



ASSISTANT  
DIRECTOR

DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

WASHINGTON, DC 20226

MAR 9 2001

United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500  
Washington, DC 20002-8002

Attn: Public Information

Dear Commissioners:

My name is John Malone and I'm the Assistant Director of Firearms, Explosives and Arson Directorate at the Bureau of Alcohol, Tobacco and Firearms (ATF). I want to thank you for giving me the opportunity to speak today about the two proposals to amend United States Sentencing Guideline 2K2.1 to increase the number of levels added to offenses involving certain numbers of firearms. The reason I appreciate having the chance to speak about this issue is because increasing the sentences for offenses involving large numbers of firearms is a critical part of ATF's efforts to combat firearms trafficking and violence.

As you are aware, the guidelines for firearms violations currently provide for a 1 to 6 level increase of the base offense level if the crime involved 3 or more firearms. For example, if a crime involved 3 to 4 firearms, 1 level is added, and if a crime involved 5 to 7 firearms, 2 levels are added. This incremental one-level increase continues up to crimes involving 50 or more firearms, where 6 levels are added. Unfortunately, the current guidelines reach their peak at 50 firearms. Therefore, if a person is sentenced for trafficking 50 firearms, he or she receives a 6 level increase. If a person is sentenced for trafficking 250 firearms, he or she would receive this same 6 level increase. There is little incentive for a trafficker to cease his or her activities once the 50-firearms threshold had been met.

United States Sentencing Commission

Accordingly, it is not surprising that statistics prepared by the Department of Justice (DOJ) demonstrate that defendants sentenced under 2K2.1 in cases involving 50 or more firearms frequently received low sentences. For example, in 1997, 4.9 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 10 percent received no prison sentence. Similarly, in 1998, 3.8 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 24.4 percent received no imprisonment. In 1999, 4.9 percent received less than 1-year imprisonment and 9.8 percent received no imprisonment. These low sentences do not reflect the seriousness of trafficking in a large number of firearms and the threat that it poses to public safety. The sentences also do not serve as a deterrent against trafficking in large numbers of firearms. In addition, many traffickers are able to continue trafficking firearms after a short time in jail.

The Commission has put forward 2 options for amending Guideline 2K2.1. Option 1, originally proposed by ATF, would provide an additional 1 level increase for crimes involving 100 to 199 firearms and a 2 level increase for crimes involving 200 or more firearms. Option 2 would restructure the present format for adding levels based on the number of firearms involved, by providing increases in two-level increments, rather than one-level increments. This would result in 2 levels being added for offenses involving 3-7 guns; 4 levels added for offenses involving 8-24 guns; and 6 levels added for offenses involving 25-99 guns. It also would lift the 50 firearm cap so that 8 levels would be added for offenses involving 100-199 guns and 10 levels would be added for offenses involving 200 or more guns.

Both of the proposed options would address the problems with the present guidelines which I have discussed. Therefore we support both options. However, we prefer Option 2 for several reasons. First, it would provide

United States Sentencing Commission

higher sentences than Option 1 in certain cases involving less than 50 firearms. For example, someone being sentenced for a crime involving 4 firearms would get 2 levels added to his or her base offense, rather than the 1 level increase he or she would get under Option 1. Second, Option 2 would provide higher sentences than Option 1 in all cases involving 100 or more firearms. For example, someone trafficking 150 firearms would get a seven level increase under Option 1 and an 8 level increase under Option 2. Therefore Option 2 better reflects the serious threat firearms trafficking poses to public safety and is a more effective deterrent.

In addition, Option 2 has the added benefit of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

To get a better understanding of the effect of the different options, it is useful to calculate their impact on a defendant's sentence. Under the present guidelines, a person with a base offense level of 12 and a criminal history in category I who is being sentenced for selling 250 firearms without a license would have an offense level of 18 ( $12 + 6$ ), giving him or her a sentence in the range of 27-33 months. Under Option 1, this person would have an offense level of 20 ( $12 + 8$ ), giving him or her a sentence in the range of 33-41 months. Finally, under Option 2, this person would have an offense level of 22 ( $12 + 10$ ), giving him or her a sentence in the range of 41-51 months. Clearly the impact of the different options is significant.

I want to explain why ATF views firearms trafficking as a serious crime which poses a large threat to the public safety and which must be punished accordingly. As we have stated in correspondence with the Commission, trafficked firearms often are used in subsequent crimes, thereby threatening public safety. In 1997, an ATF investigation of a dealer who lied on his license application and failed to maintain records was initiated in the San Francisco Field Division, where I was Division Director. More than 100 of the 446 guns the defendant bought and sold during

United States Sentencing Commission

the short time he was in business were later seized by police investigating violent crimes. The defendant was sentenced to 2 years for lying on his license application and failing to maintain records. Similarly, in a 1999 case, a defendant pled guilty to engaging in the business of dealing in firearms without a license. To date, approximately 25 of the over 200 firearms he sold have been recovered in crimes including robberies, aggravated assaults, narcotics offenses, and firearms offenses. Several of the firearms have been recovered in the hands of juveniles. Subsequently, the defendant was sentenced to 4 1/2 years in prison.

These are just two examples. Unfortunately they reflect a pattern we see over and over again. Obviously, the greater the number of firearms that are trafficked, the greater the risk they will end up being used in crime. Therefore shutting down a trafficker's activity is an ounce of prevention which yields several pounds of cure to the community. The proposed amendments, particularly Option 2, would provide an effective tool to combat trafficking in large numbers of firearms.

As the Assistant Director of the Firearms, Explosives and Arson Directorate, I have the unique responsibility of overseeing the development and implementation of firearms enforcement initiatives which directly impact violent crime in our country. Over the last several years, ATF has sharpened the focus of its firearms enforcement efforts on identifying, investigating and preventing illegal firearms trafficking. The slight decrease in the number of cases brought in 1998 and 1999 involving 50 or more firearms is not a result of a reduced focus on firearms trafficking by ATF. In fact, it likely is a result of ATF's increased focus on identifying, investigating, and preventing firearms trafficking. ATF has added additional agents and inspectors to combat trafficking. We also have increased our use of technology in investigating trafficking. Moreover, programs such as the Youth Crime Gun Interdiction Initiative, which combines the strategic use of crime gun information with investigative activity, have enabled us to

United States Sentencing Commission

more effectively identify and prevent trafficking. Accordingly, ATF often is able to stop trafficking violations before the trafficker has had time to acquire large numbers of firearms. However, ATF agents are continuing to perfect significant numbers of criminal cases involving quantities of firearms over the current 50-firearms threshold.

ATF's improved success in combating firearms trafficking in no way removes the need for the proposed amendments. Tougher sentences are a crucial tool, along with all the other steps we are taking, in our attempt to prevent firearms trafficking by sending a strong message that such behavior will not be tolerated. An increase in the levels added for firearms offenses involving multiple firearms will ensure a fair and uniformly applied sentence to large scale firearms traffickers, regardless of judicial district or presiding judge, and ensure adequate protection to the public from this type of conduct. We are pleased the Department of the Treasury joins us in supporting both Options, and in particular Option 2.

I want to thank you once again for giving me the opportunity to speak to you about this very important issue. I would be happy to answer any questions you might have.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Malone".

John P. Malone  
Assistant Director  
(Firearms, Arson and Explosives)



DIRECTOR

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Dear Commissioners:

This letter is in response to proposals to amend the United States Sentencing Guidelines which were published in the Federal Register on January 26, 2001. Specifically, it is in response to the two proposals to amend Guideline 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition). (We have no comment on the other firearms-related proposals contained in the January 26, 2001, edition of the Federal Register.)

As you know, in a December 1, 1998, letter to the General Counsel of the United States Sentencing Commission, the Bureau of Alcohol, Tobacco and Firearms (ATF) recommended that section 2K2.1(b)(1) be amended to provide an additional one-level increase for crimes involving 100 to 199 firearms and a two-level increase for crimes involving 200 or more firearms. Our letter noted that Mr. James E. Johnson, former Treasury Under Secretary for Enforcement, had sent you a letter on November 17, 1998, seeking the same amendment.

The January 26, 2001, edition of the Federal Register contained ATF's suggested amendment (Option 1), as well as a second proposal for amending Guideline 2K2.1, which would provide increases in two-level increments (Option 2). In relation to the current guidelines, Option 2 would result in a one-level increase for crimes involving 3-4 firearms, 8-12 firearms, and 25-49 firearms; a two-level increase for crimes involving 100-199 firearms; and a four-level increase for crimes involving 200 or more firearms.

United States Sentencing Commission

Although we support both Option 1 (our original proposal) and Option 2, we prefer Option 2. Because Option 2 would provide higher sentences than Option 1 in certain cases involving less than 50 firearms, and higher sentences than Option 1 in all cases involving 100 or more firearms, it better reflects the serious threat firearms trafficking poses to public safety. In addition, Option 2 has the added benefit, pointed out in the Federal Register notice, of diminishing some of the fact-finding required to determine how many firearms were involved in an offense.

In our December 1998, letter we explained, and provided examples to demonstrate, that trafficked firearms often are used in subsequent crimes, thereby threatening public safety. This pattern unfortunately has continued. For example, in a 1999 case where a Federal firearms licensee sold over 200 firearms to convicted felons, gang members, and juveniles through straw purchases, several of the firearms have been recovered in narcotics offenses, homicides, robberies, and assaults. (The defendant received a sentence of 6 months imprisonment and 3 years supervised release.) In another 1999 case, a defendant pled guilty to engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A). To date, approximately 25 of the over 200 firearms he sold have been recovered in crimes including robberies, aggravated assaults, narcotics offenses, and firearms offenses. Several of the firearms have been recovered in the hands of juveniles. The greater the number of firearms that are trafficked, the greater the risk they will end up being used in crime. The proposed amendments would acknowledge this dangerous consequence of trafficking large numbers of firearms.

The proposed amendments also would serve as more effective deterrents to trafficking large numbers of firearms than the present guidelines. As stated in our December 1, 1998, letter under the current guidelines, unless an upward departure is issued, a defendant who trafficked 200 firearms would get the same base offense level as a

United States Sentencing Commission

defendant who trafficked 50 firearms. Therefore, there is little incentive for a trafficker to stop his or her activity once 50 firearms have been trafficked. The proposed amendments, particularly Option 2, would send a message to potential traffickers that they will pay a price if they traffic large numbers of firearms.

Moreover, increased sentences will hinder the ability of traffickers to continue their illegal activities. Presently, many firearms traffickers are able to continue trafficking firearms after a short period of incarceration.

Our December 1998, letter contained statistics prepared by the Department of Justice which showed that defendants convicted under 2K2.1 in cases involving 50 or more firearms frequently received low sentences. For example, in 1997, 4.9 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 10 percent received no prison sentence. Department of Justice statistics from 1998 and 1999 show this problematic trend continues. In 1998, 3.8 percent of defendants who were convicted in cases involving 50 or more firearms received less than 1-year imprisonment and 24.4 percent received no imprisonment. In 1999, 4.9 percent received less than 1-year imprisonment and 9.8 percent receiving no imprisonment. (In 1999, 77 percent of defendants who were convicted in cases involving 50 or more firearms received imprisonment in the range of 1 to 5 years.)

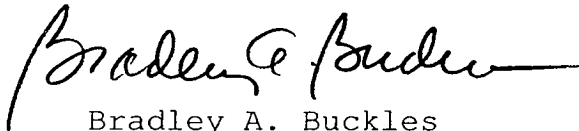
Department of Justice statistics also show that slightly less cases involving 50 or more firearms were brought in 1998 and 1999 than had been brought in 1995-1997, both in terms of raw numbers and percentages. For example, 79 cases were brought in 1998 and 61 cases were brought in 1999, versus 81 in 1995, 113 in 1996, and 82 in 1997. Similarly, 3.5 percent of the cases brought in 1998 and 2.5 percent of the cases brought in 1999 involved 50 or more firearms, versus 3.6 percent, 5.1 percent, and 3.9 percent in 1995, 1996, and 1997 respectively.

United States Sentencing Commission

We want to emphasize that this small shift does not reflect a reduced need for the proposed amendments. As an initial matter, for the 140 cases involving 50 or more firearms that were brought in 1998 and 1999, the defendants committed serious offenses which should be punished in a manner which reflects their severity. Moreover, the shift is not a result of a reduced focus on firearms trafficking by ATF. In fact, it likely is a result of ATF's increased focus on identifying, investigating, and preventing firearms trafficking. ATF has added additional agents and inspectors to combat trafficking. We also have increased our use of technology in investigating trafficking. Moreover, programs such as the Youth Crime Gun Interdiction Initiative, which combines the strategic use of crime gun information with investigative activity, have enabled us to more effectively identify and prevent trafficking. Accordingly, ATF often is able to stop trafficking violations before the trafficker has had time to acquire large numbers of firearms. However, as stated above, that does not remove the need for the proposed amendments. Tougher sentences are a crucial tool in our attempt to prevent firearms trafficking.

Please let us know if we can provide you with any further information regarding these proposals. Mr. John P. Malone, ATF's Assistant Director of the Firearms, Explosives and Arson directorate, will be making a statement in support of these proposals (in particular, Option 2) at the public hearing on this matter. He is eager to address any questions you have. Thank you for your consideration of this important issue.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Bradley A. Buckles", with a long horizontal flourish extending to the right.

Bradley A. Buckles  
Director