



AMERICAN BAR ASSOCIATION

Criminal Justice Section

740 15th Street, NW
10th Floor
Washington, DC 20005-1009
202/662-1500 (FAX 202/662-1501)
crimjustice@abanet.org
www.abanet.org/crimjust/home.html

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Washington, DC 20036

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Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, D.C. 20002-8002

February 4, 1997

Dear Mr. Courlander:

Enclosed, please find the American Bar Association's comments with regard to the emergency amendments proposed by the United States Sentencing Commission, pursuant to 61 C.F.R. 152-198.

Sincerely,

Alan J. Chaset
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Mary Lou Soller
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Enclosure

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AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1009 • (202) 682-1760

COMMENT OF

THE AMERICAN BAR ASSOCIATION

to

THE UNITED STATES SENTENCING COMMISSION

on

PROPOSED EMERGENCY AMENDMENTS TO
THE FEDERAL SENTENCING GUIDELINES

February 4, 1997

[46]

Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines. The members of this committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists.

On January 2nd of this year, the Commission published notice of proposed temporary emergency guideline amendments which increase and/or impose penalties for certain offenses. The notice requested public comment from interested parties. On behalf of our Committee, the Criminal Justice Section, and the American Bar Association, please accept the following brief remarks as our response to that publication and that request.

In that regard, our principal policy directive on these matters can be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18-2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18-4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

As opposed to the changes to U.S.S.G. §§2L1.1, 2L2.1 and 2L2.2 initiated in response to the Illegal Immigration Reform and Immigration Responsibility Act of 1996, we recommend that the base offense levels in each instance be increased by the least amount required by the applicable legislative directive. As to that issue and the options presented in the proposals, we believe that the Commission bears the burden of justifying any additional increases. Since no data supporting the need for something more onerous has been offered and without any other rationale or argument provided to explain or support the larger increases, we conclude that this burden has not been met.

As to the options for enhancing the now increased base offense levels for offenders with prior records for the immigration and naturalization offenses, we recommend Option 1 in each instance. We believe that these options are fairer, more responsive to the legislative directive and more consistent with other aspects of the guidelines. And as to the various other specific offense characteristic enhancements, in the absence of data or a documented rationale, we can only recommend that option or that point in the enhanced range that would result in the less severe alternative.

Next, as regards the proposed downward adjustments where the offense involves the smuggling of only the alien's spouse or child, we recommend that the Commission permit a decrease in each instance equal to the base level increase discussed above.

Next, as to the proposed changes to U.S.S.G. §2H4.1 similarly initiated in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, we again feel that the Commission has not met its burden of justifying anything more than the minimum increases in either

the base offense level and/or the various specific offense characteristic increases. Thus we recommend the adoption of the least severe alternatives.

Finally, as regards the request for comment on the need for some additional amendment to better address those instances where the peonage, involuntary servitude, slave trade offense involve a large number of victims, please permit us to respond first that we do not possess nor have we been provided with enough information about these crimes and the difficulties they have presented to the sentencing courts in order for us to answer in a useful or intelligent fashion. Without an indication or evidence that the current mechanisms for dealing with unusual facts or atypical circumstances do not function well for these offenses and without data indicating that the number of victims is sufficiently remarkable to necessitate the development of a specific offense characteristic here, there should be no need to treat them any differently and no need to amend the guideline here any further.

Having said that, permit us to conclude that we remain uncomfortable with the emergency amendment process in general and its use in these four amendment circumstances in particular.¹ We do not understand why the Congress singled out these guideline changes for the more immediate reaction by the Commission and we do not appreciate the rationale for addressing these matters outside the normal amendment cycle. We recognize the increased burden these directives place on the Commission and would support any effort to communicate that problem to the appropriate committees of the Congress.

Thank you for this opportunity to comment.

¹We are offering no comment on the proposal to increase the base offense levels for offenses involving list chemicals pursuant to the Comprehensive Methamphetamine Control Act of 1996.