspiracy statute, the mail or wire fraud statute, the Travel Act, or the racketeering act, the court shall apply the guideline that most accurately describes the underlying offense conduct.

Section C211 applies to defendants who give gratuities to public officials for committing an official act, in violation of 18 U.S.C. § 201(f). A corrupt purpose is not an element of these offenses, which carry a two year maximum penalty. United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974); United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir.), cert. denied, sub. nom. Tsang-Chi Chen v. United States 105 S.Ct. 2684 (1985). Section C211(a)(1) applies when a bribe is given for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, in violation of 18 U.S.C. § 201(b). Under this provision, the statutory maximum is increased to fifteen years. The guidelines provide for a minimum sentence in the range of six to twelve months for offenses involving payment of gratuities and eight to fourteen months for offenses involving payment of bribes. They also provide the court with substantial latitude in adjusting the offense level to reflect the degree of corruption involved.

Section C212 applies to public officials who solicit or accept gratuities for performing an official act, in violation of 18 U.S.C. § 201(g). The guidelines give the court the same latitude in affixing an appropriate punishment for the public official as for the person who offers or gives a gratuity. This is consistent with the statute that carries the same maximum sentence for the giver and the recipient of the unlawful payment. In some cases the public official is the instigator. In others, the private citizen who is attempting to ingratiate himself or his business with the public official may have been the aggressor. These factors should be considered by the court when determining appropriate adjustments to the base offense level by reference to Part Z, Role in the Offense.

Section C212(1) provides that a public official who accepts a bribe for a corrupt purpose, under 18 U.S.C. § 201(c), is subject to the same sentencing exposure as the corrupt person who pays a bribe. This approach is consistent with the statutory scheme and legislative intent of § 201. Presumptive parole guidelines provide for a minimum time served range of zero to ten months for giving or receiving an illegal payment. Parole guidelines do not differentiate bribes from gratuities, but the minimum range of presumptive time served is increased to twelve to eighteen months if the offense involved multiple instances, and the maximum time in custody

extends to forty to fifty-two months based on the greater of the value of the illegal payment or the favor received. In addition, the parole guidelines provide that breach of trust causing injury beyond monetary gain may be considered as an aggravating factor in increasing the period of custody above the presumptive parole guidelines. Current practice estimates indicate a difference in average time served based on whether a bribe or gratuity was involved, whether the defendant was the giver or recipient, and whether dollar loss was reported. In those instances where it was not possible to determine the dollar loss, the estimated minimum average time served for the giver and the recipient of a gratuity were two to eight months and four to ten months, respectively. Where bribery was the offense and it was not possible to determine dollar loss, the estimated time served for the giver and the recipient of a bribe was six to twelve months and eight to fourteen months, respectively.

Section C213 applies to extortion by officers or employees of the United States in violation of 18 U.S.C. § 872, and Hobbs Act extortions, conspiracies, and attempts under color of official right, in violation of 18 U.S.C. § 1951. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations, to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court. Violations of 18 U.S.C. § 872 carry a three year statutory maximum, while violations of 18 U.S.C. § 1951 carry a statutory maximum of twenty years imprisonment. The guideline therefore provides a flexible range of offense levels, so that the sentencing judge may adequately consider the defendant's position and the degree the public trust was violated, the nature of the conduct, and any personal benefit expected or received.

The Hobbs Act treats extortion conspiracies and attempts in the same manner. The reason these offenses are often not completed is that the victim complains to authorities or is acting in an undercover capacity. Lack of completion is not a measure of the defendant's culpability in attempting to use a public position for personal gain. The guidelines therefore provide the same sentencing range for completed and incomplete Hobbs Act violations. Presumptive parole guidelines treat extortion under color of official right in the same manner as bribery, based on the amount of money received. Current practice estimates do not distinguish between extortion under color of official right and other extortion offenses. In general, current practice estimates indicate a minimum range of average time served of fifteen to twenty-one months for extortion not resulting in reported dollar loss.

Bribery conspiracies, solicitations, and attempts in violation of 18 U.S.C. §§ 201(b) and (c) provide the same maximum penalty for unsuccessful corrupt activities. Since the same public policy considerations apply, the sentencing judge is given comparable sentencing latitude to evaluate the seriousness of the offense. Presumptive parole guidelines treat these offenses in the same manner. Current practice estimates also indicate that estimated time served for these offenses is not significantly different from that of the underlying offenses.

Section C214 applies to present and former federal officers and employees who act in the face of financial and non-financial conflicts of interest proscribed by 18 U.S.C. §§ 207 and 208. A two year maximum term of imprisonment is provided. The range of levels permit the sentencing judge to give probation to the technical violator. However, a sentence up to sixteen months incarceration may be imposed if the court finds the violation was serious in nature and substantial in scope. These offenses are not explicitly treated in the parole guidelines, but would presumptively be subject to a period of zero to six months in custody by application of the parole commission's grading of miscellaneous offenses. There are no current practice estimates available for these offenses.

Section C215 applies to violations of 18 U.S.C. §§ 203 and 209. Under 18 U.S.C. § 203, the offer or receipt of unlawful compensation by an appointed or elected official, or official-elect of the federal government are prohibited. The statute makes no distinction in punishment between the person who solicits or receives compensation and the person who offers or gives compensation, and is intended to ensure that government officials do not exert undue influence on government matters in response to the receipt of unlawful compensation. The statute provides a two year maximum penalty. 18 U.S.C. § 209 provides a maximum term of imprisonment of one year for the receipt or payment of salary, or supplementation of salary of an officer or employee of the executive branch or an independent agency of the federal government, or an employee of the District of Columbia. The guideline provides for sentences ranging from level 6 (probation to six months) to level 10 (six to twelve months) depending upon the nature, extent, and duration of the offense and the nature of the defendant's position. Application of the parole commission's grading of miscellaneous offenses indicates a minimum period of custody of zero to six months. Current practices data indicate a minimum range of average time served of one to seven months.

Section C216 applies to offenses involving the offer or acceptance of payment in return for appointment to government office, in violation of 18 U.S.C. §§ 210 and 211. Section 210 of Title 18 makes it illegal to pay, offer, or promise something of value to a person, firm, or corporation in consideration of procuring appointive office, while §211 applies to the solicitation or acceptance of something of value in consideration of a promise of the use of influence in obtaining appointive federal office. These statutes are designed to penalize trafficking in federal appointive office. Both statutes carry a maximum of one year imprisonment. The guideline provides for a minimum sentence ranging from probation to six months, depending upon the nature and circumstances of the offense. Because the statutory maximum for these offenses is one year, presumptive parole guidelines do not apply. Current practice estimates are not available for these offenses.

Section C217 applies to violations of 18 U.S.C. §§ 212 to 214, 217, and 1909 involving the offer or acceptance of payments and gratuities by federal banking officials. These statutes carry a maximum of one year imprisonment. Violations of 18 U.S.C. §§ 212 and 213 involve the offer and acceptance of loans or gratuities to bank examiners. Violations of 18 U.S.C. § 214 entail the offer or receipt of something of value for procuring a loan, or discount of commercial paper from a Federal Reserve bank. 18 U.S.C. § 217 prohibits the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation, for banks or bank officials. The base offense level for this guideline provides for a minimum sentence ranging from probation to six months imprisonment, depending upon the defendant's position and the nature and extent of the offense. Guidelines for offenses involving unlawful payments to bank officials in violation of 18 U.S.C. § 215 appear in Part B, Offenses Involving Property. Because the statutory maximum for these offenses is one year, presumptive parole guidelines do not apply. Current practice estimates indicate a minimum range of average time served for these offenses of one to seven months.

Federal officers and employees who fail to register as representatives of foreign principals as required under the Foreign Agents Registration Act, 18 U.S.C. § 219, should be sentenced under the relevant provisions of Part M, Offenses Involving National Defense.

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

21 U.S.C. § 841
21 U.S.C. § 843
21 U.S.C. § 845(a), (b)
21 U.S.C. § 846
21 U.S.C. § 848
21 U.S.C. §§ 952 - 953
21 U.S.C. §§ 955, 955a, 955c
21 U.S.C. § 957
21 U.S.C. § 959
21 U.S.C. §§ 960 - 963
21 U.S.C. App. § 1903
Also See Statutory Index

INTRODUCTION

These guidelines are consistent with the provisions of the Anti-Drug Abuse Act of 1986. Many of the guideline sentences correspond to the mandatory minimum term of imprisonment required under the Act. Additionally, these guidelines have adopted the approach generally utilized in the Act of determining the amount of the controlled substance involved by reference to the weight of the overall mixture or compound in which it is found.

Other factors being equal, offenses involving substances that present a similar danger are treated similarly. The guidelines are designed to assure that larger quantities of a controlled substance considered to be less harmful result in the same punishment as smaller amounts of a substance considered more harmful.

Violations of laws that prohibit the use or distribution of controlled substances represent a serious harm to individuals and society. Illegal drug transactions may fund organized crime. Evidence has increasingly established a correlation between drug abuse and other crimes. Therefore, the controlling principles in formulating these guidelines were adequate punishment, deterrence, and public protection. Drug offenders show a high rate of recidivism. Those who have not been deterred should be incapacitated.

A majority of drug offenses require harsher penalties for defendants with prior drug related convictions. As a result, the guidelines enhance for prior drug offense convictions. To avoid double counting, convictions resulting from drug offenses should not be considered in computing the defendant's criminal history category in Chapter Three, Part A. Criminal history adjustments resulting from other offenses should be counted.

§D211. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses). The base offense value is determined as follows:

(1) For trafficking that results in serious bodily harm, with a prior drug related conviction, the base offense level is **43**.

(2) For trafficking in controlled substances (except Schedule III, IV, and V controlled substances and relatively small amounts of marihuana and hashish), determine the base offense level from the following table:

TABLE I

I Controlled Substances and Amounts	II Trafficking in Controlled Substances	III Trafficking with a Prior Drug-related Conviction	IV Trafficking Resulting in Serious Bodily Harm
1 KG Heroin, 5 KG Cocaine, 50 G Cocaine Base, 1 KG PCP or 100 G Pure PCP, 10 G LSD, 400 G Propanamide or 100 G Propanamide Analogue, 1000 KG Marihuana (or more of any of the above)	Level 32*	Level 38*	Level 38*
500-999 G Heroin, 2.5-4.9 KG Cocaine, 25-49 G Cocaine Base, 500-999 G PCP or 50-99 G Pure PCP, 5-9 G LSD, 200-399 G Propanamide or 50-99 G Propanamide Analogue, 500-999 KG Marihuana	Level 30	Level 36	Level 38*
250-499 G Heroin, 1.25-2.49 KG Cocaine, 12.5-24.9 G Cocaine Base, 250-499 G PCP or 25-49.9 G Pure PCP, 2.5-4.9 G LSD, 100-199 G Propanamide or 25-49 G Propanamide Analogue, 250-499 KG Marihuana	Level 28	Level 34	Level 38*
100-249 G Heroin, .5-1.24 KG Cocaine, 5-12.4 G Cocaine Base, 100-249 G PCP or 10-249 G Pure PCP, 1-2.49 G LSD, 40-99 G Propanamide or 10-24.9 G Propanamide Analogue, 100-249 KG Marihuana	Level 26*	Level 32*	Level 38*
60-99 G Heroin, 300-499 G Cocaine, 3-4.9 G Cocaine Base, 75-99 G PCP or 7.5-9.9 G Pure PCP, 750-999 MG LSD, 30-39 G Propanamide or 7.5-9.9 G Propanamide Analogue, 70-99 KG Marihuana, 1000+ KG other Schedule I or II Controlled Substances, 1000+ Marihuana Plants	Level 24	Level 30	Level 38*
40-59 G Heroin, 200-299 G Cocaine, 2-2.9 G Cocaine Base, 50-74 G PCP or 5-7.4 G Pure PCP, 600-749 MG LSD, 20-29.9 G Propanamide or 5-7.4 G Propanamide Analogue, 50-69 KG Marihuana, 500-999 KG other Schedule I or II Controlled Substances, 750-1000 Marihuana Plants	Level 22	Level 28	Level 38*
20-39 G Heroin, 100-199 G Cocaine, 1-1.9 G Cocaine Base, 30-49 G PCP or 3-4.9 G Pure PCP, 400-599 MG LSD, 12-19.9 G Propanamide or 3-4.9 G Propanamide Analogue, 250-499 KG other Schedule I or II Controlled Substances, 500-749 Marihuana Plants	Level 20	Level 26	Level 38*
10-19 G Heroin, 50-100 G Cocaine, 500-999 MG Cocaine Base, 20-29 G PCP or 2-2.9 G Pure PCP, 200-399 MG LSD, 8-11.9 G Propanamide or 2-2.9 G Propanamide Analogue, 50-249 KG other Schedule I or II Controlled Substances, 400-499 Marihuana Plants	Level 18	Level 24	Level 38*
5-9.9 G Heroin, 30-49 G Cocaine, 300-499 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD, 6-7.9 G Propanamide or 1.5-1.9 G Propanamide Analogue, 5-50 KG other Schedule I or II Controlled Substances, 300-399 Marihuana Plants	Level 16	Level 22	Level 38*
Less than 5 G Heroin; 20-29 G Cocaine, 200-299 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD, 4-5.9 G Propanamide or 1-1.4 G Propanamide Analogue, 1-4.9 KG other Schedule I or II Controlled Substances, 200-299 Marihuana Plants	Level 14	Level 20	Level 38*
Less than the following: 20 G Cocaine, 200 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD, 4 G Propanamide or 1 G Propanamide Analogue, 1 KG other Schedule I or II Controlled Substances; or 100-199 Marihuana Plants	Level 12	Level 18	Level 38*

*Statute Specifies a Mandatory Minimum Sentence

Commentary

The offense levels assigned to offenses involving controlled substances depend upon the type and amount of the controlled substance, prior criminal history, the harm caused by the controlled substance, the circumstances of the offense, and the presence of mitigating or aggravating factors, such as the use of weapons and distribution to minors.

Table I is based on the classifications and punishments established in the Anti-Drug Abuse Act of 1986 and applies to all unlawful trafficking in schedule I and II controlled substances. "Trafficking" refers to all offenses under 21 U.S.C. §§ 841 and 960, which includes importing, exporting, manufacturing, distributing, and possessing with intent to distribute or manufacture offenses. Offenses under sections 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether serious bodily harm resulted from the offense.

These factors are set out at 21 U.S.C. §§ 841(b)(1)(A), (B), and (C) and 960(b)(1), (2) and (3). They appear in Table I as follows: Column I contains the list of controlled substances identified in the statutory provisions. The statutes establish only three weight classifications. Five additional ones are included in the table in order to make finer distinctions in punishment based upon the quantity of the substance involved. Column II contains offense levels for the eight classifications of trafficking in controlled substances identified in Column I. Column III contains eight classifications that provide higher offense levels for defendants with a prior federal, state, or foreign drug related conviction. Column IV provides a mandatory minimum penalty of twenty years imprisonment for first offenders who are convicted for trafficking in a controlled substance that caused serious bodily harm.

The base offense levels with asterisks represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences with a lower limit as close to the statutory requirement as possible; e.g., level 32 in Column II ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months. The base offense levels that comply with statutory requirements serve as anchors in attributing offense levels to other categories. Those offense levels that are not defined by statute are proportional to those that are statutorily defined.

The recent legislation does not provide the same distinctions in drug amounts as provided in Table I. The Commission, in determining these distinctions, has consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Force, who advocate the necessity of finer distinctions.

Terms of imprisonment are calculated by reference to the offense level table, which provides a sentence range based upon the defendant's criminal history. In calculating the criminal history adjustment, any prior drug related conviction taken into account in determining the defendant's offense level in Table I shall not be considered in determining the defendant's criminal history for purposes of Chapter Three.

For each of the offenses listed in Table I, a term of supervised release to follow imprisonment is required by law. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, §§A531-A533.

While the new legislation provides mandatory minimum sentences for many offenses, it also provides the means by which sentences lower than the statutory minimum may be imposed.

28 U.S.C. § 994(n). A lower sentence may be imposed by reason of a "defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." See Chapter Three, §C331, Cooperation.

The scale amounts for all controlled substances identified in Column I refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the more serious controlled substance, as determined by applicable guideline punishment, shall determine the name affixed to the entire quantity.

If a defendant trafficked in a large quantity of controlled substances, compounds or mixtures of unusually high purity, this shall constitute a sufficient basis for the sentencing judge to increase a sentence above the applicable guideline range. The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate that the individual has a prominent role in the criminal enterprise and is close to the source of the drugs.

Congress provides an exception to purity considerations in the case of phencyclidine (PCP). 21 U.S.C. § 841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. Row 1 of Table I illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP.

The reference to specific amounts, weights, or quantities of controlled substances in Table I serves only as a general guide. It is not necessary to find that the exact amount provided in a particular weight category exists in order to impose the guideline sentence applicable to that category. It is sufficient that the controlled substance approach or be substantially equivalent to that specified in Table I. If, for example, an offense involved 750 grams of heroin, the court should sentence the defendant under level 31. Similarly, if five kilograms of heroin were involved, the court could sentence at a level correspondingly greater than level 32.

In cases where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the sentencing judge may consider any reliable information relevant to quantity, including but not limited to the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

Table I applies to trafficking in all marihuana products except amounts of less than fifty kilograms of marihuana, ten kilograms of hashish, or one kilogram of hashish oil, which are covered under Table II. Additionally, pursuant to 21 U.S.C. § 841(b)(1)(D), Table I applies to trafficking in 100 marihuana plants or more, regardless of weight. If 100 or more marihuana plants found to weigh fifty kilograms or more are seized, the appropriate offense levels shall be determined by reference to weight and not numbers of plants.

All controlled substance analogues are covered under Table I. Subtitle E of the Anti-Drug Abuse Act provides that these substances should be treated as schedule I controlled substances. Therefore, controlled substance analogues should be considered as "other schedule I or II controlled substances" beginning in row five of column I.

Any reference to a particular controlled substance in these guidelines is also meant to include all salts, isomers, and all salts of isomers. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. Any reference to heroin includes all Schedule I and II opiates. Any reference to marihuana includes all cannabis products.

The Commission recognizes that there are certain Schedule I and II substances that, although not encountered as frequently as heroin, have 'heroin like' effects. Where such substances are encountered in significant quantities, a decision above the applicable guideline for Schedule I and II substances may be warranted. The following chart lists these substances and their relative potency compared to heroin of equivalent purity.

Schedule I Substances with 'Heroin Like' Effects

1 gm of Alpha-Methylfanyl =	*100 gm of heroin*
1 gm of Dextromoramide =	*0.66 gm of heroin*
1 gm of Dipipanone =	*0.25 gm of heroin*
1 gm of 3-Methylfentanyl =	*125 gm of heroin*
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperdine/MPPP =	*5 gm of heroin*
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	*5 gm of heroin*

Schedule II Substances with 'Heroin Like' Effects

1 gm of Alphaprodine =	*0.1 gm of heroin*
1 gm of Fentanyl =	*31.25 gm of heroin*
1 gm of Hydromorphone/Dihydromorphinone =	*2.5 gm of heroin*
1 gm of Levorphanol =	*2.5 gm of heroin*
1 gm of Meperidine/Pethidine =	*0.05 gm of heroin*
1 gm of Methadone =	*0.5 gm of heroin*
1 gm of 6-Monoacetylmorphine =	*1 gm of heroin*
1 gm of Morphine =	*0.5 gm of heroin*
1 gm of Oxycodone =	*1 gm of heroin*
1 gm of Oxymorphone =	*5 gm of heroin*
1 gm of Racemorphan =	*1.66 gm of heroin*

A defendant who used special skills in the commission of the offense may be subject to an enhancement for role in the offense. See Part Z, §Z212. Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others who have a special skill, trade, profession, or position that may be used to significantly facilitate the commission of a drug offense. An aggravating factor is included to both enhance the punishment of the person convicted and to deter other individuals from criminal activity.

* * * * *

3. For trafficking in Schedule III, IV, and V controlled substances or less than fifty kilograms of marihuana, ten kilograms of hashish, and one kilogram of hashish oil, determine the base offense level from the following table.

TABLE II

Controlled Substances and Amounts	Trafficking in Controlled Substances	Trafficking with a Prior Drug-Related Conviction
500 KG Schedule III, 40-49 KG Marihuana, 8-9.9 KG Hashish, 800-999 MG Hashish Oil or more	Level 20	Level 25
250-499 KG Schedule III, 25-39 KG Marihuana, 5-7.9 KG Hashish, 500-799 MG Hashish Oil	Level 18	Level 23
50-249 KG Schedule III, 10-24.9 KG Marihuana, 2-4.9 KG Hashish, 200-499 MG Hashish Oil	Level 16	Level 21
1-49 KG Schedule III, 1-9.9 KG Marihuana, 200 MG - 1.9 G Hashish, 20-199 MG Hashish Oil, or 500 KG or more of any Schedule IV	Level 14	Level 19
Less than 1 KG Schedule III, Less than 1 KG Marihuana, less than 200 MG Hashish Oil, 50-499 Schedule IV	Level 12	Level 17
Less than 50 KG Schedule IV, 500 KG Schedule V or more	Level 10	Level 14
50-499 KG Schedule V	Level 8	Level 12
Less than 50 KG Schedule V	Level 6	Level 10

Commentary

Table II applies to drug trafficking offenses involving relatively small amounts of marihuana and all Schedule III through V controlled substances. These offenses are punishable under 21 U.S.C. §§ 841(b)(1)(D), (2), and (3) and 960(b)(4).

Table II operates identically to Table I except that it does not contain columns for trafficking in controlled substances causing serious bodily harm because the statutory provisions do not make that distinction. The sole distinction established in these statutory provisions is between first offenders and traffickers with prior drug related convictions. The maximum allowable periods of imprisonment for defendants with a prior offense is double that allowed for first offenders.

It should be noted that although Table II applies to trafficking in even small amounts of marihuana, under 21 U.S.C. § 841(b)(4), distribution of "a small amount of marihuana for no remuneration" must be treated as a simple possession offense. These offenses should be punished in accordance with §D221.

The base offense levels for Table II reflect the statutory penalties associated with particular amounts of drugs. The statutory maximum for trafficking in 500 kilograms of Schedule III drugs is five years imprisonment, and with a prior drug related conviction is ten years. The base offense levels in the first category serve as reference points for the other categories, providing a base proportional to smaller drug amounts and less serious drug types.

The distinctions among categories in Table II were provided by experts and practitioners, as in Table I. Also, as with Table I, specific amounts, weights, or quantities of controlled substances serve only as a general guide. For sentencing purposes, it is sufficient that the controlled substance approach or be substantially equivalent to that specified in Table II. As stated in the previous commentary, in cases where there is no drug seizure or the amount seized does not reflect the actual scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. Criminal histories for drug convictions are included in Table II, and should not be added again in computing the defendant's Chapter Three criminal history category.

For various offenses listed in Table II, a term of supervised release to follow imprisonment may be required by law. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, §§A531-A533.

§D212. **Involving Juveniles in the Trafficking in Controlled Substances.** The base offense level is determined as follows:

(1) For involving an individual who is less than fourteen years of age, the base offense level is **19**.

(2) For involving an individual who is less than eighteen years of age and greater than fourteen years, the base offense level is **13**.

Commentary

Section D212 refers to 21 U.S.C. § 845b, that makes it unlawful for any person at least eighteen years of age to knowingly employ or use any person younger than eighteen years to violate or to conceal any violation of any provision of Title 21. Section 845b provides a minimum mandatory period of imprisonment of one year in addition to the punishment imposed for the applicable crime in which the defendant involved a juvenile. This mandatory minimum is reflected in the base offense level. The increased penalty for the employment or use of persons under age fourteen is statutorily directed by 21 U.S.C. § 845d.

§D213. **Distributing Controlled Substances to Individuals Younger than Twenty-One Years, To Pregnant Women, or Within 1000 Feet of a School or College.** The base offense level is determined as follows:

(1) For distributing a controlled substance to a pregnant woman, the base offense level is **13**.

(2) For distributing a controlled substance to an individual under the age of twenty-one years, the base offense level is **13**; if the substance is five grams of marihuana or less, the base offense level is **6**.

(3) For distributing or manufacturing a controlled substance within 1000 feet of a schoolyard, the base offense level is **13**; if the substance is five grams of marihuana or less, the base offense level is **6**.

(a) Specific Offense Characteristic

(1) If the defendant has a prior drug related conviction, increase by **7** levels.

Commentary

This section refers to conduct proscribed by three separate statutory provisions, 21 U.S.C. §§ 845, 845a, and 845b. Each of these provisions contains a mandatory minimum period of imprisonment of one year. This additional year is intended as an enhancement to the sentence imposed on the defendant for the distribution of controlled substances. If more than one enhancement provision is found applicable in any particular distribution, the punishment imposed under the separate enhancement provisions should be added together in calculating the appropriate guideline sentence.

The guideline sentences for distribution of controlled substances to individuals under twenty-one years of age or within 1000 feet of a school or college treats the distribution of less than five grams of marihuana less harshly than other controlled substances. This distinction is based on the statutory provisions that specifically exempt convictions for the distribution of less than five grams of marihuana from the mandatory minimum one year imprisonment requirement.

An enhancement is provided for defendants with prior drug related convictions. This enhancement is statutorily mandated and requires a three year minimum term of imprisonment.

§D214. **Unlawful Interstate Sale and Transporting of Drug Paraphernalia.** The base offense level is **12**; if the defendant has a prior conviction under this provision, the base offense level is **16**.

Commentary

Subtitle O of the Anti-Drug Abuse Act creates the new offense of interstate sale or transportation of drug paraphernalia. The base offense level is proportional to the new statutory maximum of three years. The controlling consideration in this guideline is deterrence.

§D215. **Renting or Managing an Establishment Used to Unlawfully Manufacture Controlled Substances.** The base offense level is **16**; if the defendant has a prior conviction under this provision, the base offense level is **24**.

Commentary

Subtitle P of the Anti-Drug Abuse Act adds a new category to the drug related offenses set out at 21 U.S.C. § 856. This provision makes it unlawful to knowingly maintain, manage, or control any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law. A maximum period of twenty years imprisonment may be imposed for violation of this statute.

Part Y, General Provisions, should be consulted if physical injury was caused by maintaining an establishment used to produce, store, or sell controlled substances.

§D216. **Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances.** The base offense level is **23**; if the defendant has a prior conviction under this provision, the base offense level is **30**.

Commentary

This provision refers to offenses under 21 U.S.C. § 841(e)(1), making it unlawful to assemble, place, or maintain a "booby-trap" on federal property where a controlled substance is being manufactured or distributed. A maximum period of ten years imprisonment may be imposed under this statute, except where a prior conviction provides for a maximum sentence of twenty years. The controlling considerations are deterrence and just punishment.

§D217. **Continuing Criminal Enterprise.** The base offense level is determined as follows:

(1) For the first conviction of engaging in a continuing criminal enterprise, the base offense level is **32**.

(2) For two or more convictions of engaging in a continuing criminal enterprise, the base offense level is **38**.

(3) For engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if the amount involved was 300 times that specified in Row 1 of Table I or if the principal received $10 millon in gross receipts for any twelve month period, the base offense level is 43.

Commentary

Section D217 refers to conduct proscribed by 21 U.S.C. § 348. The base offense levels for continuing criminal enterprise are mandatory minimum sentences provided by the statute.

Notwithstanding the foregoing, the sentence shall be not less than would result from imposition of consecutive sentences for each of the predicate offenses, excluding offenses that have resulted in the imposition of a final sentence prior to sentencing for the current offense.

As in Part E, Offenses Involving Criminal Enterprises, §E211, which refers to violations of 18 U.S.C. § 1962 (Racketeering Influenced and Corrupt Organizations offenses), emphasis is placed on the predicate offenses required for conviction. The offense level reflects Congressional intent to provide a mandatory minimum term of imprisonment for leaders of large scale drug enterprises.

When sentencing for convictions under 21 U.S.C. § 848, §D217 reflects the defendant's role in the enterprise. A conviction establishes that the defendant controlled and exercised decision-making authority over one of the most serious forms of ongoing criminal activity. Therefore, an adjustment for role in the offense is not applicable to convictions under 21 U.S.C. § 848.

§D218. Attempts and Conspiracies. If a defendant is convicted of participating in an unlawful conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall by the same as if the object(s) of the conspiracy or attempt had been completed.

Commentary

This section refers to conduct proscribed under 21 U.S.C. §§ 5, 846, and 963.

If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale.

If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount, provided that the defendant was reasonably capable of providing the amount of the controlled substance under negotiation.

* * * * *

2. UNLAWFUL POSSESSION

18 U.S.C. § 342
21 U.S.C. § 843(a)(3)
21 U.S.C. § 844
Also See Statutory Index

§D221. Unlawful Possession. The base offense level is determined as follows:

1. If the substance is heroin or any Schedule I-II opiate, the base offense level is **10**.

2. If the substance is cocaine, PCP, or LSD, the base offense level is **9**.

3. If the substance is any other controlled substance, the base offense level is **6**.

(a) Specific Offense Characteristic

(1) If the defendant has one or more final prior convictions for an offense involving a controlled substance, increase by **1** to **4** levels, depending upon the number and seriousness of prior convictions.

Commentary

The base offense levels reflect statutory distinctions as well as categorical distinctions provided by Drug Enforcement Administration authorities and practitioners. The enhancement for prior convictions is statutorily based. 21 U.S.C. § 844a. Criminal history points should not be added in Chapter Three for prior offenses applied under this provision.

§D222. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge. The base offense level is **4**; if the defendant has one or more convictions for this offense, the base offense level is **8**.

Commentary

This violation is infrequently prosecuted. The enhancement for prior convictions is statutorily based. The controlling considerations are deterrence and just punishment.

§D223. Operating or Directing the Operation of a Common Carrier under the Influence of Alcohol or Drugs. The base offense level is **15**.

Commentary

Under recent legislation, operating a common carrier while under the influence of alcohol or drugs is recognized as a serious offense, with a statutory maximum of five years imprisonment. 18 U.S.C. § 342. The controlling sentencing principle is deterrence.

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3. REGULATORY VIOLATIONS

21 U.S.C. §§ 842(a), (b), (c)(2)
21 U.S.C. § 843(a)
21 U.S.C. § 954
21 U.S.C. § 961(2)

§D231. **Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance.** The base offense level is **4**; if the defendant has one or more prior convictions for this offense, the base offense level is **8**.

§D232. **Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person.** The base offense level is **4**; if the defendant has one or more prior convictions for this offense, the base offense level is **8**.

§D233. **Illegal Transfer or Transshipment of a Controlled Substance.** The base offense level is **4**; if the defendant has one or more prior convictions for this offense, the base offense level is **8**.

Commentary

These violations are infrequently prosecuted. The enhancement for prior convictions is statutorily based. The controlling principles are deterrence and just punishment.

PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING

INTRODUCTION

A variety of offenses involving criminal enterprises are commonly committed by members of criminal organizations. These offenses are frequently the result of intentional, coordinated, and repeated action by individuals who are career criminals. Many of these offenses involve conduct covered under other guidelines. Where the provisions of Part E are involved due to a jurisdictional statute, look to the nature of the underlying offenses.

When sentencing for racketeering offenses, it is especially important that the sentence reflect the defendant's role in the racketeering scheme. Attention is specifically directed to Part Z, Role in the Offense, for the appropriate adjustment to the offense levels. While the guidelines do not contain an offender characteristic based upon membership in a criminal enterprise, a sentence above the applicable guideline range is permissible if a defendant derives a substantial portion of income from criminal activity. See Chapter Three, §A316.

1. RACKETEERING

18 U.S.C. §§ 1951 - 1952
18 U.S.C. §§ 1952A - 1952B
18 U.S.C. § 1962

§E211. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations. The base offense level is the greater of 19 or the offense level applicable to the underlying racketeering activity. 18 U.S.C. § 1962.

§E212. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise. The base offense level is the greater of 6 or the offense level applicable to any crime of violence or any other unlawful activity as defined in 18 U.S.C. § 1952(b), for which the travel or transportation was undertaken. 18 U.S.C. § 1952.

§E213. Violent Crimes in Aid of Racketeering Activity. The base offense level is the greater of 12 or the offense level applicable to the underlying conduct. 18 U.S.C. § 1952B.

§E214. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire. The base offense level is the greater of 23 or the offense level applicable to the underlying conduct. 18 U.S.C. § 1952A.

§E215. Interference with Commerce By Extortion. If the defendant extorted, conspired, or attempted to extort property, the base offense level is 18 to 23, depending upon the nature of the defendant's conduct and any personal benefit he derived or expected to derive from the offense. 18 U.S.C. § 1951.

§E216. Interference with Commerce By Robbery. The base offense level is the greater of 20 or the offense level applicable to the underlying conduct. 18 U.S.C. § 1951.

Commentary

Because of the jurisdictional nature of the offenses included in this section, a variety of criminal offenses fall under these provisions. For this reason, a minimal base offense level is provided for each guideline section. However, since the primary concern rests with the underlying conduct, the offense level is generally determined by the offense level of the underlying conduct, or the base offense level of the guideline section above, whichever is greater.

In §E211, the jurisdictional basis of the Racketeer Influenced and Corrupt Organizations Act (RICO) is an enterprise engaged in or affecting interstate commerce. 18 U.S.C. § 1962. The seriousness of the offense is reflected in the pattern of racketeering activity committed. To determine the base offense level, the offense level for each underlying offense should first be determined. If the underlying racketeering activity involves violations of state law, the offense level should be computed by using the offense level applicable to the corresponding or most analogous federal statute. If a base offense level cannot be appropriately determined in this fashion, the court may, as to the undetermined conduct, impose a sentence consistent with the purposes of sentencing. 18 U.S.C. § 3553(a)(2).

Section E212 refers to Travel Act offenses proscribed by 18 U.S.C. § 1952. This jurisdictional statute is directed to a variety of unlawful conduct. A minimum base offense level that is generally consistent with current practices under the presumptive parole guidelines is provided. If the offense level of the underlying crime of violence or unlawful activity exceeds 6, the offense level for the underlying activity shall constitute the base offense level.

Section E213 relates to violent crimes in aid of racketeering activity proscribed by 18 U.S.C. § 1952B. The base offense level is 12, or the level for the underlying conduct, whichever is greater. The proscribed activities in the statute range from threats to murder, with the statutory sentences ranging from three years to life imprisonment. If death results, then a sentence at or near the statutory maximum may be imposed.

Section E214 covers the "murder-for-hire" offense proscribed by 18 U.S.C. § 1952A. This statute is jurisdictional, reaching the underlying conduct of murder or intended murder committed for pecuniary gain, with the requisite nexus provided by interstate or foreign travel, or the use of facilities in interstate commerce. Sentences under this statute range from five years to life imprisonment, depending upon whether personal injury or death resulted from the offense. A base offense level of 23 is provided. The statute carries a maximum term of imprisonment of five years where the intended victim was not actually injured. If injury or death results, the base offense level should be increased to reflect the seriousness of the injury, with a sentence at or near the statutory maximum if death results.

Sections E215 and E216 concern two different aspects of the Hobbs Act (18 U.S.C. § 1951), which involves interference with interstate commerce by robbery or extortion. Since these two violations of the statute are different crimes, separate sections have been included to indicate that distinction. A range of offense levels is provided for extortion because of the significant variables in offense behavior.

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2. EXTORTIONATE EXTENSION OF CREDIT

18 U.S.C. §§ 892 - 894

§E221. **Making, Financing, or Collecting an Extortionate Extension of Credit.** The base offense level is **18** to **23**, depending upon the nature of the defendant's conduct and any personal benefit derived or expected to be derived from the offense.

Commentary

This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve violence or threats of violence and provide economic support for organized crime.

If actual violence or damage to property was associated with the extortionate extension of credit, then these factors may result in an enhanced sentence under the general provisions. No additional offense level should be assigned for threats of violence or other harm, since threatening conduct is inherent in the offense and subsumed in the base offense level. Among those factors to be considered in determining the appropriate level within the range are the degree of actual and immediate danger to the victim, the extent to which the victim reasonably perceived a danger that any threat would be acted upon, the extent to which any conduct against the victim constituted an isolated occurrence or was part of a pattern of harassment, and whether the offense involved an unlawful debt. For purposes of this section, the term "unlawful debt" is defined in 18 U.S.C. § 1961(6).

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3. GAMBLING

15 U.S.C. §§ 1172 - 1175
18 U.S.C. § 1082
18 U.S.C. § 1084
18 U.S.C. §§ 1301 - 1304
18 U.S.C. § 1306
18 U.S.C. § 1511
18 U.S.C. § 1953
18 U.S.C. § 1955
Also See Statutory Index

§E231. **Engaging in a Gambling Business.** The base offense level is **10.** 18 U.S.C. § 1955.

§E232. **Transmission of Wagering Information.** The base offense level is **10.** 18 U.S.C. § 1084.

§E233. **Interstate Transportation of Wagering Paraphernalia.** The base offense level is **10.** 18 U.S.C. § 1953.

§E234. **Unlawful Conduct Relating to Gambling Ships.** The base offense level is **10.** 18 U.S.C. § 1082

§E235. **Unlawful Conduct Relating to Lottery Tickets or Related Matter.** The base offense level is **6.** 18 U.S.C. §§ 1301-1304, and 1306.

§E236. **Other Gambling Offenses.** The base offense level is **6.** 18 U.S.C. §§ 1172-1176.

Commentary

When gambling offenses are part of a criminal enterprise, they often provide economic support for organized crime. With these considerations in mind, minimal base offense levels have been set for isolated gambling transactions. The base offense levels under these provisions are generally consistent with current practices data and with treatment under the presumptive parole guidelines, provided there is an appropriate adjustment of the sentence based upon the defendant's role in the offense. See Role in the Offense, Part Z.

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4. TRAFFICKING IN CONTRABAND CIGARETTES

18 U.S.C. § 2342(a)

§E241. Unlawful Conduct Relating to Contraband Cigarettes. The base offense level is 9 to 14, depending upon the quantity of cigarettes, the amount of tax that is the object of the evasion, and the nature and circumstances of the offense.

Commentary

This offense generally involves evasion of state excise taxes and becomes a federal matter only upon the establishment of minimum quantities transported in interstate commerce or by use of interstate communications. Volume typically suggests the involvement of criminal organizations. Since this offense is basically a tax matter, the tax table under §T241 should be used to assist in determining the appropriate level within the range.

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5. LABOR RACKETEERING

18 U.S.C. § 664
18 U.S.C. § 1027
18 U.S.C. § 1231
18 U.S.C. § 1954
29 U.S.C. § 162
29 U.S.C. § 186
29 U.S.C. § 439
29 U.S.C. § 461
29 U.S.C. § 501(c)
29 U.S.C. § 502
29 U.S.C. § 504
29 U.S.C. § 530
29 U.S.C. § 1111
29 U.S.C. § 1141

INTRODUCTION

This section includes a variety of offenses involving criminal activity in relation to labor unions and employee welfare or pension funds. These offenses are included in Criminal Enterprises because they frequently involve members of organized criminal groups who exploit labor unions and welfare and pension funds. While some of the offenses in this section may be relatively minor, they are serious in the context of systematic corruption or exploitation of a union or employee benefit plan by organized criminal groups.

§E251. Bribery or Graft Affecting the Operation of an Employee Welfare or Pension Benefit Plan. The base offense level is **10** to **15**, depending upon the extent and duration of the offense. 18 U.S.C. § 1954.

(a) Specific Offense Characteristics

(1) If a thing of value was given, offered, requested, or received with an intent to influence or be influenced with respect to matters concerning a benefit plan, increase by **3** levels.

(2) If the offense was committed by a fiduciary of the benefit plan, increase by **3** levels.

§E252. Theft or Embezzlement from Employee Pension and Welfare Benefit Plans. The base offense level is **4**. 18 U.S.C.§ 664.

(a) Specific Offense Characteristics

(1) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by **6** levels.

(2) If the value of the property stolen exceeded $1,000, increase by the appropriate offense level as specified in the Property Table, §B211.

(3) If the theft involved multiple occurrences, increase by **1** to **6** levels, depending upon the number of transactions or occurrences. Do not apply if §E252(2) is greater.

§E253. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act. The base offense level is **6**. 18 U.S.C § 1027.

(a) Specific Offense Characteristics

(1) If false records were used for criminal conversion of plan funds or a scheme involving bribery or graft relating to the operation of an employee benefit plan, the defendant should be sentenced for theft or embezzlement, §E252, or bribery or graft, §E251.

(2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by **6** levels.

(3) If the offense involved multiple occurrences, increase by **1** to **6** levels, depending upon the nature and extent of the offense.

§E254. Interference With the Exercise of Employee Benefit Plan Rights by Fraud or Coercion. The base offense value is **6**. 29 U.S.C. § 1141.

§E255. Prohibited Service by Convicted Persons in Connection with Employee Benefit Plans. The base offense value is 10 to 15, depending upon the nature and circumstances of the offense. 29 U.S.C. § 1111.

(a) Specific Offense Characteristic

(1) If the prior disqualifying conviction was related to the embezzlement or theft of plan assets or a scheme involving bribery or graft in the operation of an employee benefit plan, increase by 6 levels.

§E256. Embezzlement or Theft from Labor Unions in the Private Sector. The base offense level is 4. 29 U.S.C. § 501(c).

(a) Specific Offense Characteristics

(1) If the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), increase by 6 levels.

(2) If the amount of the theft exceeds $1,000, increase by the appropriate offense level as specified in the Property Table, §B211.

(3) If the theft involved multiple occurrences, increase by 1 to 6 levels, depending upon the number of transactions or occurrences. Do not apply if §E256(2) is greater.

§E257. Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act. The base offense level is 6. 29 U.S.C. §§ 439 and 461.

§E258. Prohibited Service by Convicted Persons in Labor Organizations, Employer Associations, and as Labor Relations Consultants. The base offense level is 15. 29 U.S.C. § 504.

(a) Specific Offense Characteristic

(1) If the prior disqualifying conviction was related to the embezzlement or theft of labor union or employee benefit fund assets or a scheme involving bribery or graft in the operation of a labor organization or employee benefit plan, increase by 6 levels.

§E259. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations. The base offense level is 6 to 12, depending upon the amount and the nature of the transaction. 29 U.S.C. § 186.

(a) Specific Offense Characteristics

(1) If the prohibited payment was made or received to influence the actions or decisions of a union official, increase by 6 levels.

(2) If the offense involved multiple occurrences or transactions, increase by 1 to 6 levels, depending upon the number of transactions or occurrences.

§E260. Interstate Transportation of Strikebreakers. The base offense level is 6 to 10, depending upon the nature and circumstances of the offense. 18 U.S.C. § 1231.

§E261. Interference With an Agent of the National Labor Relations Board. The base offense level is 6. 29 U.S.C. § 162.

Commentary

The base offense levels for many of these provisions have been determined by reference to analogous sections of the guidelines. Thus, the base offense levels for bribery, theft and fraud in this section correspond to similar conduct under other parts of the guidelines. The Commission invites public comment as to whether this treatment is generally appropriate.

The statutes included in this section protect the rights of employees under the Taft-Hartley Act, of members of labor organizations under the Labor-Management Reporting and Disclosure Act of 1959, and of participants of employee pension and welfare benefit plans covered under the Employee Retirement Income Security Act. One of the primary concerns in determining the base offense levels for these offenses is distinguishing between those acts that are isolated or limited transactions and those acts that are part of a systematic attempt to loot employee benefit funds, dominate labor organizations, or generally exploit labor-management relationships. The higher base offense levels apply where violations are part of a systematic pattern of corruption or exploitation.

Section E251 covers the giving or receipt of bribes and other illegal gratuities involving employee welfare or pension benefit plans under 18 U.S.C. § 1954. This offense may involve persons who have a fiduciary duty to the benefit plan. The seriousness of the offense is determined by several factors, including the value of the gratuity, the nature of the "favor," and the magnitude of the loss resulting from the transaction. A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft where the prohibited payment is given because of one's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.

Section E252 applies to theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims. 18 U.S.C. § 664. The base offense level corresponds to the base level for other forms of theft. Special offense characteristics address cases where a defendant has a fiduciary relationship to the benefit plan, or if the theft is part of a systematic looting of the plan by multiple occurrences of criminal conduct.

Section E253 involves the falsification of documents or records relating to a benefit plan covered by ERISA. Violations of 18 U.S.C. § 1027 sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation of this section occurs in connection with another offense or as part of a long term scheme, or involves a fiduciary of the plan, a higher base offense level is warranted.

Section E254 refers to conduct proscribed by 29 U.S.C. § 1141. The conduct addressed by this provision is punishable by a maximum term of one year imprisonment.

Section E255 addresses conduct under 29 U.S.C. § 1111, which prohibits persons convicted of certain criminal offenses from holding particular positions or offices associated in specified capacities with employee benefit plans. Where the prior disqualifying conviction was related to the operation of a benefit plan or the prohibited employment consisted of a position carrying substantial decision making authority with respect to plan operations, the base offense level should be increased.

Section E256 refers to conduct proscribed by 29 U.S.C. § 501(c), embezzlement or theft from a labor organization. This section is directed at union officers and persons employed by the union. The seriousness of this offense is determined by the amount of money taken, the scope of the misconduct, and the nature of the defendant's position in the union.

Section E257 involves failure to maintain proper documents required by the LMRDA or falsification of such documents. While this offense is a misdemeanor, it can occur in conjunction with schemes to convert union funds or schemes involving prohibited payments to labor unions and labor union officials.

Section E258 refers to conduct proscribed by 29 U.S.C. § 504, which prohibits persons convicted of certain offenses from holding positions in labor organizations or serving in certain capacities associated with collective bargaining. This section involves the same considerations discussed in connection with §E255 regarding employee benefit plans.

Section E259 deals with bribery and other prohibited transactions with employers, labor relations consultants, and other persons acting in the interest of employers to labor officials in industries governed by the Taft-Hartley Act. The statute contains misdemeanor and felony provisions, depending upon whether the prohibited payment exceeds $1,000. The amount of the illegal payment should therefore be a sentencing consideration. Where the prohibited payment is made with an intent to influence the actions, duties, or decisions of the employee representative or union official, or is received with knowledge of such an intent, a more severe penalty is warranted for the special bribery characteristic of the offense. The scope of the misconduct will also result in some level of enhancement where multiple occurrences or transactions are involved.

Sections E260 and E261 deal with other offenses involving labor-management relations. Section E260 covers the interstate transportation of strikebreakers, a two-year felony proscribed by 18 U.S.C. § 1231. Section E261 covers the offense of interference with a National Labor Relations Board agent, a misdemeanor proscribed under 29 U.S.C. § 162.

Finally, with regard to the labor racketeering offenses, an important part of punishment is the prohibition imposed by 29 U.S.C. §§ 504 and 511 of convicted persons from service in labor unions, employer associations, employee benefit plans, and as labor relations consultants. Violations of these provisions are felony offenses, discussed in §§E255 and E259. Persons convicted after October 12, 1984, may petition the sentencing court to reduce the statutory disability (thirteen years after sentence or imprisonment, whichever is later) to a lesser period (not less than three years after entry of judgment in the trial court). After November 1, 1987, petitions for exemption from the disability that were formerly administered by the United States Parole Commission will be transferred to the courts. Relief shall not be given in such cases to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he has been rehabilitated since commission of the crime.

PART F - OFFENSES INVOLVING FRAUD AND DECEPTION

7 U.S.C. §§ 6, 6b, 6c, 6h, 6o
7 U.S.C. § 13
7 U.S.C. § 23
15 U.S.C. §§ 77a - 80b - 17
18 U.S.C. §§ 285 - 291
18 U.S.C. § 371
18 U.S.C. § 656
18 U.S.C. § 659
18 U.S.C. §§ 1001 - 1030
18 U.S.C. §§ 1341 - 1344
Also See Statutory Index

§F211. **Fraud and Deception.** The base offense level is determined as follows:

(1) If the fraud consisted of a single occurrence or transaction and did not involve more than one victim, the base offense level is 6.

(2) If the fraud consisted of more than one transaction or occurrence and did not involve more than one victim, the base offense level is 7.

(3) If the fraud consisted of a scheme or artifice to defraud more than one victim, the base offense level is 8.

(a) **Specific Offense Characteristic**

(1) If the court determines that the seriousness of the offense is reflected by the financial loss to the victim or gain to the defendant, increase the base offense level by the appropriate level for the gain or loss, whichever is greater, in the following Property Table:

Property Table

Loss or Gain	Increase in Level
$5,000 - $10,000	add 1
$10,001 - $20,000	add 2
$20,001 - $50,000	add 3
$50,001 - $100,000	add 4
$100,001 - $200,000	add 5
$200,001 - $500,000	add 6
$500,001 - $1,000,000	add 7
$1,000,001 - $2,000,000	add 8
$2,000,001 - $5,000,000	add 9
over $5,000,000	add 10

(2) Alternatively, if the gravity of the offense is not reflected by the amount of financial loss or gain, the Property Table shall not be used; the base offense level may be increased by 3 to 9 levels, depending upon the nature, sophistication, and duration of the offense.

§F212. Insider Trading. The base offense level is 8, plus the level from §F211(a)(1) corresponding to the defendant's market gain as the measure.

Commentary

The base offense level for fraud offenses is determined by factors relating to single or multiple transactions and victims. The alternative base offense levels are mutually exclusive. The General Provisions, Part Y, should be consulted, particularly those applicable to vulnerable victims, public welfare, and psychological injury. In a complex fraud scheme, the defendant's role in the offense may be a significant sentencing factor.

The fraud section does not link offense characteristics to specific statutes, because most fraud statutes contain general language that applies to a broad range of offenses of widely varying severity. For example, the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, apply to any person who devises or intends to devise a scheme or artifice to defraud by use of false or fraudulent pretenses, representations, or promises, in order to obtain money or property. By application of the statute, a mail order scheme to defraud an individual of $50 constitutes the same statutory violation as a multimillion dollar false billing scheme victimizing businesses nationwide.

The Commission has considered two alternative methods for evaluating the seriousness of fraud offenses. One is to use financial gain to the defendant or loss to the victim as the principal measuring device to aggravate the base offense level. This approach utilizes a property table that designates increases in the offense levels based on the dollar value of the gain or loss. The other approach focuses on the fraudulent conduct by using a range of offense levels. This approach leaves fact-finding determinations concerning the nature, sophistication, and duration of the offense to the sentencing judge in selecting the appropriate level in the range that reflects the seriousness of the offense.

The Commission has combined both approaches in this draft, leaving to the sentencing judge the determination of the appropriate approach to follow. Section F211(a)(1) contains a table designating the increase in the offense level to be in a given case used only if the financial loss or gain approach best reflects the gravity of the offense.

If the sentencing judge determines that other factors relating to offense conduct more accurately reflect the seriousness of the offense, §F211(a)(2) provides that the defendant's base offense level may be increased from 3 to 9 levels, depending upon the nature, sophistication, and duration of the offense. In evaluating the nature of the offense, the court may consider such factors as whether the defendant took advantage of a business, professional, or personal relationship to exploit the victim or whether the fraud was in the technical nature of a false statement to a government agency.

The sophistication of the scheme may be an extremely important sentencing factor. A complex, sophisticated scheme is indicative of an intention to do considerable harm, and is

often related to increased difficulties of detection and proof. Some factors that may indicate the degree of sophistication are:

(a) the extent to which the offense involved careful planning;

(b) the number of victims;

(c) the number of transactions and the length of time over which they took place;

(d) the extent to which efforts were made to disguise or conceal the nature or proceeds of the offense or to prevent detection, apprehension, or prosecution;

(e) the extent to which the defendant used special skills or training in carrying out the offense, or utilized the special skills or training of others;

(f) the potential financial impact of the scheme; and

(g) the harm done to the integrity of a governmental or financial institution, a community, or business, and the resulting impact upon public confidence.

Sections F211(a)(1) and (2) are mutually exclusive. The property table may be an accurate measure of the seriousness of the offense in a financially successful scheme where loss to the victim or gain to the defendant may be reasonably determined, such as a well-documented securities or bank fraud scheme. However, the property table may not be a reliable indicator of the offense conduct in many cases. It may not be feasible to use the property table if the harm was intangible, the scheme was financially unsuccessful, or the loss or gain was difficult to establish or financially disproportionate to the nature of the offense. For example, if the defendant took cash from victims who are difficult to identify and his disposition of the funds cannot be traced, or if a co-conspirator cooperated with the government and the scheme was exposed before the victims actually lost money, the property table would not provide an accurate measure of the gravity of the offense.

On the other hand, application of the property table to situations where dollar loss or gain are disproportionately high in relation to the nature of the offense conduct would be inappropriate. Illustrations might include the defendant who commits a fraud of opportunity rather than one based on planning and manipulation, such as concealing a debt on an application for a $100,000 bank loan or withdrawing $12,000 in Social Security direct deposit payments from a deceased spouse's checking account over a considerable period to time. Section F211(b) would also not apply in these examples unless the court found aggravating factors relating to the nature, sophistication, and duration of the offense.

Section F212 applies to violations of Rule 10b-5 that are commonly referred to as "insider trading." A separate guideline is provided in order to make it clear that insider trading is treated essentially the same as any other fraud. Because the victims and their loss are difficult if not impossible to identify, the defendant's market gain, i.e., the total increase in value realized on securities in which he traded based on inside information, is used in lieu of the actual loss. The market gain should approximate the loss.

Presumptive time served for fraud under the parole guidelines varies directly with the amount of property involved. For fraud involving less than $2,000, the parole guidelines provided not more than six months in custody. For fraud offenses involving more than $500,000, the presumed time served is forty to fifty-two months. Current practice data indicate a distinction in estimated time served based on the sophistication of the offense, as well as the dollar amount involved. Commission estimates of current practices range from six to eighteen months in unsophisticated fraud cases, and from ten to twenty-seven months in sophisticated cases.

Ongoing fraud schemes usually result in multiple count indictments. The cumulative loss or gain produced by a common scheme or course of conduct shall be used in applying the property table. Similarly, all conduct relevant to the scheme shall be considered when determining any increase in the offense level under §F211(a)(2). Sophisticated fraud schemes may warrant imposition of consecutive sentences in order to serve the purposes of sentencing. See Chapter Five, §A562(b), and related commentary.

The Commission invites public comment concerning the two approaches presented here, either individually or in the alternative form.

PART G - OFFENSES INVOLVING PROSTITUTION, SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY

1. PROSTITUTION

18 U.S.C. § 1384
18 U.S.C. §§ 2421 - 2424
Also See Statutory Index

INTRODUCTION

Federal jurisdiction for prostitution primarily involves interstate or foreign transportation for the purposes of prostitution or other immoral purposes. Rarely does engaging in prostitution or owning and operating a place of prostitution occur under federal jurisdiction, except near or on military or naval installations.

§G211. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct. The base offense level is 14.

(a) Specific Offense Characteristics

(1) If the defendant used drugs, physical force, or coercion, increase by 2 to 4 levels, depending upon the degree of compulsion used.

(2) If the conduct involved the transportation of a person under eighteen, increase by 2 to 6 levels, depending upon the age and immaturity of the minor.

§G212. Engaging in Prostitution. The base offense level is 6.

Commentary

Section G211 applies to offenses listed under the white slave traffic statutes, 18 U.S.C. §§ 2421-2424. Transportation for the purpose of prostitution or any other immoral purpose carries a statutory maximum penalty of five years imprisonment. The base offense level reflects the time specified by the federal parole guidelines. An enhancement for minors and for force or coercion is provided by statute. 18 U.S.C. §§ 2422 and 2423.

Section G212 applies to conduct prohibited by 18 U.S.C. § 1384. The conduct covered by 18 U.S.C. § 1384 includes engaging in prostitution as well as owning or maintaining a prostitution business. These offenses are rarely the subject of federal prosecutions. Therefore, a low base offense level is provided in §G212. Specific guidelines for owning or maintaining a prostitution business are not provided. Should a case of this nature be prosecuted, the Commission recommends that §G211 be followed subject to statutory maximums. The mandatory maximum penalty for both offenses is one year. The base offense level reflects the time specified under the parole guidelines.

If the offense resulted in physical injury, death, or psychological injury, reference should be made to Part Y, General Provisions.

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2. SEXUAL EXPLOITATION OF A MINOR

18 U.S.C. § 2252

§G221. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material. The base offense level is **22**.

(a) **Specific Offense Characteristic**

(1) If the person exploited was under age twelve at the time of the offense, increase by **2** to **4** levels, depending upon the age of the person exploited.

§G222. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor. The base offense level is **13**.

(a) **Specific Offense Characteristics**

(1) If the conduct involved transportation of the exploitive material, increase by **2** levels.

(2) If the offense involved trafficking in or transporting material that depicts a minor under age twelve, increase by **2** levels.

(3) If the retail value of the exploitive material exceeds $25,000, increase by **4** levels.

Commentary

Section G221 applies to conduct prohibited by 18 U.S.C. § 2252. This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. The base offense level reflects the time specified by the parole guidelines. The statutory requirement of higher penalties for defendants with prior convictions for similar conduct is covered under Chapter Three, §A314.

An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children. The enhancement is provided as a range to reflect concern for particularly youthful victims. The Commission recommends an enhancement at the maximum of this range for children under eight years. Each minor child exploited shall be considered a separate offense.

If the exploitation involves physical or psychological injury, refer to Part Y, General Provisions.

Section G222 refers to the distribution of materials that visually depict a minor or minors engaging in sexually explicit conduct. The base offense level is substantially higher than that applicable to the distribution of obscene materials not involving minors (§G231). The severity of the penalty reflects Congressional and Commission judgment (See preamble to the Child Protection Act of 1984, Pub. L. No. 98-292) that child pornography is a serious crime in which minors are exploited. The statutory requirement of higher penalties for defendants with prior similar convictions is covered under Chapter Three, §A314.

While the statute does not provide a distinction between those transporting and those receiving the exploitive material, the more serious offense rests with the purveyor. Therefore, an enhancement is provided for the defendant responsible for transporting the material.

The serious nature of this offense is reflected in the enhancement for the distribution of material depicting minors under age twelve. The amount of enhancement reflects the time specified by the parole guidelines. The enhancement for a retail value in excess of $25,000 provides significant punishment for defendants involved in large scale operations.

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3. OBSCENITY

18 U.S.C. § 552
18 U.S.C. §§ 1461 - 1465
Also See Statutory Index

§G231. Importing, Mailing, or Transporting Obscene Matter. The base offense level is 6.

(a) Specific Offense Characteristics

(1) If the offense involved distribution for pecuniary gain, increase by 1 to 6 levels, depending upon the amount and value of the obscene material involved.

(2) If the defendant used his office as agent, employee, or officer of the United States in the commission of the offense, increase by 6 levels.

§G232. Broadcasting Obscene Language. The base offense level is 4.

(a) Specific Offense Characteristic

(1) If the offense was committed using, or on a communications frequency used by, a commercial broadcasting station, increase by 2 levels.

Commentary

Section G231 applies to offenses involving the mailing, importation, and interstate transportation for sale or distribution of obscene materials. The base offense level reflects the time specified by the parole guidelines, and a judgment that these offenses pose a threat to accepted moral standards and values, and often provide economic support for organized crime. With the exception of broadcasting obscene language, all the above provisions carry a maximum penalty of five years. Defendants with prior convictions for similar offenses receive higher penalties through the criminal history adjustments in Chapter Three. The statute (18 U.S.C. § 1462) allows for twice the maximum penalty when prior similar convictions exist. Chapter Three, §A313, provides guidance for enhancing repeated violations of this offense.

When the obscenity distribution offense is part of a for-profit enterprise, the penalty is enhanced according to the scope of the criminal scheme. This enhancement reflects statutory recognition of a more serious offense when transportation is for commercial use. 18 U.S.C. § 1465.

A statutory enhancement is provided where the defendant is a federal employee acting as an agent of the United States government who contributes to the distribution of obscene material. 18 U.S.C. § 552.

Section G232, radio broadcasting of obscene language, 18 U.S.C. § 1464, is generally considered a less serious offense than the distribution of obscene printed matter, which has greater permanence and typically involves an organized business enterprise. The base offense level reflects the time specified by the parole guidelines. If the obscene or profane broadcast occurred over a commercial radio station, as opposed to a citizens' band or other limited transmission, the penalty increases to reflect the generally wider audience affected by the broadcast and its commercial nature.

PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS

1. CIVIL RIGHTS

18 U.S.C. §§ 241 - 242
18 U.S.C. §§ 245 - 246
42 U.S.C. § 3631
Also See Statutory Index

§H211. Interfering with Civil Rights. The base offense level is **10**.

(a) **Specific Offense Characteristics**

(1) If the defendant conspired to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any civil right, increase by **10** levels.

(2) If the defendant and at least one other person went in disguise on the highway or on the premises of another with intent to prevent or hinder the exercise of any civil right, increase by **10** levels.

Commentary

This section refers to violations of civil rights or privileges secured under the Constitution or laws of the United States proscribed by 18 U.S.C. §§ 241, 242, 245, and 246, and 42 U.S.C. § 3631. A violation of these provisions may involve death, injury, or unlawful restraint. Reference should be made to Part Y, General Provisions, in those cases. If the defendant played a leadership role in a civil rights conspiracy or was a public official or law enforcement officer who used his position to facilitate the offense, refer to Part Z, Role in the Offense.

The base offense level applies to violations of civil rights under color of state law, 18 U.S.C. § 241. These offenses carry a statutory maximum term of imprisonment of only one year, unless death results when a sentence of life imprisonment is provided. An offense level near the statutory maximum is provided for non-death cases because of the compelling public interest in deterring and adequately punishing civil rights violators. A defendant who was a law enforcement or public official should be sentenced at the maximum end of the guideline range. The statutory maximum sentence for conspiracy to violate civil rights is ten years.

The specific offense characteristics are based on statutory language and reflect Congressional intent to punish more seriously those civil rights violators who act in concert with others or who wear a disguise to terrorize others. If both factors are present in the offense, the guidelines provide for a sentencing range of ninety-seven to 121 months. Average time served under presumptive parole guidelines is based on the level of the assault involved in the offense, or provide for zero to six months custody for civil rights offenses that do not result in assaults. In cases where death results, presumptive parole guidelines provide for not less than 100 months imprisonment. The number of cases available for these offenses in the Commission's data is insufficient to provide reliable estimates. The seriousness of these

offenses, and the need to foster justice and fairness in the community, compel sentences that are generally higher than those imposed in the past.

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2. POLITICAL RIGHTS

2 U.S.C. § 437g(d)
18 U.S.C. §§ 241 - 242
18 U.S.C. § 245(b)(1), (A)
18 U.S.C. §§ 592 - 607
18 U.S.C. § 1341
18 U.S.C. § 1343
42 U.S.C. §§ 1973i(c),(d),(e)
Also See Statutory Index

§H221. **Obstructing an Election or Registration.** The base offense level is determined as follows:

(1) If the obstruction occurred by use of force or threat of force against persons or property, the base offense level is **17**.

(2) If the obstruction occurred by forgery, fraud, theft, or deceit, the base offense level is **12**; if the obstruction involved multiple occurrences, the base offense level is **13**.

(3) If the obstruction occurred by offering, giving, or agreeing to give anything of value to another person, or a member of that person's immediate family, for or because of that person's voting, refraining from voting, voting for or against a particular candidate, or for registering to vote, the base offense level is **12**; if the obstruction involved multiple occurrences, the base offense level is **13**.

(4) If the defendant a) solicited, demanded, accepted, or agreed to accept anything of value for voting, to refrain from voting, to vote for or against a particular candidate, or to register to vote, b) gave false information to establish eligibility to vote, or c) voted more than once in a federal election, the base offense level is **6**.

§H222. **Interfering with a Federal Benefit for a Political Purpose.** The base offense level is **6**.

§H223. Misusing Authority Over Personnel for a Political Purpose. The base offense level is 6; if the offense involved multiple occurrences, the base offense level is 8.

(a) Specific Offense Characteristic

(1) If the conduct adversely affected an individual's employment, increase by 2 levels.

§H224. Unlawfully Soliciting a Political Contribution or Making an Unlawful Political Contribution as a Federal Public Servant, or Soliciting or Receiving a Political Contribution in a Federal Building. The base offense level is 6.

§H225. Making, Receiving, or Failing to Report an Excess or Otherwise Unlawful Campaign Contribution or Expenditure. The base offense level is 6.

§H226. Polling Armed Forces. The base offense level is 6.

§H227. Promise of Appointment, Employment, or Other Benefit for Political Activity. The base offense level is 6.

§H228. Deprivation of Employment or Other Benefit for Political Contribution. The base offense level is 6.

§H229. Solicitation From, or Disclosure of Names of, Persons on Relief. The base offense level is 6.

Commentary

Sections H221-H229 apply to violations of political rights. Section H221 refers to conduct proscribed by 2 U.S.C. § 437g(d), 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, and 597, and 42 U.S.C. §§ 1973i(c), (d), (e). Aggravating factors are provided for obstructing an election: by force, by deceptive or dishonest conduct, or by bribery. If the use of force results in personal injury or property damage, or if the scheme to obstruct an election or registration involves corrupting a public official, the sentence should be enhanced in accordance with the general provisions. A defendant who directs others to engage in criminal conduct may have a sentence enhanced by reference to the provisions in Part Z, Role in the Offense.

Current practice under presumptive parole guidelines provide for twenty-four to thirty-six months imprisonment if obstructing an election or registration was caused by force or threat of force, and twelve to eighteen months in custody otherwise. There are no parole guidelines for the offenses covered by §§ H222 through H229 since they are misdemeanors.

Section H222 refers to conduct proscribed by 18 U.S.C. §§ 595 and 598.

Section H223 refers to conduct proscribed by 18 U.S.C. § 606. The base offense level is aggravated in a case where the misuse of personnel involves an actual loss of employment, compensation, or position. A promise of promotion, actual promotion, or threat of adverse action is treated less severely.

Section H224 covers conduct proscribed by 18 U.S.C. §§ 602, 603, and 607. These statutes are primarily intended to protect federal civil servants from on-the-job political pressures.

Section H225 pertains to conduct proscribed by 2 U.S.C. § 437g(d), i.e., regulatory offenses under the Federal Election Campaign Act.

Section H226 refers to conduct proscribed by 18 U.S.C. § 596, protecting the right to vote by secret ballot among members of the Armed Forces.

Section H227 refers to conduct proscribed by 18 U.S.C. §§ 599 and 600, prohibiting the "buying" of votes or political support through promises of future federal employment, appointment, or other federal benefit.

Section H228 refers to conduct proscribed by 18 U.S.C. § 601. This guideline applies to the deprivation of, or threat to deprive, federal employment or other federal benefits in order to gain a political contribution.

Section H229 refers to conduct proscribed by 18 U.S.C. §§ 604 and 605. The purpose of these statutes is to protect recipients of federal unemployment, welfare, and similar benefits from the solicitation of political contributions.

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3. PRIVACY AND EAVESDROPPING

18 U.S.C. § 1702
18 U.S.C. § 1905
18 U.S.C. §§ 2511 - 2512
21 U.S.C. § 842(a)(8)
47 U.S.C. § 605

§H231. Eavesdropping. The base offense level is 6.

(a) Specific Offense Characteristics

(1) If the offense involved the interception or disclosure of wire, oral, or electronic communications, increase by 6 levels.

(2) If the purpose of the conduct was to facilitate another offense, increase by 6 levels.

(3) If the purpose of the conduct was direct or indirect commercial advantage or gain, and is not covered by (1) or (2) above, increase by 6 levels.

§H232. Manufacturing or Trafficking in an Eavesdropping Device. The base offense level is 9.

§H233. Possessing an Eavesdropping Device. The base offense level is 6.

Commentary

Section H231 refers to conduct proscribed by 47 U.S.C. § 605, and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and various sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The interception of radio communications in violation of 47 U.S.C. § 605, carries a maximum term of imprisonment of one year for the first conviction and a maximum term of imprisonment of two years for any subsequent conviction. The new law provides for a maximum term of imprisonment of five years for violations involving most types of communication. If the offense involved a radio communication that was not scrambled or encrypted, and was a first offense not committed for a wrongful purpose or for commercial gain, the statutory maximum is one year imprisonment. If the conduct was intended to facilitate the commission of another offense, the base offense level is increased. Similarly, the base offense level is increased if the purpose of the conduct is commercial or economic gain. Current practice under presumptive parole guidelines provides for zero to six months imprisonment for these offenses, unless there was a more serious underlying offense.

Section H232 applies to conduct proscribed by 18 U.S.C. § 2512 covering commercial dealings in illegal eavesdropping devices. The current practice under presumptive parole guidelines is zero to ten months in custody.

Section H233 applies to possession of eavesdropping devices in violation of 18 U.S.C. § 2512(1)(b). Since it is the least serious of these offenses, it is assigned a lower offense level. The current practice under presumptive parole guidelines is zero to six months.

§H234. Obstructing Correspondence. The base offense level is 6.

(a) Specific Offense Characteristic

(1) If the obstruction involved multiple occurrences, increase by 4 to 6 levels, depending upon the number of occurrences.

§H235. Revealing Private Information Submitted for a Government Purpose. The base offense level is 6.

(a) Specific Offense Characteristics

(1) If the offense involved multiple occurrences, increase by 8 levels.

(2) If the offense was committed for political or economic gain or for the purpose of obstructing a governmental function, increase by 6 levels.

Commentary

Sections H234 and H235 apply to other statutes designed to protect the privacy of communications.

Section H234 pertains to the unlawful intercepting of correspondence, conduct proscribed by 18 U.S.C. § 1702. While this conduct often involves theft from the mails, it is not necessary that theft be involved. Opening, destroying, and misrouting of another's mail are also covered by the statute.

Section H235 refers to conduct proscribed by numerous statutes, including: 7 U.S.C. §§ 472, 608(d), 2105, 2157, 2276, 2619, 2623, 2706(c), 2904, 3204, 4307, 4504(k), 4534(c), 4810(c), 4908(c); 13 U.S.C. § 214; 18 U.S.C. §§ 1902, 1904-1908; 21 U.S.C. § 842(a)(8); 26 U.S.C. § 7213(a)(1); and 42 U.S.C. §§ 2000g-2 and 2181.

Section H235 addresses a sensitive area. Valuable information, including trade secrets, marketing information, and crop reports, is provided to the government under various regulatory provisions with an understanding that the information will be kept confidential. Certain government regulatory functions depend upon the availability of this information. In order to protect the flow of information, it is necessary to punish and deter unlawful disclosures.

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4. PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE

18 U.S.C. § 1581 - 1588
Also See Statutory Index

§H241. **Peonage.** The base offense level is **15.**

§H242. **Enticement or Sale into Involuntary Servitude.** The base offense level is **15.**

§H243. **Slave Trade.** The base offense level is **15.**

Commentary

Section H241 applies to conduct proscribed by 18 U.S.C. § 1581(a). The statute prohibits peonage, holding a person in involuntary servitude, or any activity contrary to the Thirteenth Amendment of the United States Constitution.

Section H242 applies to conduct proscribed by 18 U.S.C. §§ 1583 and 1584, statutes prohibiting the enticement, kidnapping, or sale of a person into involuntary servitude.

Section H243 covers conduct prohibited by 18 U.S.C. §§ 1582-1588, relating to seizing, detaining, transporting, or procuring of slaves. The base offense levels are sufficiently high to assure that a term of imprisonment will ordinarily be imposed for these offenses. This punishment is appropriate for purposes of both just punishment and deterrence.

PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

18 U.S.C. §§ 401 - 402
18 U.S.C. §§ 912 - 913
18 U.S.C. §§ 1503 - 1513
18 U.S.C. § 1581(a)
18 U.S.C. §§ 1621 - 1623
18 U.S.C. §§ 3146 - 3147

§J211. Contempt. If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

§J212. Obstruction of Justice. If the defendant obstructed or attempted to obstruct the administration of justice, the base offense level is **13** to **18**, depending upon the nature and circumstances of the offense, and its effect on the administration of justice.

§J213. Perjury. If the defendant committed or suborned perjury, the base offense level is **13** to **18**, depending upon the nature of the proceedings, and the circumstances under which the false testimony was given or suborned, and its effect on the administration of justice.

§J214. Impersonation. If the defendant falsely represented himself as a federal officer, agent or employee, the base offense level is **10** to **12**, depending upon the nature and circumstances of the offense.

§J215. Failure to Appear by Material Witness. The base offense level is **6** to **10**, depending upon the nature and circumstances of the offense.

§J216. Failure to Appear by Defendant. If the defendant failed to appear in court as required by the conditions of his release, or if he failed to surrender for service of sentence, the base offense level is **6** to **15**, depending upon the grading of the offense for which he was on release. See 18 U.S.C. § 3146(b).

§J217. Commission of Offense While on Release. If the offense was a felony, increase the base offense level by **17** to **24** levels; if the offense was a misdemeanor, increase the base offense level by 3 to 6. 18 U.S.C. § 3147.

§J218. Bribery of Witness, Conspiracy, Attempt, and Solicitation. If the offense involved a gratuity for testimony or for refusing to testify, the base offense level is 10 to 15, depending upon the nature of the proceedings and the circumstances of the offense. 18 U.S.C. § 201(f).

(a) **Specific Offense Characteristic**

(1) If the offense involved a bribe for the purpose of influencing the testimony of a witness or to influence a witness to absent himself from a proceeding, increase by 1 to 8 levels, depending upon the nature of the proceeding and the effect the offense had upon the administration of justice. 18 U.S.C. § 201(d).

Commentary

Misconduct constituting contempt under 18 U.S.C. §§ 401 and 402 varies significantly. The nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are context specific variables. Because the seriousness of a contempt violation can only be determined within the context of the often unique circumstances of the offense, the Commission leaves punishment to the discretion of the sentencing judge to be proportional to similar offenses. Explicit factual findings must be made if the contempt occurred in the presence of the court and is summarily punished. Rule 42(a), Federal Rules of Criminal Procedure.

The Commission has no data regarding sentences for contempt. Punishment by fine or imprisonment for criminal contempt is statutorily unlimited and is addressed to the sound discretion of the court. While the Commission finds that continued latitude must be afforded in the determination of an appropriate proportional sentence for criminal contempt, the court must state reasons based on the nature of the conduct, its effect on the adminstration of justice, and the need for the court to vindicate its authority, considered in light of the statutory purposes of sentencing.

Section J212 addresses offenses involving obstruction of justice, generally prosecuted under 18 U.S.C. §§ 1503-1513. This guideline only applies to independent prosecutions and convictions for obstruction offenses. However, conduct constituting obstruction in connection with the investigation or prosecution of another offense may be a relevant sentencing consideration as post-offense conduct. See Chapter Three, Part B, Post-Offense Conduct.

Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer (five year statutory maximum); obstructing a civil or administrative proceeding (five year maximum); stealing or altering court records (five year maximum); unlawfully intercepting grand jury deliberations (one year maximum); obstructing a criminal investigation (five year maximum); obstructing a state or local investigation of illegal gambling (five year maximum); using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer (ten year maximum); or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding (ten year maximum). The conduct that gives rise to the violation may therefore range from a mere threat to an act of extreme violence. The offense levels provided in §J212 approximate current practices.

Section J212 therefore provides flexibility in the determination of punishment, based upon the nature and circumstances of the offense and its effect on the administration of justice. However, because even a threat will also cause some interference with the judicial process, the

base offense level is substantial. In selecting the appropriate offense level, the court shall identify the factors considered and state reasons for its decision to apply a specific offense level. Reference should be made to the Part Y, General Provisions, if a weapon was used or physical or psychological injury or property damage resulted from the commission of the offense.

Section J213 applies to perjury and subordination of perjury, generally prosecuted under 18 U.S.C. §§ 1621-1623. Under both provisions, the maximum statutory punishment is five years. This guideline only applies to independent prosecutions for perjury. Perjury and suborning perjury may be considered as an aggravating factor in sentencing for other offenses. See Chapter Three, Part B, Post-Offense Conduct. The guidelines provide a higher penalty for perjury than the current practice estimate of ten months imprisonment. The Commission finds that perjury should be treated as seriously as obstruction of justice.

In evaluating the appropriate offense level for a perjury offense, it is important to consider the nature of the proceedings and the attendant effect the offense had on the administration of justice. For example, if a defendant falsely testified against another during a grand jury proceeding and the victim of the perjury was consequently indicted, the maximum offense level may be appropriate. Similarly, if a defendant provided false alibi testimony in a criminal trial and an acquittal resulted, the maximum offense level may be appropriate. In both examples, the damage to the administration of justice would be irreparable. However, in any case of perjury a substantial minimum punishment is provided to reflect the resulting interference with an essential aspect of a judicial function.

Section J214 applies to violations of 18 U.S.C. § 912, impersonation of a federal officer, agent, or employee, and 18 U.S.C. § 913, engaging in such an impersonation in order to unlawfully conduct a search or arrest. The statutory maximum for both offenses is three years. The determination of the appropriate offense level depends upon the nature and circumstances of the offense. If the defendant perpetrated a fraud or restricted the liberty of another while posing as a law enforcement officer, the sentence should be at or near the guideline maximum of two years. If an unlawful arrest or search was motivated by some other criminal purpose, a sentence above the guideline range may be warranted under Part Y, General Provisions. See §Y229. No current practices information is available for these offenses.

Sections J215 and J216 apply to failures to appear by material witnesses and defendants released pending trial, sentencing, or appeal. 18 U.S.C. § 3146. The statutory maximum for material witnesses failing to appear is one year. However, if the failure to appear was by a defendant who was released pending trial, sentencing, appeal, or surrender for service, the statutory maximum for the violation increases in relation to the statutory maximum punishment for the underlying offense. 18 U.S.C. § 3146. A sentence imposed for failure to appear runs consecutively to a sentence of imprisonment for any other offense.

Section J217 implements a statutory sentencing enhancement for any offense committed by a defendant while on release. 18 U.S.C. § 3147. A mandatory minimum of two years imprisonment is added to the sentence prescribed for the offense if it was a felony; a mandatory minimum of ninety days imprisonment is added if the offense was a misdemeanor. If a sentence is enhanced under §J217, the adjustment for offenses committed by defendants in custody in Chapter Three, §A311(d), shall not apply.

Section J218 applies to gratuities offered, paid, demanded, or accepted by witnesses in federal proceedings. 18 U.S.C. § 201(f). Section J218(a)(1) addresses the more serious witness bribery provision of 18 U.S.C. § 201(d). The offense levels correspond to those for bribing federal officials and approximate current practice estimates.

PART K - OFFENSES INVOLVING PUBLIC ORDER AND SAFETY

1. EXPLOSIVES AND ARSON

18 U.S.C. §§ 32 - 33
18 U.S.C. § 81
18 U.S.C. § 842
18 U.S.C. § 844
18 U.S.C. § 1153
18 U.S.C. § 1855
18 U.S.C. § 2275
26 U.S.C. § 5685
49 U.S.C. § 1472(*l*)

§K211. Failure to Report Theft of Explosives. The base offense level is 6.

§K212. Improper Storage of Explosives. The base offense level is 6.

§K213. Unlawfully Trafficking In, Receiving, or Transporting Explosives. The base offense level is 12.

(a) **Specific Offense Characteristic**

(1) If the defendant was a person prohibited by federal, state, or local law from possessing explosives, increase by 2 levels.

§K214. Property Destruction by Arson or Explosives. The base offense level is determined as follows:

(1) If the defendant's conduct was intended to result in death or serious bodily injury, the base offense level is 24 to 27, depending upon the result intended.

(2) If the defendant used an explosive or destructive device to commit the offense, the base offense level is 24.

(3) If the conduct involved any place where persons were present or were likely to be present, the base offense level is 12 to 15, depending upon the danger actually presented.

(4) Otherwise, the base offense level is 8.

§K215. Unlawfully Possessing an Explosive in a Government Building. The base offense level is 10.

§K216. Dangerous Weapons and Materials Aboard an Aircraft. The base offense level is **12**.

(a) **Specific Offense Characteristics**

(1) If the defendant acted with intent to commit another crime, increase by **12** levels.

(2) If the defendant was a person prohibited by federal, state, or local law from possessing the item, increase by **2** levels.

(3) If the defendant acted as a result of simple negligence, decrease by **3** levels.

§K217. Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge. The base offense level is **18**.

§K218. Using or Carrying Explosives in Certain Crimes. The base offense level is **18**.

Commentary

Sections K211 and K212 refer to conduct proscribed by 18 U.S.C. §§ 842(k) and (j), respectively. The conduct covered is generally a regulatory violation, punishable by a maximum term of one year imprisonment. A review of current sentencing practices under 18 U.S.C. § 842(j) indicates that the majority of defendants receive probation. If the defendant was prohibited by federal, state, or local law from possessing explosives or if the explosives were stolen, the sentence imposed shall be at or near the statutory maximum.

Section K213 refers to various forms of conduct proscribed by 18 U.S.C. § 842, ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce, to more serious violations that involve substantial danger to public safety. A review of current sentencing practices indicates that the majority of prosecutions are under 18 U.S.C. § 842(a) and 18 U.S.C. § 842(h) and that sentences imposed under these subsections are comparable. The base offense level includes the average for convictions under both subsections. The notable exception would appear to be cases involving prohibited persons, usually convicted felons, under 18 U.S.C. § 842(i). Although limited, current practices data and presentence investigation reports indicate the average sentence for these defendants is substantial.

Section K214 refers to property destruction by fire or explosives under 18 U.S.C. §§ 32 and 33, 18 U.S.C. § 81, 18 U.S.C. § 844(f) and (i), 18 U.S.C. §§ 1153, 1855, and 2275. Arson where death or serious bodily injury is intended, or involving any place where persons are present, or likely to be present, will result in a base offense level that corresponds to current practices under the presumptive parole guidelines. Current practices data indicate that arson sentences are significantly higher in cases where a destructive device or explosive is used. The base offense level corresponds to the average sentence imposed under current practices where the value of the resulting property damage was approximately $100,000. Review of arson presentence investigation reports indicates that many arson cases involve "malicious mischief." Many of these defendants receive probationary sentences. Those sentenced to a period of

incarceration receive sentences between two and three years. The base offense level for §K214(4) approximates the average sentence for those currently sentenced to prison.

Sections K214(1), (2), and (3) are not mutually exclusive. If a defendant plants a bomb in a residence with the intent to kill or seriously injure, he should be sentenced based on the most serious aspect of the conduct. If injury or property loss results, refer to Part Y, General Provisions.

Section K215 refers to conduct proscribed by 18 U.S.C. § 844(g). Possession of explosives in a government building poses a substantial danger to public safety and to the effective and orderly administration of government. The low base offense level reflects the statutory maximum prison term of one year. If the defendant was prohibited by federal, state, or local law from possessing explosives or if the explosives were stolen, a sentence at or near the statutory maximum shall be imposed. This consideration reflects public comment and assures that offenses posing a greater threat of danger receive a sentence at or near the statutory maximum. Possession of any armed explosive should result in the maximum sentence allowed by law.

Section K216 refers to additional conduct proscribed by 18 U.S.C. § 32 and by 49 U.S.C. § 1472(l). Carrying or placing the dangerous items aboard an aircraft constitutes a substantial danger to public safety and commerce. Enhancements for intent to commit another offense and for any prohibition from possessing explosives reflect statutory concerns. The reduction in penalty for simple negligence reflects a statutory consideration. Possession of any armed explosive should result in the maximum sentence allowed by law.

Sections K217 and K218 refer to conduct proscribed by 18 U.S.C. § 844(d) and 844(h), and 26 U.S.C. § 5685. The base offense level is consistent with time specified under the parole guidelines and reflects the added seriousness of the offense if explosives were used.

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2. FIREARMS

18 U.S.C. § 922
18 U.S.C. App. II § 1202
26 U.S.C. § 5861

INTRODUCTION

This section addresses only the most frequently prosecuted firearms offenses. With respect to other firearms offenses, an analogous guideline will be applied or, if an analogous guideline is not apparent, a sentence reflecting the statutory purposes of sentencing shall be imposed.

§K221. Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons. The base offense level is 9.

(a) Specific Offense Characteristics

(1) If the firearm was stolen, increase by 2 levels.

(2) If the defendant intended to use the firearm solely for legitimate sporting purposes, decrease by 2 to 5 levels, depending upon the circumstances of possession, the defendant's criminal history, and the extent to which possession violated local law.

§K222. Receipt, Possession, or Manufacture of Firearms or Other Weapons in Violation of National Firearms Act. The base offense level is 17.

(a) Specific Offense Characteristics

(1) If the firearm was stolen, increase by 2 levels.

(2) If the firearm was a silencer or assassination kit, increase by 3 levels.

(3) If the defendant received, possessed, or manufactured the firearm solely for purposes of legitimate sport or collection, decrease by 6 to 9 levels, depending upon the circumstances of possession and the defendant's criminal history.

§K223. Unlicensed Dealing in Firearms. The base offense level is 9, except under 26 U.S.C. § 5861, the base offense level is 17.

(a) Specific Offense Characteristics

(1) If the defendant dealt in more than one firearm, increase by 1 to 6 levels, depending upon the quantity of firearms involved.

(2) If the defendant dealt in one or more stolen firearms, increase by 2 to 7 levels, depending upon the quantity stolen.

(3) If the defendant had reason to know that any of the firearms were likely to be used in criminal activity, increase by 3 to 6 levels, depending upon the nature and seriousness of the criminal activity and the extent of the defendant's knowledge as to the intended use of the firearms.

(4) If the defendant knew that the weapons were being obtained by prohibited persons, increase by 1 to 4 levels, depending upon the reasons the person was prohibited from possessing weapons.

§K224. Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes. If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 924(c) or § 929(a), the penalties are those required by statute.

Commentary

Section K221 applies to violations of 18 U.S.C. §§ 922(g) and 922(h), which prohibit receipt or possession of firearms by certain persons and, 18 U.S.C. § 922(a)(6) for false statements concerning disqualification of the defendant from possessing a firearm. The statutory maximum sentence for violation of these sections is five years imprisonment. This guideline also applies to violations of 18 U.S.C. App. II § 1202, which prohibits similar conduct but ordinarily carries a maximum sentence of two years imprisonment. If, however, the defendant has "three previous convictions . . . for burglary or robbery, or both," § 1201 requires a term of imprisonment of at least fifteen years. In these cases, the statute supersedes the guideline.

Section K221 is intended to produce sentences that, on average, reflect current sentencing practices. There is, however, considerable sentencing variation. Based upon sentencing data and presentence investigation reports, as well as comment by probation officers, this variation may be attributable to the variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his intended use of the firearm is probably the most important factor.

Statistics show that sentences average two to three months lower if the firearm involved is a rifle or shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Lawful use, as determined by the surrounding circumstances, is a mitigating factor. These circumstances include, among others, the number and type of firearms and ammunition, the location and circumstances of possession, the defendant's criminal history, and the extent to which possession is limited by local law.

Available data are not sufficient to determine the effect a stolen firearm has on the average sentence. However, reviews of actual cases suggest that this is a factor that tends to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes. The guideline specifies that the offense level be increased by two when the firearm is stolen. If the defendant in fact stole the firearm, a sentence above the otherwise applicable guideline range may be warranted. The court should also consider increasing the offense level when the firearm involved is a machine gun, sawed-off rifle or shotgun, silencer or destructive device, or has an altered or obliterated serial number. Ordinarily, however, these offenses are prosecuted under 26 U.S.C. § 5861, carrying a maximum term of imprisonment of ten years.

The general provisions enable the court to increase the offense level when there is evidence that the defendant intended or used the firearm to commit another crime. See §Y216.

Section K222 applies to violations of subdivisions (b) through (l) of 26 U.S.C. § 5861, that prohibit the unlicensed receipt, possession, or manufacture of certain firearms, such as machine guns, silencers, sawed-off rifles and shotguns, and destructive devices. The offense is a felony with a maximum prison sentence of ten years. For violations of 26 U.S.C. § 5861(a), refer to §K223.

As with §K221, there is considerable variation in the sentences currently given for this offense. The most important consideration is the defendant's intended use of the firearm.

Section K223 applies to violations of 18 U.S.C. § 922(a)(1). This statute has a maximum penalty of five years imprisonment. Considerable variation in sentencing for these offenses currently exists. Current practice studies by the Commission identify the specific offense characteristics as likely sources of that variation. While these factors relate to the harm against which the statute is intended to protect, their significance cannot be readily quantified. Accordingly, the guideline employs flexible ranges to adjust for them.

Sections K223(a)(1) and (a)(2) are mutually exclusive.

Section K223(a)(3) should result in the highest sentences for persons who provide firearms to others who commit serious crimes. (If the purpose of the sale was to further the commission of another crime, the general provisions permit imposition of a more severe sentence.) This factor also should result in higher sentences for sales to felons or across state lines.

Section K224 refers to conduct proscribed by 18 U.S.C. § 924(c) or § 929(a). Convictions pursuant to other statutes for crimes where firearms are possessed or used should be addressed by reference to the General Provisions section of the guidelines. If the defendant was convicted under 18 U.S.C. § 924(c) or § 929(a), the penalties are mandatory and shall be imposed pursuant to the statute.

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3. TRANSPORTATION OF HAZARDOUS MATERIALS

46 U.S.C. § 3718
49 U.S.C. § 1472(h)(2)
49 U.S.C. § 1809(b)
49 U.S.C. § 2007

§K231. Unlawfully Transporting Hazardous Material Aboard an Aircraft. The base offense level is 7 to 15, depending upon the danger posed by the material.

(a) **Specific Offense Characteristic**

(1) If the defendant acted with intent to commit another crime, increase by 5 levels.

§K232. Unlawfully Transporting Hazardous Material in Commerce. The base offense level is 7 to 15, depending upon the danger posed by the material.

(a) **Specific Offense Characteristic**

(1) If the defendant acted with intent to commit another crime, increase by 5 levels.

§K233. Unlawful Carriage of Dangerous Cargoes by Vessel. The base offense level is 6 to 10, depending upon the danger to the public presented by the violation.

§K234. Violations of Liquid Pipeline Safety Act; Intentional Damage to Pipeline Facilities. If the violation involved:

(1) intentional damage or attempts to damage any interstate pipeline facility, the base offense level is 15 to 19, depending upon the danger to the public arising from the violation.

(2) a failure to comply with the requirements of any applicable safety standard established by law, or with any order of the Secretary of Transportation relating thereto, the base offense level is 7 to 12, depending upon the danger to the public arising from the violation.

(3) a failure to establish and maintain a plan of inspection and maintenance as required by law, or failure to permit access to such information as required by law, the base offense level is 6.

Commentary

Section K231 refers to conduct proscribed by 49 U.S.C. § 1472(h)(2). The conduct addressed by this provision is punishable by a maximum five years imprisonment. A distinction is made between the defendant who acts with intent to commit another crime, and the defendant who acts recklessly or with intent to ignore the safety of others but intends no other crime. These offenses are not addressed under the parole guidelines, nor are current practices data sufficient to provide a basis for establishing a base offense level. Therefore, a range of levels is provided and public comment is invited as to the appropriate punishment.

Section K232 refers to conduct proscribed by 49 U.S.C. § 1809(b). The conduct addressed by this provision is punishable by imprisonment for five years. Sentencing distinctions are the same as those under §K231. For reasons stated in the commentary above, a range of levels is provided and public comment as to the appropriate punishment is invited.

Section K233 refers to conduct proscribed by 46 U.S.C. § 3718. Conduct generally addressed by this provision is punishable by a maximum term of five years imprisonment. The base offense levels reflect the regulatory nature of offenses dealing with safety requirements for vessels transporting dangerous cargoes. The statute allows for twice the punishment in cases where a weapon is used to prevent enforcement officials from carrying out official duties, or where they are seriously injured or threatened with serious injury. In circumstances where a weapon is used or physical injury results, enhancement is provided in Part Y, General Provisions.

Section K234 refers to conduct proscribed by 49 U.S.C. § 2007. The conduct addressed by this provision ranges from violations that are regulatory in nature, carrying a maximum five year imprisonment term, to serious damage to an interstate pipeline facility, punishable by imprisonment for fifteen years. Sentencing distinctions are based upon the statute. A range of levels is provided and public comment as to the appropriate punishment is invited.

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4. RIOTING

18 U.S.C. § 231
18 U.S.C. § 2101
Also See Statutory Index

§K241. **Engaging In, Inciting, or Attempting to Incite a Riot.** The base offense level is **7** to **13**, depending upon the number of persons involved, the danger presented to public safety, and the extent of resulting community disruption.

Commentary

Section K241 refers to conduct proscribed by 18 U.S.C. §§ 231 and 2101. The conduct addressed by these provisions is punishable by a maximum term of five years imprisonment. Data limitations preclude an estimate of current practices in sentencing, and the presumptive parole guidelines do not address these offenses. The range of base offense levels is intended to reflect the broad scope of activities encompassed by 18 U.S.C. §§ 231 and 2101. The minimum of the range is intended to assure minimal incarceration for any active participation. The maximum results in a substantial sentence in cases of serious disruption. Conduct resulting in death, physical injury, or property damage should be addressed under Part Y, General Provisions. Rioting misconduct that occurs in a federal facility for official detention is addressed in Part P, Offenses Involving Prisons and Correctional Facilities.

PART L - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

1. IMMIGRATION

8 U.S.C. §§ 1324 - 1328

INTRODUCTION

The interests protected are maintaining the integrity of the borders, safeguarding a policy of controlled immigration, and excluding undesirable aliens.

§L211. Smuggling, Transporting or Harboring an Unlawful Alien. The base offense level is 6.

(a) **Specific Offense Characteristics**

(1) If the defendant committed the offense a) for commercial advantage or private financial gain; b) with knowledge of the alien's desired entry for unlawful purpose or c) with knowledge that the alien was excludable as a dangerous offender, increase by 6 levels.

(2) If the defendant participated in bringing illegal aliens into the United States for profit on more than one occasion, increase by 3 levels.

(3) If the illegal aliens were transported for immoral purposes, increase by 6 levels.

§L212. Unlawfully Entering or Remaining in the United States. The base offense level is 6.

§L213. Engaging in a Pattern of Unlawful Employment of Aliens. The base offense level is 6.

Commentary

§L211. This section includes conduct proscribed by Section 112 of The Immigration and Reform Act of 1986 and 8 U.S.C. §§ 1327, 1328, 1324(a)(1), (2) and (4).

This section concerns the most serious immigration offenses covered under The Immigration Reform Act of 1986. This Act establishes a five year maximum term of imprisonment for smuggling or harboring illegal aliens in the case of a second or subsequent offense, an offense committed for commercial advantage, or for any offense in which the alien is not presented to an immigration officer immediately upon arrival. In all other cases, the maximum term is one year. The base offense level reflects the statutory maximum as well as current practice estimates. 8 U.S.C. § 1324.

Defendants who were involved in a general criminal conspiracy or business operation received longer sentences to reflect statutory recognition of the scale of their offense. Defendants assisting entry of aliens who intend to engage in unlawful activities or who are otherwise specifically excludable under the immigration laws as dangerous subversives, 8 U.S.C. §§ 1182(a)(27), (28), or (29), receive greater penalties by statute. 8 U.S.C. § 1324.

The enhancement for transporting illegal aliens for immoral purposes reflects statutory recognition of the seriousness of the offenses. 8 U.S.C. § 1328.

The additional enhancement for defendants who transport illegal aliens for profit reflects current practice estimates that suggest multiple recurrent acts, part of an ongoing scheme for profit, receive significantly higher sentences.

§L212. This section includes conduct proscribed by 8 U.S.C. §§ 1325 and 1326. Repeated instances of deportation with or without criminal conviction shall constitute a sufficient basis for sentencing at the higher base offense level.

§L213. This section includes conduct proscribed by Section 101 of The Immigration Reform and Control Act of 1986. This offense is specifically directed at defendants who engage in a pattern of unlawful employment of aliens. The unlawful employment of an alien carries a civil penalty. The low base offense level reflects the statutory maximum penalty of six months imprisonment.

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2. NATURALIZATION AND PASSPORTS

18 U.S.C. § 1423 - 1429
18 U.S.C. § 1542 - 1544
18 U.S.C. § 1546

§L221. **Trafficking in Evidence of Citizenship or Documents Authorizing Entry.** The base offense level is 6.

§L222. **Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use.** The base offense level is 6.

§L223. **Trafficking in a United States Passport.** The base offense level is 8.

§L224. **Fraudulently Acquiring or Improperly Using a United States Passport.** The base offense level is 6.

§L225. **Failure to Surrender Canceled Naturalization Certificate.** The base offense level is 6.

§L226. **Neglect or Refusal to Answer Subpoena.** The base offense level is 6.

Commentary

§L221. This section includes conduct proscribed by 18 U.S.C. §§ 1425-1427, and 1546, and Section 103 of The Immigration Reform and Control Act of 1986. The base offense level reflects time specified by the parole guidelines.

§L222. This section includes conduct proscribed by 18 U.S.C. §§ 1423, 1424, 1425, and 1546. The base offense levels are consistent with time specified by the parole guidelines.

§L223. This section applies to conduct proscribed by 18 U.S.C. §§ 1542, 1543, and 1544. The base offense level is consistent with a reduction in the statutory maximum under 18 U.S.C. § 1543, and with time specified by the parole guidelines.

§L224. This section includes conduct proscribed by 18 U.S.C. §§ 1543 and 1544. The base offense level is consistent with time specified by the parole guidelines.

§L225. This section applies to conduct proscribed by 18 U.S.C. § 1428. The base offense level reflects time specified by the parole guidelines.

§L226. This section includes conduct proscribed by 18 U.S.C. § 1429. There are no current practice data available to suggest a base offense level for this crime. Because of the similarity in the offenses, the base offense level has been set proportionate to the level in §L225, Failure to Surrender Canceled Naturalization Certificate.

PART M - OFFENSES INVOLVING NATIONAL DEFENSE

1. TREASON AND RELATED OFFENSES

U.S. Const., Art. III, §3
18 U.S.C. § 757
18 U.S.C. §§ 2381 - 2384
50 U.S.C. § 783

By their nature, treason and violent rebellion threaten the security of the United States and the peace and welfare of its citizens. The high offense levels assigned those crimes reflect the government's need to assure its continued preservation by punishing defendants who threaten its existence by violence or unlawful advocacy, and deterring others who may seek to do so in the future.

§M211. Treason. The base offense level is 30.

(a) **Specific Offense Characteristic**

(1) If the offense significantly threatened the national security, increase by 3 to 5 levels, depending upon the nature and circumstances of the offense.

§M212. Misprision of Treason. The base offense level is 17.

(a) **Specific Offense Characteristic**

(1) If the offense significantly threatened the national security, increase by 1 to 3 levels, depending upon the nature and circumstances of the offense.

§M213. Violent Rebellion or Insurrection. The base offense level is 28.

(a) **Specific Offense Characteristic**

(1) If the offense involved conspiracy to use force to overthrow or destroy the government of the United States, increase by 6 levels.

§M214. Aiding Escape of Prisoner of War or Enemy Alien. The base offense level is 25.

Commentary

Little empirical data exist to assist the Commission in assigning appropriate offense levels for offenses involving national defense. Presumptive parole guidelines specifically address only a few of these offenses; the limited number of prosecutions in these cases gives little guidance for drawing inferences regarding current sentencing practices.

Violations of national defense statutes are extremely serious offenses deserving significant punishment. In this regard, the Commission invites public comment on the details of this section, concentrating on two major issues: (1) organization (are all offenses and specific offense characteristics adequately identified), and (2) relative weighting of offense seriousness.

§M211. This section sets forth the punishment for violations of Article III, section 3 of the United States Constitution and 18 U.S.C. § 2381. The statute provides a minimum term of imprisonment of five years and a maximum sentence of death. Defendants convicted of treason are barred from holding any United States office. Presumptive parole guidelines provide for a period of custody of not less than 100 months for treason.

§M212. This section sets forth the guideline for violations of 18 U.S.C. § 2382. The statute provides a maximum term of imprisonment of seven years.

§M213. This section sets forth the punishment for violations of 18 U.S.C. § 2383 and 50 U.S.C. § 783. The statutes prohibit inciting any rebellion or insurrection against the authority of the United States, conspiring to use force to prevent, hinder, or delay the execution of any law of the United States, conspiring to seize, take, or possess any property of the United States, or conspiring to establish a totalitarian dictatorship in the United States. Defendants convicted of this offense are barred from holding any federal office. The offense levels for violent rebellion or insurrection are graded by the object of the rebellion or insurrection. A rebellion to overthrow the government is treated as more harmful than a rebellion seeking to impede the execution of a federal law, seize federal property, or establish a totalitarian dictatorship, all of which are treated equally.

Although conspiring to establish a totalitarian dictatorship might be viewed as tantamount to conspiring to overthrow the government and therefore deserve the same penalty, Congress has established a ten year maximum for conspiring to establish a dictatorship, 50 U.S.C. § 783, and a twenty year maximum for conspiring to overthrow the government, 18 U.S.C. § 2385. The offense levels reflect the difference in the statutory maximums. If fire, explosives, or dangerous devices were used, or if persons were killed or injured or property damaged, the court shall refer to Part Y, General Provisions. Presumptive parole guidelines provide for imprisonment for fifty-two to eighty months for this offense.

§M214. This section sets forth the base offense level for violations of 18 U.S.C. § 757.

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2. SABOTAGE

18 U.S.C. §§ 2153 - 2156
42 U.S.C. § 2284

§M221. **Destruction of War Material, Premises, or Utilities.** The base offense level is 32.

§M222. **Production of Defective War Material, Premises, or Utilities.** The base offense level is 32.

§M223. Destruction of National Defense Material, Premises, or Utilities. The base offense level is 26.

§M224. Production of Defective National Defense Material, Premises, or Utilities. The base offense level is 26.

Commentary

Congress has made distinctions in several sabotage statutes on the basis of whether the sabotage occurred with respect to "war materials" (18 U.S.C. §§ 2153 and 2154) or "national defense materials" (18 U.S.C. §§ 2155 and 2156). War materials, for the purpose of these statutes, are military-related materials sabotaged during war. National defense materials are the same materials sabotaged during peacetime. The offense levels in this section follow the statutory provisions that more severely punish the destruction or defective production of war materials than the destruction or defective production of national defense materials.

The guideline for sabotage also references conduct prohibited under 42 U.S.C. § 2884, i.e., sabotage of a nuclear production or utilization facility, nuclear waste storage facility, or nuclear fuel. While the statute does not make a wartime/peacetime distinction, it includes a provision for increasing the maximum term of imprisonment from five to ten years when the offense involves the intent to injure the United States or aid a foreign nation. Thus, these provisions are consistent with the wartime/peacetime distinctions that apply to war material, premises, and utilities.

Sections M221 and M222 apply to violations of 18 U.S.C. §§ 2153 and 2154, respectively. These offenses represent extreme conduct. Both the high statutory maximum (thirty years) and the base offense level reflect this. Violations of these statutes are treated as equivalent to second degree murder, since they are likely to lead to death in time of war. Presumptive parole guidelines provide for a period of imprisonment of not less than 100 months for sabotage.

Sections M223 and M224 apply to violations of 18 U.S.C. §§ 2155 and 2156, respectively. The statutes carry a maximum term of imprisonment of ten years. The guidelines treat these offenses equally since both the destruction of materials and the production of defective materials impose the same danger.

As with other offenses, if fire, explosives, or dangerous devices were used, or if persons were killed or injured or property damaged, the court shall refer to Part Y, General Provisions.

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3. ESPIONAGE AND RELATED OFFENSES

18 U.S.C. §§ 792 - 798
42 U.S.C. § 2274(a), (b)
42 U.S.C. §§ 2275 - 2276
42 U.S.C. § 2278(b)
50 U.S.C. § 421
50 U.S.C. § 783
50 U.S.C. § 855

§M231. Gathering or Transmitting National Defense Information With Intent or Reason to Believe the Information Would Injure the United States or Aid a Foreign Government. The base offense level is 24.

(a) Specific Offense Characteristics

(1) If top secret information was gathered or transmitted, increase by 6 levels.

(2) If secret information was gathered or transmitted, increase by 4 levels.

§M232. Communicating or Conspiracy to Communicate National Defense Documents or Information to A Person Not Entitled to Receive It. The base offense level is 16.

(a) Specific Offense Characteristics

(1) If a top secret document or top secret information was communicated, increase by 12 levels.

(2) If a secret document or secret information was communicated, increase by 9 levels.

§M233. Gathering, Delivering, or Conspiracy to Gather or Deliver National Defense Information to Aid a Foreign Government. The base offense level is 30.

(a) Specific Offense Characteristic

(1) If secret or top secret information was gathered or transmitted in time of war, the base offense level is 43.

§M234. Tampering with Restricted Data Concerning Atomic Energy. The base offense level is 30.

§M235. Disclosure of Classified Cryptographic Information. The base offense level is 29.

(a) Specific Offense Characteristic

(1) If top secret or secret information was disclosed, increase by 2 levels.

§M236. Unauthorized Disclosure of Classified Information by Government Employee. The base offense level is 29.

(a) Specific Offense Characteristics

(1) If top secret information was disclosed, increase by 2 levels.

(2) If secret information was disclosed, increase by 1 level.

§M237. Receipt of Classified Information. The base offense level is 29.

(a) Specific Offense Characteristics

(1) If top secret information was received, increase by 2 levels.

(2) If secret information was received, increase by 1 level.

§M238. Disclosure of Information Identifying a Covert Agent. The base offense level is 20.

(a) Specific Offense Characteristics

(1) If the information is disclosed by a person with authorized access to classified information identifying a covert agent, increase by 10 levels.

(2) If the information is disclosed by a person with authorized access to other classified information, increase by 5 levels.

§M239. Negligent Delivery or Loss of National Defense Information. If the offense involved:

(1) top secret national defense information, the base offense level is 14.

(2) secret national defense information, the base offense level is 12.

(3) classified national defense information, the base offense level is 10.

§M240. Failure to Report Loss of National Defense Information. The base offense level is 10.

(a) Specific Offense Characteristics

(1) If top secret national defense information was involved, increase by 4 levels.

(2) If secret national defense information was involved, increase by 2 levels.

§M240A. Photographing or Sketching Defense or Nuclear Energy Installations. The base offense level is 10.

§M240B. Failure to Register as a Person Trained in a Foreign Espionage System. The base offense level is 20.

§M240C. Harboring or Concealing a Spy. The base offense level is 20.

Commentary

The Commission has set base offense levels in this section on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. This is not the case, for example, when revelation is likely to cause little or no harm. The court may impose a sentence below the applicable guideline under these circumstances.

The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than that authorized under the guidelines for espionage and related offenses is necessary to protect national security or further the objectives of the nation's foreign policy.

§M231. This section sets forth offense levels relevant to violations of 18 U.S.C. § 793, which proscribes diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government. The statute carries a maximum term of ten years imprisonment. Pursuant to 18 U.S.C. § 793(g), conspiracy to violate the statute is subject to the same punishment as the offense that is the object of the conspiracy. The guideline similarly makes no distinction between the offense level for the conspiracy and the object of the conspiracy.

Attempts to violate § 793(b) and (c) are also subject to the same punishment as the completed offenses proscribed by those sections and should be accorded an offense level identical to the completed offense.

Offense level distinctions in this section are based on the classifications of the information gathered or transmitted. The classifications in turn reflect the importance of the information to national security. Pursuant to Executive Order 12356, "Top Secret" information is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." "Secret" information is information that, if disclosed, "reasonably could be expected to cause serious damage to the national security." "Confidential" information is information that, if disclosed, could reasonably be expected to cause "damage" to the national security. Presumptive parole guidelines provide for a period of imprisonment of not less than 100 months for espionage.

§M232. This section sets forth offense levels relevant to violations of 18 U.S.C. § 793(d) and (e). An offense is committed under those subsections whenever a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense" is willfully transmitted or communicated to a person not entitled to receive it. It need not be proven that the item was communicated with a "reason to believe" that it could be used to the injury of the United States or the advantage of a foreign nation. The statute only requires such intent when intangible "information" is communicated under subsections (d) and (e).

The base offense level for §M232 is substantially lower than the base offense level for §M231 primarily because prosecutions under subsections (d) and (e) often do not involve defendants who have the intent or reason to believe the information could be used to injure the United States or aid a foreign nation. When such intent or reason to believe is present in a violation of subsection (d) or (e), §M231 applies.

§M233. This section sets forth the offense levels relevant to 18 U.S.C. § 794, the general espionage statute, and 42 U.S.C. §§ 2274(a), 2274(b), and 2275, (that address communication of restricted data pertaining to nuclear material, weapons production, and use with reason to believe or intent that the data will be used to injure the United States or aid a foreign nation.) Although life imprisonment may be imposed for violations of any of these statutes, the death penalty may only be imposed for violations of 18 U.S.C. § 794.

Like the crimes of treason and violent rebellion, espionage poses a significant threat to the security and preservation of the United States and the peace and well being of its people. The high offense levels and prescribed punishments are intended to serve the purposes of public protection and deterrence.

No distinction in punishment was made on the basis of whether "secret" or "top secret" information was disclosed. The magnitude of the threat posed to the national security under these statutes may, in some circumstances, be sufficient to warrant imposition of life imprisonment or the death penalty even though the information disclosed was "secret" rather than "top secret."

Attempts to violate 18 U.S.C. § 794 and 42 U.S.C. §§ 2274(a), (b) and 2275 are subject to the same punishment as the completed offenses proscribed by those sections and should be accorded an offense level identical to the completed offense.

Conspiracies to violate 18 U.S.C. § 794 and 42 U.S.C. §§ 2274(a), (b) and 2275 are also subject to the same punishment as the offense that is the object of the conspiracy. The guideline similarly makes no distinction between the offense level for the conspiracy and the object of the conspiracy.

§M234. This section applies to violations of 42 U.S.C. §2276, which proscribes removing, concealing, tampering with, altering, mutilating or destroying restricted data involving atomic energy.

§M235. This section sets forth the offense levels relevant to violations of 18 U.S.C. § 798, which proscribes the disclosure of confidential information concerning cryptographic or communication intelligence or for the benefit of a foreign government. While the offense is similar to that covered by §M233, the statutory maximum for violations of 18 U.S.C. § 798 is ten years.

§M236. This section applies to violations of 50 U.S.C. § 783(b), which proscribes unauthorized disclosure of confidential information by a government employee to a foreign government or a Communist organization. With respect to §§M236 and M237, the underlying statute makes no distinction in punishment on the basis of whether the classified information was provided to a foreign government or a Communist organization. The guideline similarly makes no distinction.

§M237. This section applies to violations of 50 U.S.C. § 783(c), which proscribes the receipt of confidential information by an agent of a foreign government or a Communist organization.

§M238. This section sets forth the offense levels relevant to violations of 50 U.S.C. § 421. The base offense level applies to violations of 50 U.S.C. § 421(c), which carries a statutory maximum of three years imprisonment.

The offense level distinctions in §M238 are based on distinctions made by Congress in the underlying statute. Subsections (a) and (b) carry maximum terms of imprisonment of ten years and five years, respectively. The statute establishes higher maximum punishments for those persons with higher security classifications and correspondingly higher obligations to maintain confidentiality. Accordingly, the statute and the guideline establish the highest penalties for officials with authorized access to classified information identifying covert agents, the next highest penalties for officials with authorized access to classified information generally and the lowest penalties for all other persons. Disclosure of information identifying covert agents may result in their death or injury. If disclosure resulted in death, the court would apply the general provisions in imposing a sentence above the otherwise applicable guideline range, not to exceed the statutory maximum for the offense of conviction. Similarly, if physical injury or property damage occurred, the court would enhance the sentence.

§M239. This section sets forth offense levels relevant to violations of 18 U.S.C. § 793(f)(1). The lowest base offense level reflects the fact that offenses generally prosecuted under this statute do not involve subversive conduct on behalf of a foreign power, but rather the loss of national defense information by a grossly negligent employee of the federal government or a federal contractor.

§M240. This section sets forth offense levels relevant to violations of 18 U.S.C. § 793(f)(2). The base offense level for failing to report the loss, theft, abstraction or destruction of national defense information is set significantly higher than the base offense level for loss of the same information, because the failure to report the loss also impedes or prevents efforts to recover the information, thereby exacerbating the harm caused by the loss. The higher value is intended to encourage those entrusted with the custody of national defense information to faithfully discharge their duty to report its loss.

§M240A. This section sets forth the offense levels relevant to violations of 18 U.S.C. §§ 795, 796, and 797, and 42 U.S.C. § 2278(b), that proscribe photographing or sketching vital military installations or equipment, or nuclear energy installations, or publishing or selling photographs or sketches. The maximum statutory penalties (one year of imprisonment) are identical.

§M240B. This section sets forth the offense levels relevant to violations of 50 U.S.C. § 855(a).

§M240C. This section sets forth the offense levels relevant to violations of 18 U.S.C. § 792.

Guidelines for espionage and related offenses might include other aggravating factors to distinguish offense seriousness. For example, a factor might be included to indicate whether the offense was committed on behalf of a "hostile" or "non-hostile" government. This distinction was not made in the guidelines for several reasons. First, there is no statutory basis for making a distinction in sentencing. See Gorin v. United States, 312 U.S. 19, 29-30

(1941). Since Congress has not drawn a distinction, and since the punishment of espionage is a sensitive and important area of national policymaking, the Commission finds it imprudent to make the distinction.

Changes in the basis for sentencing in espionage cases might lead to changes in the intelligence gathering procedures of foreign governments. For example, in the recent case of United States v. Whitworth, ___ F. Supp. ___, (N.D. Cal. 1986), the defendant claimed that he did not know that the information he was supplying to another person was provided to the Soviet Union. If a sentencing guideline distinguished punishment on the basis of "hostile" and "non-hostile" governments, foreign espionage systems might adapt by establishing procedures making it difficult to prove that their agents knew it was intended for a hostile power. For these reasons, the guidelines do not distinguish "hostile" or "non-hostile" status of the nation receiving the information.

No offense level distinctions were made on the basis of whether the person committing espionage was a United States citizen. The guidelines could be drafted to expose United States citizens to higher punishment than foreign nationals on the grounds that greater allegiance is expected of citizens. On the other hand, the guidelines could equally discourage espionage by citizen or alien. The guidelines adopt the latter approach.

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4. CONDUCT IMPAIRING MILITARY EFFECTIVENESS

18 U.S.C. § 2387
18 U.S.C. § 2388
18 U.S.C. § 2389
18 U.S.C. § 2390
50 U.S.C. App. § 462

§M241. **Incitement to Insubordination, Disloyalty, Mutiny, or Refusal of Duty by Member of Armed Forces.** The base offense level is **10** to **15**, depending upon the nature and circumstances of the offense.

§M242. **Recruitment to Serve Against the United States.** The base offense level is **25**.

§M243. **Enlistment to Serve Against the United States.** The base offense level is **20**.

§M244. **Obstruction of Recruitment or Enlistment in the Armed Forces.** The base offense level is **10** to **15**, depending upon the nature and circumstances of the offense.

§M245. Failure of Member of Selective Service System to Perform Duty. The base offense level is 10.

(a) **Specific Offense Characteristic**

(1) If the offense occurred during time of war, increase by 2 levels.

§M246. Evasion of Military Service. The base offense level is determined as follows:

(1) If the offense involved failing to register, or otherwise evading military service, the base offense level is 10.

(2) If the offense occurred during a peacetime draft, the base offense level is 12.

(3) If the offense occurred during time of war, the base offense level is 25.

Commentary

Section M241 applies to violations of 18 U.S.C. §§ 2387 and 2388. Conviction under the latter statute increases the maximum term of imprisonment from ten to twenty years for a violation occurring during wartime. By statute, a conviction of a peacetime violation under §M241 also entails a prohibition of government employment for a five year period. The court may wish to consider whether the offense occurred during wartime in determining the appropriate sentence. Presumptive parole guidelines for offenses involving incitement to desertion provide for twelve to eighteen months imprisonment during wartime, and zero to ten months otherwise.

Sections M242 and M243 apply to violations of 18 U.S.C. §§ 2389 and 2390, respectively. The maximum terms of imprisonment under these statutes are five and three years, respectively.

Sections M244 through M246 apply to violations of 50 U.S.C. App. § 462. In determining a sentence under §M244, the court may wish to consider whether the offense occurred during wartime. The base offense level for Evasion of Military Service (§M246) is determined by whether the evasion occurred during a period when registration was required, peacetime draft, or time of war. Sections M241 and M244 may apply to offenses in which property damage or physical injury occurred. In these instances, the court shall refer to Part Y, General Provisions, and apply any provisions warranted by the circumstances of the offense. Presumptive parole guidelines for evasion of military service provide for twelve to eighteen months in custody in time of war or national defense emergency, zero to ten month during a peacetime draft, and zero to four months otherwise.

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5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS

18 U.S.C. § 955
22 U.S.C. § 2778
50 U.S.C. §§ 1701 - 1706
50 U.S.C. App. § 5(b)
50 U.S.C. App. § 2410

§M251. Prohibited Financial Transactions With Foreign Governments. The base offense level is 10 to 18, depending upon the nature and circumstances of the offense.

§M252. Financial Transactions With Foreign Governments and Foreign Nationals during a National Emergency. The base offense level is 20.

(a) Specific Offense Characteristic

(1) If the offender willfully made a false statement of a material fact or willfully omitted any material fact in engaging in such financial transactions, increase by 2 levels.

§M253. Exportation of Goods or Technology Without Required Validated Export License. If the offender knowingly violated or conspired or attempted to violate any law, regulation, order, or license pertaining to the control of exports, the base offense level is 10 to 18, depending upon the nature and circumstances of the offense.

§M254. Failure to Report Exportation of Goods or Technology to a Controlled Country for Military or Intelligence-gathering Purposes. If the offender was issued a validated export license for exports to a controlled country, had knowledge that such exports were being used for military or intelligence-gathering purposes contrary to the conditions under which the license was issued, and willfully failed to report such use, the base offense level is 20.

§M255. Possession of Goods or Technology With Intent to Export in Violation of Foreign Policy or National Security Controls. The base offense level is 20.

(a) Specific Offense Characteristic

(1) If the offender possessed goods or technology with the intent to export them in violation of a national security export control, increase by 6 levels.

§M256. Evasion of Export Controls. The base offense level is 10.

(a) Specific Offense Characteristics

(1) If the offense involved the evasion of foreign policy or national security export controls, increase by 10 levels.

(2) If the offense involved the evasion of export controls to or for the benefit of a party previously denied export privileges, increase by 10 levels.

§M257. Exportation of Goods or Technology to a Controlled Country. The base offense level is 22.

§M258. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License. The base offense level is 22.

(a) Specific Offense Characteristic

(1) If the offense involved multiple violations, increase by 1 to 7 levels for each violation, depending upon the nature and scope of the offense.

Commentary

In determining the appropriate sentence within the guideline range for export violations, the court may consider: whether the violation occurred during wartime; the degree to which the violation threatened a security interest; the volume of commerce involved; the extent of planning and sophistication; whether the offense involved a technical violation; the presence of willfulness or intent; and whether there were multiple occurrences or transactions.

Section M251 deals with violations of 18 U.S.C. § 955, which carries a maximum term of imprisonment of five years. Section M252 pertains to violations of 50 U.S.C. §§ 1701-1706, the International Emergency Economic Powers Act, which prohibits certain commercial transactions with foreign governments and foreign nationals during a declared national emergency. Included here is a provision not appearing in the statute that enhances the penalty for making false statements in conjunction with violating the law. The combination of the base offense level and the special offense characteristic equals the statutory maximum.

The language of §§M253-257 follows the provisions of 50 U.S.C. App. § 2410 that set out the penalty provisions for violations of the Export Administration Act, which prohibits the exportation of strategic goods and technology without a license from the Secretary of Commerce. These provisions are designed, in part, to protect the United States by controlling exports of goods or technologies that could significantly contribute to the military potential of another country to the detriment of the national security of the United States.

Section M253 deals with exportation without a valid export license. In choosing the appropriate sentence under this guideline, the court may wish to consider, in addition to the factors mentioned earlier, whether the license would not have been approved. An offense where the license would have been denied is a more significant threat to the national security.

Section M254 applies to offenses where a defendant willfully failed to report that goods or technology for which a valid export license had been issued were intended for military or intelligence-gathering use by a controlled country. Section M255 deals with the possession of goods or technology with intent to violate foreign policy controls and national security controls. The higher offense level for intent to violate national security controls in §M255(a)(1) reflects the statutory penalty for the increased gravity of such offenses.

Section M256 applies to willful evasion of export controls and reflects the statutory recognition of the greater seriousness of evasion of national security controls. The guidelines also increase the sentence for offenses where the evasion was for the benefit of or involved a party forbidden to engage in the export or re-export of United States goods. Section M257 applies to willful violation or conspiracy to violate controls on exports to a controlled country. Consistent with 50 U.S.C. App. § 2410(b)(1), §M257 makes no distinction between violations of foreign policy and national security controls. Presumptive parole guidelines provide for forty to fifty-two months in custody for exporting goods or technology to a controlled country in violation of national security or nuclear nonproliferation controls.

In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 also contains the following provisions for criminal fines and forfeiture as well as civil penalties.

§§M253, 255, 256	*Five times the value of the exports involved or $50,000, whichever is greater.*	
§§M254, 255(a)(1), 256(a)(1), 257	*Corporation:*	*Five times the value of the exports or $1 million, whichever is greater;*
	Individual:	*Not more than $250,000.*

In addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation, under procedures specified in 18 U.S.C. § 1963. Prior related administrative sanctions may be indicative of recidivism and are to be appropriately considered at sentencing.

Section M258 applies to exports and imports of military arms, equipment, and services in violation of 22 U.S.C. § 2778, the Arms Export Control Act. The statute requires that, in the interest of world peace and the security and foreign policy of the United States, exports of military goods, equipment, and services be licensed by the Department of State's Office of Munitions Control. Since the statute specifies the sentence to be imposed upon conviction for each violation (count), the guidelines specify offense level increases for multiple violations.

The definition of false statements used in §M258 is exactly as it appears in the statute and in 18 U.S.C. § 1001. (See Part F, Offenses Involving Fraud and Deception), and includes the willful making of an untrue statement of a material fact in a license or registration application, or the omission of a material fact required to make a statement not misleading. A recent case prosecuted under both 50 U.S.C. App. § 2410 and 22 U.S.C. § 2778, involved illegal arms sales to Libya and included a conviction under 18 U.S.C. § 1001. United States v. Malsom, 779 F.2d 1228 (7th Cir. 1985). The provisions of §M258 follow the statutory provisions with regard to the maximum term of imprisonment. Since the nation's security requires that

exporters act as a "first line" of defense against unauthorized exports of military hardware and services, imposing the full penalty of the law serves as a deterrent. Presumptive parole guidelines for unlicensed exportation offenses are based on the types of weapons involved. Presumptive time served for the unlicensed exportation of sophisticated weaponry (e.g., aircraft, armed vehicles, or high technology weapons), is forty to fifty-two months. The unlicensed exportation of machine guns or explosives would result in twenty-four to thirty-six months in custody, while the unlicensed export of other arms, munitions, or military equipment would result in twelve to eighteen months in custody.

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6. AGENT REGISTRATION

18 U.S.C. § 219
18 U.S.C. § 951
18 U.S.C. § 957
18 U.S.C. § 2386
22 U.S.C. §§ 611 - 621
50 U.S.C. §§ 851 - 857

§M261. United States Government Officers and Employees Acting as Agents of Foreign Principals. The base offense level is 16.

§M262. Failure to Register as an Agent of a Foreign Principal or Government. The base offense level is 20.

(a) **Specific Offense Characteristic**

(1) If the offense involved acting in the United States as an agent of a foreign government without prior registration, increase by 6 levels.

§M263. Possession of Property in Aid of a Foreign Government. The base offense level is 20.

§M264. Failure to Register of an Organization Subject to Foreign Control and Engaged in Political Activity or Civilian Military Activity. The base offense level is 20.

§M265. Failure to Register of a Person Who Has Knowledge Of or Has Received Instruction or Assignment in Espionage, Counter-espionage, or Sabotage Services or Tactics of a Foreign Government. The base offense level is 20.

§M266. Failure to File Political Propaganda. The base offense level is 10.

§M267. Failure to Label Political Propaganda. The base offense level is 6.

§M268. Furnishing Information to Agency or Official of the United States Government. The base offense level is 6.

§M269. Notice of Appearance Before Congressional Committee. The base offense level is 6.

§M270. Noncomplying Registration Statement. The base offense level is 6.

§M270A. Acceptance of Contingent Fee. The base offense level is 6.

Commentary

Section M261 contains the sanction for violations of 18 U.S.C. § 219, which prohibits federal officers and employees from representing a foreign government required to register under the Foreign Agents Registration Act, 22 U.S.C. § 616.

Section M262 deals with violations of 18 U.S.C. § 951 and 22 U.S.C. § 612(a). These statutes require certain non-diplomatic personnel to register with the Attorney General as agents of a foreign principal or government. The base offense value applies to violations of 22 U.S.C. § 612(a), which requires an individual who acts as an agent of a foreign principal to register with the Attorney General. These offenses generally involve non-espionage agents who are engaged in activities that are legitimate as long as they are disclosed. A large proportion of violations of the statute are sanctioned with civil penalties. The specific offense characteristic enhances the sentence if the defendant was an agent for a foreign government.

Section M263 deals with violations of 18 U.S.C. § 957, which prohibits the possession of property or papers intended for use in the violation of United States law or interests in aid of a foreign government.

Section M264 deals with violations of 18 U.S.C. § 2386. This section is designed to punish the unregistered formation and functioning of paramilitary organizations within the United States. Registration is required of those organizations that are under foreign control, as well as those that aim to use force to establish, control, or overthrow a government whether such organizations are subject to foreign control or not.

Section M265 applies to violations of 50 U.S.C. § 851, the "Act of August 1, 1956" that deals with the registration of foreign agents trained in espionage who are not officials or diplomats of a foreign government. The statute is designed to provide a means of detecting foreign trained espionage agents operating in the United States. It provides for a maximum penalty of five years imprisonment as well as a fine of $10,000. Consideration was given to a factor that would distinguish those offenses in which the defendant complied with the registration requirement, but provided misleading information including willful false statements. There are two problems with that approach. First, failure to register goes to the heart of the legislation. It therefore is not appropriate to punish failure to register less severely than filing a false registration statement. Second, the burden on the government of proving false

registration would be substantial, and difficult to justify in light of the intent of the law. Therefore, no sentence enhancement based on this factor is included.

Another possible basis for making a distinction in offense seriousness would be whether the offense occurred during wartime or a national emergency. This approach was rejected here as for other offenses because it would make the sanction dependent upon future Congressional action. Any alien convicted of violating the Act is subject to deportation under the provisions of 8 U.S.C. §§ 1251-1254, but deportation is rarely recommended.

Section M266 covers violations of 22 U.S.C. § 614(a), which requires agents of foreign principals who transmit propaganda in the United States to file copies with the Attorney General. Section M267 deals with violations of 22 U.S.C. § 614(b), which makes it illegal for an agent of a foreign principal to transmit propaganda that is not clearly labeled as such. Section M268 applies to offenses where an agent of a foreign principal conveyed information with respect to matters pertaining to the political or public interests of a foreign principal to an official of the United States, or requested information or advice from any official, without identifying himself as a registered agent of a foreign principal. 22 U.S.C. § 614(e). Section M269 deals with offenses where an agent testified before Congress and did not file a copy of his agent registration for inclusion in the committee records. 22 U.S.C. § 614(f). Section 270 applies to offenses where an agent of a foreign principal filed a registration statement that did not comply with the requirements of law or regulation. 22 U.S.C. § 618(g). Section 270A applies to violations of 22 U.S.C. § 618(h). The statute prohibits agents of foreign principals from being parties to contracts or agreements that make payment of fees or compensation contingent upon the success of any political activities they carry out.

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7. ATOMIC ENERGY

18 U.S.C. §831
42 U.S.C. §2077
42 U.S.C. §2122
42 U.S.C. §2131
42 U.S.C. §2138
42 U.S.C. §2273

§M271. Conspiracy to Unlawfully Acquire, Alter, Use, Transfer, or Possess Nuclear Material, Weapons, or Facilities. The base offense level is 30.

(a) Specific Offense Characteristic

(1) If the object of the conspiracy was to injure the United States or to aid a foreign nation, increase by 12 levels.

§M272. Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Materials, Weapons, or Facilities or Attempt to Do Same. The base offense level is 30.

(a) Specific Offense Characteristic

(1) If with intent to injure the United States or to aid a foreign nation, increase by 12 levels.

§M273. Interference with Recapture of Special Nuclear Material, Entry, or Operation Orders during Time of War or National Emergency. The base offense level is 30.

(a) Specific Offense Characteristic

(1) If with intent to injure the United States or to secure an advantage to any foreign nation, increase by 12 levels.

§M274. Violation of Other Federal Atomic Energy Agency Rules and Regulations. The base offense level is determined as follows:

(1) If the offense involved a conspiracy, an attempt, or a willful violation of any other federal atomic energy agency rules or regulations, the base offense level is 12.

(2) If the offense involved making a false statement of a material fact or the omission of any material fact, the base offense level is 15.

(3) If the offense involved intent to injure the United States or to secure an advantage to any foreign nation, the base offense level is 25.

Commentary

While relatively few prosecutions occur for offenses under this section, the conduct covered often involves potential threats to the nation's public health, safety, and security. Most of the prosecutions that occur under this section are for trespass on federal installations, and often involve protest or civil disobedience. Section M271 deals with conspiracies to commit various acts of nuclear sabotage prohibited under 18 U.S.C. § 831, and 42 U.S.C. §§ 2077(b), 2122, and 2131. The former, 18 U.S.C. § 831, deals with the unlawful acquisition, possession, or use of nuclear materials. The statute distinguishes the seriousness of various offenses by penalizing conspiracies less severely than attempts or completed acts and increasing the penalty where death or serious injury occurred. And, 42 U.S.C. §§ 2077(b), 2122, and 2131 make it illegal to conspire, attempt, manufacture, obtain, transfer, deal in, or possess nuclear materials, devices, or facilities. The statutes provide a maximum life sentence for offenses intended to injure the United States or aid a foreign nation, and a maximum ten year sentence otherwise. These distinctions are reflected in the guidelines. Presumptive time served under the parole guidelines is not less than 100 months for this offense.

Section M272 deals with attempts and completed acts of acquisition, possession, or use of nuclear materials, nuclear weapons, or nuclear utilization or production facilities. It is designed, in part, to punish conduct prohibited by 18 U.S.C. §831, such as instances of theft of

nuclear materials for the purpose of blackmail or extortion. Section M272 also relates to 42 U.S.C. §§ 2077(b), 2122, and 2131, and it reflects the distinctions present in the statute. If the offense resulted in property damage, physical injury, or if it involved the disposal or dispersal of radioactive materials into the environment, the court shall consider this factor in imposing a sentence above the otherwise applicable guideline range. Presumptive parole guidelines provide for not less than 100 months in custody for this offense.

The offense covered in §M273 can, by definition, occur only during wartime or a national emergency. The statute on which it is based, 42 U.S.C. § 138, is designed to protect the government's ability to recapture nuclear materials and operate nuclear facilities during wartime or a national emergency. The statutory penalty is ten years imprisonment, unless the interference was intended to injure the United States or secure an advantage for a foreign nation, in which case life imprisonment is authorized. Because the nature of the offense involves a highly dangerous instrumentality, death, personal injury, property damage, and the release of radioactive materials into the environment are all possible consequences of an offense. If any of these factors are present, the general provisions in Part Y, should be applied.

Section M274 covers violations of 42 U.S.C. § 2273, which is a "catch-all" provision for nuclear energy related offenses not specifically addressed elsewhere. This provision covers violations of regulations, license conditions, and orders of the Nuclear Regulatory Commission and the Department of Energy, including accidental discharge of radioactive materials. The maximum term of imprisonment for violations is two years, unless the offense was intended to injure the United States or aid a foreign government, in which case the maximum is twenty years. This adjustment is reflected in the guidelines. A significant number of criminal prosecutions recommended by the Nuclear Regulatory Commission occur under 18 U.S.C. § 1001 (false statements). An enhancement for these violations is included. If death, personal injury, property damage, weapons use, or environmental damage occurred, the court should apply the appropriate general provisions in Part Y.

PART N - OFFENSES INVOLVING FOOD, DRUGS, AGRICULTURAL PRODUCTS, AND CONSUMER PRODUCTS

1. TAMPERING

18 U.S.C. § 1365

§N211. Tampering or Attempting to Tamper with Consumer Products. If the defendant tampered, conspired, or attempted to tamper with a consumer product, its labeling, or its container, with reckless disregard for the risk of death or bodily injury, the base offense level is **25**.

§N212. Tampering With Intent to Injure Business. If the defendant tampered, conspired, or attempted to tamper with a consumer product, its labeling, or its container with intent to cause serious injury to a business, the base offense level is **12**.

§N213. Providing False Information or Threatening to Tamper with Consumer Products. If the defendant threatened to tamper with a consumer product, its labeling, or its container, or communicated false information that a consumer product was tainted, the base offense level is **16**.

Commentary

Product tampering is a very serious offense, as evidenced by cases in recent years where tampering with over-the-counter drugs resulted in several deaths, widespread public concern, and significant losses by pharmaceutical manufacturers.

Section N211 applies to 18 U.S.C. §§ 1365(a) and (e) and §N212 applies to 18 U.S.C. § 1365(b). Section N213 covers 18 U.S.C. §1365(c),(d). The term "consumer product" means any food, drug, device, or cosmetic as defined in 21 U.S.C. § 321 or any article, product, or commodity produced or distributed for consumption by individuals.

Protection of the health and safety of the individual and the integrity of the marketplace are of paramount importance. If death or injury results from product tampering, or if the target of a tampering suffers significant monetary losses, consult the appropriate sections of the General Provisions, Part Y.

Attempts are treated with the same severity as completed acts, pursuant to Commission decision and guidance from 18 U.S.C. § 1365, which provides for maximum sentences of ten years for both attempted and completed tamperings. As is the case with all conspiracies, appropriate adjustments should be made in Part Z, Role in the Offense.

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2. FOOD, DRUG, AND AGRICULTURAL

7 U.S.C. §§ 150bb, 150gg
21 U.S.C. § 117
21 U.S.C. § 122
21 U.S.C. §§ 134 - 134e
21 U.S.C. §§ 151 - 158
21 U.S.C. § 331
21 U.S.C. § 333
21 U.S.C. § 458
21 U.S.C. §§ 460 - 461
21 U.S.C. §§ 610 - 620
21 U.S.C. §§ 642 - 644
21 U.S.C. § 676
42 U.S.C. § 262
Also See Statutory Index

§N221. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product. The base offense level is **4.**

(a) Specific Offense Characteristics

(1) If the defendant acted knowingly, increase by **2** to **3** levels.

(2) If the defendant acted with intent to defraud, mislead, or conceal a violation, increase by **3** to **6** levels.

(3) If the offense involved manufacture for distribution or distribution of any product, increase by **2** to **6** levels, depending upon the risk of injury and the scope of the violation.

Commentary

If death, serious injury, property damage, or other harms occurred through offenses sentenced under this section, consult the appropriate provisions in Part Y, General Provisions.

Section N221 applies to most regulatory crimes involving food, drugs, biological products, devices, cosmetics, and agricultural products. Definitions are to be taken from the various statutes upon which conviction is based. However, because of their technical nature, practicality should be the rule. "Meat," for example, is also considered to be "food" for purposes of this section, even though the Food and Drug Administration and the United States Department of Agriculture have very different regulations depending upon whether the item is considered a food or a meat. Regulatory violations that amount to bribery, revealing trade secrets, theft, and destruction of property are covered more specifically elsewhere.

A defendant previously convicted under 21 U.S.C. § 333 is subject to a maximum potential term of imprisonment of three years. Section A314, Prior Similar Convictions, is applicable to repeat offenders.

Fraud schemes are to be sentenced under §F211, Fraud and Deception, even when the conduct involved the food or drug industries. For example, a person convicted of mail fraud under 18 U.S.C. § 1341 shall not, by virtue of the fact that the conduct involved the food industry, successfully claim that a lesser punishment should be meted out under the "intent to defraud" aggravator in §N211(a)(2).

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3. OTHER CONSUMER PRODUCT

15 U.S.C. § 68h
15 U.S.C. § 69i
15 U.S.C. § 70i
15 U.S.C. § 1196
15 U.S.C. § 1212
15 U.S.C. § 1233
15 U.S.C. § 1264
15 U.S.C. §§ 1983 - 1988
15 U.S.C. § 1990c
15 U.S.C. § 2070
Also See Statutory Index

§N231. Misbranding or Mislabeling Consumer Products. The base offense level is 6.

(a) **Specific Offense Characteristic**

(1) If the product was hazardous or otherwise endangered a person or the general public, increase by 2 to 4 levels, depending upon the nature of the substance and the risk created.

§N232. Unsafe Consumer Products. If the defendant violated consumer statutes, regulations, or standards other than labeling requirements, the base offense level is 6.

(a) **Specific Offense Characteristic**

(1) If the offense involved the distribution of a banned hazardous product, increase by 2 to 6 levels, depending upon the extent and danger of the distribution.

§N233. Odometer Laws and Regulations. The base offense level for odometer violations is determined as follows:

(1) If the offense consisted of a single occurrence, the base offense level is 6.

(2) If the offense involved a conspiracy to violate odometer requirements, the base offense level is 10.

(a) **Specific Offense Characteristic**

(1) If the offense involved multiple motor vehicles, increase by **2** to **6** levels, depending upon the extent of the operation.

Commentary

These consumer product guidelines apply to a variety of statutes designed to prevent consumer fraud and to protect the safety of the public. Similar sentencing factors are to be considered whether the offense involves new automobiles, wool products, textiles, fur products, refrigerators, or other products for which guidelines have not been specifically provided.

In §N231, the base offense level applies to only the deceptive aspect of mislabeling. This section applies to a variety of statutes in Title 15 of the U.S. Code including § 68h (wool products), § 69i (fur products), § 70i (textile fiber products), and § 1233 (automobiles).

In §N232, the base offense level includes both the affront to the regulatory process and risk to the public safety. The special offense characteristics require aggravation for the greater risk to the public posed by hazardous products. This section applies to a variety of statutes in Title 15 of the United States Code including § 1196 (flammable fabrics), § 1212 (refrigerators), § 1264 (hazardous substances), and § 2070 (product safety).

In §N233, the base offense level takes into account the deception aspect of the offense and a safety risk comparable to that of consumer product safety violations. This section applies to 15 U.S.C. §§ 1983-1988 and 1990c as amended by Pub. L. 99-579, Oct. 28, 1986.

PART P - OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES

18 U.S.C. §§ 751 - 752
18 U.S.C. § 755
18 U.S.C. §§ 1791 - 1793
28 U.S.C. § 1826
Also See Statutory Index

INTRODUCTION

Certain offenses are unique to prisons and correctional institutions. The sanctions to be imposed for escape, the introduction and possession of contraband, riots, and trespass on prison property all relate to the nature of these facilities and reflect the potential consequences of the offenses to corrections personnel and other prisoners.

§P211. Escape or Attempted Escape. The base offense level is determined as follows:

(1) If from lawful custody resulting from a conviction or process or as a result of a lawful arrest for a felony, the base offense level is 13.

(2) If from lawful custody resulting from designation as a recalcitrant witness, the base offense level is 10.

(3) If from lawful custody awaiting extradition or as a result of a lawful arrest for a misdemeanor, the base offense level is 8.

(a) Specific Offense Characteristic

(1) If the escape or attempted escape was from non-secure custody, decrease by 2 levels.

§P212. Instigating or Assisting Escape or Attempted Escape. The base offense level is determined as follows:

(1) If from lawful custody resulting from a conviction or process or as a result of a lawful arrest for a felony, the base offense level is 13.

(2) If from lawful custody resulting from designation as a recalcitrant witness, the base offense level is 10.

(3) If from lawful custody awaiting extradition or as a result of a lawful arrest for a misdemeanor, the base offense level is 8.

(a) Specific Offense Characteristic

(1) If the escape or attempted escape instigated or assisted was from non-secure custody, decrease by 2 levels.

§P213. Officer Permitting Escape. The base offense level is determined as follows:

(1) If a custodial officer voluntarily permitted a prisoner to escape, the base offense level is 23.

(2) If a custodial officer negligently permitted a prisoner to escape, the base offense level is 6.

§P214. Providing or Possessing Contraband in Prison (and Attempts). The base offense level is determined as follows:

(1) If the object provided to or possessed by an inmate in a federal correctional facility was a firearm or destructive device, the base offense level is 23.

(2) If the object provided to or possessed by an inmate in a federal correctional facility was a weapon (other than a firearm or a destructive device), ammunition, anything that might be used as a weapon or as a means of facilitating escape, or LSD, PCP, or a narcotic drug, the base offense level is 20.

(3) If the object provided to or possessed by an inmate in a federal correctional facility was an alcoholic beverage, United States or foreign currency, or a controlled substance (other than LSD, PCP, or a narcotic drug), the base offense level is 8.

(4) If the object provided to or possessed by an inmate in a federal correctional facility was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual, the base offense level is 6.

(a) Specific Offense Characteristic

(1) If the defendant who provided the contraband object was a correctional officer or other employee of the Department of Justice, increase by 2 levels.

§P215. Engaging In, Inciting, or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention. The base offense level is 15 to 23, depending upon the number of persons involved, the danger presented to other prisoners or corrections personnel, and the extent of disruption to the corrections facility that resulted.

§P216. Trespass on Bureau of Prisons Facilities. The base offense level is 6.

Commentary

Sections P211 and P212 refer to conduct proscribed by 18 U.S.C. §§ 751 and 752. While the base offense level reflects the seriousness of escape or attempted escape, it should be emphasized that the defendant's role in the offense and property damage, personal injury, or other serious harm attributable to his conduct are addressed by reference to Part Y, General

Provisions. Non-secure custody refers to custody with no significant physical restraint (e.g., if a defendant walked away from a work detail outside the security perimeter of an institution; failure to return to any institution from a pass or unescorted furlough; or escape from an institution with no physical perimeter barrier). Section P213 refers to conduct proscribed by 18 U.S.C. § 755.

Sections P214 and P215 refer to conduct proscribed by 18 U.S.C. § 1791 as amended by the Comprehensive Crime Control Act Amendments of 1986 and 18 U.S.C. § 1792, respectively. Section P216 refers to conduct proscribed by 18 U.S.C. § 1793.

Under current practice, prisoners who commit the offenses in these guidelines are potentially subject to three, non-exclusive forms of sanction: a new sentence imposed by a federal court; loss of good conduct time through the inmate disciplinary system; and rescission of the previously approved parole release date through the presumptive parole guidelines. Since the Comprehensive Crime Control Act eliminates parole and significantly reduces the amount of good conduct time that may be forfeited, the offense levels for these offenses have been set somewhat higher than current sentencing practices.

PART Q - OFFENSES INVOLVING THE ENVIRONMENT

INTRODUCTION

Violations of the nation's environmental and conservation laws frequently arise from an economic motive. The nature of the damage and harm caused to public health, safety, and the environment is often intangible, and, therefore, difficult to measure empirically. Sentences should reflect the seriousness of the offense and provide just and sure punishment in order to deter those who disregard the public's health and safety. Sentences should also promote respect for the nation's environmental and conservation laws, remove the economic incentive giving rise to such acts, and protect the marketplace for those who do comply with the laws.

1. ENVIRONMENT

7 U.S.C. §§ 136j, 136l
15 U.S.C. §§ 2613 - 2615
33 U.S.C. § 403
33 U.S.C. §§ 406 - 407
33 U.S.C. § 411
33 U.S.C. § 1319
33 U.S.C. § 1321
33 U.S.C. § 1344(s)
33 U.S.C. § 1415
33 U.S.C. § 1517(d)
33 U.S.C. §§ 1907 - 1908
42 U.S.C. §§ 300i, 300j-4
42 U.S.C. § 4912
42 U.S.C. §§ 6928(d), (e)
42 U.S.C. § 7413
42 U.S.C. § 9603
43 U.S.C. § 1816(a)
43 U.S.C. § 1822(b)
Also See Statutory Index

§Q211. Mishandling of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification. The base offense level is 9.

(a) Specific Offense Characteristics

(1) If the defendant placed another person in imminent danger of death or serious bodily injury, increase by 6 to 12 levels, depending upon the nature of the risk and number of people at risk.

(2) If the offense resulted in disruption of public utilities or evacuation of a community or

if the cleanup required a substantial public expenditure, or

if the offense resulted in an ongoing, continuous, or repetitive release of hazardous or toxic substances or pesticides into the environment,

increase by 3 to 6 levels, depending upon the extent of the effect, the quantity and nature of the substance, and the duration of the offense.

(3) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 3 to 6 levels, depending upon the quantity and nature of the substance.

(4) If the offense concealed an environmental offense violation, increase by 3 to 6 levels, depending upon the nature of the concealed offense.

Commentary

Section Q211 applies to mishandling, tampering with, and falsifying records with respect to pesticides and toxic and hazardous substances, punished primarily by 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614, 2615; 33 U.S.C. § 1319; 42 U.S.C. §§ 6928 and 7413; and 43 U.S.C. § 1350. The guideline applies to situations in which the defendant manufactured, processed, distributed in commerce, transported, treated, stored, mislabeled, disposed of, exported, or released into air, water, or land pesticides or substances designated hazardous or toxic by statute or by regulation. The guidelines also cover violations of a permit or its equivalent, omissions or falsified information in a statement or document or destroyed, altered, concealed, or failure to file or maintain required information. The base offense level covers not only violations resulting in harm or potential harm to the environment, but also violations that undermine the regulatory process or conceal other illegal conduct. Most environmental offenses involve one or more specific offense characteristics.

Section Q211 includes crimes of falsification when hazardous or toxic substances or pesticides are involved. The government functions aimed at regulating those materials rely heavily upon recording and providing accurate information. If those functions are not carried out properly, the regulatory efforts are undermined with potential adverse public and environmental impact.

A listing of hazardous and toxic substances in the guidelines would be impractical. Lists of toxic pollutants for which effluent standards (or prohibitions) are published under the Federal Water Pollution Control Act are revised from time to time (e.g., 33 U.S.C. § 1317) as are lists of hazardous substances under the Resource Conservation and Recovery Act (e.g., 42 U.S.C. § 9601). "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly changed. Section Q211 applies to pesticides and to substances designated toxic or hazardous at the time of the offense. The Toxic Substances Control Act now covers PCBs (polychlorinated biphenyls). 15 U.S.C. § 2605(e). Regulated nuclear materials shall be treated at least as severely as those designated toxic or hazardous.

Section Q211(a)(1) applies to violations of 42 U.S.C. §6928(e), offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury. Any defendant convicted of violating this statute must be sentenced under this

section. Defendants who have violated other statutes are sentenced under this section only if the court finds knowing endangerment.

Section Q211(a)(3) applies to 42 U.S.C. § 6928(d)(1) and (d)(2), for which Congress has prescribed more stringent levels of maximum imprisonment than for other violations under 42 U.S.C. § 6928(d).

In selecting the appropriate level for a specific offense characteristic in §Q211(a)(2) and (3), the court should take into account the nature and quantity of the substance involved, the extent of resulting contamination, and the degree of public disruption and expense caused. Mishandling a small amount of a highly toxic substance may be of more serious consequence than mishandling a similar amount of a less hazardous substance. Plainly, mishandling that results in public disruption and expense should be taken into account. Hazardous waste dumped in a populous urban environment may force the evacuation of thousands of people to protect public health and safety, while the same dumping in a sparsely populated rural area might require evacuation of several families. The first situation justifies an offense level in the maximum of the range, while the second situation warrants the minimum of the range. Similarly, a contaminant in the urban area might be in secure containers that can be cleaned up at relatively little public expense, while that in the rural setting may saturate acres of soil and can only be cleaned up at considerable public expense. Finally, the longer an offense continues, the greater should be the criminal sanctions. A one time hazardous waste disposal may be treated less severely than continuous disposal of the same material. Factors including the nature and amount of contamination, continuity, disruption, and public expense combine in a variety of ways in actual situations; however, subsections Q211(a)(2) and (3) allow the court to separate these factors in assessing the severity of a crime.

While §Q211(a)(4) is similar to §Q214(a)(5), §Q211(a)(4) has higher offense levels because of the different substances involved. Falsification and other forms of misinformation are more serious if done to conceal other violations. If a defendant states on a required report that he produces no hazardous waste, when, in fact, he does generate that waste and is dumping it into a nearby river, then falsification takes on additional consequences.

Policy statement §A314, Similar Prior Convictions, applies if a defendant convicted under 42 U.S.C. § 6928(d) is subject to a doubling of the otherwise applicable maximum penalty because of a prior similar conviction.

If the offense involved mishandling of nuclear material, source material, byproduct material, or radioactive substances regulated by the Nuclear Regulatory Commission, a sentence at or near the statutory maximum is appropriate.

§Q212. Tampering with Public Water System. The base offense level is **14**.

(a) Specific Offense Characteristics

(1) If a risk of death or serious injury was created, increase by **4** to **8** levels, depending upon the nature of the risk and the number of people at risk.

(2) If the offense resulted in disruption of a public water system or evacuation of a community or

if the cleanup required a substantial public expenditure, or

if the offense involved an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time,

increase by 3 to 6 levels, depending upon the extent of effect, the quantity and nature of any contaminant involved, and the duration of the offense.

(3) If the purpose of the violation was to influence government action or to extort money, increase by 8 levels.

§Q213. Attempted or Threatened Tampering with Public Water System. The base offense level is 10.

(a) **Specific Offense Characteristics**

(1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 3 to 6 levels, depending upon the extent of the effect and the quantity and nature of any contaminant threatened or attempted.

(2) If the purpose of the violation was to influence government action or to extort money, increase by 8 levels.

Commentary

Sections Q212 and Q213 apply to the new tampering section added to 42 U.S.C. § 300i in 1986. Since intent to harm persons is an element of the tampering and attempted tampering offenses, it is included in the base offense levels. Tampering or interference with a public water supply system has the potential for widespread and serious public health effects, justifying substantial base offense levels. Given the similarities between these offenses and those covered by §Q211, the specific offense characteristics and the factors to be taken into account in choosing among offense levels are similar.

Sections Q212(a)(2) and Q213(a)(3) take into account the fact that public water supplies are vulnerable targets for terrorists and extortionists.

§Q214. Mishandling of Other Environmental Pollutants; Record Keeping, Tampering, and Falsification. The base offense level is 6.

(a) **Specific Offense Characteristics**

(1) If the defendant discharged or emitted a pollutant into the water, air or land, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious illness, increase by 3 to 6 levels, depending upon the nature of the risk and the number of people at risk.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or

if the cleanup required a substantial public expenditure, or

if a single offense resulted in an ongoing, continuous, or repetitive release of a pollutant into the environment,

increase by 3 to 6 levels, depending upon the extent of the effect, on the quantity and nature of the pollutant, and the duration of the offense.

(4) If the offense concealed another environmental violation, increase by 3 to 5 levels, depending upon the nature of the concealed violation.

Commentary

Section Q214 applies to offenses concerning substances not designated hazardous or toxic, usually punished under 33 U.S.C. §§ 403, 406, 407, 411, 1319, 1344(s), 1415(b), 1907, and 1908; and 42 U.S.C. §§ 300j-4, 4912, and 7413. They include violations of an order, plan, rule, regulation, limitation, standard, permit, or other requirement relating to pollution abatement, provided that the violation is not covered more precisely in another section. Also included are violations in which the defendant made a false statement in an application, record, report, plan, or other document; or falsified, destroyed, tampered with, or rendered inaccurate any monitoring device or method, or any record required to be maintained by law. If the violations involved a pesticide or a hazardous or toxic substance, §Q211 applies.

The base offense level considers negligent violations that may involve criminal liability under 33 U.S.C. §1319(c)(1), as well as violations resulting from knowing conduct. Section Q214(a)(1) attaches higher penalties to violations that result in actual environmental contamination, whether its ultimate effect is detectable or not. The specific offense characteristics in §Q214(a)(2) and (3) are similar to those in §Q211(a) because similar environmental results occur even if the contaminants are not specifically designated as hazardous. Therefore, the relevant factors in selecting the offense level are basically those described under §Q211. For example, the introduction of raw, untreated sewage into water from which drinking water is taken may cause serious illness, public disruption, and expense. If it is of a continuous or repetitive nature, punishment should be increased accordingly.

Current environmental regulatory schemes rely heavily upon record-keeping, monitoring, and self-reporting. If regulated persons or entities fail to collect, keep, or report accurate information, the programs prescribed by Congress for the protection of the public are substantially undermined. Such failures may conceal significant amounts of pollutants entering the environment and may result in harm to the public or the environment.

Policy statement §A314, Similar Prior Convictions, applies to any defendant subject to a higher maximum penalty because of a prior similar conviction under 33 U.S.C. §§ 1319(c)(1) or 1344(s)(4) or 42 U.S.C. § 7413(c)(1).

§Q215. Failure to Comply with Notification Requirements After Release of Hazardous Substance or Oil. If the violation involved oil, the base offense level is 6; if the violation involved a hazardous substance, the base offense level is 9.

(a) Specific Offense Characteristics

(1) If the failure to report resulted in a delay in the cleanup of the discharge or release, increase by 1 to 5 levels, depending upon the circumstances of the offense.

(2) If the failure to report resulted in an ongoing, continuous, or repetitive release that lasted a substantial period of time, increase by 2 to 5 levels, depending upon the circumstances of the offense.

(3) If the failure to report resulted in harm to the environment, wildlife or the public, increase by 2 to 5 levels, depending upon the circumstances of the offense.

Commentary

Notifications of spills and releases are required by 33 U.S.C. § 1321(b)(5) for oil or hazardous substances; 42 U.S.C. § 9601 et seq., as amended in 1986 and Pub.L. 99-499, Title III, § 325, Oct. 17, 1986, for hazardous substances; 43 U.S.C. §§ 1816(a), 1822(b) for offshore oil spills; and 33 U.S.C. § 1517(b) for oil spills.

A major purpose of these requirements is to alert public officials so that threats to the environment and public health and safety may be minimized by prompt action. Even when the party responsible for the spill or release undertakes cleanup, public officials need to be alerted in order to monitor the work and assure that it is properly accomplished. The notification requirements are not substantial burdens; a toll-free number is provided for notifying federal authorities. Given the ease of compliance, non-compliance is particularly deserving of punishment. The specific offense characteristics take into account consequences of failure to report. The longer response and cleanup is delayed, the greater the likelihood of human or environmental harm. If the release is ongoing rather than of limited duration, the likelihood of harm increases.

Policy statement §A314, Similar Prior Convictions, applies to any defendant subject to a higher maximum penalty because of a prior similar conviction under 42 U.S.C. § 9603 and Pub. L. 99-499, Title III, § 325, October 17, 1986.

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2. CONSERVATION AND WILDLIFE

16 U.S.C. § 668(a), dd(e)
16 U.S.C. § 707
16 U.S.C. § 742j-1(a)
16 U.S.C. § 1174(a)
16 U.S.C. § 1338(a)
16 U.S.C. § 1375(b)
16 U.S.C. § 1540(b)
16 U.S.C. § 1859
16 U.S.C. § 3373(d)
18 U.S.C. § 545
Also See Statutory Index

§Q221. Specially Protected Fish, Wildlife, and Plants. If the defendant violated laws or regulations protecting fish, wildlife, or plants, the base offense level is **6**.

(a) **Specific Offense Characteristics**

(1) If the offense involved a commercial purpose, increase by **3** levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by **3** levels.

(3) If the offense involved a quantity of fish, wildlife, or plants, that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by **3** to **5** levels, depending upon the circumstances of the offense.

(4) If the specially protected fish, wildlife, or plants had a market value in excess of $1,000, increase the offense level by the appropriate number of levels from the Property Table, §B211.

§Q222. Lacey Act. The base offense level is determined as follows:

(1) If the defendant imported, exported, transported, sold, received, acquired, or purchased any fish, wildlife, or plant taken, possessed, transported, or sold in violation of any treaty or law of the United States or any state, or in violation of any foreign law or Indian tribal law, the base offense level is **6**.

(2) If the defendant, having imported, exported, transported, sold, purchased or received any fish, wildlife, or plant, made or submitted a false record, account, label, or identification, the base offense level is **4**.

(3) If the defendant imported, exported, or transported any container or package containing fish or wildlife without marking, labeling, or tagging in accordance with applicable regulations, the base offense level is **4**.

(a) **Specific Offense Characteristics**

(1) If the defendant knowingly imported or exported fish, wildlife, or plants referred to in §Q222(1), or if the defendant knowingly engaged in conduct involving the sale or purchase, or the offer or intent to sell or purchase fish, wildlife, or plants, with a market value in excess of $350, increase by 3 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 3 levels.

(3) If the offense involved a quantity of fish, wildlife, or plants, that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 3 to 5 levels, depending upon the circumstances of the offense.

(4) If the fish, wildlife, or plants had a market value in excess of $1,000, increase the offense level by the appropriate number of levels from the Property Table, §B211.

§Q223. National Parks, Forests, and Wildlife Refuges. The base offense level is determined as follows:

(1) If property (other than fish or wildlife) was damaged or stolen, apply the appropriate sections in Part B, Offenses Involving Property.

(2) If the offense was trespassing, apply §B222 in Part B, Offenses Involving Property.

(3) If the defendant violated a hunting, fishing, or camping regulation or any other park, forest, or wildlife refuge regulation not covered elsewhere, the base offense level is 5.

§Q224. Airborne Hunting. The base offense level is 6.

(a) **Specific Offense Characteristics**

(1) If the offense involved the capture or killing of multiple birds, fish or animals, increase by 1 to 4 levels, depending upon the nature and extent of the offense.

(2) If the defendant knowingly captured or killed specially protected fish or wildlife, increase the offense level as indicated by the specific offense characteristics in §Q221 instead of (a)(1) above.

(3) If the defendant used or possessed for a commercial purpose any fish or wildlife taken in violation of airborne hunting laws or regulations, increase the offense level as indicated by the specific offense characteristics in §Q222 instead of (a)(1) above.

§Q225. Magnuson Fishery Conservation and Management Act. The base offense level is 6.

§Q226. Smuggling of Fish, Wildlife, and Plants. The base offense level is 6.

(a) **Specific Offense Characteristics**

(1) If the offense involved a commercial purpose, increase by 3 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 3 levels.

(3) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 3 to 5 levels, depending upon the circumstances of the offense.

(4) If the fish, wildlife, or plants had a market value in excess of $1,000, increase by the appropriate number of levels from the Property Table, §B211.

Commentary

Section Q221 applies to violations of the Endangered Species Act, 16 U.S.C. § 1540(b); the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a); the Migratory Bird Treaty Act, 16 U.S.C. § 707; the Marine Mammal Protection Act, 16 U.S.C. § 1375(b); the Wild Horse and Burro Act, 16 U.S.C. § 1338(a); and the Fur Seal Act, 16 U.S.C. § 1174(a). These statutes provide special protection to particular species of fish, wildlife, or plants. The base offense level for these statutes is low, so that probation may be imposed on first-time offenders. However, enhanced punishment is warranted where the offense involved a commercial purpose, the species were not quarantined as required by law, or the market value of the protected species was substantial. The Commission recognizes that an offense may have a serious impact upon protected species, even though the market value is negligible. In such circumstances if the species is either endangered or threatened, the greater enhancement should be applied. Policy statement §A314, Similar Prior Convictions, applies to defendants subject under the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) to a higher maximum sentence because of a prior conviction under the Act.

Section Q222 applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. § 3373(d). This is the principal enforcement statute utilized to combat interstate and foreign commerce in illegally taken fish, wildlife and plants. The Act distinguishes between misdemeanor and felony violations; the guidelines retain that distinction. The base levels for misdemeanor and felony violations are increased if the market value of the fish, wildlife, or plants exceeds $1000.

Section Q223 applies to violations of laws governing conduct within National Parks, National Forests, or components of the National Wildlife Refuge System, and regulations implementing such laws. 16 U.S.C. Chapters 1, 2, 6-8; see 16 U.S.C. 668dd(e). Specially protected wildlife are covered by §Q231.

Section Q224 applies to violations of the Airborne Hunting Act, 16 U.S.C. § 742j-1. Where multiple birds, fish, or animals are captured or killed, increased punishment is warranted. Enhancement is appropriate if the defendant captured or killed specially protected fish or wildlife for a commercial purpose (see specific offense characteristics in §Q222).

Section Q225 applies to violations of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1859(b). The Act makes criminal any interference with the inspection and enforcement activities of authorized enforcement officers. Interference with these activities impairs the effective management of national fishery resources. The base offense level permits a probationary sentence for first offenders. These guidelines apply to similar penalty provisions in other fishery or conservation statutes. See North Pacific Fisheries Act, 16 U.S.C. § 1030(b); Antarctic Marine Living Resources Convention Act, 16 U.S.C. § 2438(b); Atlantic Salmon Convention Act, 16 U.S.C. § 3606(b)(2); and the Pacific Salmon Treaty Act, 16 U.S.C. § 3637(c). Where the offense involves the use of threats, intimidation, or bodily injury, the guidelines in Part A, Offenses Involving the Person, apply in lieu of §Q225.

Section Q226 applies to violations of 18 U.S.C. § 545 when a defendant smuggles or illegally brings fish, wildlife, or plants into the United States, or subsequently receives, conceals, buys, sells, or facilitates the transportation of fish, wildlife, or plants knowing the item was illegally brought into the United States. The guidelines in this section prevail over those in §T231 (also pertaining to violations of 18 U.S.C. § 545) since generally the primary purpose of smuggling wildlife is not tax evasion, but avoidance of other wildlife laws regulating importation of fish, wildlife, or plants. Enhanced punishment is warranted where the offense was for a commercial purpose, quarantine requirements were evaded, the offense involved a substantial quantity of fish, wildlife, plants or specially protected fish, wildlife, or plants, or the market value exceeded $1,000.

PART R - ANTITRUST OFFENSES

15 U.S.C. §§ 1 - 3

INTRODUCTION

These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors such as horizontal price fixing (including bid rigging) and horizontal market allocation can cause serious economic harm. However, there is little agreement about the harmfulness of other types of antitrust violations; the law involving them is frequently unsettled and criminal prosecutions are infrequent. Consequently, the guidelines divide antitrust offenses into two categories: Price Fixing or Market Allocation Agreements Among Competitors (§R211) and Other Antitrust Violations (§R212).

§R211. Price Fixing or Market Allocation Agreements Among Competitors. The base offense level is 9, unless the volume of commerce attributable to the offender is less than $1 million or more than $4 million, in which case the base offense level is as follows:

Volume of Commerce	Offense Level
under $1,000,000	8
$1,000,001 - $4,000,000	9
$4,000,001 - $15,000,000	10
$15,000,001 - $50,000,000	11
over $50,000,000	12

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in the goods or services that are the subject of the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

Fines.

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of commerce, but not less than $20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000. The statutory maximum fine is $250,000 for individuals and $1,000,000 for organizations, but is increased when multiple counts are involved.

§R212. Other Antitrust Violations. The base offense level is 6.

Commentary

§R211. The Commission finds that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The guideline is designed with that purpose in mind. Absent adjustments, mandatory minimum prison sentences are two months in cases where the volume of commerce is not large, and will be four months or longer in the majority of cases that are prosecuted. Considerably longer sentences will be possible, and will be mandated for repeat offenders. Adjustments for acceptance of responsibility and, in a few instances, role in the offense, may decrease these minimum sentences, but should not affect the level of fines. Fines are greatly increased over current practice.

The guideline imprisonment terms represent a substantial change from present practice. Currently, approximately 20 percent of all individuals convicted of antitrust violations are imprisoned and they serve, on average, slightly more than three months. The guideline prison terms are, however, consistent with the parole guidelines. The current average fine for individuals is only approximately $16,000; for corporations, it is approximately $133,000.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is some incentive to desist from a violation once it has begun. The offense levels are not based directly on the amount of damages caused by the violation because damages are difficult and time consuming to establish. The volume of commerce is a reasonable and more readily measurable substitute. The limited empirical data currently available show that fines increase with the volume of commerce and the term of imprisonment probably does also.

Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. The Commission has specified a lower fine for individuals. In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement). The fines specified represent substantial increases over existing practice. The Commission finds that most antitrust defendants have the resources and earning capacity to pay fines, at least over time, and will monitor the level of fines that are imposed and actually paid. If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally burdensome as a fine.

No specific increase in the sanction is provided for defendants who initiate an antitrust conspiracy or coerce others to join it. These considerations are dealt with under Part Z, Role in the Offense.

Recidivist antitrust violators might warrant sentences at or above the guideline maximum, even after adjustment for prior record.

§R212. The offense level for antitrust offenses other than price fixing or market allocation has been set at 6 because such offenses do not invariably cause serious harm. The civil system, which allows for private treble damage actions and injunctive relief, provides both a deterrent and a remedial effect, particularly because non-horizontal practices are generally difficult to conceal.

PART S - MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

18 U.S.C. § 371
18 U.S.C. § 1001
18 U.S.C. §§ 1005 - 1008
18 U.S.C. § 1014
18 U.S.C. §§ 1956 - 1957
31 U.S.C. §§ 5313 - 5314
31 U.S.C. § 5316
31 U.S.C. § 5322
31 U.S.C. § 5324

§S211. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements. The base offense level is **10**.

(a) Specific Offense Characteristics

(1) If the defendant knew that the funds were the proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by **5** levels;

(B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by **3** levels.

(2) If the defendant committed the offense with the intent to promote any specified unlawful activity, increase by **3** levels.

(3) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value	Increase in Level
$100,001 - $200,000	add **1**
$200,001 - $350,000	add **2**
$350,001 - $600,000	add **3**
$600,001 - $1,000,000	add **4**
$1,000,001 - $2,000,000	add **5**
$2,000,001 - $3,500,000	add **6**
$3,500,001 - $6,000,000	add **7**
$6,000,001 - $10,000,000	add **8**
$10,000,001 - $20,000,000	add **9**
$20,000,001 - $35,000,000	add **10**
$35,000,001 - $60,000,000	add **11**
$60,000,001 - $100,000,000	add **12**
over $100,000,000	add **13 or above**

Commentary

This section applies to violations of 31 U.S.C. §§ 5313, 5314, 5316, 5322, 5324, which relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is five years. These offenses sometimes are prosecuted as conspiracies, frauds, or false statements under 18 U.S.C. §§ 371, 1001, 1005-1008, or 1014.

Money laundering activities are essential to the operation of organized crime. Congress has recently increased the maximum penalties for a typical money laundering case from a one year misdemeanor to twenty years imprisonment. The guidelines provide substantial punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reported under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the perniciousness of this activity, and sentences as long as thirty-five years have been reported. Congress has demonstrated its intent to increase the sanctions for money laundering offenses by making all reporting violations felonies in 1984, as well as by enacting the Money Laundering Control Act of 1986, which creates new offenses and provides higher maximum sentences for similar conduct when facilitation or concealment of serious criminal activity is involved.

The sentencing factors are derived from distinctions in the statute and in the Money Laundering Control Act. The dollar value of the transactions not reported is an indicator of several factors that are pertinent to the sentence, including the likely criminal source of the funds, the size of the criminal enterprise, and the extent to which the defendant participated. The defendant's intent and the nature of any associated criminal behavior are also important. In keeping with the Congressional intent of the Anti-Drug Abuse Act of 1986 (of which the Money Laundering Control Act is a part), the offense level is increased the most when any associated criminal activity is "specified unlawful activity" that involves trafficking in narcotics or other dangerous drugs. This includes a conspiracy or other inchoate offense, an object of which is the manufacture, importation, or distribution of narcotics or other controlled substances. A further increase is provided when the defendant actually intended to promote the carrying on of an illegal activity specified in the statute.

The offense levels in this section presume that the defendant should have suspected that the funds involved were likely to be the proceeds of crime. Section Y216, Criminal Purpose, authorizes the court to depart from the guidelines by enhancing the sentence if the defendant violated these statutes to facilitate or conceal another crime, or for some other criminal purpose. Conversely, if the circumstances would have indicated to a reasonable man that the funds were unlikely to be the proceeds of crime, the court should depart from the guidelines by reducing the otherwise applicable sentence.

§S212. Laundering of Monetary Instruments. The base offense level is 20.

(a) **Specific Offense Characteristics**

(1) If the defendant was convicted under 18 U.S.C. § 1956(a)(1)(A), increase by 3 levels.

(2) If the specified unlawful activity involved the manufacture, importation, or distribution of narcotics or other controlled substances, increase by **2** levels.

(3) If the value of the funds exceeded $100,000, increase the offense level as specified in §S211(a)(3).

Commentary

This section applies to violations of 18 U.S.C. § 1956. That statute is a part of the Anti-Drug Abuse Act of 1986 that prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment specified is twenty years.

This guideline provides for significant punishment in keeping with the clear intent of the legislation. The punishment is higher than that specified in §S211 because of the higher statutory maximum, and the added elements and higher standard of proof as to knowledge and intent.

The base offense level is set to correspond roughly with the current parole guidelines when more than $500,000 is involved. A higher punishment is specified when the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A) because that subsection applies to defendants who did not merely conceal a serious crime that had already taken place, but encouraged or facilitated the commission of further crimes.

The amount of money involved is included as a factor because it is an indicator of the scope of the criminal enterprise as well as the degree of the defendant's involvement. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

§S213. **Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity**. The base offense level is **18**.

(a) **Specific Offense Characteristics**

(1) If the offender knew the transaction involved the proceeds of specified unlawful activity, increase by **2** levels.

(2) If the specified unlawful activity involved the manufacture, importation, or distribution of narcotics or other controlled substances, increase by **2** levels.

(3) If the value of the funds exceeded $100,000, increase the offense level as specified in §S211(a)(3).

Commentary

This section applies to violations of 18 U.S.C. § 1957. That statute is a part of the Anti-Drug Abuse Act of 1986 prohibiting financial transactions that exceed $10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. § 1956), knowing that the funds were "criminally derived property." The maximum term of imprisonment specified is ten years.

The statute is similar to 18 U.S.C. § 1956. This guideline provides for significant punishment, in keeping with the intent of the legislation. The punishment is higher than that specified in §S211 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property. In keeping with the apparent legislative intent, expressed in the Money Laundering Control Act, to adequately punish those who aid specified criminal activity, a higher punishment is provided when the defendant knew that the funds were the proceeds of such activity, as opposed to merely criminally derived property. See §Y216, General Provisions.

The amount of money involved is included as a factor because it is an indicator of the scope of the criminal enterprise and the degree of the defendant's involvement. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

PART T - OFFENSES INVOLVING TAXATION

INTRODUCTION

The primary purpose of the laws that make certain tax offenses criminal is to ensure the full, prompt, and efficient collection of taxes. Accurate reporting of information is another interest protected. These guidelines are intended to provide for a just sentencing structure that advances the purposes of the tax laws.

1. INCOME TAXES

26 U.S.C. §§ 7201 - 7207
26 U.S.C. § 7215

§T211. Tax Evasion. The base offense level is the level in the Tax Table, §T241, that corresponds to the tax deficiency. If the amount of the deficiency is not established, the base offense level is **9**.

For purposes of this guideline, "deficiency" means the total amount of tax that the taxpayer evaded or attempted to evade, but not less than 25 percent of the amount any misstatements or omissions decreased reported net income. When more than one year or more than one taxpayer is involved, the amounts are to be added. The deficiency does not include any interest or penalties.

(a) **Specific Offense Characteristic**

(1) If the offense was committed in furtherance of or in conjunction with a movement to encourage others to violate the internal revenue laws, increase by **2** to **4** levels, depending upon the nature of the conduct and its potential to subvert the tax system.

§T212. Willful Failure To File Return, Supply Information, or Pay Tax. The base offense level is one level lower than the level in the Tax Table, §T241, corresponding to the deficiency as defined below. If there is no deficiency, or its amount is not established, the base offense level is **6**.

For purposes of this guideline, "deficiency" means the total amount of tax that the taxpayer owed and did not pay, but not less than 10 percent of the amount by which the taxpayer's total income exceeded $20,000.

(a) **Specific Offense Characteristic**

(1) If the offense was committed in furtherance of or in conjunction with a movement to violate the internal revenue laws, increase by **2** to **4** levels, depending upon the nature of the conduct and its potential to subvert the tax system.

§T213. Fraud and False Statements (Under Penalty of Perjury). If the offense was committed in order to facilitate evasion of a tax, including a future tax, the base offense level is the level in the Tax Table, §T241, corresponding to a deficiency of 25 percent of the amount by which income was understated. Otherwise, the base offense level is 6.

(a) Specific Offense Characteristics

(1) If the offender was in the business of preparing or assisting in the preparation of tax returns or of providing documentation for the substantiation of tax returns, increase by 1 level.

(2) If the offense was committed in furtherance of or in conjunction with an organized movement to encourage others to violate the internal revenue laws, increase by 2 to 4 levels, depending upon the nature of the conduct and its potential to subvert the tax system.

§T214. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud. The base offense level is the level in the Tax Table, §T241, corresponding to a deficiency of 25 percent of the total amount by which income was understated pursuant to the defendant's advice or instructions. If there is no deficiency, or its amount is not established, the base offense level is 6.

(a) Specific Offense Characteristics

(1) If the defendant was in the business of preparing or assisting in the preparation of tax returns or of providing documentation for the substantiation of tax returns, increase by 1 level.

(2) If the defendant committed the offense in furtherance of or in conjunction with a fraudulent pattern or scheme from which he derived substantial income, increase by 2 to 4 levels, depending upon the nature and extent of the scheme.

(3) If the offense was committed in furtherance of or in conjunction with a movement to encourage others to violate the internal revenue laws, increase by 2 to 4 levels, depending upon the nature of the conduct and its potential to subvert the tax system.

§T215. Fraudulent Returns, Statements, or Other Documents. The base offense level is 6.

§T216. Failing to Collect or Truthfully Account for and Pay Over Tax. The base offense level is 4, or the level in the Tax Table, §T241, corresponding to the amount of tax not paid over, whichever is greater.

§T217. Failing to Deposit Collected Taxes in Trust Account as Required After Notice. The base offense level is 4, or five less than the level in the Tax Table, §T241, corresponding to the amount not deposited, whichever is greater.

§T218. Failing to Furnish an Employee a True Statement Regarding a Tax Withheld. The base offense level is 4.

§T219. Furnishing False Information to an Employer in a Withholding Exemption Certificate, or Failing to Supply Information that Would Require an Increase in the Tax to Be Withheld. The base offense level is 4.

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2. ALCOHOL AND TOBACCO TAXES

§T221. Non-Payment of Taxes. The base offense level is the level in the Tax Table, §T241, corresponding to the amount of taxes that the taxpayer failed to pay or attempted not to pay.

§T222. Regulatory Offenses. The base offense level is 4.

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3. CUSTOMS TAXES

§T231. Evading Import Duties or Restrictions (Smuggling). The base offense level is the level in the Tax Table, §T241, corresponding to the duty evaded.

§T232. Receiving or Trafficking in Smuggled Property. The offense level is the offense level from §T231 for smuggling the object into the United States without paying the duty.

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4. TAX TABLE

§T241. Tax Table

Deficiency	Offense Level
less than $2,000	6
$2,000 - $5,000	7
$5,001 - $10,000	8
$10,001 - $20,000	9
$20,001 - $40,000	10
$40,001 - $70,000	11
$70,001 - $120,000	12
$120,001 - $200,000	13
$200,001 - $350,000	14
$350,001 - $600,000	15
$600,001 - $1,000,000	16
over $1,000,000	17 or above

Commentary

1. Offenses Involving Income Taxes

This part deals with criminal violations of the internal revenue laws. The offense levels have been set independently of those for offenses such as fraud or theft because the collection of taxes involves a unique governmental interest and estimates of the level of evasion are extremely high.

§T211. This section deals with conduct proscribed by 26 U.S.C. § 7201. In order for there to be a violation of 26 U.S.C. § 7201, there must be an affirmative act in furtherance of the evasion of taxes. If there was no affirmative act, another section may apply. (E.g., if the taxpayer did not pay the tax and did not file a return, see §T212.) False statements in furtherance of the evasion (See §T213, §T215, and §T219) are considered part of tax evasion, and generally would not warrant consecutive sentences unless they occur in connection with taxes other than those that the defendant is charged with evading or attempting to evade.

This guideline relies most heavily on the amount of tax evaded because the interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. The guideline adopts a definition of "deficiency" that is intended to minimize the number and significance of disputes regarding the amount or size of the evasion. It corresponds to neither the "criminal deficiency" nor the "civil deficiency" as those terms are commonly defined. Rather, for purposes of the guideline, the deficiency is the larger of any of three figures as to which the prosecution presents reliable information: (1) the amount of tax that the taxpayer evaded; (2) the amount of tax that he attempted to evade; or (3) 25 percent of the amount by which any false statement or omission made with scienter (i.e., knowingly or recklessly) caused income to be understated, exclusive of offsetting items. The court is to determine these amounts as it would any other guideline factor, and need only make a reasonable estimate of the range (level) in the Tax Table where the deficiency falls. The

purpose of these alternative standards is to deal with differing methods of proof and to eliminate disputes as to whether the taxpayer was entitled to offsetting adjustments that he failed to claim. When the indirect method of proof is used, the amount of unreported income may be uncertain; the guideline contemplates that the court will simply make a plausible estimate based on the facts presented, keeping in mind that countervailing facts are within the control of the defendant.

The overlapping imprisonment ranges in the Tax Table should also result in minimizing disputes. The consequence of an inexact estimate of the deficiency is never severe, even when the deficiency is near the boundary of a range. For example, even though the difference between $39,999 and $40,001 results in a change from level 10 to level 11, a sentence of eight to twelve months would be within the guidelines for either level. Indeed, any sentence between ten and twelve months would be within the guidelines for a deficiency ranging from $20,000 to $120,000. Thus, for all dollar amounts, the Tax Table affords the court considerable latitude in evaluating other factors, even when the amount of the deficiency is uncertain.

The presumptive base offense level has been set at 9, which corresponds to an evasion of $10,000 to $20,000. The great majority of tax evasion cases that are prosecuted involve a deficiency of at least $10,000. Thus, the fact that an evasion involved a particularly small amount of taxes may be viewed as a mitigating factor.

This guideline is intended both to reduce disparity in sentencing for tax evasion and to increase average sentence length somewhat, particularly for large-scale evasions. As a result, the number of purely probationary sentences will be reduced. Roughly half of all tax evaders are sentenced to probation without imprisonment, while the other half receive sentences that require them to serve an average prison term of twelve months. The Commission finds that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. Current estimates are that income taxes are underpaid by some $90 billion annually.

Although currently some large-scale evaders serve as much as five years in prison, in practice the average sentence length, for defendants sentenced to a term of imprisonment, does not increase significantly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than $10,000 in taxes is about nine months, while the corresponding figure for those evading over $100,000 in taxes is about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax evaded. The increase may be slightly larger for cases involving more taxes. Absent aggravating factors, all sentences will be well below the corresponding maximum presumptive parole guideline.

Factors considered for incorporation into the guidelines included: (1) the amount of tax evaded, (2) whether the income on which the tax was evaded was unlawfully obtained, (3) the proportion of the tax evaded to the total tax due, (4) the number of years of evasion, (5) whether there was careful planning, (6) whether the offender encouraged or assisted others to evade taxes, and (7) whether the offender notified the Internal Revenue Service of the violation. Only factors (1) and (6) have been expressly incorporated into the guideline.

Factor (1) (the amount of tax that the offender evaded or attempted to evade): As discussed above, this is the primary factor, since the primary interest protected by the laws against tax evasion is collection of revenue.

Factor (2) (whether the income was lawfully or unlawfully obtained): Inclusion of this factor for deterrence purposes would appear justified because unlawfully obtained income is generally unreported or otherwise difficult to establish. In practice, it appears to have an effect that is significant but difficult to measure. Because its impact is difficult to quantify, and it is substantially equivalent to §Y216, Criminal Purpose, the Commission has elected not to include this factor explicitly in the tax guidelines. Instead, the court is encouraged to rely upon the General Provisions and make the appropriate upward adjustment if faced with this type of conduct.

Factor (3) (the proportion of the tax due that was evaded): This factor raises the issue of whether, for example, one who evades $100,000 in tax when it is 90 percent of the tax due should be punished more than one who evades $100,000 in tax when that is 10 percent of the tax due. Proponents of this factor argue that the former situation merits more punishment than the latter. That is by no means clear. In either case, the harm to the treasury is identical. Moreover, it should, on average, be considerably easier to prove intentional evasion in the former case, implying that for deterrence purposes, the latter case might require more punishment. On the other hand, it might be argued that persons in the latter category are likely to be more responsive to the threat of sanctions because of their enormous income, so that not as high a sentence would be required in order to deter them. The available evidence does not enable the Commission to determine whether this somewhat complex factor has a significant impact in current practice. For these reasons, the Commission has elected not to include it in the initial guidelines.

Factor (4) (the number of years of evasion): This factor is related in part to the amount of tax evaded. Proponents of the factor argue that it is worse, for example, to evade $10,000 in tax over four years than in a single year. Presence of the factor thus implies greater culpability. It is plausible that multiple years of evasion cause the court and the IRS to underestimate the amount of tax evaded. Under current practice, repeated instances of evasion appear to result in an average additional time served of approximately one month.

Factor (5) (careful planning): It is difficult to commit tax evasion without planning. However, unusually sophisticated efforts to conceal the evasion obviously decrease the likelihood of detection. It is also likely that this factor, which can be related to organized criminal activity, has some impact on current practices. However, available data do not permit the Commission to quantify its effect.

Factor (6) (aiding or encouraging others to evade taxes): This factor, which may amount to a violation of 26 U.S.C. § 7206(2), significantly increases the risk of revenue loss, particularly when an organized movement is involved, and therefore has been expressly included as an aggravating factor. Although this factor is quite significant in current practice, where its average effect appears to be to increase the average term of imprisonment by one year, its importance obviously depends upon the nature and extent of the conduct. Accordingly, the Commission has chosen to provide a range for the factor.

Factor (7) (filing a corrected return): Giving the Internal Revenue Service notice of an error obviously increases the likelihood that a fraud or evasion will be detected. However, filing a corrected return may also be a ploy to avoid criminal liability. Existing data do not address this factor, and to a large extent it overlaps with the Chapter Three adjustment for Acceptance of Responsibility. Accordingly, no adjustment has been provided for this factor.

The Commission has decided not to make a distinction in the guideline to treat an employee who prepares fraudulent returns on behalf of his employer less severely than the principal. The role in the offense adjustments (Part Z) should suffice for this purpose.

This guideline does not treat an unsuccessful attempt less severely because such attempts generally involve completed acts that, but for fortuitous circumstances such as action by the Internal Revenue Service would result in the evasion. The statute makes no distinction in punishment as between an attempt and a completed offense; indeed, the offense is an attempt.

§T212. This section refers to violation of 26 U.S.C. § 7203. Such violations are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. It is rarely prosecuted unless the defendant also owed taxes that he failed to pay. In instances where no tax was due, the court should consider whether a sentence at or below the guideline minimum is warranted, especially if the failure to file was unconnected with other unlawful activity.

Because the conduct generally is tantamount to tax evasion, the guideline is similar to that for tax evasion (§T211). Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes. The commentary to §T211 regarding aggravating and mitigating factors also applies to this offense.

An alternative measure of the deficiency, 10 percent of total income in excess of $20,000, has been provided because of the difficulty of computing the deficiency, which may become the subject of protracted civil litigation. It is expected that this measure will generally understate the tax due, and will not call for a punishment approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the deficiency if it seeks enhanced punishment.

The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Currently, the average time served for this offense is about 2.5 months, including those who are not sentenced to prison. Considering only those who do serve a term of imprisonment, the average term is about six to seven months.

§§T213 and T214. §T213 refers to conduct proscribed by 26 U.S.C. §§ 7206(1), and 7206(3)-(5). Section T214 applies to conduct proscribed by 26 U.S.C. § 7206(2). Together, these guidelines cover the wide variety of conduct prohibited by 26 U.S.C. § 7206, conduct generally amounting to actual or attempted tax evasion (subsection 1), or assisting in tax evasion (subsection 2). Accordingly, the guidelines treat the offenses essentially as tax evasion.

In instances where the offender is setting the groundwork for future tax evasion, he may make false statements that underreport income but, as of the time of conviction, may not yet have resulted in a tax deficiency. To deal with those cases, the deficiency is to be computed using a rate of 25 percent, somewhat below the maximum under the new tax law. The same rate is used when the taxes of another person are involved, so as to avoid complex problems of proof and invasion of privacy. Misreporting of income by the principal that the defendant facilitated would have to be established.

In certain instances, such as promotion of a tax shelter scheme, the offender may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), it will be treated as evasion

of the approximate amount (computed by using a tax rate of 25 percent) by which the returns understate the taxes due.

A more severe punishment is specified for tax preparers because their misconduct poses a greater risk of revenue loss and is more clearly willful. The same is true for tax protesters.

See also commentary to §T211 regarding significant factors not expressly incorporated into these guidelines.

§T215. This section refers to conduct proscribed by 26 U.S.C. § 7207, which is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§T213), which is a felony that requires a false statement under penalty of perjury. The offense level has been set at 5 in order to give the sentencing judge considerable latitude because the conduct may be similar to tax evasion.

§T216. This section refers to conduct proscribed by 26 U.S.C. § 7202. This offense is a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay.

Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines. For purposes of applying the Tax Table, the deficiency is the amount of unpaid tax. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. In such instances, the court should consider increasing the offense level.

§T217. This section refers to conduct proscribed by 26 U.S.C. § 7215 and 7512(b). This offense is a misdemeanor that does not require any intent to evade taxes, nor even that taxes have not been paid. The more serious offense is 26 U.S.C. § 7202 (See §T216).

This offense should be relatively easy to detect and fines may be feasible. Accordingly, it has been graded considerably lower than tax evasion, although some effort has been made to tie the offense level to the level of taxes that were not deposited. The deficiency is the amount of tax that was not deposited. If funds are deposited and withdrawn without being paid to the Internal Revenue Service, they should be treated as never having been deposited.

A fine that is a percentage of the funds not deposited is suggested.

§T218. This section refers to conduct proscribed by 26 U.S.C. § 7204, a misdemeanor that is infrequently prosecuted and rarely results in a substantial term of imprisonment.

§T219. This section refers to conduct proscribed by 26 U.S.C. § 7205. This offense rarely results in a substantial term of imprisonment. The court should, however, consider increasing the offense level if the offender was attempting to evade, rather than delay, payment of taxes.

2. Offenses Involving Alcohol and Tobacco Taxes

This section deals with offenses contained in Parts I-IV of Subchapter J of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5697, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines.

Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

§T221. The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1). Offenses in this subsection are treated as equivalent to income tax evasion offenses. The tax deficiency is the total amount of unpaid taxes that were due on the alcohol and/or tobacco.

Offense conduct directed at more than tax evasion, e.g., theft or fraud may warrant departure above the guideline.

§T222. For offenses where there is no effort to evade taxes, such as record-keeping violations, the offense level is set at 5. Prosecution of these offenses is rare.

3. Offenses Involving Customs

This part deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1568(e), 1708(b). These guidelines are primarily aimed at revenue collection or trade regulation. They are not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, importation of which is prohibited or restricted for non-economic reasons. Other, more specific legislation generally applies to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, or for imposing a sentence above that specified in these guidelines.

§T231. This offense is treated as equivalent to tax evasion. A lower offense level, or a point near the minimum of the range, might be appropriate for cases involving tourists who bring in items for their own use. Such conduct generally poses a lesser threat to revenue collection.

Particular attention should be given to items whose entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States, might be considered.

§T232. This offense, encompassed by 18 U.S.C. § 545, is treated as equivalent to smuggling without payment of any duty.

PART X - OTHER OFFENSES

INTRODUCTION

The guidelines in this part have application to a broad variety of illegal activities that can occur in numerous contexts and are not covered by a specific guideline.

1. CONSPIRACIES, ATTEMPTS, SOLICITATIONS

18 U.S.C. § 286
18 U.S.C. §§ 371 - 373
18 U.S.C. § 2271
Also See Statutory Index

§X211. Conspiracies and Attempts. If the defendant was convicted of a conspiracy or an attempt not otherwise covered by a specific guideline, the offense level is the same level as that of the underlying offense(s).

§X212. Solicitations. If the defendant was convicted of a solicitation not otherwise covered by a specific guideline, the offense level is one-half the level as that of the underlying offense.

Commentary

Under §X211, the offense level for conspiracies and attempts is the same as that for the underlying conduct. This is consistent with the parole guidelines. This principle will normally result in a sentence for conspiracy less than that imposed had the underlying offense been completed. While the defendant will be punished according to the base offense level of the underlying offense, specific offense characteristics will not apply unless that conduct actually occurred. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level would not include speculative aggravating factors such as injury to others, hostage taking, the amount of money the defendants hoped to steal, and so forth. The offense level would reflect the level applicable to armed robbery of a financial institution.

Under §X212, the Commission has concluded that it is appropriate to treat one who solicits illegal conduct at an offense level of one-half the level for the underlying offense. The offense level in these cases shall include any specific offense characteristics that apply to elements of the crime actually intended, and to acts that actually occurred (and are conduct relevant to the underlying offense). Enhancement of sentence for defendants involved in this type of criminal activity may be appropriate under Part Z, Role in the Offense. If the underlying purpose of a conspiracy is not itself illegal, the base offense level shall be determined by the greater of any felonious conduct intended, or by reference to guidelines for criminal conduct similar to the underlying purpose of the conspiracy. If the offense level still cannot be determined, the court may impose a sentence consistent with the purposes of

sentencing. 18 U.S.C. § 3553(a)(2). If there were multiple illegal objects of the conspiracy, the base offense level is that for the most serious underlying conduct intended by the defendant.

If a defendant was convicted of conspiracy or solicitation and also for the underlying conduct, the sentence for the conspiracy or solicitation shall generally be imposed to run concurrently with the substantive charge of conviction, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. § 994(l)(2). If a defendant is convicted of conspiracy, the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators over whom the defendant exercised control.

* * * * *

2. AIDING AND ABETTING

18 U.S.C. § 2
18 U.S.C. §§ 752 - 753
18 U.S.C. §§ 755 - 757
18 U.S.C. § 2383

§X221. Aiding and Abetting. If the defendant was convicted of aiding and abetting in the commission of an offense, the offense level is the same as that of the underlying offense.

Commentary

A defendant convicted of aiding and abetting is "punishable as a principal." 18 U.S.C. § 2. Section X221 provides that aiding and abetting the commission of an offense has the same offense level as that for the underlying offense. Varying degrees of involvement or assistance may be reflected by appropriate adjustment of the sentence under Part Z, Role in the Offense.

* * * * *

3. ACCESSORY AFTER THE FACT

18 U.S.C. § 3
18 U.S.C. § 757
18 U.S.C. §§ 1071 - 1072
18 U.S.C. § 1381
18 U.S.C. § 2388(c)

§X231. Accessory After the Fact. If the defendant was convicted as an accessory after the fact, the offense level is 2 to 10 levels lower than that of the underlying offense, depending upon the nature and extent of the defendant's misconduct.

Commentary

An accessory after the fact may receive up to one-half the punishment prescribed for the principal offender, or if the principal is punishable by death, not more than ten years. 18 U.S.C. § 3. Section X231 provides that an accessory after the fact will be punished at an offense level 2 to 10 levels below the underlying offense. A range is provided to assure that an appropriate sentencing distinction is made between an accessory after the fact and the principal offender. The appropriate level within the range should reflect considerations that include, but are not limited to, the following:

1. *the nature and seriousness of the principal's conduct;*

2. *the danger presented by the principal;*

3. *the extent of the defendant's knowledge and appreciation of 1 or 2; and*

4. *the extent of the defendant's aid to the principal.*

* * * * *

4. ALL OTHER OFFENSES

§X241. Other Offenses. If the offense was one for which no specific guideline was written, the court shall apply the most analogous guideline. If no analogous guideline is available, the court shall impose a sentence consistent with the purposes of sentencing. 18 U.S.C. § 3553(a)(2).

Commentary

Section X241 addresses cases in which a defendant has been convicted of any other offense for which there is no specific guideline, such as threatening to commit a crime. For example, a broad range of federal threat offenses are distinguished by different felony classifications. For example, threatening foreign officials or official guests carries a maximum prison sentence of six months, 18 U.S.C. § 112(b), while threatening the President or those in line of succession carries a possible five year sentence. 18 U.S.C. § 871. Threatening violence by use of explosives, 18 U.S.C. § 844(e), and threatening to kidnap or injure, 18 U.S.C. § 875, both carry a possible five year sentence. A threat of violence affecting commerce carries a maximum twenty year sentence. 18 U.S.C. § 1951. Because of the extensive range of conduct and punishment addressed in these offenses, significant latitude is given a court in sentencing under §X241.

PART Y - GENERAL PROVISIONS

INTRODUCTION

The general provisions are not applicable where guidelines expressly take account of the same factor, either in the base offense level or the specific offense characteristics. The provisions identify factors relevant to broad categories of criminal conduct, and provide flexibility for individualized sentences. Use of general provisions is governed by the definition of sentencing factors provided in the Overview to Chapter Two, and include all intended or foreseeable harm that resulted from the offense conduct. The general provisions apply where specific guidelines do not adequately reflect the nature of particular criminal conduct.

The general provisions are divided into two sections. Section 1 provides departures from the applicable guidelines. These provisions apply to offenses for which criminal behavior and its consequences are too individualized to quantify in a meaningful way. Therefore, the guidelines provide these factors as a basis for departure. The degree to which the court departs is left to the discretion of the sentencing judge.

For example, the death of the victim is expressly considered in the homicide guidelines. It is not, however, included as a factor in the fraud guidelines, because it would be unusual to have a death in a fraud case. If death occurred, the general provisions allow the court to depart from the applicable guidelines by increasing the offense level to reflect the seriousness of the offense. Thus, in a case where fraudulent substitution of inferior cord in parachutes by a defense contractor causes the death of a serviceman, the departure provision relating to death, §Y211, may be applied.

Like departures, Section 2 applies to criminal conduct not included in the base offense level or the specific offense characteristics of specific guidelines. This section provides adjustments that might appropriately apply to any other part of Chapter Two. Unlike the departures, guidance for their application is given. The court is directed to consider these adjustments and to increase or decrease the otherwise applicable offense level.

For example, the specific offense guidelines ordinarily assume psychological injury to the victim. However, the amount of injury may be so severe that a specific offense guideline fails to adequately reflect the seriousness of the offense. Section Y222 allows the judge to increase the penalty for that injury. Or, for example, if the defendant collected advance deposits from elderly victims for care in non-existent nursing homes, the adjustment for vulnerable victims, §Y223, is applicable.

It is possible that more than one adjustment or departure may apply, depending upon the facts and circumstances of the relevant offense conduct.

The provisions are not meant to be exhaustive. In addition to those factors identified in the general provisions, other factors justifying an enhancement or reduction of the offense level are found in Part Z, Role in the Offense. Cases will arise presenting other factors as well, perhaps very different from the ones set forth

here, warranting departure or adjustment. Similarly, the court may depart from the guidelines, even though the reason for departure is listed under adjustments, if the court determines the adjustment range is inadequate. The departures and adjustments will be controlled by (1) the need for the judge to state reasons; (2) review by the appellate court; and (3) future guidance given by the Commission based upon analysis of guideline practice.

Note: The Commission has considered three different ways of taking account of the factors in the general provisions. First, some or all factors might constitute grounds for departure from the guidelines. The Commission would offer in its commentary guidance for the courts in departing; while that guidance would not necessarily bind the courts, appellate courts may take the commentary into account when deciding whether a sentence that departed from the guidelines was unreasonable.

Second, the Commission might treat some or all factors as adjustments within the guidelines, providing specific adjustment levels to take account of the extent or the manner in which a particular factor appeared in a given case.

Third, the Commission might treat some or all factors as adjustments within the guidelines, but provide a range to which the court would refer in making the adjustment (e.g., in the case of coercion, adjust by one to five levels). The Commission would offer guidance in the commentary as to how the court should select within the range. This approach would avoid creating potentially litigable issues about precisely which offense level should apply. (The Commission has followed the approach in some instances within certain individual guidelines.) The Commission has not reached a conclusion, however, about whether its authorizing statute permits this approach.

Part Y, as presently written, illustrates both the first and second approach. The Commission solicits comment 1) as to the approaches that should be used for a particular factor; 2) as to whether other factors should be included in these general provisions; and 3) as to the advisability of the third approach here or elsewhere in the guidelines.

1. DEPARTURES

§Y211. Death

If death resulted, the court should increase the offense level to reflect the seriousness of the misconduct.

§Y212. Disruption of Governmental Function

If the defendant's conduct resulted in a significant disruption of a governmental function, the court should increase the offense level to reflect the nature and extent of the disruption and the importance of the governmental function affected.

§Y213. Extreme Conduct

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court should increase the offense level to reflect the nature and extent of the conduct.

§Y214. Victim Conduct

If the defendant committed homicide or assault (Part A) under circumstances that establish that the victim's wrongful conduct contributed significantly to the confrontation, the court should reduce the offense level to reflect the nature and circumstances of the offense.

§Y215. Public Welfare

If national security, public health, or safety was significantly endangered, the court should increase the offense level to reflect the nature and circumstances of the offense.

§Y216. Criminal Purpose

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, or for another criminal purpose, the court shall increase the offense level to reflect the true nature and seriousness of the defendant's conduct.

§Y217. Altruistic Purpose

If the defendant committed the offense for an altruistic purpose that makes the defendant's conduct less harmful, or that significantly diminishes society's interest in punishing or preventing that conduct, reduce the offense level to reflect the nature and circumstances of the offense.

§Y218. Diminished Capacity

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, decrease the offense level by not more than 4 levels to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

Commentary

These provisions are consistent with legislative intent that the Commission establish policies and practices to "permit individualized sentences when warranted by mitigating or

aggravating factors not taken into account in the establishment of general sentencing practices," 28 U.S.C. § 991(b)(1)(B), and with other legislation that indicates the sentencing process should retain some reasonable measure of discretion. 18 U.S.C. § 3553.

It shall be the probation officer's duty in the presentence report to provide an explanation "of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances." Rule 32(c)(2)(B), as amended, effective November 1, 1987. It still remains for the court to state after finding "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission . . . the specific reason for the imposition of a sentence different" from one that would otherwise be imposed under the applicable guideline for the offense of conviction.

There will be other factors in addition to those identified by the departures section that have not been given adequate consideration by the Commission. The statutory standard for departure from the guidelines arises when "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b). This does not mean that a sentencing judge must review the administrative record of the Commission to determine the extent or adequacy of consideration the Commission gave to any particular factor. Rather, a sentencing judge may depart from the guidelines when an aggravating or mitigating factor is present to an extreme degree or under extraordinary circumstances, supporting a reasonable conclusion that a factor substantially similar to that confronting the sentencing judge was not likely considered in the applicable guideline. Departures should be no more than necessary to reflect the seriousness of the offense conduct. When the guidelines require a specific type of sanction (e.g., imprisonment), the judge should ordinarily impose that type of sanction even though the terms, conditions, or length of the sentence may be increased or decreased depending upon the factor justifying the departure.

§Y211. If death occurred as a result of the defendant's conduct, the sentencing judge may impose a sentence up to the statutory maximum for the offense of conviction. For example, if a case involving pollution of waters under 33 U.S.C. § 1319(c)(1) resulted in death, the resultant loss of life is paramount to any other environmental interests and should be the most significant factor in imposition of sentence. Other federal statutes, including 18 U.S.C. § 844(i), (arson) and 18 U.S.C. § 1992, (trainwrecking), provide up to life imprisonment where death resulted from the defendant's conduct. Although the sentencing judge determines the extent to which the loss of life should govern punishment for the underlying conduct, loss of life would not automatically suggest a sentence at or near the statutory maximum. In these cases the sentencing judge should give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind in the underlying conduct, or the degree of planning or preparation involved in the offense. Other appropriate factors are whether multiple deaths resulted from the defendant's conduct, the level of victim suffering prior to death, the defendant's motive in the underlying conduct, the means by which life was taken, and the foreseeability that the underlying conduct would be life-threatening.

§Y212. The commission of an offense that carries with it an additional impingement upon the authority of government presents a danger of obstructing or interfering with the process of government and warrants significant enhancement of punishment.

The following are suggested criteria for offenses involving disruption of governmental function:

1. *the extent to which the crime disrupted a governmental function; and*

2. *the importance of that function.*

§Y213. Extreme violence or victim abuse occurs in a variety of ways. A specific guideline cannot fairly identify the various degrees of misconduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or unnecessary prolonging of pain or humiliation. If the defendant engaged in conduct of this nature, the court should increase the punishment to reflect the severity of the conduct. A resulting sentence at or near the statutory maximum would be appropriate in most cases.

§Y214. The wrongful conduct of the victim directed at the defendant may provoke the crime. In assaults and homicides this feature may amount to a significant mitigating circumstance. In deciding the extent of a sentencing reduction, the court should consider:

1. *the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;*

2. *the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;*

3. *the danger reasonably perceived by the defendant, including the victim's reputation for violence;*

4. *the danger actually presented to the defendant by the victim; and*

5. *any other relevant conduct by the victim that substantially contributed to the danger presented.*

This provision does not apply to other crimes of violence such as criminal sexual conduct, nor does it generally justify reduction for offenses other than homicide or assault. However, there may be unusual or extreme cases that justify a decreased penalty due to victim conduct. This provision does not preclude a sentencing judge from departing from the guidelines in unusual cases.

§Y215. Although most crimes are not directed at the general public, there are offenses in which the public suffers significant adverse effects. For example, if a scheme involved fraud by a medicaid provider who falsified laboratory reports, there may be special impact upon the public that should be reflected in sentencing.

Suggested criteria, among others, for consideration are:

1. *the nature and significance of those interests affected; and*

2. *the extent to which any damage to the public welfare is permanent.*

§Y216. Sentences should reflect the true motivation for and purpose of the defendant's conduct. If, for example, the offense of conviction is tax evasion but the reason for not reporting income was not merely to avoid paying taxes but also to conceal an illegal source of

income, an increase in the sentence for tax evasion is appropriate to reflect the true nature of the defendant's conduct. Other common examples include a defendant convicted of illegal possession of a handgun who acquired the weapon to use in a robbery, or a defendant convicted of failing to report currency transactions who was attempting to conceal the proceeds of narcotics trafficking.

§Y217. If a defendant's intent in committing the offense was not to produce the ultimate harm against which the statute was designed to protect, society's interest in punishment and deterrence is significantly reduced. For example, if a war veteran possesses a machine gun or grenade as a trophy or memento, or a school teacher possesses controlled substances for display in a drug education program, a reduction in sentence is warranted. A decreased sentence may also be warranted if a defendant committed the offense out of altruism or in order to avoid some other serious harm.

This provision should not be utilized to decrease a sentence because the defendant perceives his motive to be beneficent unless his good motive makes his conduct less harmful or diminishes society's interest in punishing or preventing the conduct. Providing defense secrets to a hostile power deserves no less punishment because the defendant believes that government policies are misdirected. Similarly, a defendant who brings aliens into the United States unlawfully deserves no consideration simply because he disagrees with national immigration policies. His good motive should decrease the overall potential of his conduct for harming society in order to justify a departure.

Under no circumstances may this provision be utilized to reduce the sentence because of a mental state that is attributable to the voluntary use of alcohol, drugs, or other mind-altering substances.

§Y218. A reduction in sentence may be justified when a defendant suffers from a significantly reduced mental capacity so that he did not fully appreciate the criminality of his conduct. This provision applies only when a defendant does not present a danger to the public. Thus, it may not be applied when the offense is a violent one, or a defendant's criminal history otherwise indicated that he would present a danger to the public if released. Furthermore, sentence reduction based on a mental state that is attributable to the voluntary use of alcohol, drugs, or other mind-altering substances is expressly prohibited.

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2. ADJUSTMENTS

§Y221. Property Loss or Damage

If the offense caused property damage or loss (and neither property damage nor loss is a factor in the offense guideline), increase the offense level as follows:

(a) If the property loss or damage is small in relation to the other harm caused or risked but nonetheless significant, increase by 1 level;

(b) If the property loss or damage is approximately equal in magnitude to the other harm caused or risked, increase by 3 levels;

(c) If the property loss or damage is substantially more serious than the other harm caused or risked, increase by 5 levels.

In cases falling between these reference points, intermediate increases of 2 or 4 levels should be made.

§Y222. Extreme Psychological Injury

If extreme psychological injury resulted, increase the offense level by 1 level. If extreme psychological injury is substantially more serious than the other harm caused or risked, increase the offense level by 3 levels.

§Y223. Vulnerable Victims

If a victim, or class of victims, was especially vulnerable due to age (and age of the victim was not an element of the offense), or mental or physical condition, increase the offense level by 1 level. If the victim's vulnerability was the reason the victim was selected by the defendant, increase the offense level by 4 levels.

§Y224. Victim Official

If, in any offense involving the person (Part A), the victim was selected or the crime was committed because the victim was: law enforcement or corrections personnel, the President, President-elect, Vice-President, a Member of Congress, member of the federal judiciary, high-level appointed official, other government official or employee, a foreign official, official guest, internationally protected person, or a member of the immediate family of such persons, increase the offense level by 3 levels.

§Y225. Physical Injury

If significant physical injury resulted, increase the offense level as follows to reflect the nature and extent of the injury:

Degree of Physical Injury	Increase in Level
Permanent Bodily Injury	6
Serious Bodily Injury	4
Bodily Injury	2

§Y226. Weapons and Dangerous Instrumentalities

If a weapon or dangerous instrumentality was involved, increase the offense level as follows:

Weapon Use	Increase in Level
Discharged	5
Otherwise Used	4
Displayed	3
Possessed or Only Threatened Use	2

In crimes of violence or drug trafficking crimes where a firearm is used or carried, separate prosecution and conviction under 18 U.S.C. § 924(c) will result in imposition of a statutory mandatory sentence of at least five years, consecutive to the underlying offense.

§Y227. Abduction or Unlawful Restraint

If any person is abducted or taken hostage to facilitate commission of an offense or to escape from the scene of a crime, increase by 4 levels.

§Y228. Coercion or Duress

If the defendant committed the offense because, as a result of a credible threat, the defendant reasonably believed that he or a member of his family would suffer serious, imminent physical harm unless he committed the offense, reduce the offense level by:

(a) 5 levels if the offense was a non-violent offense and the threatened harm substantially outweighed any harm resulting or risked by the offense;

(b) 4 levels if the offense was a non-violent offense and the threatened harm outweighed any harm resulting from or risked by the offense;

(c) 3 levels if the offense was a non-violent offense and the threatened harm was the same or less than any harm resulting from or risked by the offense;

(d) 2 levels if the offense was a violent offense and the threatened harm outweighed any harm resulting from or risked by the offense;

(e) 1 level if the offense was a violent offense and the threatened harm was the same or less than any harm resulting from or risked by the offense.

Commentary

§Y221. This adjustment is designed for crimes in which property loss or damage is incidental. In increasing the offense level because of property harm, the court must evaluate the magnitude of such harm in relation to the other harm caused by the offense. This is necessary because even a large property loss may be insignificant in a very serious crime, such

as murder, but quite significant when it occurs in the context of a lesser crime, such as simple assault or a regulatory violation.

The procedure for making this adjustment can be implemented as follows: Evaluate the total property loss plus damage. Look up the dollar value in the property table in §B211(a)(6). Compare that number with the offense level of the offense of conviction to determine whether to apply adjustment (a), (b), or (c), or an intermediate adjustment.

This adjustment does not apply when the offense guideline contains an adjustment for either property loss or damage. If both loss and damage result, the two should be added and the adjustment from the offense guideline that corresponds to the total should be used.

§Y222. Extreme psychological injury means a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim following a crime that is likely to be of an extended and continuous duration, and that manifests itself by physical or psychological symptoms or by changes in behavior patterns.

Emotional injury suffered by victims is a relevant sentencing consideration, particularly in violent crimes. Although there is no specific provision in federal law that punishes the infliction of emotional or psychological injury, the Commission has generally included considerations of psychological injury in the base offense levels. However, if the sentencing judge determined that the victim's psychological injury is unusual, the court shall increase the sentence by increasing the offense level by 2 levels to reflect the fact that the severity of the injury suffered is beyond that injury ordinarily resulting from the offense of conviction. In a case where psychological harm is both extreme and makes up the bulk of the harm the offense caused or risked, the offense level should be increased by 3 levels. That is because the offense level otherwise specified for the offense itself in such a case is unlikely to reflect the seriousness of the harm caused or risked. For purposes of this provision, a member of the victim's immediate family is considered a victim.

§Y223. Conduct by a defendant that is particularly predatory in nature warrants special enhancement in sentencing. For example, the defendant who victimizes those least able to resist and defend against violent action or those more susceptible to fraudulent schemes, exhibits a characteristic of criminal behavior deserving additional punishment. Therefore, if the victim was especially vulnerable an enhancement is warranted. If, however, the victim's vulnerability was related to the defendant's selection of the particular victim, the offense level should be increased by a total of 4 levels.

§Y224. The commission of an offense against the person of certain officials, such as the President and other high level officials or law enforcement or corrections personnel, or against someone who was an official guest or other person invoking the protection of the United States, carries with it an additional impingement upon the authority of government deserving of additional punishment.

§Y225. Definitions of various degrees of bodily injury are found in different parts of the federal code, See, 18 U.S.C. § 1365; 18 U.S.C. § 1515; and 21 U.S.C. § 802(25), as amended, as well as under the presumptive parole guidelines.

For sentencing purposes the levels of physical injury are:

1. Permanent Bodily Injury. Permanent bodily injury means that the victim suffered a substantial risk of death from the injury, major disability, impairment, or loss of a bodily function or significant disfigurement.

2. Serious Bodily Injury. Serious bodily injury means that the victim suffered extreme pain from the injury, suffered substantial impairment of a bodily function, required medical intervention, such as surgery, hospitalization, or physical rehabilitation.

3. Bodily Injury. Bodily injury means any other physical injury.

The definitions for physical injury are meant to be suggestive only. If the injury lies between permanent and serious bodily injury, the sentencing judge shall increase by 5 levels. If the injury lies between serious and bodily injury, the sentencing judge shall increase by 3 levels.

§Y226. A defendant's possession or use of a weapon or other dangerous instrumentality in the course of or in relation to the commission of the offense shall increase the sentence based on the added danger presented. A weapon or dangerous instrumentality is possessed if it is carried on or about the person of the defendant, but is not visible to other persons. The threat of use, without the item being apparent to other persons is treated the same as mere possession. Display of a weapon or dangerous instrument means that it is presented or shown for the view of others. Any other defendant conduct that employs a weapon or dangerous instrument, except discharge, to any degree greater than already set forth constitutes a "use" for purposes of this provision.

If a firearm was used or possessed in crimes of violence or drug trafficking, separate prosecution and conviction under 18 U.S.C. § 924(c) results in imposition of a statutory mandatory sentence of at least five years, consecutive to the underlying offense, and this provision does not apply.

§Y227. If a person is taken hostage in order to facilitate commission of other criminal conduct or escape from its commission, substantial additional punishment is warranted.

§Y228. Situations may occur in which a defendant who committed an offense deserves a reduction in sentence because the offense was committed only in response to an imminent credible threat of serious harm to the defendant or the defendant's family. The reduction, however, is not available unless the defendant reasonably believes that there is no alternative course of conduct open to avoid the threatened harm. In determining whether there were other courses of conduct open to the defendant, the court should consider the immediacy of the threat.

The extent of reduction is determined by the seriousness of the offense, including whether it was a violent offense, and the nature and extent of the threatened harm. The greatest reduction is allowed only, if on balance, the threatened harm substantially outweighs the harm resulting from the offense. Consequently, it is available only when the offense is non-violent. For example, a defendant convicted of bank embezzlement and who does so because of a credible threat of immediate substantial bodily harm would qualify for reduction of sentence if the defendant reasonably believed there was no other means of avoiding the threatened injury.

A defendant who is coerced into committing an offense is not by virtue of that fact alone a minor participant in the offense. Section Z214, Role in the Offense, may apply as well if the contribution made by the defendant was in fact minor.

PART Z - ROLE IN THE OFFENSE

§Z211. If the defendant's role in the offense was one of organization, leadership, direction, or supervision of others or the part he played was particularly prominent, making him more culpable than other participants, the court shall increase the offense level by 1 to 6 levels, depending upon the nature and extent of the defendant's activities.

§Z212. If the defendant used a special skill, trade, training, education, or public position to facilitate the commission of an offense, the court shall increase the offense level by 1 to 4 levels, depending upon the special role of the defendant and his overall contribution to the commission of the offense.

§Z213. If the defendant was either a sole participant not subject to Z212 or if he shared comparable responsibility with other participants, no adjustment in the offense level shall be made for role.

§Z214. If the defendant was a minor participant in the offense, or voluntarily withdrew from a conspiracy, or voluntarily abandoned participation in the crime after an attempt was made but before commission of the underlying offense, the court shall reduce the offense level by 1 to 6 levels, depending upon the defendant's relative culpability and the nature of the criminal conduct involved.

Commentary

The sentencing judge shall select the most appropriate category in §§Z211-Z214 to reflect the defendant's role in the offense and relative culpability.

Section Z211 gives latitude to the court in distinguishing levels of culpability. Titles such as "leader," "kingpin," or "boss" are not controlling. It is the defendant's actual role in the offense that is important. Factors the court should consider include the exercise of decision-making authority, the degree of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the planning or organization of the offense, the scope of the illegal activity, the nature and seriousness of the criminal activity, and the degree of control and authority exercised over others.

Section Z212 increases the sentence of a defendant who uses a special skill, training, education, trade, or public position to facilitate the commission of a crime. Thus, a pilot who smuggles cocaine from Colombia in a private plane, a doctor who prepares fraudulent drug prescriptions, or medical reports in an automobile accident insurance scheme, or a deputy sheriff who conspires with private citizens to commit a civil rights violation, would be subject to this provision. A sole participant in an offense who uses a special expertise or public position for criminal purposes qualifies for this adjustment because of the higher degree of culpability involved. Of course, a defendant who uses a skill common to many, such as the ability to drive an automobile or operate office equipment, would not be subject to an increase under this section. If §Z211 applies, do not apply §Z212.

Section Z213 applies to a sole participant in an offense who is not subject to §Z214 and to multiple defendants who have comparable roles in the offense.

Section Z214 applies to a defendant who has a limited role in an offense that is planned, directed, and controlled by another person or persons. A minor participant is one who is not in a position to make decisions affecting the offense or to benefit substantially from its commission. His participation may have been the result of a personal or business relationship with a more culpable individual who exerted a controlling influence. In determining the appropriate sentence, the court shall evaluate and state reasons based on the nature of the defendant's role and conduct in relation to other participants. Also, individuals who are convicted of conspiracy or attempts, but who voluntarily withdrew from the conspiracy or voluntarily abandoned participation before the commission of the underlying offense, may be entitled to some reduction in sentence, depending upon the facts and circumstances of the withdrawal or abandonment. The reason for the abandonment or withdrawal is of paramount importance. For example, if the defendant abandoned the criminal activity because of fear of apprehension or because of suspicion that a co-conspirator was cooperating with law enforcement officials, the defendant would not be entitled to a reduction.

CHAPTER THREE - OFFENDER CHARACTERISTICS

PART A - CRIMINAL HISTORY

§A311. Criminal History Category

The total points from items (a) through (e) provide the criminal history category used in the Sentencing Table in Chapter One.

(a) Add 3 points for each prior sentence of imprisonment for more than one year.

(b) Add 2 points for each prior sentence of imprisonment for sixty days or more not counted in (a).

(c) Add 1 point for each prior sentence not included in (a) or (b), up to a total of 6 points for this item.

(d) Add 2 points if the defendant committed the current offense while under any form of criminal justice control, including probation, parole, federal supervised release, custody or escape status, or any form of release pending trial, sentencing, or appeal.

(e) Add 2 points if the defendant committed the current offense (1) within three years after release from, or while in custody or escape status on, a prior sentence of imprisonment for more than one year, or (2) within three years after imposition of any other prior countable sentence.

§A312. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the current offense of conviction.

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

(3) A conviction for which the imposition of sentence was totally suspended or stayed shall be counted as a prior sentence under §A311(c).

(b) Sentence of Imprisonment Defined

(1) The term "sentence of imprisonment" means a sentence of incarceration, and refers to the maximum sentence imposed.

(2) If part of a "sentence of imprisonment" was suspended, the "sentence of imprisonment" refers to the portion that was not suspended.

(c) Misdemeanors and Petty Offenses

Sentences for all felonies are counted. Sentences for misdemeanors and petty offenses are counted, except as follows:

(1) Sentences for the following offenses are not counted unless the sentence was a term of probation of at least one year, imprisonment for thirty days or more, or the prior offense was similar to a current offense:

Disorderly conduct
Driving without a license or with a revoked or suspended license
Fish and game violations
Gambling
Local ordinance violations
Trespassing

(2) Sentences for the following offenses are not counted:

Hitchhiking
Juvenile status offenses and truancy
Loitering
Public intoxication and similar offenses
Vagrancy
Minor traffic infractions (Note, driving while intoxicated or under the influence, and hit and run offenses involving personal injury are not minor traffic infractions and, therefore, are counted.)

(d) Offenses Committed Prior to Age Eighteen

(1) If the defendant was convicted as an adult and received a sentence of imprisonment for a term of more than one year, add 3 points under §A311(a).

(2) In any other case,

(A) add 2 points under §A311(b) for each adult or juvenile sentence to confinement for sixty days or more if the defendant was released from confinement within five years of the commencement of the current offense;

(B) add 1 point under §A311(c) for each adult or juvenile sentence imposed within five years of the commencement of the current offense not covered in (A).

(e) Applicable Time Period

(1) Any sentence of imprisonment for more than one year that was imposed within fifteen years of the current offense shall be counted in computing criminal history. Also count any prior sentence of imprisonment for more than one year that resulted in the defendant's incarceration during any part of the fifteen year period.

(2) Any other prior sentence imposed more than ten years prior to the current offense is not counted.

(f) Diversionary Dispositions

A diversionary agreement in which the defendant admitted guilt may be counted as a sentence under §A311(c). Diversions from juvenile court are not counted.

(g) Military Sentences

Sentences resulting from military offenses are counted if imposed by a general or special court martial. Sentences imposed by a summary court martial or Article 15 proceeding are not counted.

(h) Foreign Sentences

Sentences resulting from foreign convictions may only be considered under §A313, Similar Misconduct, or §A315, Adequacy of Criminal History Category.

(i) Tribal Court Sentences

Sentences resulting from tribal court convictions may only be considered under §A313, Similar Misconduct, or §A315, Adequacy of Criminal History Category.

(j) Revocations of Probation, Parole, Mandatory Release, or Supervised Release

(1) Revocation of probation or federal supervised release affects the total points for §A311(a), (b), (c), and (e). Revocation of parole, special parole, or mandatory release affects the total points only for §A311(e), i.e., recency of the current offense.

(2) For a prior revocation of probation or federal supervised release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history category for §A311(a), (b), and (c).

(3) If the sentence imposed on prior revocation of probation or federal supervised release was more than one year, use the date of release to compute §A311(e).

(4) If the sentence imposed on prior revocation of probation or federal supervised release was at least sixty days but less than one year, use the date of revocation to compute §A311(e).

(5) If the prior revocation of parole, special parole, or mandatory release resulted in incarceration for sixty days or more, use the date of release from imprisonment to compute §A311(e).

(k) Date of Current Offense

The date of the current offense is defined by the date of commission of the first overt act of the current offense(s).

POLICY STATEMENTS

§A313. Similar Misconduct

(a) Aspects of a defendant's criminal history not included in §A311 may warrant consideration. Reliable information regarding the following misconduct may be the basis for a sentence at the maximum applicable guideline range, or for a departure above the guidelines:

(1) Prior similar misconduct established by a civil adjudication, by a failure to comply with an administrative order, or by other information that has not been used to aggravate the offense level in Chapter Two; or

(2) Prior similar adult criminal conduct not resulting in a criminal charge or conviction.

§A314. Similar Prior Convictions

The sentencing judge may take into account the similarity between prior convictions and the current offense in selecting the point within the applicable sentencing range. Prior convictions similar to the current offense may warrant a sentence at or near the maximum of the applicable guideline range.

§A315. Adequacy of Criminal History Category

The sentencing judge shall take into account the relative seriousness of the prior convictions in selecting a point within the sentencing range. If the criminal history category does not adequately reflect the seriousness of past criminal conduct; or if the defendant poses a danger to the public; or if there is a likelihood the defendant will commit other crimes, the court should depart from the guidelines in imposing the appropriate sentence.

§A316. Criminal Livelihood

If the defendant derives a substantial portion of income from criminal activity, a sentence above the applicable guideline range may be imposed. This policy statement implements 28 U.S.C. § 994(i)(2).

Commentary

Sections A311 and A312 provide instructions for calculation of criminal history. The total criminal history points determine a defendant's criminal history category for the Sentencing Table in Chapter One. The sentencing range for a given offense level increases with the number of criminal history points. If a defendant's total criminal history points exceed ten, a sentence above the applicable guideline range is warranted.

Criminal History Points. Three points are added for each sentence counted under §A311(a). There is no limit to the number of points countable under this item. Two points are added for each sentence counted under §A311(b). There is no limit to the number of points countable under this item. One point is added for each sentence counted under §A311(c), up to a maximum of six points for this item. If the defendant is under any form of criminal justice control as specified in §A311(d), two points are added for this item. If the defendant has committed the current offense under any condition specified in §A311(e), two points are added for this item.

Prior Convictions. Prior convictions represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was a felony or misdemeanor. Imposition of a sentence of more than a year of imprisonment generally reflects a judicial assessment of the seriousness and scope of the underlying criminal conduct, particularly when judges have considered total offense behavior. In recognition of the imperfection of this measure, however, §A313 and §A315 permit information about the significance or similarity of past conduct underlying prior convictions to be used in deciding where to sentence a defendant within the applicable sentencing range or in deciding whether to sentence outside the applicable guideline. For example, where a defendant's criminal history category does not adequately reflect the extent of recidivism demonstrated by the defendant, a sentence above the applicable guideline is warranted.

The sentence distinctions in §A311(a), (b), and (c) represent a custody sentence longer than one year, a custody sentence of sixty days or more but not greater than one year, and other sentences including custody sentences of less than sixty days, probation, fines, and residency in a halfway house. Criminal history points are based on the sentence imposed. To be considered a custody sentence, time must have been served (or, if the defendant escaped, would have been served). The maximum sentence shall be the sentence of imprisonment for purposes of applying §A311(a), (b), or (c).

In addition to the criminal history adjustments for the number and severity of prior convictions, §A311(d) provides an enhancement if the defendant was under criminal justice control during the commission of the offense. This section also applies if the defendant

committed the current offense while on release pending trial, sentencing, or appeal of another case. This adjustment does not apply to a separate conviction for committing a crime while on release under 18 U.S.C. § 3147.

Section A311(e) provides an enhancement if the defendant was recently released from custody. For sentences exceeding one year, the date of release from custody was chosen because the release may have been some years after the date of imposition. For other sentences, the date of imposition of sentence was selected because of the difficulty in obtaining accurate release dates on short sentences served in jails, and because the date of imposition would be within a year of the release date.

Offenses Committed Prior to Age Eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment for more than one year, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the commencement of the current offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

Applicable Time Period. Section A312(e) establishes the time period within which prior sentences may be considered by the court in assigning the criminal history category. If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct, the similarity or seriousness of prior convictions, or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining where within the guideline range to impose the sentence or whether to depart and sentence above the applicable guideline level.

Diversionary Dispositions. Section A312(f) authorizes but does not require the counting of prior diversionary dispositions. Diversions that are recent, similar to the current offense, or otherwise relevant for sentencing purposes are to be counted.

Revocations to be Considered. Revocations of probation and federal supervised release result in modification of the sentence originally imposed. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or federal supervised release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Revocations of parole, special parole, and mandatory release, as well as revocations of probation and supervised release, may result in additional points for recency of criminal record under §A311(e).

Factors Justifying Departure. The values assigned to determine the criminal history category do not take into account a pattern of violent criminal behavior, civil or administrative sanctions imposed as part of an enforcement or regulatory scheme, or any factors that might indicate ongoing criminal behavior, (such as evidence of significant income for which there is no legitimate source). These factors may justify a sentence above the guidelines.

PART B - SPECIAL OFFENDERS

28 U.S.C. § 994(h)

§B311. Special Offenders Defined

If (1) the defendant was at least eighteen years old at the time of the current offense, and (2) more than a minor participant in the current offense, and (3) the current offense is a crime of violence or trafficking in a controlled substance, and (4) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense, the sentence shall be at or near the maximum term of imprisonment authorized by statute for the offense of conviction.

Commentary

The special offenders provision implements 28 U.S.C. § 994(h).

Crimes of violence are offenses that involve force or threat of force, including robbery, kidnapping, arson, criminal sexual conduct, and any other felony offenses that, by their nature, involve the use of physical force. The controlled substance offenses covered by this provision are identified in 21 U.S.C. § 841; 21 U.S.C. §§ 952(a), 955, 955a, 959; and in §§ 405B and 416 of the Controlled Substance Act as amended in 1986.

If the guideline range in the Sentencing Table provides for a maximum penalty less than the statutory maximum for the offense of conviction, increase the offense level to the lowest level that includes the statutory maximum for the offense of conviction. To that level, make any applicable adjustment in Part C, Post-Offense Conduct, and any authorized departure.

PART C - POST-OFFENSE CONDUCT

1. OBSTRUCTION OF JUSTICE AND PERJURY

§C311. If the defendant obstructed or attempted to obstruct the administration of justice during the investigation or prosecution of the offense of conviction, increase the offense level from Chapter Two by 1 to 4 levels, depending upon the nature of the conduct.

(a) The appropriate adjustment shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) destruction or concealment of material evidence or attempts to do so;

(2) direction to or procurement of another person to destroy or conceal material evidence or attempts to do so;

(3) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record before a preliminary or grand jury proceeding, during trial, during a sentencing hearing, or any other judicial proceeding;

(4) threatening, intimidating, or otherwise unlawfully attempting to influence a witness or juror, directly or indirectly.

Commentary

This section provides a range of sentence enhancements for a defendant who engages in conduct calculated to unlawfully mislead or deceive authorities or those involved in a judicial proceeding. Before a sentence may be aggravated under this section, the sentencing judge must state reasons and determine the appropriate adjustment according to the nature of the conduct and its impact on the administration of justice.

The aggravation of a sentence because of perjury or obstruction of justice is in recognition of a basic principle that no one has a right to lie, deceive, or direct others to do so.

This provision is not intended to punish a defendant for the exercise of any Constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

This provision does not apply to sentences imposed after an independent prosecution for perjury or obstruction of justice.

* * * * *

2. ACCEPTANCE OF RESPONSIBILITY

§C321. If the defendant demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction, the court may reduce the offense level by 1 to 3 levels, depending upon the nature of the case and manner and extent by which the defendant acknowledged responsibility.

(a) The appropriate adjustment shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) voluntary surrender to authorities before charges are filed or an arrest warrant is executed;

(2) voluntary termination or withdrawal from criminal activity or associations;

(3) voluntary payment of restitution to victim(s) prior to adjudication of guilt;

(4) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

(5) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(6) voluntary resignation from the office or position held during the commission of the offense;

(7) timeliness of the manifested acceptance of responsibility; and

(8) any other objective conduct that establishes the defendant's affirmative acceptance of personal responsibility for the offense.

§C322. A defendant may be given consideration under §C321 without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or a jury or the practical certainty of the evidence of the defendant's guilt.

§C323. A defendant who enters a guilty plea is not entitled to a sentencing reduction under §C321 as a matter of right.

§C324. Since an adjustment for acceptance of responsibility rests exclusively in the discretion of the sentencing judge, it may be denied without any requirement that the sentencing judge state reasons.

Commentary

The reduction of sentence available under §C321 recognizes a number of societal interests. The defendant who affirmatively accepts personal responsibility for the offense, who takes affirmative steps to dissociate from past criminal conduct, and who attempts to rectify the harm caused by the conduct may be entitled to receive recognition for these socially desirable

actions. The conduct listed is illustrative only. The timeliness of the defendant's conduct in manifesting an acceptance of responsibility for the offense is particularly important in determining the amount of reduction granted.

The sentencing judge is in a unique position to evaluate whether the defendant's expressions of remorse are sincere or merely self-serving. For this reason, the sentencing judge is not required to reduce an otherwise applicable guideline sentence. If the sentencing judge finds that the defendant is entitled to a reduction under this section, the amount of the reduction shall be determined by the court. However, the reduction may not exceed three offense levels. In the event a reduction is given, the sentencing judge shall state reasons for the level of reduction. If no reduction is given, there is no requirement that reasons be stated.

The availability of a reduction under §C321 is not governed by the plea entered. A defendant may manifest sincere contrition and take steps toward rehabilitation even if he exercises his constitutional right to a trial. This often occurs when a defendant decides to go to trial to assert and preserve issues that do not relate to factual guilt, a constitutional challenge to a statute, a challenge to the applicability of a statute to his conduct, or to raise evidentiary issues that might produce an acquittal. Conversely, although a guilty plea may be some evidence of the offender's acceptance of responsibility, it does not automatically entitle him to a sentencing adjustment.

* * * * *

3. COOPERATION

§C331. If the defendant cooperated with authorities by providing significant and truthful information or testimony regarding the criminal activities of others, by assisting in an ongoing investigation, or by providing authorities with other substantial assistance regarding the criminal activities of others, the court may decrease the sentence as appropriate.

(a) The appropriate adjustment shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's cooperation, taking into consideration the government's evaluation;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's cooperation;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his cooperation;

(5) the timeliness of the defendant's cooperation; or

(6) any other relevant factor.

§C332. A defendant's refusal to cooperate with authorities in the investigation of other persons may not be considered as a sentencing factor, except to the extent such conduct may reflect adversely upon the defendant's claim that he has abandoned criminal activity and associations under Acceptance of Responsibility, §C321.

Commentary

A defendant's willingness to cooperate with authorities in the investigation of criminal activities has long been recognized as a mitigating sentencing factor. The nature, extent, and significance of cooperation can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is therefore afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

The sentencing reduction for cooperation shall be considered independently of any reduction for acceptance of responsibility. Cooperation is directed to the investigation and prosecution of criminal activities of persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

Substantial weight should be given to the government's evaluation of the extent of the defendant's cooperation, particularly where the extent and value of the cooperation are difficult to ascertain.

The Commission considered and rejected the use of a defendant's refusal to cooperate with authorities as an aggravating sentencing factor. Refusal to cooperate with authorities based upon continued involvement with criminal activities and accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility.

Under circumstances set forth in 18 U.S.C. § 3553, as amended, cooperation may justify a sentence below a statutorily required minimum mandatory sentence.

PART D - OTHER OFFENDER CHARACTERISTICS

INTRODUCTION

Congress has directed the Commission to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. § 994(d).

§D311. Age

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Neither is it relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. However, age may be a reason to go above the guidelines when the offender is under the age of twenty-one and has an extensive criminal record, indicating the likelihood of future criminality and the need for incapacitation. Age may be a reason to go below the guidelines when the offender is elderly or infirm and where a form of punishment (e.g., house arrest) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.

§D312. Education and Vocational Skills

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall, except to the extent a defendant may have misused special training or education to facilitate criminal activity. See Chapter Two, Role in the Offense. Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service.

§D313. Mental and Emotional Conditions

Mental and emotional conditions that mitigate a defendant's culpability are discussed in the general provisions in Chapter Two. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release.

§D314. Physical Condition, Including Drug Dependence and Alcohol Abuse

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence alone may be a reason for imposing a sentence above the guidelines to the extent that the drug dependence leads to an increased propensity to commit crimes. Drug dependence is not a reason for imposing a sentence below the guidelines. If a defendant is sentenced to probation or supervised release, drug dependence should be taken into consideration with respect to the length and conditions of supervision.

Alcohol abuse alone is not a reason for imposing a sentence below the guidelines. If a defendant is sentenced to probation or supervised release, alcohol abuse should be taken into consideration with respect to the length and conditions of supervision.

§D315. Previous Employment Record

Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision. However, if a defendant derives a substantial portion of income from criminal activity, the sentence should be enhanced. 28 U.S.C. §994(i)(2). See Part A, Criminal Livelihood, §A316.

§D316. Family Ties and Responsibilities, and Community Ties

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Family responsibilities are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities and community ties may be relevant in the determination of the length and conditions of supervision.

§D317. Role in the Offense

A defendant's role in the offense is relevant in determining culpability and thus relevant in determining the appropriate sentence. See Chapter Two, Role in the Offense.

§D318. Criminal History

A defendant's criminal history is relevant in determining the appropriate sentence. See Part A, Criminal History Category, §A311.

§D319. Dependence upon Criminal Activity for a Livelihood

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Part A, Criminal Livelihood, §A316.

§D320. Race, Sex, National Origin, Creed, Religion and Socio-Economic Status

These factors are not relevant in the determination of a sentence.

CHAPTER FOUR - SENTENCING PROCEDURES, GUILTY PLEAS, AND PLEA AGREEMENTS

INTRODUCTION

These policy statements address sentencing procedures that are applicable in all cases, including those in which guilty or nolo contendere pleas are entered with or without a plea agreement, and convictions based upon guilty verdicts after trial.

Policy statements governing the acceptance of plea agreements under Rule 11(e)(1), Federal Rules of Criminal Procedure are intended to ensure that plea negotiation practices:

(1) promote the purposes of sentencing prescribed in 18 U.S.C. § 3553(a);

(2) provide for just sentencing of defendants based on criminal history and actual offense behavior; and

(3) do not perpetuate unwarranted sentencing disparity.

POLICY STATEMENTS

§A411. Sentencing Factors

In all cases, the court shall confirm that within a reasonable time before sentencing the attorney for the government and the attorney for the defendant, or the pro se defendant, have exchanged written statements of sentencing factors each party intends to rely on at sentencing. The parties are not precluded from asserting any additional sentencing factor if written notice is provided to the opposing party within a reasonable time before sentencing. Copies of all sentencing statements shall be filed contemporaneously with the court and submitted to the probation officer assigned to the case. This provision may be satisfied through a stipulation or plea agreement that complies with §A413.

§A412. Plea Agreements

The court may accept a plea agreement conforming with Rule 11(e), Federal Rules of Criminal Procedure, provided that:

(a) if the plea agreement includes the dismissal of any charges or counts pursuant to Rule 11(e)(1)(A), the court shall determine that the remaining charges or counts reflect the seriousness of the offense behavior;

(b) if the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that it is not bound by the sentencing recommendation. The court need not accept the recommendation, but, if it does it shall determine that either

(1) the recommended sentence is within the applicable guidelines range; or

(2) if the recommended sentence departs from the applicable guideline range, that reason exists for departure from the guidelines. Rule 11(e)(2) requires the court to advise the defendant that he has no right to withdraw his guilty plea if the court does not accept the sentencing recommendation set forth in the plea agreement.

(c) if the plea agreement includes a specific sentence pursuant to Rule 11(e)(1)(C), the court before agreeing to impose this sentence shall determine that either:

(1) the agreed sentence is within the applicable sentencing guideline range; or

(2) if the agreed sentence departs from the applicable guideline range, the court shall independently determine that reason exists for departure from the guidelines and that the agreed sentence does not undermine any of the legislatively mandated purposes of sentencing.

(d) The court may accept a guilty plea but defer decision whether to accept a plea agreement to dismiss charges or counts under §A412(a) or for a specific sentence under §A412(c). In such cases, however, the court shall afford the defendant an opportunity to withdraw the guilty plea if the plea agreement is later rejected. Rule 11(e)(4), Federal Rules of Criminal Procedure.

§A413. Ethical Standards for Plea Agreements

Plea agreements shall:

(a) set forth all relevant facts and circumstances of the offense conduct;

(b) not omit any material fact relevant to the commission of the offense; and

(c) not contain incomplete, non-existent, or misleading facts; or any other unethical representations.

§A414. Resolution of Disputed Factors

In all cases, the court shall resolve disputed factors "important to the sentencing determination" in accordance with Rule 32(a)(1), Federal Rules of Criminal Procedure (effective November 1, 1987).

§A415. Notice of Tentative Findings

In cases involving significant disputed sentencing factors, the Commission recommends that the court notify the parties of its tentative findings and provide a reasonable time for the submission of written objections before imposition of sentence.

CHAPTER FIVE - DETERMINING THE SENTENCE

INTRODUCTION

The Sentencing Reform Act directs the Commission to ensure that guidelines reflect the "general appropriateness" of imposing a non-incarcerative sentence on first offenders who have not been convicted of a violent crime or an otherwise serious offense. 28 U.S.C. § 994(j). The guidelines accomplish that result by the assignment of offense levels in Chapter Two, adjustments in Chapter Three, and the provisions of this chapter regarding sentencing options.

For certain categories of offenses and defendants, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter.

In general, the sentencing judge should impose the least restrictive alternative compatible with fulfilling the statutory purposes of sentencing. However, imprisonment should not be rejected simply because other, non-incarcerative sentences are within the guidelines. For example, imprisonment for a short period of time might be appropriate for some crimes having a relatively low statutory maximum, such as vote fraud or failure to file income tax returns, because it is likely to have a greater general deterrent effect than other sentences.

If the application of the guidelines results in a sentence greater than the maximum authorized by statute for the offense of conviction, then the maximum authorized by statute shall apply. A number of offenses carry statutory minimum mandatory sentences. If the application of the guidelines results in a sentence less than the minimum sentence required by statute, the statutory minimum shall apply.

1. PROBATION

18 U.S.C. § 3561
18 U.S.C. § 3563

§A511. Imposition of a Term of Probation

(a) Subject to the restrictions in subsection (b) below, the court may impose a sentence of probation if:

(1) the minimum term of imprisonment in the range specified by the Sentencing Table in Chapter One is zero months;

(2) the minimum term of imprisonment specified by the Sentencing Table is not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided at §A521(c).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

(c) Where the Sentencing Table specifies a minimum term of imprisonment of more than six months (e.g., level 10 for first offenders), a sentence of probation is not authorized by the guidelines, and may be imposed only by the court departing from the guidelines for stated reasons.

§A512. Term of Probation

When a term of probation is imposed, the guideline for the length of the term shall be:

(a) at least one year but not more than five years if the offense level is 6 or greater;

(b) no more than three years in any other case.

§A513. Conditions of Probation

(a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1).

(b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. § 3563(b). See the recommended conditions set forth in the Commentary below.

(c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service. 18 U.S.C. § 3563(a)(2).

(d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(a)(11). Intermittent confinement shall be credited toward the guideline for imprisonment at §A521 as provided in the schedule at §A521(c).

Commentary

Section A511 provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case not prohibited by statute or inconsistent with the requirements of the guidelines set forth at §A521. Section A511(b)(3) reflects Congressional intent to abolish split sentences of imprisonment and probation. S. REP. N0. 225, 98th Cong., 1st Sess. 89.

Section A512 governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than six. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation is also used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation, and it may not often be possible to determine the amount of time required for the satisfaction of such payments or program in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the defendant's offense level (the offense level from Chapter Two, as adjusted by any applicable offender characteristics from Chapter Three). Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.

Section A513 describes mandatory and discretionary conditions of probation. The following conditions are generally recommended for both probation and supervised release:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall promptly notify the probation officer of any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within three days of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The following conditions of probation are required under the circumstances described:

(14) Restitution

If the court imposes an order of restitution, payment of restitution or adherence to a court ordered installment schedule becomes a condition of probation as a matter of law. 18 U.S.C. § 3663(g). See §A541, Restitution.

(15) Fines

If the court imposes a fine, payment or adherence to a court ordered installment schedule becomes a condition of probation as a matter of law. 18 U.S.C. § 3563(a). If an installment schedule is imposed, the court may impose a condition of probation prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless he is in compliance with the payment schedule.

The following conditions of probation may be warranted in specific circumstances:

(16) Possession of Weapons

If the current conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the current offense of conviction, it is recommended that a condition of probation be imposed prohibiting the defendant from possessing a firearm or other dangerous weapon.

(17) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, it is recommended that a condition be imposed requiring the defendant to provide the probation officer access to any requested financial information.

(18) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. See §A551, Community Confinement.

(19) Home Detention

Home detention may be imposed as a condition of probation. See §A552, Home Detention.

(20) Community Service

Community service may be imposed as a condition of probation. See §A553, Community Service.

(21) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §A555, Occupational Restrictions.

The court may impose any other conditions it deems appropriate.

* * * * *

2. IMPRISONMENT

18 U.S.C. § 3581
18 U.S.C. § 3582

§A521. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the guideline range.

(b) If the minimum term of imprisonment in the guideline range is zero months, a sentence of imprisonment is not required unless the applicable guideline in Chapter Two expressly requires a term of imprisonment.

(c) If the minimum term of imprisonment in the guideline range is from one to six months, the guidelines require (1) a sentence of imprisonment, or (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment, according to the following schedule (provided however, that this section is generally inapplicable to defendants with a criminal history category greater than Category II):

(1) Thirty days of intermittent confinement in prison or jail for one month of imprisonment (for purposes of this provision, each calendar day during which the defendant is confined for at least twelve hours counts as a day of intermittent confinement);

(2) One month of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one month of imprisonment;

(3) One month of home detention for one month of imprisonment.

(d) If the minimum term of imprisonment in the guideline range is more than six months, the guidelines require that the minimum be satisfied by a sentence of imprisonment.

Commentary

Section A521(b) provides that if the minimum term of imprisonment set forth in the guidelines is zero months, the court is permitted, but not required, to impose a sentence of probation unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense.

Section A521(c) provides that if the guidelines require a minimum term of imprisonment of six months or less, the term may be satisfied either by a sentence of imprisonment or by a sentence of probation with a condition requiring a period of intermittent confinement, community confinement, or home detention.

If §A521(c)(2) permits confinement in a community treatment center in lieu of imprisonment for reasons of addiction, such confinement should be used as a substitute for imprisonment only in cases where the defendant's dependence on an addictive substance contributed to the commission of the offense and there is a reasonable likelihood that completion of a treatment program will eliminate that dependence.

Although home detention may be substituted for imprisonment on the same scale as intermittent confinement and community confinement, this does not imply that home detention has a punitive or deterrent effect equivalent to those sanctions. Rather, the intent is to provide a sentencing judge the flexibility to use home detention as a meaningful sanction in cases in which a term of imprisonment is not warranted.

Section A521(d) provides that if the guidelines require a minimum period of imprisonment of more than six months, the minimum term must be satisfied by a sentence of imprisonment without the use of other sentencing options in §A521(c).

The sentencing judge shall determine the appropriate sentence within the applicable guideline range. For example, if the offense level is 20, Category I, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

In general, the maximum of the guideline range exceeds the minimum by the greater of 25 percent or six months, the limit allowed by 28 U.S.C. § 994(b) as amended by Pub. L. No. 99-363. An exception is made in the case of guideline ranges for extremely short terms of imprisonment. In such cases, the guideline range is generally narrower than the maximum range authorized by statute.

* * * * *

3. SUPERVISED RELEASE

18 U.S.C. § 3583

§A531. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case.

§A532. Term of Supervised Release

(a) If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater.

(b) Otherwise, when a term of supervised release is ordered, the length of the term shall be:

(1) three years for a defendant convicted of a Class A or B felony;

(2) two years for a defendant convicted of a Class C or D felony;

(3) one year for a defendant convicted of a Class E felony or a misdemeanor.

§A533. Conditions of Supervised Release

(a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d).

(b) The court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) the need to generally deter the criminal conduct of others, and (4) the need to provide the defendant rehabilitative treatment. 18 U.S.C. § 3583(d).

Commentary

Section A531(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by departure from the guideline requiring post release supervision.

Under §A531(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.

Section A532 specifies the length of a term of supervised release that is to be imposed. Subsection (a) applies to statutes, such as some provisions of the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release. Subsection (b) applies to all other statutes, and specifies terms that are the maximum permitted by law. The terms of supervisory release authorized by statute are considerably shorter than those authorized as terms of probation.

Section A533 applies to conditions of supervised release. The recommended conditions for supervised release are the same as those recommended for probation. (See Commentary under §A513.)

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4. RESTITUTION, FINES, ASSESSMENTS, FORFEITURES

18 U.S.C. §§ 1956 - 1957
18 U.S.C. § 1963
18 U.S.C. § 3013
18 U.S.C. §§ 3553 - 3554
18 U.S.C. § 3556
18 U.S.C. §§ 3571 - 3572
18 U.S.C. § 3579
18 U.S.C. § 3614
18 U.S.C. §§ 3663 - 3664
18 U.S.C. §§ 3681 - 3682
21 U.S.C. § 841
21 U.S.C. § 848
21 U.S.C. § 853
21 U.S.C. § 960
49 U.S.C. § 1472

§A541. Restitution

(a) Restitution shall be ordered for convictions under Title 18 of the United States Code or under 49 U.S.C. § 1472(h), (i), (j) or (n) in accordance with 18 U.S.C. §3663(d).

(b) Restitution may be ordered as a condition of probation or supervised release or as an independent sentence. If restitution is imposed as an independent sentence, the restitution order becomes a condition of any probationary sentence or supervised release, as a matter of law.

(c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

Commentary

Section 3553(a)(7) of Title 18 requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664 for violations of Title 18 and of designated subdivisions of 49 U.S.C. § 1472. Restitution is not precluded, however, as a condition of probation or supervised release for other offenses. See S. REP. NO. 225, 98th Cong., 1st Sess. 95-96. An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. § 3663 where victims require relief more promptly than the civil justice system provides.

Section 3663(d) requires the court to "impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong sentencing." If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3663(a)(2).

In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. § 3664(a).

Pursuant to Rule 32(c)(2)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. The report must contain information about financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence, supported by a preponderance of evidence. 18 U.S.C. § 3664(d).

A court's authority to deny restitution is limited. Even "in those unusual cases where the precise amount owed is difficult to determine, section 3579(d) [the identical predecessor of section 3663(d)] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. REP. NO. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2515, 2537.

Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. § 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment be paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or five years after the date of sentencing in any other case. 18 U.S.C. § 3663(f)(1) and (2). The restitution order should specify how and to whom payment is to be made.

§A542. Fines for Individual Defendants

(a) Except as provided in subdivision (f) below, the court shall impose a fine, either as the sole sanction if a term of imprisonment is not required, or in conjunction with other sanctions.

(b) (1) The generally applicable guideline minimum and maximum fine for each offense level is shown in the Fine Table in subsection (c) below.

(2) If the guideline for the offense prescribes a different rule for imposing fines, that rule takes precedence. Unless a statute expressly authorizes a greater amount, no fine may exceed $250,000 for a felony or a misdemeanor resulting in the loss of human life; $25,000 for any other misdemeanor; or $1,000 for an infraction. 18 U.S.C. § 3571(b)(1).

(c) (1) The minimum of the guideline fine range is the greater of:

(a) the amount shown in column A of the table below; or

(b) any monetary gain to the defendant, less any restitution made or ordered.

(2) The maximum of the guideline fine range is the greater of:

(a) the amount shown in column B of the table below;

(b) twice the estimated loss to the victim; or

(c) three times the estimated gain to the defendant.

(3) Fine Table

Offense Level	A Minimum	B Maximum
1	$25	$250
2-3	$100	$1,000
4-5	$250	$2,500
6-7	$500	$5,000
8-9	$1,000	$10,000
10-11	$2,000	$20,000
12-13	$3,000	$30,000
14-15	$4,000	$40,000
16-17	$5,000	$50,000
18-19	$6,000	$60,000
20-22	$7,500	$75,000
23-25	$10,000	$100,000
26-28	$12,500	$125,000
29-31	$15,000	$150,000
32-34	$17,500	$175,000
35-37	$20,000	$200,000
38 and above	$25,000	$250,000

(4) Provision (c)(2), limiting the maximum fine, does not apply to statutes authorizing maximum fines greater than $250,000. For convictions under those statutes, however, the court should consider the factors set forth in subsection (d) in determining the amount of the fine.

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) the ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;

(4) any restitution or reparation that the defendant has made or is obligated to make;

(5) collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) whether the defendant previously has been fined a lesser amount for a similar offense; and

(7) any other pertinent equitable considerations.

(e) The amount of the fine should always be sufficient to ensure that the total sanction is punitive.

(f) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider other sanctions in lieu of all or a portion of the fine, and must impose a total combined sanction that is punitive. Community service is the preferred alternative when a fine is not feasible, but any additional sanction other than one which increases imprisonment beyond the applicable guideline range is permissible within the guidelines.

(g) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of

probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(h) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

(i) Notwithstanding any other provisions of this section, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment or probation ordered, unless the defendant is unable to pay such costs. For purposes of this section, the court shall presume that the cost of imprisonment is $1,500 per month, and the cost of probation supervision is $50 to $300 per month, depending upon the degree of supervision.

Commentary

These guidelines provide for a relatively wide and flexible range of fines. More detailed guidelines for the imposition of fines may be promulgated after analyzing practice under these initial guidelines. Recent legislation provides for substantial increases in fines. 18 U.S.C. § 3571(b). With few restrictions, 42 U.S.C. § 10601(b), and (c) authorize fine payments up to $100 million to be deposited in the Crime Victims Fund in the United States Treasury. With vigorous enforcement by the Department of Justice and United States Probation Officers, higher fines will be effective punitive and deterrent sanctions.

Section A542(c)(2) provides for alternative calculations of the maximum fine as three times the gain or twice the loss. Different multiples were chosen to reflect the fact that most offenses result in losses to society and provable gains to defendants. When only the gain can be estimated, it is likely that the court will be unable to require restitution. Hence, a higher multiple of the gain is needed to approximate a fine based on the loss involved. It is intended that these alternatives will not require precise calculation.

Section A542(c)(4) applies to statutes that provide for larger fines than are applicable under §A542(c)(2). These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; and 18 U.S.C. §1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction.

If the court concludes the defendant has undisclosed income or assets that justify a greater fine to satisfy the purposes of sentencing in 18 U.S.C. § 3553(a)(2)(A) and (B), a fine higher than would otherwise be warranted under §A542 should be imposed. The court may base its conclusion on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it should aggravate his sentence in accordance with Chapter Three, Part B (Post-Offense Conduct).

If no term of imprisonment is imposed and the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, and that payment of the fine be a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.

§A543. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

Commentary

The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs.

The Act requires the court to impose assessments in the following amounts:

$25, if the defendant is an individual convicted of a misdemeanor;
$50, if the defendant is an individual convicted of a felony;
$100, if the defendant is an organization convicted of a misdemeanor; and
$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.

The Act does not authorize the court to waive imposition of the assessment.

§A544. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

Commentary

Forfeiture generally. Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires a court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

Special Forfeiture of Collateral Profits of Crime. The provisions of 18 U.S.C. §§ 3681-3682 authorize a court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to

satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 18 U.S.C. § 3681(c)(2).

* * * * *

5. SENTENCING OPTIONS

18 U.S.C. § 3553
18 U.S.C. § 3555
18 U.S.C. § 3563
18 U.S.C. § 3583
18 U.S.C. § 3663
18 U.S.C. § 3742

§A551. Community Confinement

(a) Community confinement may be imposed as a condition of probation or supervised release.

(b) Community confinement may be imposed in lieu of imprisonment, as provided in §A521.

Commentary

"Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility, and community service, employment, or treatment during non-residential hours.

Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.

§A552. Home Detention

(a) Home detention may be imposed as a condition of probation or supervised release.

(b) Home detention may be imposed in lieu of imprisonment, as provided in §A521, provided, however, that the circumstances of home confinement are sufficient to ensure compliance, including the detection of any violation.

Commentary

"Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence permanently, or during specified hours, enforced by appropriate means of surveillance by the probation office.

Home detention generally should not be imposed for a period in excess of six months. A longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned. The sentencing judge should impose conditions of probation or supervised release assuring the defendant's participation in community service, treatment programs, or employment during non-detention hours. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention.

§A553. Community Service

(a) Community service may be ordered as a condition of probation or supervised release. If the defendant was convicted of a felony, the court must order one or more of the following sanctions: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2).

(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. § 3663(b)(4).

Commentary

Community service should generally not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.

§A554. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

Commentary

In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than $20,000 to give notice.

If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S.C. § 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.

The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process.

§A555. Occupational Restrictions

(a) The court shall impose a condition of probation or supervised release prohibiting a defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which he may do so, only if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and his conduct relevant to the offense of conviction;

(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which he was convicted; and

(3) imposition of such a restriction is reasonably necessary to protect the public.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

(c) If the defendant is an organization, occupational restrictions may only be imposed as a condition of probation or supervised release where necessary to prohibit the activities of a fraudulent enterprise.

Commentary

The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(6), or supervised release, 18 U.S.C. § 3583(d). Pursuant to section 3563(b)(6), a court may require a defendant to:

> *[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.*

Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. REP. NO. 225, 98th Cong., 1st Sess. 96-97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." Id. at 96. Section A555 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.

Section A555(c) authorizes the application of occupational restrictions to organizations, "where necessary to restrict the activities of a fraudulent enterprise." The Senate Judiciary Committee Report notes that the limitation of § 3563(b)(6) to individuals "should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law." S. REP. NO. 225, 98th Cong., 1st Sess. 96-97.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6) if "the sentence includes . . . a more limiting condition of probation or supervised release under section 3563(b)(6) . . . than the maximum established in the guideline." 18 U.S.C. § 3742(a)(3)(A). The government may appeal if the sentence includes a "less limiting" condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)(A).

The Comprehensive Crime Control Act expressly authorizes promulgation of policy statements regarding the appropriate use of conditions of probation and supervised release. 28 U.S.C. § 994(a)(2)(B). The Act does not expressly grant the authority to issue guidelines on the subject. The appellate review provisions of the Act, however, authorize appeals of occupational restrictions that deviate from the minimum and maximum limitations "established in the guideline" (emphasis added).

* * * * *

6. CONCURRENT AND CONSECUTIVE SENTENCES OF IMPRISONMENT

18 U.S.C. § 924(c)
18 U.S.C. §§ 3146 - 3147
18 U.S.C. § 3553
18 U.S.C. § 3584

§A561. Sentences imposed on multiple counts of an indictment, or on multiple consolidated indictments run concurrently, unless otherwise ordered by the court.

§A562. Concurrent sentences shall not be imposed in the following cases:

(a) Offenses for which consecutive sentences are required by law;

(b) Multiple counts of an indictment or multiple consolidated indictments, if concurrent sentences would not adequately serve the statutory purposes of sentencing, including just punishment, general and special deterrence, and incapacitation.

§A563. Sentences imposed at different times in separate cases run consecutively, unless the court finds that the underlying offenses in the separate cases arise from the same occurrences or transactions, or that the sentencing purposes set forth in 18 U.S.C. § 3553(a) would not be served by consecutive sentences.

§A564. Sentences imposed for conspiracy or solicitation and for an offense that was the sole object of the conspiracy or solicitation are assumed to run concurrently. 28 U.S.C. § 994(*l*)(2). Sentences imposed for an attempt and for the offense that was the sole object of the attempt shall run concurrently. 18 U.S.C. § 3584(a).

§A565. A sentence imposed for an offense involving a general prohibition shall run concurrently with a sentence imposed for an offense involving a violation of a specific prohibition encompassed in the general provision. 28 U.S.C. § 994(u).

Commentary

Congress has directed that multiple terms of imprisonment imposed at the same time run concurrently unless the court orders, or a statute governing one of the offenses of conviction mandates, that the sentences are to run consecutively. 18 U.S.C. § 3584(a). Congress has also directed that multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently. Id. In determining whether to impose concurrent or consecutive sentences, the court shall consider the purposes of sentencing, enumerated in 18 U.S.C. § 3553(a), as to each offense. 18 U.S.C. § 3584. With these legislative mandates in mind, guidelines were formulated pursuant to 28 U.S.C. § 944(a)(1)(D) for imposition of concurrent and consecutive sentences.

Concurrent sentencing for multiple count indictments is generally the current practice in routine cases. However, if the offense conduct violates substantial public interests or involves aggravated or ongoing criminal behavior, courts often impose consecutive sentences or a combination of consecutive and concurrent sentences. Congress clearly intended for the courts to retain the right to impose consecutive sentences, provided that a statutory mandate or a sentencing factor set forth in 18 U.S.C. § 3553(a) supports the court's decision.

Section A561 provides that multiple sentences imposed in the same case or in judicially consolidated cases run concurrently, unless otherwise ordered. This provides a mechanism for a determination whether to impose concurrent or consecutive sentences. It is not meant to create a presumption either for or against the imposition of concurrent or consecutive sentences. Section A563 provides that sentences imposed in different cases at different times run consecutively, unless the court finds that the underlying offense behavior is the same and the statutory purposes of sentencing would not be served by consecutive sentences.

Section A562(a) applies to offenses that are subject to statutorily required consecutive sentences. For example, a conviction for the use of a deadly or dangerous weapon or device in committing "a crime of violence" requires imposition of a consecutive five-year sentence for the first conviction and a mandatory consecutive sentence of ten years for subsequent convictions. 18 U.S.C. § 924(c). Similarly, a sentence imposed upon a conviction for failure to appear in court, as required by the conditions of release on bond, or to surrender for service of sentence, shall run consecutively to any other sentence imposed. 18 U.S.C. § 3146(b). A sentence imposed for commission of an offense while on release shall run consecutively to any other sentence of imprisonment. 18 U.S.C. § 3147.

Section A562(b) applies to criminal conduct that requires consecutive sentences to adequately punish the defendant for the scope and nature of his conduct and to deter others from chronic and often profitable criminal activity. Sophisticated fraud schemes, espionage, violent crimes, crimes involving corruption of governmental institutions, organized counterfeiting and theft operations, and willful, continuous violations of environmental laws are examples of ongoing conduct that may warrant consecutive sentences to adequately punish the defendant and to deter others.

Section A563 sets forth the general circumstances in which multiple sentences in the same or related cases do not run concurrently. In these cases, the court may impose consecutive sentences, or a combination of consecutive and concurrent sentences, to effectuate the sentencing purposes enumerated in 18 U.S.C. § 3553(a).

As explained at the beginning of Chapter Two, in determining the appropriate sentence the court should consider all conduct relevant to the offense of conviction and all relevant defendant characteristics. Thus, while concurrent sentences may be imposed in a multicount indictment, each sentence should reflect more than just a sentence imposed on an individual count of conviction as if the other acts of misconduct had not occurred. The sentence on any given count concurrent with others should incorporate all the relevant acts of misconduct committed by the defendant even though they may be recited in other counts. If the otherwise indicated sentence on any given count, taking into consideration all the relevant acts of misconduct by the defendant, calls for a sentence above the maximum permitted by law for the offense charged in that count, the court shall impose consecutive sentences to the extent necessary to fulfill the purposes enumerated in 18 U.S.C. § 3553(a).

CHAPTER SIX - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

INTRODUCTION

Regardless of the purposes for which a term of probation or supervised release is imposed, compliance with the conditions of supervision is essential if these sanctions are to be meaningful and acceptable. Only if the defendant perceives that failure to comply will result in a prompt and certain response from the court will the conditions be adhered to in a serious and conscientious manner. Consistency in handling violations of probation and supervised release is therefore necessary in order to reduce unwarranted disparity.

§A611. Categories of Violations

(a) A violation of any condition of probation or supervised release that constitutes new criminal conduct is a Category 1 violation.

(b) APPLICABLE TO FELONY PROBATION ONLY: A violation of any condition of probation resulting from a conviction for a felony requiring a defendant to pay a fine, restitution, or perform community service is a Category 2 violation.

(c) A violation of any condition of probation or supervised release except those in (a) and (b) above or in (d) below is a Category 3 violation.

(d) A violation of any condition of probation or supervised release, recommended in the commentary of Chapter Five, §A513, that does not constitute new criminal conduct is a Category 4 violation.

§A612. Reporting of Violations

(a) Category 1, 2, and 3 Violations

The United States Probation Officer shall report all Category 1, 2, and 3 violations to the court. With respect to conditions such as payment of fines, restitution, or performance of community service, the court and probation office should establish policies as to when non-compliance constitutes a violation.

(b) Category 4 Violations

The United States Probation Officer shall report all Category 4 violations to the court, unless the probation officer determines that the violation behavior can be handled through alternate means. Alternatives should only be used if the probation officer determines that their use: (1) will not present undue risk to the public; (2) will not depreciate either the defendant's or the public's respect for the court or the probation system; and, (3) is consistent with the court's intention for placing the defendant on supervision.

§A613. **Court Response to Violation Reports**

(a) Category 1 Violations

For violations of Category 1 (new criminal conduct), the court shall in most instances issue a violator's warrant and conduct a violation hearing. Rule 32.1, Federal Rules of Criminal Procedure. If the court determines that the violation has occurred, it normally shall revoke the probation or supervised release and impose a new sentence. If the court determines that revocation is not appropriate, it shall state its reasons and, in most instances, shall modify or increase the discretionary conditions of probation or supervised release to afford closer supervision.

(b) Category 2 and 3 Violations

For violations of these mandatory and discretionary conditions, the court shall assess the nature and seriousness of the violation to determine whether a violation hearing is required. If the defendant either will not or cannot adhere to the conditions, despite efforts by the probation officer to enforce compliance, the court shall conduct a hearing to determine the action necessary. This action might include modification or release from the condition (with the exception that at least one of the mandatory conditions of fine, restitution, or community service shall be required for a defendant convicted of a felony), the inclusion of other discretionary conditions, or revocation of the probation or supervised release.

(c) Category 4 Violations

For Category 4 violations, the court shall assess the nature and seriousness of the violation and determine whether a violation hearing is required. If the violation is deemed to be of a serious nature, or if it appears that despite efforts by the probation officer the defendant will not comply, the court shall conduct a hearing pursuant to Rule 32.1 and determine the appropriate action.

§A614. **Sentence to be Imposed Upon Revocation**

(a) Revocation of Probation

(1) Category 1 Violations

Upon revocation for a Category 1 violation, the court shall impose a sentence between the midpoint and maximum guideline range originally applicable. However, if the offense is unusually serious, the court may depart from the guideline range and impose any appropriate sentence up to the statutory maximum.

(2) Category 2 Violations

Upon revocation for a Category 2 violation, the court shall impose a sentence between the midpoint and maximum guideline range originally applicable.

(3) Category 3 and 4 Violations

Upon revocation for a Category 3 or Category 4 violation, the court shall impose a sentence within the guideline range originally applicable.

(4) Consecutive Sentence

If at the time of revocation the defendant is serving or subject to a custody sentence in another case, the court shall order the sentence imposed upon revocation to run consecutively to the prior custody sentence. This shall occur whether or not the prior custody sentence is related to the violation of probation.

(5) Allowable Considerations Upon Revocation

Upon revocation, no credit for time served under supervision shall be given. Additionally, no credit shall be given for time served as a special condition of probation in custody, community confinement, or home detention.

In determining the appropriate sentence upon revocation, the court shall consider the factors described in 18 U.S.C. § 3565(a), and the nature and seriousness of the violation.

The court may consider the defendant's adjustment and compliance otherwise to the conditions of probation. These considerations may include the amount of time successfully spent under supervision, payments toward fines or restitution, performance of community service, residency or participation in halfway houses, drug or other rehabilitation programs, and compliance with other conditions of probation.

(b) Revocation of Supervised Release

(1) Category 1 Violations

Upon revocation for a Category 1 violation, the court shall impose a sentence not less than one-third the term of supervised release originally imposed.

(2) Category 3 and 4 Violations

Upon revocation for a Category 3 or Category 4 violation, the court shall impose a sentence not to exceed two-thirds the term of supervised release originally imposed.

(3) Consecutive Sentence

If at the time of revocation the defendant is serving or subject to a custody sentence in another case, the court shall order the sentence imposed upon revocation to run consecutively to the prior custody sentence. This shall occur whether or not the prior custody sentence is related to the violation of supervised release.

(4) Allowable Considerations Upon Revocation

Upon revocation, the court shall give no credit for time served under supervision. Additionally, no credit shall be given for time served as a special condition of the supervised release in community confinement or home detention.

In determining the appropriate sentence upon revocation, the court shall consider the factors described in 18 U.S.C. § 3583(e), and the nature and seriousness of the violation.

The court may consider the defendant's adjustment and compliance otherwise to the conditions of supervised release. These considerations may include the amount of time successfully spent under supervision, payments toward fines or restitution, performance of community service, residency or participation in halfway houses, drug or other rehabilitation programs, and compliance with other conditions of supervised release.

Commentary

Categories of Violations. Violations of probation and supervised release and the sentence to be imposed upon revocation are affected by the category of the violation. While the guidelines establish when certain violations must be reported to the court, they are not intended to restrict action at an earlier point. The Commission emphasizes that at any time prior to that called for by these guidelines, the probation officer may report any violation to the court and request a violator's warrant. The court may then issue a warrant, conduct a hearing, and, upon determination that the violation has occurred, modify the conditions (through addition, deletion, or change of discretionary conditions), or revoke the probation or supervised release.

Category 1 violations include any violations of the statutorily required condition of not committing another crime. Category 2 violations apply to a felon placed on probation who fails to pay a fine, restitution, or perform community service. Category 3 violations are violations of any conditions imposed by the court that are not covered in Category 1, 2, or 4. Category 4 violations include any violations of the recommended conditions of probation or supervised release (except those constituting new criminal conduct).

Determining Category. Violations of certain conditions of probation and supervised release necessarily constitute new criminal behavior (e.g., violations of the mandatory condition prohibiting the commission of another crime, the recommended condition prohibiting possession of controlled substances, and, in the case of a convicted felon, possession of a firearm). When a violation of any condition constitutes new criminal behavior, the violation shall be treated under the guidelines applicable to Category 1 violations (new criminal behavior), both for purposes of handling the violation and resentencing if revocation occurs.

New Criminal Behavior. Probation officers shall immediately report new criminal behavior, Category 1 violations, to the court. In most instances, the court shall issue a violator's warrant and conduct a violation hearing. Upon determining that the violation has occurred, the anticipated disposition shall be revocation. If the court determines that revocation is not appropriate at that time, reasons shall be stated on the record. The court shall modify or increase the discretionary conditions of supervision to afford closer supervision.

The reporting of violations, issuance of violator warrants, and violation hearings based on new criminal behavior shall not be restricted to situations where new criminal charges have resulted. Rather, action shall be dependent upon the actual behavior of the defendant on probation or supervised released.

New Criminal Charges. In many instances where new criminal charges have been made but have not yet been disposed of, the court may wish to proceed in the issuance of a violator's warrant and in conduct a violation hearing. Instances where the court may wish to delay issuance of a warrant or conduct a violation hearing might include the following:

(1) the court determines that the new criminal charges are likely to be disposed of in the very near future;

(2) conducting a violation hearing prior to the disposition of the pending charges would place an unnecessary burden on the court because of extensive evidentiary proceedings or the unavailability of evidence for a violation hearing at the time; or

(3) the interests of justice are best served by delaying the issuance of a warrant or the violation hearing.

In deciding whether to delay the issuance of a violator's warrant or the violation hearing, the court shall consider the relative risk the defendant presents to the community during the pendency of the new criminal charges, and the seriousness of the alleged conduct. The court shall not permit the term of probation or supervised release to expire without issuance of a violator's warrant unless the probation officer's report indicates that the new criminal charges are without foundation and that the defendant has committed no act that constitutes new criminal behavior, or that the new prosecution is to be ended and that establishing the violation would place an undue burden on the court or would not be in the interests of justice.

When revocation occurs following conviction for new criminal charges, the sentence imposed shall be consecutive to any custody sentence that the defendant received for the new criminal conviction.

Violations for Drug Use. A recommended condition for probation and supervised release prohibits the possession, use, and other activities involving illicit drugs. A violation of this condition constitutes new criminal behavior. If a defendant submits to urinalysis pursuant to a discretionary condition of supervision, a positive reading would be a violation constituting new criminal behavior to be reported to the court. In instances where no new criminal charges have resulted and the indications are that the drug activities of the defendant are confined only to personal use, the court may wish to impose discretionary conditions requiring participation in a drug program and urinalysis. If there is continued drug use after placement in a drug program, the court should revoke the probation or supervised release because illegal drug use is closely correlated to other criminal activity and indicates unwillingness or inability on the part of the defendant to adhere to the conditions of supervision. If there are indications that the drug activities involve anything other than personal use, or if the defendant has a history of violence associated with drug use, the presumption is that supervision will be revoked.

Category 3 Violations. Category 3 violations are to be reported by the probation officer to the court. Should it become apparent that the defendant either cannot or will not adhere to the condition, the court should take the appropriate steps to address the violation. If the

defendant is unable to comply, these steps may include modification, or release from, the condition if it was discretionary. If the defendant is unwilling to comply, the court may modify or increase the conditions of supervision to promote compliance, or revoke the probation or supervised release.

Violations Involving Fines, Restitution, and Community Service. Violations of mandatory or discretionary conditions involving fines, restitution, and community service are to be reported to the court. Because there may be situations where the defendant is under a payment or community service work schedule and does not fully meet the requirement during a given time period or may otherwise be in default, the court shall establish with the probation office the point at which the matter is to be reported as a violation. For example, the court may decide to require a report only after the defendant is two full months in arrears in fine or restitution payments, or is not fulfilling his community service obligations. As with other violations, such a plan would not prohibit the probation officer or the court from taking earlier action.

Violations of Recommended Conditions. The Comprehensive Crime Control Act requires only one condition of probation imposed in every case, i.e., that the defendant not commit another criminal act while under supervision. If the defendant is placed on probation as the result of a felony conviction, the law also requires that a condition be imposed requiring the defendant to pay a fine, restitution, or perform community service. To make probation an acceptable sentencing option, a list is provided of recommended conditions of probation that must be included in every case along with the statutorily required conditions.

Violation of recommended conditions (except those constituting new criminal behavior) are to be reported by the probation officer to the court unless the probation officer determines that compliance can be achieved through alternate means that do not present an undue risk to the public. In handling violations in such a fashion, documented in the chronological record in the case file, the probation officer is to consider the court's intent in placing the defendant on probation or supervised release, and both the defendant's and the public's respect for the court and probation system. When violations in this category are particularly serious or are continued or flagrant, the probation officer should report them to the court for appropriate action. Because the recommended conditions are to be imposed in every case of probation or supervised release, the court should require compliance as opposed to modifying or dismissing any of these conditions.

Violations Involving Petty Offenses. Violation of petty offenses, such as public drunkenness and minor traffic offenses (not to include driving under the influence), are covered by the guidelines for Category 4 violations, and are not considered new criminal conduct. If the offense is of a serious nature or similar to the offense for which the defendant was placed on supervision, the matter shall be reported to the court. Likewise, if a pattern of these violations occurs, the court shall be notified. Any offenses that involve assaultive behavior, theft, or other acts of moral turpitude should be treated as Category 1 violations.

Revocation of Probation. Upon revocation of probation, the sentence to be imposed is based upon the category of violation and the sentencing range originally computed for the defendant, without regard to events that have occurred since its original computation. For example, if the original offense level was decreased for acceptance of responsibility, the resulting range would remain unchanged despite the fact that the defendant later failed to demonstrate such acceptance (e.g., failure to pay restitution to a victim). The defendant's criminal history score as originally computed would remain unchanged for purposes of sentencing on revocation. In the instances where the defendant was placed on probation

because the court departed from the applicable guideline range, the originally applicable guideline range is applicable upon revocation.

For revocation based on Category 1 violations, the sentence imposed should be between the midpoint and maximum of the guideline range originally applicable. Where the offense was unusually serious, the court may depart from the guideline range and impose any appropriate sentence up to the statutory maximum. For revocation based on Category 2 violations, the sentence imposed should be between the midpoint and the maximum of the guideline range originally applicable. These ranges are established to reflect the seriousness of violating those conditions that prohibit any criminal behavior or require a felon to pay a fine, restitution, or perform community service, the only statutorily required conditions of probation. For revocation based on other violations, the sentence should be within the originally applicable guideline range. Upon revocation the court may consider the seriousness of the violation as well as the defendant's adjustment and performance otherwise while under probation.

Revocation of Supervised Release. Upon revocation of supervised release, the sentence to be imposed is based upon the category of violation and the term of supervised release. For revocation based on Category 1 violations (new criminal behavior), a sentence of incarceration shall be imposed that is between one-third and the entire term of supervised release originally imposed. The minimum sentence is established to reflect the seriousness of violating the condition prohibiting any criminal behavior, the only statutorily required condition for an individual placed on supervised release. The latitude otherwise allowed the court in setting the sentence permits consideration of a number of factors, including the nature and seriousness of the criminal behavior, the relative length of the supervised release term, and the adjustment and compliance to the conditions of supervised release.

For revocation based on Category 3 and Category 4 violations (violations of discretionary conditions not involving new criminal behavior and recommended conditions of supervised release), a sentence not to exceed two-thirds of the supervised release term shall be imposed. While also allowing the court latitude in setting a sentence for these violations, the two-third restriction reflects that aggravated violations of Category 3 and Category 4 are not as serious as aggravated violations involving new criminal behavior. Within the permitted latitude, the court may consider factors including the nature and seriousness of the violation, the relative length of the supervised release, and the defendant's general adjustment and compliance with the conditions of supervised release.

Revocation for Violations of Conditions Involving Fines, Restitution, and Community Service. The Comprehensive Crime Control Act requires that individuals convicted of a felony who are sentenced to probation shall have as a condition of probation either payment of a fine, restitution, or performance of community service. 18 U.S.C. § 3563(a)(2). If the court orders a fine and places a defendant on probation, the payment of the fine or adherence to the court-established installment schedule shall be a condition of probation. Id. Emphasis is also placed on restitution. The court may order restitution upon conviction for certain offenses. If such an order is not included, the court must state its reasons on the record; if the defendant is sentenced to probation or supervised release, any restitution ordered shall be a condition of supervision. Id.

The conditions of fine, restitution, and community service are classified as Category 2 or Category 3 violations, depending upon whether they are mandatory or discretionary. Violations must always be reported to the court by the probation officer. Emphasis is given to the statutorily required conditions for felons placed on probation to pay a fine, restitution, or perform community service, through elimination of the lower half of the guideline range under

which the felony probationer is to be sentenced upon revocation for violation of one of these conditions.

18 U.S.C. § 3614 provides that a defendant may be resentenced if he knowingly fails to pay a delinquent fine, and may be sentenced to imprisonment only if the court determines that he willfully refused to pay or failed to make sufficient efforts. The defendant may also be resentenced if the court determines that because of the nature of the offense and characteristics of the defendant, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

18 U.S.C. § 3663(g) addresses revocation and modification of probation and supervised release based on failure to pay restitution. The court shall then consider the defendant's employment status, earning ability, financial resources, the willfulness of the failure to pay, and any other special circumstances that may have a bearing on the ability to pay.

The court must assess the nature and seriousness of any violation in determining the appropriate sentence within the guideline range. However, in most instances where the violation is a willful failure to pay a fine, restitution, or perform community service, the sentence should be at or near the maximum applicable guideline range.

Summary data on estimates of current sentencing practices are available on written request.

APPENDIX A:

AUTHORIZING LEGISLATION AND RELATED SENTENCING PROVISIONS

The legal authority for the United States Sentencing Commission ("Commission") and the related authority and procedures for sentencing in federal courts have their legislative foundation in the Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act of 1984, Public Law 98-473, October 12, 1984.).

The statutory authority of the Commission is codified in Chapter 58 of Title 28, United States Code, effective October 12, 1984. The related statutory authority for sentencing is codified in the new Chapters 227 and 229 of Title 18, United States Code, effective November 1, 1987. The Sentencing Reform Act of 1984 also added a new section 3742 at the end of Chapter 235 of Title 18, pertaining to appellate review of sentences.

These provisions subsequently were amended by Public Law 99-22 (April 15, 1985); Public Law 99-217, "The Sentencing Reform Amendments Act of 1985" (December 26, 1985); Public Law 99-363, "The Sentencing Guideline Adjustment Act of 1986" (July 11,1986); Public Law 99-570, "The Anti-Drug Abuse Act of 1986" (October 27, 1986); and Public Law 99-646, "The Criminal Law and Procedure Technical Amendments of 1986" (November 10, 1986).

Solely for the purpose of providing a reference to the law as it currently stands, these statutory provisions, as amended, are presented in this appendix. For the sake of brevity, historical notes and certain miscellaneous provisions are omitted. The Commission makes no representations concerning the accuracy of these provisions and recommends that authoritative sources be consulted where legal reliance is necessary.

TITLE 18--CRIMES AND CRIMINAL PROCEDURE
CHAPTER 227
Subchapter A--General Provisions

§ 3551. Authorized sentences

(a) In general.--Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.--An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(b)(1) a term of probation as authorized by subchapter B;

(b)(2) a fine as authorized by subchapter C; or

(b)(3) a term of imprisonment as authorized by subchapter D. A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.--An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(c)(1) a term of probation as authorized by subchapter B; or

(c)(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

§ 3552. Presentence reports

(a) Presentence investigation and report by probation officer.--A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence study and report by bureau of prisons.--If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) Presentence examination and report by psychiatric or psychological examiners.--If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under Section 4244(b) of this title.

(d) Disclosure of presentence reports.--The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this

minimum period is waived by the defendant.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(a)(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(a)(2) the need for the sentence imposed--

(a)(2)(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(a)(2)(B) to afford adequate deterrence to criminal conduct;

(a)(2)(C) to protect the public from further crimes of the defendant; and

(a)(2)(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(a)(3) the kinds of sentences available;

(a)(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(a)(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(a)(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(a)(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described. In the absence of applicable sentencing guidelines, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission and the purposes of sentencing set forth in subsection (a)(2).

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(c)(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(c)(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described. If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(d)(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(d)(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(d)(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order. Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. --Upon motion of the government, the court shall have the authority to impose a sentence below a level established by the statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to Section 994 of Title 28, United States Code.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense, may order restitution in accordance with the provisions of sections 3663 and 3664.

§ 3557. Review of a sentence

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

§ 3558. Implementation of a sentence

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

§ 3559. Sentencing classification of offenses

(a) Classification.–An offense that is not specifically classified by a letter grade in the section defining it, is classified–

(a)(1) if the maximum term of imprisonment authorized is–

(a)(1)(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(a)(1)(B) twenty years or more, as a Class B felony;

(a)(1)(C) less than twenty years but ten or more years, as a Class C felony;

(a)(1)(D) less than ten years but five or more years, as a Class D felony;

(a)(1)(E) less than five years but more than one year, as a Class E felony;

(a)(1)(F) one year or less but more than six months, as a Class A misdemeanor;

(a)(1)(G) six months or less but more than thirty days, as a Class B misdemeanor;

(a)(1)(H) thirty days or less but more than five days, as a Class C misdemeanor; or

(a)(1)(I) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification.–An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

(b)(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

(b)(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

SUBCHAPTER B --PROBATION

§ 3561. Sentence of probation

(a) In General.--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless--

(a)(1) the offense is a Class A or Class B felony;

(a)(2) the offense is an offense for which probation has been expressly precluded; or

(a)(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

(b) Authorized terms.--The authorized terms of probation are--

(b)(1) for a felony, not less than one nor more than five years;

(b)(2) for a misdemeanor, not more than five years; and

(b)(3) for an infraction, not more than one year.

§ 3562. Imposition of a sentence of probation

(a) Factors to be considered in imposing a term of probation.--The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence of probation can subsequently be--

(b)(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(b)(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(b)(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

§ 3563. Conditions of probation

(a) Mandatory conditions.--The court shall provide, as an explicit condition of a sentence of probation--

(a)(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(a)(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13). If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court- established installment schedule shall be a condition of the probation.

(b) Discretionary conditions.--The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant--

(b)(1) support his dependents and meet other family responsibilities;

(b)(2) pay a fine imposed pursuant to the provisions of subchapter C;

(b)(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(b)(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(b)(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(b)(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(b)(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(b)(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(b)(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(b)(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as

specified by the court, and remain in a specified institution if required for that purpose;

(b)(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense during the first year of the term of probation;

(b)(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

(b)(13) work in community service as directed by the court;

(b)(14) reside in a specified place or area, or refrain from residing in a specified place or area;

(b)(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(b)(16) report to a probation officer as directed by the court or the probation officer;

(b)(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(b)(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(b)(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

(b)(20) satisfy such other conditions as the court may impose.

(c) Modifications of conditions.--The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the revocation or modification of probation.

(d) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3564. Running of a term of probation

(a) Commencement.--A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

(b) Concurrence with other sentences.--Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation. A term of probation does not run while the defendant is imprisoned in connection with a conviction for a federal, state, or local crime unless the imprisonment is for a period of less than thirty consecutive days.

(c) Early termination.--The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

(d) Extension.--The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

(e) Subject to revocation.--A sentence of probation remains conditional and subject to revocation until its expiration or termination.

§ 3565. Revocation of probation

(a) Continuation or revocation.--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--

(a)(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

(a)(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed revocation.--The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

§ 3566. Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

§ 3568. Effective date of sentence; credit for time in custody prior to theimposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress. If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

SUBCHAPTER C --FINE

§ 3571. Sentence of fine

(a) In general.--A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Authorized fines.--Except as otherwise provided in this chapter, the authorized fines are--

(b)(1) if the defendant is an individual--

(b)(1)(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

(b)(1)(B) for any other misdemeanor, not more than $25,000; and

(b)(1)(C) for an infraction, not more than $1,000; and

(b)(2) if the defendant is an organization--

(b)(2)(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

(b)(2)(B) for any other misdemeanor, not more than $100,000; and

(b)(2)(C) for an infraction, not more than $10,000.

§ 3572. Imposition of a sentence of fine

(a) Factors to be considered in imposing fine.--The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider--

(a)(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

(a)(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant, relative to the burden which alternative punishments would impose;

(a)(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

(a)(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

(a)(5) any other pertinent equitable consideration.

(b) Limit on aggregate of multiple fines.--Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(c) Effect of finality of judgment.--Notwithstanding the fact that a sentence to pay a fine can subsequently be--

(c)(1) modified or remitted pursuant to the provisions of section 3573;

(c)(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(c)(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(d) Time and method of payment.--Payment of a fine is due immediately unless the court, at the time of sentencing--

(d)(1) requires payment by a date certain; or

(d)(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

(e) Alternative sentence precluded.--At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

(f) Individual responsibility for payment.--If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Responsibility to provide current address.--At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

(h) Stay of fine pending appeals.--Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay--

(h)(1) a requirement that the defendant, pending appeal, to deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

(h)(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

(i) Delinquent fine.--A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

(j) Default.--A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due with thirty days of notification of the default, notwithstanding any installment schedule.

§ 3573. Modification or remission of fine

(a) Petition for modification or remission.--A defendant who has been sentenced to pay a fine, and who--

(a)(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for--

(a)(1)(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

(a)(1)(B) a remission of all or part of the unpaid portion including interest and penalties; or

(a)(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation. Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

(b) Order of modification or remission.--If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

§ 3574. Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

§ § 3575 to 3580. See Chapter 227 post.

SUBSECTION D --IMPRISONMENT

§ 3581. Sentence of imprisonment

(a) In general.--A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) Authorized terms.--The authorized terms of imprisonment are--

(b)(1) for a Class A felony, the duration of the defendant's life or any period of time;

(b)(2) for a Class B felony, not more than twenty-five years;

(b)(3) for a Class C felony, not more than twelve years;

(b)(4) for a Class D felony, not more than six years;

(b)(5) for a Class E felony, not more than three years;

(b)(6) for a Class A misdemeanor, not more than one year;

(b)(7) for a Class B misdemeanor, not more than six months;

(b)(8) for a Class C misdemeanor, not more than thirty days; and

(b)(9) for an infraction, not more than five days.

§ 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(b)(1) modified pursuant to the provisions of subsection (c);

(b)(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(b)(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(c)(1) in any case--

(c)(1)(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(c)(1)(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(c)(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Inclusion of an order to limit criminal association of organized crime and drug offenders.--The court, in imposing a sentence to term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

(b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--

(b)(1) for a Class A or Class B felony, not more than three years;

(b)(2) for a Class C or Class D felony, not more than two years; and

(b)(3) for a Class E felony, or for a misdemeanor, not more than one year.

(c) Factors to be considered in including a term of supervised release.--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition--

(d)(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), and (a)(2)(D);

(d)(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B) and (a)(2)(D); and

(d)(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)--

(e)(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(e)(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(e)(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title; or

(e)(4) revoke a term of supervised release and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and the provisions of applicable policy statements issued by the Sentencing Commission.

(f) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3584. Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms.-- The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

§ 3585. Calculation of a term of imprisonment

(a) Commencement of sentence.--A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for prior custody.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--

(b)(1) as a result of the offense for which the sentence was imposed; or

(b)(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.

§ 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

CHAPTER 229 --POSTSENTENCE ADMINISTRATION

§ 3621. Imprisonment of a convicted person

(a) Commitment to custody of Bureau of Prisons.--A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) Place of imprisonment.--The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering--

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence--

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

(c) Delivery of order of commitment.--When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) Delivery of prisoner for court appearances.--The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

§ 3622. Temporary release of a prisoner.

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to--

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the

purpose of–

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if–

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau of Prisons such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

§ 3623. Transfer of a prisoner to State authority.

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if–

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

§ 3624. Release of a prisoner.

(a) Date of release.–A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit toward service of sentence for satisfactory behavior.–A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(c) Pre-release custody.–The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) Allotment of clothing, funds, and transportation.–Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with–

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and

the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) Supervision after release.--A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than thirty consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by the prisoner.

§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

CHAPTER 235 --APPEAL

§ 3742. Review of a sentence

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than--

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is greater than the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(1);

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than--

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is less than the sentence specified in as plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

(c) Record on review.–If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals–

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(d) Consideration.–Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for–

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

(e) Decision and disposition.–If the court of appeals determines that the sentence–

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and–

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court deems appropriate;

(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.

TITLE 28
UNITED STATES CODE
Chapter 58 - UNITED STATES SENTENCING COMMISSION

§ 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to–

(b)(1) establish sentencing policies and practices for the Federal criminal justice system that–

(b)(1)(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(b)(1)(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(b)(1)(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(b)(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

§ 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that--

(a)(1) two members, including the Chairman, serve terms of six years;

(a)(2) three members serve terms of four years; and

(a)(3) two members serve terms of two years.

(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

(d) Sections 44(c) and 134(b) of this title (relating to residence of judges) do not apply to any judge holding a full-time position on the Commission under subsection (c) of this section.

§ 993. Powers and duties of Chairman

The Chairman shall--

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct--

(b)(1) the preparation of requests for appropriations for the Commission; and

(b)(2) the use of funds made available to the Commission. "Before the appointment of the first Chairman, the Administrative Office of the United States Courts may make requests for appropriations for the Commission.

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System--

(a)(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including--

(a)(1)(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(a)(1)(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(a)(1)(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

(a)(1)(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

(a)(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of–

(a)(2)(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(a)(2)(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(a)(2)(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(a)(2)(D) the fine imposition provisions set forth in section 3572 of title 18;

(a)(2)(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(a)(2)(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(a)(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(b)(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the maximum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance–

(c)(1) the grade of the offense;

(c)(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(c)(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(c)(4) the community view of the gravity of the offense;

(c)(5) the public concern generated by the offense;

(c)(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(c)(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance–

(d)(1) age;

(d)(2) education;

(d)(3) vocational skills;

(d)(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(d)(5) physical condition, including drug dependence;

(d)(6) previous employment record;

(d)(7) family ties and responsibilities;

(d)(8) community ties;

(d)(9) role in the offense;

(d)(10) criminal history; and

(d)(11) degree of dependence upon criminal activity for a livelihood. The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(h)(1) has been convicted of a felony that is--

(h)(1)(A) a crime of violence; or

(i) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(i)(b)(2) has previously been convicted of two or more prior felonies, each of which is--

(i)(b)(2)(A) a crime of violence; or

(i)(b)(2)(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

(i)(b)(2)(B)(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant--

(i)(b)(2)(B)(i)(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(i)(b)(2)(B)(i)(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(i)(b)(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(i)(b)(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(i)(b)(5) committed a felony that is set forth in section 401 of 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect--

(l)(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of--

(l)(1)(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(l)(1)(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(l)(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with

the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The 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. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress but not later that the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including–

(q)(1) modernization of existing facilities;

(q)(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(q)(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than one year after the initial set of sentencing guidelines promulgated under Subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in–

(s)(1) the community view of the gravity of the offense;

(s)(2) the public concern generated by the offense; and

(s)(3) the deterrent effect particular sentences may have on the commission of the offense by others. Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of this sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

§ 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to–

(a)(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(a)(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

(a)(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

(a)(4) procedure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(a)(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

(a)(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(a)(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(a)(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(a)(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

(a)(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(a)(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(a)(12) establish a research and development program within the Commission for the purpose of–

(a)(12)(A) serving as a clearing house and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(a)(12)(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(a)(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(a)(14) publish data concerning the sentencing process;

(a)(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(a)(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(a)(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(a)(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(a)(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(a)(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

(a)(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

(a)(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a)(1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered

in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.
(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions
(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.
(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

§ 996. Director and staff

(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.
(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

§ 997. Annual report

The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

§ 998. Definitions

As used in this chapter--
(a) "Commission" means the United States Sentencing Commission;
(b) "Commissioner" means a member of the United States Sentencing Commission;
(c) "guidelines" means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and
(d) "rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 995 of this title.

PUBLIC LAW 98-473
COMPREHENSIVE CRIME CONTROL ACT OF 1984
CHAPTER II --SENTENCING REFORM

Effective Date

Section 235(a)(1) This chapter shall take effect on the first day of the first calendar month beginning thirty-six months after the date of enactment, except that--

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated under section 994(a)(1) of title 28 to the Congress within thirty months of the effective date of such chapter 58; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), shall not go into effect until the day after--

(I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(1), along with a report stating the reasons for the Commission's recommendations;

(II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within one hundred and fifty days of submission of the guidelines; reported to the Congress the results of its study; and

(III) the day after the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports; and

(IV) section 212(a)(2) takes effect, in the case of the initial sentencing guidelines so promulgated.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title,18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4251 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is--

(A) released pursuant to a provision listed in paragraph (1); and

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (8); including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio nonvoting members.

Sec.236(a)(1) Four years after the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, go into effect, the General Accounting Office shall undertake a study of the guidelines in order to determine their impact and compare the guidelines system with the operation of the previous sentencing and parole release system, and, within six months of the undertaking of such study, report to the Congress the results of its study.

(2) Within one month of the start of the study required under subsection (a), the United States Sentencing Commission shall submit a report to the General Accounting Office, all appropriate courts, the Department of Justice, and the Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.

(b) The Congress shall review the study submitted pursuant to subsection (a) in order to determine–

(1) whether the sentencing guideline system has been effective;

(2) whether any changes should be made in the sentencing guideline system; and

(3) whether the parole system should be reinstated in some form and the life of the Parole Commission extended.

Sec 237 (a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds $100 as of the effective date of this Act, the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to– (A) pay the fine in full;

(B) specify, and demonstrate compliance with, a installment schedule established by a court before enactment of the amendments made by this Act, specifying the dates on which designated partial payments will be made; or

(C) establish with the concurrence of the Attorney General, a new installment schedule of duration not exceeding two years, except in special circumstances, and specifying the dates on which designated partial payments will be made.

(2) This subsection shall not apply in cases in which–

(A) the Attorney General believes the likelihood of collection is remote; or

(B) criminal fines have been stayed pending appeal.

(b) The Attorney General shall, within one hundred and eighty days after the effective date of this Act, declare all fines for which this obligation is unfulfilled to be in criminal default, subject to the civil and criminal remedies established by amendments made by this Act. No interest or monetary penalties shall be charged on any fines subject to this section.

(c) Not later than one year following the effective date of this Act, the Attorney General shall include in the annual crime report steps taken to implement this Act and the progress achieved in criminal fine collection, including collection data for each judicial district.

APPENDIX B:

RECORD OF COMMISSION VOTE AND DISSENT OF COMMISSIONER ROBINSON

The vote of the Commission on a motion to publish this document was as follows:

William W. Wilkins	- -	Yes
Michael K. Block	- -	Yes
Stephen G. Breyer	- -	Yes
Helen G. Corrothers	- -	Yes
George E. MacKinnon	- -	Yes
Ilene H. Nagel	- -	Yes
Paul H. Robinson	- -	No

DISSENTING VIEW of Commissioner Paul H. Robinson:

I believe the Sentencing Reform Act of 1984, which created the United States Sentencing Commission, contains two main directives. First, the Commission's guidelines must provide a rational and principled sentencing system that will further the purposes of just punishment and crime control. Second, the guidelines must reduce unwarranted disparity among sentences for similar offenders who commit similar offenses. The Act provides that this is to be achieved through the Commission's promulgation of a comprehensive sentencing system that will bind all federal judges.[1] I opposed the Commission's Preliminary Draft of September, 1986, because I saw it as lacking both guiding principles and an effective means of reducing disparity. While the Commission's current proposed guidelines differ from the Preliminary Draft in many important respects, like its predecessor, this draft is not guided by rational unifying principles and it will not reduce sentencing disparity. Further, the current proposed guidelines transgress specific statutory limitations on the Commission's authority. Because I believe that the proposal violates both the intent and the letter of the Sentencing Reform Act, I cannot in good faith join the other members of the Commission in support of the proposed guidelines.

A Rational and Principled Sentencing System? Neither of the Commission's guidelines was drafted with a coherent, articulated sentencing philosophy in mind. Rather, the drafting was done in an ad hoc manner without the guidance of any set of sentencing principles. The inevitable result of this approach is guidelines that are haphazard and internally inconsistent, and that frequently generate improper results; they simply do not consistently and rationally distinguish cases according to relevant offense and offender characteristics.

A comparison of possible guideline sentences for different offenses illustrates one difficulty. Is it appropriate that the sentence for aggravated fish smuggling can be greater than that for armed bank robbery? that the sentence for aggravated forcible sexual contact with a 13-year-old child can be less than that for submitting a false record on protected wildlife? that the sentence for some antitrust violations can be less than that for failure to surrender a naturalization certificate? that the sentence for involuntary manslaughter can be less than that for impersonating a government employee? that the sentence for inciting a riot can be less than that for altering a motor vehicle ID number? The fact of the matter is that the Commission never systematically ranked offenses.

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[1] The three key provisions of the Act work together:

First, the guidelines are to take into account the relevant offense and offender characteristics. 28 U.S.C. 994(c) and (d). The legislative history directs that the guidelines should "reflect every important factor relevant to sentencing." S. Rep. No. 225, 98th Cong., 1st Sess. 169 (1983) (emphasis added).

Second, for each combination of relevant offense and offender characteristics, the maximum of the imprisonment range may not exceed the minimum of that range by more than 25%. 28 U.S.C. 994(b).

Finally, a judge cannot deviate from the guideline range "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." 18 U.S.C. 3553(b).

Further difficulties arise from the guidelines' peculiar two-track structure under which the same factor is in some instances treated under a specific offense guideline and in other instances under a general provision. Consider, for example, the discharge of a firearm. If it is discharged during an assault, the specific assault adjustments apply and the judge need not increase the sentence at all but may increase it by 3 months. If, however, the discharge occurs during serious property destruction, the general adjustment applies and the judge must increase the sentence by 3 times that amount (9 months) and may increase it by 7 times that amount (21 months).

Difficulties also arise from the use of invited or directed "departures" from the guidelines. For example, if an offender's prior conviction is similar to the offense at hand, it is suggested that a sentence at the high end of the guideline range may be appropriate. However, if the same prior misconduct did not result in a conviction, the judge is specifically invited to exceed the guideline range. Similarly, a recent similar offense--e.g., a 3 year old assault conviction--may increase the guideline sentence by 3 months. If the same conviction is over 10 years old, however, the court is invited to exceed the guideline range without limit.

Perhaps more troubling is the basic question: are such invited or directed "departures" permitted by the Sentencing Reform Act? If a judge follows an invitation or direction to depart, is the sentence subject to appellate review, as are all deviations from the guidelines? Or, is the sentence free from appellate review because the sentence is precisely what the guidelines invite or direct? The status of the Commission's "guidelines to go outside the guidelines" is further complicated by its attempt to regulate judges after they accept the invitation to depart. The extent of the permissible "departure" may be limited, to "not more than 4 levels," for example. One may wonder how such a "departure range" is different from a "guideline range" of 4 levels (a range of between 118% and 300%), which is illegal. By calling a guideline directive a "departure" (a term that does not appear in the Sentencing Reform Act), can the Commission escape from the 25% statutory limitation on the permissible width of a guideline range? Or, one may wonder, can a judge "depart" from a guideline that directs "departure"? If a judge refuses to depart when so directed, is his refusal to depart subject to appellate review?

While the proposed draft obviously does not generate peculiar results in all cases, it is all too easy to find difficulties like those noted above. The true significance of these examples is not the particular problems that they present but rather that they manifest an unsystematic approach to the complex task of guideline drafting. It is an approach that has produced a flawed structure and drafting of mixed quality.

Reduction of Disparity? In both the proposed draft and the Preliminary Draft, the Commission has failed to meet its obligation to reduce unwarranted sentencing disparity. The earlier Preliminary Draft failed because, while it attempted to meet the legislative mandate of a comprehensive sentencing system, it was not structured in a way that could effectively accommodate the wide variety of possible cases. The draft tried to account for some specific combinations of offense and offender characteristics yet ignored many others and failed to provide a general framework that made application feasible. The result was a complex, inconsistent, and unworkable document. The Preliminary Draft was like a Volkswagen "Bug" trying to pull a fully-loaded three-axle trailer. While it made an earnest effort, it was simply not powerful enough to do the job.

Unfortunately, when it became clear that the Preliminary Draft could not effectively implement a comprehensive system, the Commission's response was not to continue work toward designing a more flexible and workable comprehensive system. Instead, it abandoned the legislative mandate. Rather than trying to find a diesel cab to pull the trailer, the Commission decided to keep the "Bug" and dump the load.

It may well be possible to pull the empty trailer with the "Bug"; not much is required of guidelines that simply tell the judge to exercise discretion. And that is essentially what the Commission's current draft does. The guideline ranges for specific offenses are frequently far in excess of the 25% permitted by statute, and are so broad--as much as 600% and more--as to be of no practical value. Further, the offense ranges may be subject to one or more general adjustments, each of which gives the judge further discretion.

For example, for making illegal payments to influence the actions of a union official, Judge X can, under the guidelines, give the offender 12 months, while Judge Y, applying the same guidelines in the same case, can give the offender 60 months (a range of 400%). The offender who leads a prison riot can get 21 months from Judge X and 108 months from Judge Y (a range of 414%), both under the guidelines. The offender who bribes a federal legislator in order to influence his vote can get 8 months from Judge X and 57 months from Judge Y (a range of 612%), both under the guidelines.

Similarly, the offender who supervises the distribution of obscene matter for sale can get 2 months, or probation, from Judge X and 33 months from Judge Y (a range of 1550%), both under the guidelines. If he is convicted of two counts, Judge X can impose concurrent sentences for a total term of 2 months, or probation, while Judge Y can impose consecutive sentences for a total term of 66 months (a range of 3200%), both under the guidelines. The offender who is convicted of twice selling stolen guns to a known felon can get 10 months from Judge X and 82 months from Judge Y (a range of 720%), both under the guidelines. As long as the sentence is within the guidelines, it is not subject to appellate review.

The examples above are not uncommon. 70% of the 20 most prosecuted offenses have one or more ranges in excess of the 25% range authorized by statute. The average of these excessive ranges is well over 600%.[2] In addition to these offense ranges, general adjustments provide other sources of broad discretion: e.g., a range of increase between 118% and 300% (depending on the seriousness of the offense) is available to account for an offender's role in the offense (also available is a range of decrease between 118% and 300%); a range between 56% and 166% is available if the offender acknowledges responsibility for the offense (as through a plea of guilty); and a range between 74% and 200% is available if the offender obstructed the investigation of the case or lied at the trial. Still further, in every case of multiple counts the judge has complete discretion in deciding whether to impose concurrent

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[2] The average of all of the ranges applicable to the 20 most prosecuted offenses is, by my calculations, 232%. The Commission has not yet developed information on such matters. I believe that it is critical, however, to determine the percentage of all cases for which, in practice, the applicable range will be in excess of 25% authorized by statute and the number of cases that are likely to result in departures. Another more important research project is determining the impact of the proposed guidelines on the prison population. This legislatively required study will be difficult if not impossible for guidelines that are so discretionary.

or consecutive sentences. At least one such opportunity for additional broad discretion is likely to exist in nearly every case.[3]

As if the discretion within the guidelines were not enough, in over 100 instances the proposed guidelines or their official commentaries invite or direct judges to depart from the guidelines and to exercise their own complete, unguided, and frequently unlimited discretion. General rules invite or direct judges to depart from the guidelines when the offender: had an additional criminal purpose; has a drug dependency leading to an increased propensity to commit crimes; disrupted a governmental function or endangered the public welfare; engaged in ongoing criminal conduct; derived a substantial portion of income from criminal activity; engaged in a pattern of violent criminal conduct or a pattern of civil or administrative violations; cooperated with authorities; or has a criminal history score that, in the court's view, does not adequately reflect the seriousness of his past criminal conduct.

Indeed, the judge is told that departure is appropriate if the adjustment range of the guidelines is, in the judge's view, "inadequate."[4] And, as if this were still not enough, judges are told that in cases where the sentence is pursuant to a plea agreement--a common occurrence in the federal system--they are not bound by the guidelines.

The effect of the current draft is simply this: nearly any prison term that might be imposed presently can be imposed after these guidelines go into effect. I do not believe that this is what the Sentencing Reform Act intends, or permits.[5]

Some people argue that we ought not try to reduce disparity through comprehensive, binding sentencing guidelines. Many witnesses before the Commission suggested precisely this. But this issue was hotly debated in Congress and, with passage of the Sentencing Reform Act, was resolved in favor of binding and comprehensive guidelines. Until the Commission has explored all possible methods of performing the Legislature's mandate, it ought not abandon the assigned task.

More importantly, if the Commission ultimately concludes that it cannot perform its task, or at least not in the time allotted, it ought to admit this openly, report to Congress accordingly, and, perhaps, ask for an extension of time. The Commission ought not

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[3] For example, 87% of all federal criminal cases are settled by plea agreement, and, of those that go to trial, 63% end in multiple counts of conviction and thus permit the use of the broad concurrent-consecutive discretion.

[4] This appears to be in direct conflict with the Sentencing Reform Act. Under the Act, judges may not deviate from the guidelines simply because, in their view, the guideline range is not adequate (e.g., because it does not allow the sentence that they want to give). The statute permits deviation only if an aggravating or mitigating circumstance exists that was not adequately considered by the Sentencing Commission. 18 U.S.C. 3553(b). If the judge wants to deviate from the guideline range because of a factor already fully considered by the Commission, the statute would bar his deviation but the guidelines attempt to permit it.

[5] It is not enough, of course, for the Commission to simply remove the discretion from these proposed guidelines. That might avoid some of the illegalities of the current draft but it would only increase, dramatically, the number of inappropriate sentences. The solution is to be found, instead, in the construction of a rational system that defines its principles of sentencing and implements them through a sophisticated and workable structure.

promulgate guidelines that only create the illusion of reducing disparity. Pretending to have disparity-reducing guidelines is worse than having no guidelines at all. Once the guidelines go into effect, the United States Parole Commission--the single source of uniformity under current practice, unsatisfactory though it may be--will expire under the terms of the Sentencing Reform Act.

I have always applauded the Sentencing Reform Act's abolition of early release on parole and, accordingly, abolition of the Parole Commission, for this moves us toward honesty in sentencing: the sentence publicly imposed by the court would be the sentence served. But I assumed, as Congress clearly did in enacting the Sentencing Reform Act, that the Sentencing Commission's guidelines would replace and improve upon the disparity-reducing function of the Parole Commission. Unfortunately, neither of the Commission's efforts to date will. Instead, the policies and decision-making of the Parole Commission will be replaced by that of 500 plus individual sentencing judges with little in the way of guidance or remedial control. It would be an unfortunate irony in the history of sentencing reform if the Sentencing Reform Act, enacted to reduce disparity, resulted in increased disparity.

Complexity and Discretion. My final concern arises from the complexity of the Commission's proposed guidelines. Some people see the Commission as facing the horns of a dilemma: a comprehensive system that will reduce disparity appears to require undesirable complexity; on the other hand, given the great variety of cases, the only alternative to complexity is broad discretion and its concomitant disparity. In its current proposal, the Commission has chosen to impale itself squarely on both horns. The guidelines are overwhelmingly complex yet, in the end, they simply defer to the discretion of judges and plea-bargain negotiators.

The Commission's approach of providing both complexity and discretion may well have some political value. Without close examination, one might take the complexity as evidence of significant restraints on discretion, the desired result for those who supported the Sentencing Reform Act. At the same time, those who prefer a discretionary system will be pleased with how the system really works. In addition, if the Commission is not capable of creating a sufficiently sophisticated sentencing system, there is value in deferring to judicial discretion in order to avoid the imposition of improper sentences. I understand both of these points. The Commission has been given an extremely difficult task and asked to perform it quickly under the bright lights generated by strong and conflicting political interests. Nonetheless, a complex and discretionary system would have unacceptable consequences that would set back the cause of federal sentencing reform.

Having concluded that the proposed guidelines are not rationally calculated to impose just punishment and to reduce crime, and that they are likely to increase rather than decrease unwarranted disparity, I must, regrettably, oppose the proposed guidelines, as I opposed the Preliminary Draft.

I dissent.