

# ADEQUACY OF CRIMINAL LAW AND PROCEDURE (PHYSICAL)

A “LEGAL FOUNDATIONS” STUDY

Report 8 of 12

Report to the  
President’s Commission  
on Critical Infrastructure Protection  
1997



This report was prepared for the President’s Commission on Critical Infrastructure Protection, and informed its deliberations and recommendations. This report represents the opinions and conclusions solely of its developers.

---

---

# Contents

---

---

	Page
<b>Acknowledgments.....</b>	<b>iii</b>
<b>Preface .....</b>	<b>iv</b>
<b>Part One: Introduction .....</b>	<b>1</b>
Research Issues .....	1
Research Findings.....	1
Background.....	3
<b>Part Two: Possible Approaches to Enhancing Deterrence .....</b>	<b>7</b>
<b>Part Three: Conclusions .....</b>	<b>15</b>
<b>Appendices</b>	
Appendix A: Listing of Primary Legal Authorities.....	A-1
Appendix B: The United States Sentencing Commission.....	B-1

---

---

# Acknowledgments

---

---

The *Legal Foundations* series of reports of the President's Commission on Critical Infrastructure Protection (PCCIP) resulted from the concerted efforts and hard work of several individuals. The Commission gratefully acknowledges Commissioner Stevan D. Mitchell and Assistant General Counsel Elizabeth A. Banker for their leadership and important contributions in developing the *Legal Foundations* series of reports. Their research, writing and analytical contributions were essential to the success of the effort.

The Commission also acknowledges Lee M. Zeichner, Esq. of LegalNet Works Incorporated and his staff, for conceptualizing and maintaining the legal issues database and for providing tireless research support. Finally, the Commission acknowledges the contributions of Senior Consultant Paul Byron Pattak for his deft editing of this compilation.

---

---

# Preface

---

---

Executive Order 13010 established the President's Commission on Critical Infrastructure Protection (PCCIP) and tasked it with assessing the vulnerabilities of, and threats to, eight named critical infrastructures and developing a national strategy for protecting those infrastructures from physical and cyber threats. The Executive Order also required that the PCCIP consider the legal and policy issues raised by efforts to protect the critical infrastructures and propose statutory and regulatory changes necessary to effect any subsequent PCCIP recommendations.

To respond to the legal challenges posed by efforts to protect critical infrastructures, the PCCIP undertook a variety of activities to formulate options and to facilitate eventual implementation of PCCIP recommendations by the Federal government and the private sector. The PCCIP recognized that the process of infrastructure assurance would require cultural and legal change over time. Thus, these activities were undertaken with the expectation that many would continue past the life of the PCCIP itself.

The *Legal Foundations* series of reports attempts to identify and describe many of the legal issues associated with the process of infrastructure assurance. The reports were used by the PCCIP to inform its deliberations. The series consists of 12 reports:

1. *Legal Foundations: Studies and Conclusions*
2. *The Federal Legal Landscape*
3. *The Regulatory Landscape*
4. *Legal Authorities Database*
5. *Infrastructure Protection Solutions Catalog*
6. *Major Federal Legislation*
7. *Adequacy of Criminal Law and Procedure (Cyber)*
8. *Adequacy of Criminal Law and Procedure (Physical)*
9. *Privacy and the Employer-Employee Relationship*
10. *Legal Impediments to Information Sharing*
11. *Federal Government Model Performance*
12. *Approaches to Cyber Intrusion Response*

and two special studies:

- *Information Sharing Models*
- *Private Intrusion Response*

*Legal Foundations: Studies and Conclusions* is the overall summary report. It describes the other reports, the methodologies used by the researchers to prepare them, and summarizes the

possible approaches and conclusions that were presented to the PCCIP for its consideration. The series has been sequenced to allow interested readers to study in detail a specific area of interest. However, to fully appreciate the scope of the topics studied and their potential interaction, a review of the entire series is recommended.

# Part One

---

## Introduction

---

This paper examines the adequacy of current criminal law to provide protection for the nation's critical infrastructures from physical attack. It also addresses the adequacy of criminal law to deter or punish attacks on infrastructures, how it might be amended, revised, or supplemented to close the gap.

### Research Issues

This paper addresses the following research questions:

- Do existing laws governing criminal procedure unduly hinder investigations of infrastructure threatening behavior?
- To the extent that they may unduly hinder such investigations, how should they be reconsidered or modified?

### Research Findings

Upon reviewing Federal, state and international legal authorities, the following observations were noted:

- Critical infrastructures may prove attractive targets for a variety of attackers, whether disgruntled employees, terrorists (foreign or domestic), or agents of nation-states. Federal criminal law may not adequately differentiate in terms of punishment based on the severity of threat or the identity of perpetrator.

- There are no Federal criminal statutes specifically prohibiting attacks on “critical infrastructures” or denials of “critical infrastructure services” per se. Constitutional considerations (*e.g.*, vagueness, overbreadth, ex post facto concerns) might even preclude successful enforcement of such a broad statutory proscription.
- Nonetheless, Department of Justice experts have suggested that the vast majority of physical acts that could damage critical infrastructures are anticipated by and covered under general Federal criminal law, and that there are no significant legal deficiencies that would hinder the pursuit of serious cases.
- Statutory penalties for these general Federal crimes that would be used to prosecute physical attacks on critical infrastructures generally range from 10 to 20 years’ imprisonment.
- Infrastructure assurance is not currently being taken into account by judges when handing down sentences for physical acts against infrastructures. The *U.S. Sentencing Guidelines* encourage courts to make upward departures in sentences for crimes that involve violence against persons, but not necessarily for disruption of critical infrastructure services or extensive physical damage.
- Current legislation providing for Rewards-For-Information in terrorism cases could be more actively and efficiently implemented by Federal agencies.
- Agency-specific regulations containing prohibitions on acts against critical infrastructures (which do provide for minor criminal penalties) are seldom enforced by the agencies themselves or by the Department of Justice for a number of reasons. More comprehensive criminal statutes provide better avenues for improving protection of critical infrastructures.
- International treaties are in place that address physical crimes. The United States is a party to many of these treaties. The treaties, however, do not appear to take into account or adequately address infrastructure assurance issues.

## Assumptions

---

This paper uses certain assumptions in its analyses, and they are as follows:

- Critical infrastructures serve as potential targets of physical attacks; such attacks will likely persist, if not increase, in the future.

- Enhancements to the criminal law, including stiffer penalties for physical acts against critical infrastructures will act as a deterrent to such acts, and thus contribute to infrastructure assurance.

---

## Background

---

Federal criminal statutes have been put in place over time largely in reaction to specific events. Recent acts of domestic terrorism, abuse of firearms, and attacks on certain types of facilities (e.g., trains) have resulted in a series of laws that enable prosecutors to charge defendants for similar offenses should they recur. These newer laws, such as the Antiterrorism and Effective Death Penalty Act of 1996, in addition to the more established criminal statutes provide a rich menu of options for prosecutors faced with devastating acts of physical violence. However, because of the piecemeal nature of these statutes, they do not appear to provide blanket protection for critical infrastructures from physical attack. Neither the substantive criminal prohibitions nor the sentencing guidelines have been put in place specifically with infrastructure assurance objectives in mind.

### Substantive Prohibitions on Physical Crimes Against Infrastructures

---

Current Federal statutes which provide protection to infrastructures are difficult to categorize. As a preliminary matter, Federal investigators must be establish that the “victim” (i.e. the critical infrastructure) is involved in interstate commerce. This finding then allows the Federal government to exercise jurisdiction over a crime that otherwise would fall to the states to investigate and prosecute.<sup>1</sup> Once Federal jurisdiction is established, prosecutors have a range of options to choose from in charging a physical crime against an infrastructure. 18 U.S.C. § 844 is a statute of general applicability that may be used for crimes involving explosives targeted at instrumentalities of interstate commerce. Weapons of mass destruction, which include nuclear, chemical and biological agents, also have specific statutes addressed to their use in the U.S. Code.<sup>2</sup> Specific critical infrastructures, such as pipelines, airports, maritime vessels, and electric utilities have statutes that are aimed at protecting them from physical damage. However, to the extent a more general provision is available it will generally be preferred to a specific statute

---

<sup>1</sup> State laws protecting critical infrastructures were not studied for the purposes of this issue paper. To the extent this paper expresses a preference for Federal investigation and prosecution, it reflects not necessarily a deficiency in state law, but a lack of uniformity which may ultimately adversely affect the deterrent value of prosecutions. (e.g., state policies on the death penalty vary widely).

<sup>2</sup> See 18 U.S.C. §§ 2332a & 2332c (1997).



because of the higher penalties available. (See Appendix A for further discussion of Federal statutes prohibiting physical crimes).

## **Sentencing for Physical Crimes Against Infrastructures**

---

While there may be some holes in this statutory framework when it comes to a prosecutor charging a defendant for a crime against an infrastructure, the overall scheme is fairly comprehensive. One of the larger obstacles Federal law enforcement faces with respect to enhancing deterrence is in the area of sentencing for violations. Penalties and sentencing are controlled by two sources: Congressional statutes and the *Sentencing Guidelines* published by the United States Sentencing Commission.

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purpose is to establish sentencing policies and practices for the Federal courts, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of Federal crimes. While the development, monitoring, and amendment of the sentencing guidelines is the centerpiece of the agency's work, the Commission provides training, conducts research on sentencing-related issues, and serves as an information resource for Congress, criminal justice practitioners, and the public.

In many cases, Congress will specifically set forth a punishment in the statute which contains the substantive prohibition. In almost every criminal offense associated with critical infrastructure protection, Congress identifies a range of punishment options – such as from two years to 20 years with or without a particular fine. Because courts are given a range of punishments, the U.S. Sentencing Commission publishes Guidelines to assist Courts in delivering the most appropriate sentence. In general, the Guidelines suggest stricter punishments where criminal acts result in death, are committed with explosives, or are intended to cause harm. Amendments made to the Guidelines this year set forth more stringent punishments for terrorist-related acts. These are addressed further in the examples below.

### **Example - Terrorism and the U.S. Sentencing Guidelines**

Use of U.S. Sentencing Guidelines to Supplement Legal Authorities:  
U.S. Sentencing Guideline Enhancement

- Prior to passage of the Antiterrorism and Effective Death Penalty Act of 1996, Federal court judges were not provided any guidance with regard to acts that could be seen as “acts of terrorism.”
- Sentencing Guidelines associated with the Antiterrorism and Effective Death Penalty Act of 1996 accounted for criminal acts such as the Oklahoma bombing.

- The U.S. Sentencing Commission amended the Guidelines in May 1997<sup>3</sup> to increase the sentencing level for any offense intended to promote the “Federal crime of terrorism.”

While there are some provisions in the current Sentencing Guidelines that would allow for enhanced prison terms for certain acts against critical infrastructures, the Guidelines as written do not take into account extensive physical damage to infrastructures or disruptions in services due to physical attack on infrastructures. Amendment to the Guidelines to allow upward departures for these types of harms may be appropriate in light of the recent changes to the Sentencing Guidelines for computer crimes (as discussed in the companion paper to this effort on the adequacy of criminal law and procedure (cyber)).

One specific weakness of the current sentencing regime was uncovered with respect to biological substances. Under existing laws, crimes involving biological substances may result in unusually low prison sentences. Congressional laws do adequately address crimes involving toxic biological substances. In particular, legal authorities set forth penalties for a wide range of activities—acquiring, developing, producing, stockpiling, etc.<sup>4</sup> Congress sets the prison term for any of these, and other related activities at “life or any term of years.”<sup>5</sup> However, while Federal court judges may sentence an offender for life, there is no mandatory sentence in the statute. The Sentencing Guidelines set forth the following criteria:

- Base offense is equivalent to “weapons possession” – less than two years;<sup>6</sup>
- Where the Court finds that there was no intent to commit harm, the Sentencing Guidelines suggest only a minor increase in sentencing (*e.g.*, six months);<sup>7</sup>
- Where the Court finds intention was to commit murder, the prison term can be raised by 27 to 33 months;<sup>8</sup>
- Where the Court finds that the biological substance was used as a “weapon of mass destruction,” then the Guidelines increase the sentence considerably.<sup>9</sup>

<sup>3</sup> Amendments to the Sentencing Guidelines (U.S.S.G.), United States Sentencing Commission, May 13, 1997 at 58 (Amendment 19).

<sup>4</sup> 18 U.S.C. 175

<sup>5</sup> *Id.*

<sup>6</sup> The base offense is equivalent to 12 points under U.S.S.G. 2K2.1.

<sup>7</sup> See U.S.S.G. 2N2.1.

<sup>8</sup> See U.S.S.G. 2A.1 series for particulars.

<sup>9</sup> See U.S.S.G. 2M6.1. The Court may also find here that the act was terrorist-related and increase the term to life; where death result, the court can find for the death penalty. See USSG3A1.4.

Federal courts then have the discretion to apply the statute strictly or to find for an extremely low prison sentence. Where such crimes involve critical infrastructures, an unusually low prison sentence is—at least theoretically—possible based on relevant precedent.<sup>10</sup> Sentencing would depend, in large part, on the court’s sensitivity to critical infrastructure harm and related issues. In other areas, the Sentencing Guidelines provide strict implementation options—such as where the offender uses the substances in a terrorist-related act or as a weapon of mass destruction. Given the extreme toxicity of biological substances, and the level of threat they pose to certain infrastructures, Congress may wish to recommend (1) reducing the discretion now available to judges through Congressionally mandated sentencing, or (2) raising the courts awareness of these issues through sentencing enhancement with the existing Sentencing Guidelines framework.

## **Alternatives to Traditional Law Enforcement Efforts**

---

While it is assumed that successful prosecution and severe sentences will deter many of the possible criminal acts that could be targeted at infrastructures, recent cases (e.g. suicide bombers targeting N.Y. subways) suggest that there is a segment of society that will remain undeterred by even the most successful law enforcement efforts. For this reason, it may be important to consider other means of detecting and defeating these acts before they become realities. Neither of the alternatives suggested below should be taken as independent of law enforcement efforts, but rather as supplements to current or enhanced law enforcement efforts.

The first area where there is potential for improvement is in the administration of the current award program for information about terrorist activities. Through this Congressionally-mandated program, tips that lead to the capture and arrest of terrorists are to receive monetary awards. Such tips have played important roles in many recent law enforcement investigations such as the New York subway case. However, the current administration of the system may not be adequate to provide the necessary incentive to bring all who possess such crucial information forward. Improvements in education and awareness, scope of coverage, and the clarity of guidelines for receiving awards may contribute to the success of such a program.

In addition, preventive measures could be taken by many of the critical infrastructures to increase the physical security of the truly critical elements of their infrastructures. While it may be infeasible to make specific recommendations to each of the infrastructures as to the proper security measures to have in place at identified sites, it could still be possible to recognize the value of physical security as a deterrent and a deterrent that prevents damage rather than react to it.

---

<sup>10</sup> Recently, in a Minnesota case, an offender was convicted for manufacturing ricin. Ricin is one of the most toxic substances discovered to date, and small amounts could taint a large supply of treated water. The Court was faced with the options listed above and chose a middle course -- which increased the base offense by approximately 27 to 33 months (*See* U.S.S.G. 2K2.1.)

## Part Two

---

# Possible Approaches To Enhancing Deterrence

---

### Enact “Critical Infrastructure” Crimes Legislation

---

Congress could re-examine existing legislation covering critical infrastructures and consider revising and adding additional provisions to cover all of the critical infrastructures. Legislation would then be packaged as a “Critical Infrastructure Protection” statute. Specific guidance could also be provided to the Sentencing Commission on how to draft the guidelines for the new and revised provisions in the package.

- **Pro:** New legislation would allow Congress and the Sentencing Commission to focus on infrastructure assurance issues not previously addressed. A detailed study would allow an infrastructure-by-infrastructure approach which is probably necessary to avoid the Constitutional overbreadth issues that would plague a generic “damage to critical infrastructures” statute. Packaging of provisions together would raise the level of awareness of critical infrastructure issues. This approach may provide a useful model for states to use in evaluating their criminal statutes.
- **Con:** Congress is traditionally reluctant to consider creation of any broad criminal statutes where narrow statutes effectively address most of the problem. Congress is likely to be very reluctant to try new and untested approach where the old approach produces satisfactory results. Where there are holes, other less drastic means are available to “fill the gaps,” such as sentencing enhancement. Congress may be reluctant to pursue new legislation without an identified and urgent need (i.e. without a well-publicized event).

## Enhanced Sentencing Guidelines for Infrastructure-Related Harm and Damage

---

Several Federal criminal laws protect critical infrastructures from physical attacks. These authorities consist primarily of Federal statutes from Title 18 of the United States Code. There are over 30 major criminal laws that may be invoked in response to physical attacks on critical infrastructures—statutes that confer adequate investigative jurisdiction and authority in the vast majority of instances. Thus, the legislative scheme is comprehensive and provides an adequate “legal fortification” from physical attacks. However, there are several potential shortfalls relating to the ability of this complicated patchwork of laws to deter crimes against critical infrastructures.

Critical infrastructure deterrence may be undercut for several reasons. The first is that judges are likely not yet aware of, nor have they been trained to identify, critical infrastructure issues. Also, the Sentencing Guidelines support lighter sentencing for attacks against property, however serious. More severe sentences are reserved for attacks against people and attacks using traditional, violent means—such as explosives and firearms. In addition, the Sentencing Guidelines may not adequately take into account the severity of consequential damages arising from attacks on critical infrastructures, for example, damage resulting from the “downstream” effects of a denial of service attack. As a consequence, the Sentencing Guidelines may not adequately embody critical infrastructure assurance goals and interests, thus creating a possibility of disproportionately light sentences for some forms of attack on critical infrastructure.

Either the Administration or Congress could instruct the U.S. Sentencing Commission to enhance existing Sentencing Guidelines to account for harm to critical infrastructures. Using the Guideline on terrorist acts as a model, a specific guideline for used in sentencing physical crimes against critical infrastructures could be developed.<sup>11</sup> In particular, a recommendation could be offered to increase the range for prison sentencing for harm to critical infrastructure-related property. (See U.S.S.G. 2B1.3.) Disruptions in services that harm individuals or have substantial costs should be taken into account. (Sentencing Guidelines for computer crime may provide a model.) It may also be appropriate to recommend that the U.S. Sentencing Commission address infrastructure assurance objectives in its training program for Federal Court judges.

- **Pro:** A recommendation to enhance sentencing is an efficient legal method to protect critical infrastructures from physical threats; currently, the Guidelines do not account for, or in any way contemplate, damage to critical infrastructures.
- **Con:** Enhancing the Sentencing Guidelines will not lead to dramatically higher penalties for crimes against critical infrastructures. Only substantial changes to the underlying statutes, by Congress, will force dramatic changes from current sentencing practices.

---

<sup>11</sup> Such a provision could read: “If the offense is a felony that involved, or was intended to affect a critical infrastructure, as defined, then increase offense level by \_\_\_\_\_.”

There are three forms of “attack” against critical infrastructures which may not adequately be addressed by existing guidelines and which may require some degree of special attention. They include attacks—

1. With biological weapons or chemical weapons where no deaths occur.
2. Where there is only property damage.
3. Where no explosives or firearms are used.

There are three ways to amend the Sentencing Guidelines. This first is that Congress may instruct the Sentencing Commission to amend the Guidelines immediately to coincide with an enacted statute. Second, the U.S. Sentencing Commission may amend the Guidelines in accordance with a specific delegation of authority from Congress. Under both of these methods, Congress explicitly *empowers* the Sentencing Commission to amend the Guidelines. The third way is that any interested party may propose a Sentencing Guideline amendment.

The first two methods may result in Guideline amendments in a relatively short period of time. The only way to evade the “normal amendment cycle” is via express authority delegated by Congress. The third method—initiation by an interested party—requires at least one cycle (one full year); U.S. Sentencing Commission history suggests that two to three years is more likely required to amend a Guideline.

- **Pro:** These options complement Congressional statutes that penalize physical threats to critical infrastructures, but do so within the parameters of existing law and sentencing mechanisms. They accordingly should not require additional government structures or significant expenditures of resources. By instructing the President and Congress to delegate authority to the Sentencing Commission, infrastructure assurance goals will be incorporated outside the “normal U.S. Sentencing Commission cycles,” which may last as long as several years. Finally, sentencing enhancement achieves important consciousness-raising goals, providing information on critical infrastructure protection to a vital portion of the law enforcement and criminal justice network of professionals, judges, legislators, probation officers, local law enforcement, and academicians.
- **Con:** Working through the U.S. Sentencing Commission, as opposed to changing or developing new legislation, is not necessarily the most visible or comprehensive method for filling gaps in existing law. Critical infrastructure issues are complex and do not translate easily into U.S. Sentencing Commission Guideline Amendments. Real deficiencies in jurisdictional authority, for example, can be corrected only through specific criminal legislation.

## **Include Within Infrastructure-Related Legislation a Finding that Critical Infrastructures are “Instrumentalities of Interstate Commerce”**

---

In order to have investigative or prosecutorial jurisdiction over physical acts against critical infrastructures, the affected infrastructure must have some relationship with “interstate commerce.”<sup>12</sup> Although not common, there are examples of purely intrastate infrastructure facilities. Various rail lines, natural gas pipe networks, and state-run and operated subway systems may be deemed “intrastate.” The recent attempted pipe-bomb attack in the New York subway reveals a legal vulnerability; according to the Department of Justice, defense attorneys could defeat application of important Federal laws because the subway system is not clearly an “instrumentality in interstate commerce.” Congress could deem certain infrastructures to be “instrumentalities of interstate commerce.” Such a finding will ensure that crimes associated with critical infrastructures will be under Federal jurisdiction.

- **Pro:** Such a finding is necessary to ensure that all crimes associated with critical infrastructures are handled in Federal court, and are addressed with Federal criminal legislation. A Congressional finding is not overly dramatic or burdensome to Congress. It can be easily included in any piece of infrastructure-related legislation. Application of Federal criminal legislation to all critical infrastructure related crimes best protects these infrastructures by providing uniformity, especially in sentencing.
- **Con:** A Congressional finding that critical infrastructures are all instrumentalities of interstate commerce may be overly broad and may lead to unintended results. Such an attempt to secure Federal jurisdiction in all criminal matter affecting critical infrastructures may be premature without further study of state handling of such crimes and may be seen by state lawmakers as a usurpation of power.

The comprehensiveness of existing criminal law to cover a full range of physical attacks on critical infrastructure was examined as part of developing this paper. Deficiencies that might pose undue limitations on the exercise of Federal jurisdiction in such instances were also looked at. Two potential deficiencies were identified (discussed below) with respect to purely *intrastate* attacks against critical infrastructures—even when such an attack may result in severe damage. In these instances, in order legally to assume jurisdiction over an investigation or prosecution, the Federal government must demonstrate on a case-by-case basis that the incident affects interstate commerce. This may be a particularly difficult determination to make at the earliest stages of an investigation, before the scope of an attack or its effects are well known.

---

<sup>12</sup> Please refer to the Listing of Legal Authorities for examples (*See* Appendix A).

Also, there are several hypothetical scenarios involving purely intrastate facilities that may preclude Federal investigative and prosecutorial involvement.<sup>13</sup>

A *Congressional Finding* that all critical infrastructures (suitably defined) were “instrumentalities of interstate commerce” may be an efficient way of ensuring that Federal jurisdiction exists to respond to appropriate instances. Subsequent research, including a review of related cases and discussions with legislative counsel about these issues, lead to the following conclusions pertaining to issuance of a Congressional Finding:

- A Congressional Finding must be made part of a legislative enactment; a Congressional Resolution or statement read into the Congressional Record would not be sufficient to support a subsequent claim to Federal jurisdiction.<sup>14</sup>
- The standard used by Courts to test Congressional Findings is low: Courts demand only a “reasonable” nexus between the facts offered (in the Congressional finding) and interstate commerce.<sup>15</sup> For threats to critical infrastructures, this standard would likely be attainable.
- The Congressional Finding must be sufficiently specific to identify the critical infrastructures.<sup>16</sup>

---

<sup>13</sup> Possible examples of attacks against certain purely intrastate railroad and subway lines and natural gas pipe networks fit the profile.

<sup>14</sup> See, e.g., *U.S. v. Lopez*, 2 F.3d 1342 (5<sup>th</sup> Cir. 1993), *affirmed* 115 S.Ct. 1624, 514 U.S. 549, 131 L.Ed.2d 626 (Gun-Free School Zones Act prohibiting any individual from knowingly possessing firearm in school zone is invalid as beyond power of Congress under commerce clause. Neither Act nor legislative history reflected any congressional determination that possession denounced by Act was in any way related to interstate commerce or its regulation, or that Congress was exercising its powers under commerce clause).

<sup>15</sup> When Congress itself determines that particular conduct adversely affects interstate commerce, the courts defer to Congress’ judgment so long as there is a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. *Rasmussen v. American Dairy Ass’n*, 472 F.2d 517 (9<sup>th</sup> Cir. 1972), cert. denied, 93 S.Ct. 3014, 412 U.S. 950, 37 L.Ed.2d 1003. When reviewing Congress’ exercise of power under commerce clause, courts apply a rational basis test under which court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding. *U.S. v. Wilson*, 880 F.Supp. 621 (E.D. Wis. 1995), reversed 73 F.3d 675, rehearing and suggestion for rehearing en banc denied, cert. denied 117 S.Ct. 46, 136 L.Ed.2d 12, cert. denied 117 S.Ct. 47, 136 L.Ed.2d 12; Freedom of Access to Clinic Entrances Act (FACE), providing criminal and civil penalties against persons using or threatening to use force to interfere with reproductive health services, was validly enacted under Commerce Clause; congressional findings of nationwide violence against abortion clinics showed a substantive impact on interstate commerce. *U.S. v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995).

<sup>16</sup> See *U. S. v. Dawson*, 467 F.2d 668 (8<sup>th</sup> Cir. 1972), cert. denied, 93 S.Ct. 1427, 410 U.S. 956, 35 L.Ed.2d 689. Congressional failure to make formal findings of fact in connection with drafting of this section which among other things makes it unlawful to receive, transport, sell, etc., explosive materials knowing or having reasonable cause to believe that they were stolen did not render invalid underlying legislation despite claim of defendant that this section is infirm because its enactment was not accompanied by congressional findings concerning manner in which misuse of explosives affect interstate commerce, as there was a rational basis upon which Congress could properly have determined that the misuse of explosive materials is one activity which as a class affects commerce; *U. S. v. Perez*, 426 F.2d 1073 (2<sup>nd</sup> Cir. 1970), cert. granted 91 S.Ct. 175, 400 U.S. 915, 27 L.Ed.2d 154, affirmed 91 S.Ct. 1357, 402 U.S. 146, 28 L.Ed.2d 686 (In view of rational congressional finding that even purely intrastate extortionate



## Mandatory Prison Sentences

---

Congress could establish new, mandatory prison sentencing for all crimes involving biological substances; or in the alternative, recommend that the U.S. Sentencing Commission set forth stricter sentencing guidelines for crimes involving biological substances and train Federal court judges in effective implementation.

Biological substances are very serious agents which in small amounts can do serious damage. Congressional statutes are in place to charge crimes involving such substances; however, judges are currently given wide discretion in sentencing. Some past cases suggest that judges failed to appreciate the seriousness of the crimes in handing down their sentences. Congress or the Sentencing Commission could study and propose stricter penalties, with less discretion for judges, for cases involving biological agents. In addition, training in such new types of crimes should be given to judges to increase their sensitivity to the nature of the substances and their potential criminal uses.

- **Pro:** This approach would compel awareness of judges to relatively new crimes such as those involving biological agents. It would ensure strict sentencing in cases involving biological substances and may increase deterrence.
- **Con:** Congress has addressed the issue in the statute and may be reluctant to reopen the issue to consider sentencing. The Sentencing Commission may resist efforts to limit judicial discretion any further—as may the judicial community.

## Monetary Awards

---

The authors also reviewed legislation that offers reward monies for information leading to the capture of terrorists.<sup>17</sup> Under these legal authorities, Congress authorizes the Attorney General and the Secretary of State to administer rewards and payment-for-information programs. These laws appear to effectively supplement other Federal crimes legislation to protect critical infrastructures.

Few Federal agencies that control critical infrastructures have programs to protect infrastructure facilities—whether in the form of funds-for-information, rewards, or training and awareness. One of the few programs designed and administered by a Federal agency is Bonneville Power

---

credit transactions affect interstate commerce, this section is a constitutional exercise of Federal power over interstate commerce).

<sup>17</sup> 18 U.S.C. §§ 3071-3077.

Administration's Crime Witness Program.<sup>18</sup> Formed by BPA in 1994, the Crime Witness Program is a sophisticated blend of public relations,<sup>19</sup> grass roots training,<sup>20</sup> and cooperation with other Federal agencies to reduce losses and protect facilities.<sup>21</sup> BPA funds reward monies as a percentage of vandalism-related savings.

Government agencies could review and promote participation in Congressional programs that provide monetary awards for tips leading to the capture and arrest of terrorists (*see* 18 U.S.C. §§ 3071-3077). Such programs may be one of the best ways to prevent crimes from successfully occurring. In order for such programs to be truly effective, especially with regard to crimes against critical infrastructures, they must be well-publicized and provide clear guidelines (as little red-tape as possible) for obtaining the reward. There is evidence from recent investigations of the promise such programs have for preventing criminal acts (e.g., the New York subway case). The utility of such programs could be highlighted and expanded to include the critical infrastructures. Their administration could be streamlined and visibility heightened to improve participation.

- **Pro:** This approach is consistent with Congress' intent in establishing the reward money program. It focuses on preventing the crime (and subsequent damage). It supplements law enforcement efforts and contributes to successful prosecution. It publicizes low tolerance and proactive stance of the Federal government with regard to crimes directed against critical infrastructures.
- **Con:** Such programs are expensive and difficult to administer. Expansion to critical infrastructure issues may be resisted by agencies that administer the programs (State and DOJ).

---

<sup>18</sup> Bonneville Power Administration Journal, June 1997 at 2 (reprinted at Bonneville Power Administration Website, [www.bpa.gov/Corporate/ACS/jl/97jl/jl0697x.htm/](http://www.bpa.gov/Corporate/ACS/jl/97jl/jl0697x.htm/)).

<sup>19</sup> BPA commissioned a professional video to advertise the program as a Public Service Announcement. Television stations throughout areas that BPA maintains transmission lines broadcast the message at no charge; BPA produced similar radio spots as well.

<sup>20</sup> BPA additionally prints posters, pamphlets, and signs to advertise the Program at schools, community centers, and on-site throughout the Northwest United States. Dissemination of materials is especially heavy in sparsely populated areas. BPA has approximately 15,000 miles of transmission lines.

<sup>21</sup> The Bureau of Reclamation and the Army Corps of Engineers recently agreed to coordinate efforts with BPA as part of the Crime Witness Program. After calls come in advising of a potential crime, operators direct calls to the agency that controls the relevant infrastructure facility. The Bureau of Reclamation provides funding directly to BPA.

## **Critical Infrastructure Owners and Operators Pursue Increased Physical Security for Particularly Vital and Vulnerable Elements of Their Infrastructures**

---

This approach would allow the agencies, trade associations and owners and operators to work together to determine the areas that need additional protection, best level of protection, and appropriate means to supply it. Focusing on prevention may provide an element of deterrence for small-time criminals without access to powerful weapons or sophisticated equipment.

- **Pro:** This approach focuses on preventing damage rather than reacting to criminal act. It involves infrastructure owners and operators in protecting their infrastructures, and supplements enhanced law enforcement responses (e.g., stiffer sentences).
- **Con:** Without a powerful mandate, infrastructure owners and operators may be reluctant to sink additional funds into security. Increased security will not deter the most sophisticated and determined criminals.

## Part Three

---

# Conclusions

---

If the President and Congress so chose, they could encourage the Sentencing Commission to amend the Sentencing Guidelines to adequately and proportionately address physical threats to critical infrastructures. Specifically, they could ensure that—

- The U.S. Sentencing Commission ensure that the applicable guideline ranges for a defendant convicted of a crime against a critical infrastructure are sufficient to deter such crime, and provide an appropriate vehicle through which the sentencing court may consider the full range of consequential damages, including but not limited to economic damages, that may have been incurred by the victim and others as the result of the crime;
- The U.S. Sentencing Commission study and report to Congress on sentencing issues—with emphasis on sentencing deficiencies for damage to critical infrastructure property and attacks with biological and chemical weapons that do not result in any deaths and are not currently covered as “terrorist” acts for guidelines purposes;
- The U.S. Sentencing Commission train Federal Court judges to identify and incorporate critical infrastructure assurance goals into sentencing; and
- Sentencing Commissions and Councils within each state, and state legislatures, study Amendments to the U.S. Sentencing Guidelines intended to further critical infrastructure assurance, and to consider similar changes to their state sentencing guidelines or criminal statutes.

Congress may find it prudent to consider the propriety of including in appropriate infrastructure-related legislation a Congressional Finding that “critical infrastructures” are “instrumentalities of interstate commerce.”

Such a finding may be necessary to ensure that all serious attacks on critical infrastructures can be investigated by Federal law enforcement officials and prosecuted in Federal court. Rendering a Congressional Finding under such circumstances would likely not prove burdensome or inappropriate. It can be included in any piece of infrastructure-related legislation, and need not be tied to “new” criminal legislation.

Some issues militate against this approach however. There may be considerable delay before passage of specific “critical infrastructure” legislation. Without a Congressional statute, there can be no Congressional Finding. The Finding itself must be stated with adequate specificity as to put a defendant on notice as to what might constitute a “critical infrastructure,” and the adequacy of this definition may provide grounds for appeal of a conviction. Thus, Congress should carefully consider whether a suitable definition can be drawn, and whether the benefits might justify the effort.

The President and Congress could review and promote Federal government agencies’ participation in programs that provide monetary rewards for information leading to the capture and arrest of vandals and terrorists. Congress could further encourage agencies to explore the creation of such novel programs aimed at protecting critical infrastructure facilities from damage.

This position is wholly consistent with Congress’ intent in establishing rewards and payment for information programs. Further, at the grass roots level, there seems to be movement in creating these programs to meet individual agency and infrastructure needs. It should be noted however, that these programs are likely expensive and difficult to administer. Expansion of programs, other than the existing programs for the Department of Justice and the State Department, may be too onerous for other agencies.

## APPENDIX A

### Listing of Primary Legal Authorities

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<p>Explosives/incendiary devices</p> <ul style="list-style-type: none"> <li>• 18 U.S.C. 844</li> </ul>	<p>All critical infrastructures.</p> <p>Not applied to crimes associated with infrastructure elements not in “interstate commerce.”</p>	<p>Criminal code legal authority to prosecute use, or threat of use of explosives. Involves, government and private property.</p> <p>Used extensively by Department of Justice to prosecute use of explosives in criminal acts.</p>	<p>Must be in “interstate commerce”; if not, the provision will not apply.</p> <p>Not all infrastructures are necessarily instrumentalities in interstate commerce (e.g., certain rail lines, gas pipe networks, etc.)</p> <p>Penalties vary based on offense:</p> <p>844h - Damage to government property with explosives mandatory 10 years; if private property then mandatory 5 years. If is a second offense, penalties are far stricter.</p> <p>Where death results, then courts may sentence for any term of years up to the death penalty.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 2332a</li> </ul>	<p>All critical infrastructures.</p> <p>Any U.S. Government property, or against any person (must have results in interstate commerce).</p>	<p>Criminal code legal authority to prosecute for use of any biological, chemical, or conventional explosives.</p> <p>Department of Justice applies broadly – use of any type of explosives.</p> <p>Part of 1996 Antiterrorism and Effective Death Penalty Act (1996 Terrorism Act).</p>	<p>Would not apply if criminal act to infrastructure were solely “intrastate.”</p> <p>Penalty is term of years or life.</p> <p>Sentencing Guidelines increase time of sentence if:</p> <ul style="list-style-type: none"> <li>against property - U.S.S.G. 2B1.3;</li> <li>harm is caused to a person U.S.S.G. 2A1.1;</li> <li>where death results, then may be punished by death, or life in prison.</li> </ul>
<ul style="list-style-type: none"> <li>18 U.S.C. 2332c</li> </ul>	<p>Attacks against all critical infrastructures.</p>	<p>Criminal code legal authority to prosecute for use of any biological, chemical, or conventional explosives.</p> <p>Department of Justice applies broadly – use of any type of explosives.</p> <p>(Note 18 U.S.C. 2333 and provisions for civil penalties).</p> <p>Part of 1996 Antiterrorism and Effective Death Penalty Act (1996 Terrorism Act).</p>	<p>Would not apply if criminal act were solely “intrastate.”</p> <p>No specific Sentencing Guideline covers this provision. Congress calls for penalties similar to 2332a – term of years to life; where act causes death, then death penalty may be invoked.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 831</li> </ul>	All critical infrastructures.	Criminal code - legal authority to prosecute for use of any nuclear materials.	<p>Use of nuclear materials:</p> <ul style="list-style-type: none"> <li>Congress lists range of penalties from not more than 20 years (no harm is caused) to life (where indifference to life is manifest by criminal act).</li> <li>Where death is caused, term of years to life, and the death penalty is an Option. <i>See</i> U.S.S.G. Amendment 3A1.4 allows for the death penalty.</li> </ul> <p>If the intent is to “aid a foreign government” or to cause harm to the U.S., then the Sentencing Guidelines suggest a higher term of years U.S.S.G. 2M6.1.</p>



Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 175-178</li> </ul> <p>Biological Weapons Anti-Terrorism Act of 1989</p>	<p>All critical infrastructures.</p>	<p>Criminal code legal authority to prosecute for use of any biological weapon.</p> <p>Recently, in a Minnesota case, a Federal judge sentenced someone who was producing ricin to “minimum sentence.” The Judge ultimately based the decision on U.S. Sentencing Guidelines for unlawful weapons possession (U.S.S.G. 2K2.1) rather than the more serious “weapons of mass destruction” guideline. The Court could have set forth an even lighter sentence based on possession of a biological weapon.</p>	<p>No “interstate commerce” requirement. However, there are no specific U.S. Sentencing Guidelines for this provision and Congress indicates a “for life or any other term.”</p> <p>The absence of a specific Sentencing Guideline might prevent courts from applying this provision strictly – especially in the absence of any harm. DOJ suggests that three possible U.S. Sentencing Guideline applications</p> <p>Enhancing the Sentencing Guidelines might be appropriate. Production and stockpiling of ricin, for example, would likely lead to a 0 to 6 month sentence based on available Sentencing Guideline 2N2.1 or 2K2.1:</p> <ul style="list-style-type: none"> <li>2N2.1 (use of biological product).</li> <li>2A2.1 (attempted murder),</li> <li>2K2.1 (weapons possession);or</li> <li>2M6.1 -(weapon of mass destruction).</li> </ul>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 2332b</li> </ul>	All critical infrastructures.	<p>Aimed at prosecuting terrorism “beyond U.S. boundaries.” Provision transcends U.S. boundaries.</p> <p>Mini-RICO – Additional teeth for conspiracies – more than one person.</p>	<p>Penalties are severe for acts that lead to death. May be charged with term of years to life, or the Death Penalty under the 1996 Terrorism Act and U.S. Sentencing Guideline 3A1.4.</p> <p>Long-arm jurisdiction: Congress attempt to catch criminal “wherever and whenever.”</p>
<ul style="list-style-type: none"> <li>18 U.S.C. 1363</li> </ul>	All critical infrastructures.	Buildings of property within maritime or territorial jurisdiction.	<p>Generic: destruction of buildings and property, whether government or private. Sentencing Guidelines force increase in term based on:</p> <ul style="list-style-type: none"> <li>property damage</li> <li>weapons used (gun v. explosives)</li> <li>planning involved</li> </ul> <p>See differences between U.S.S.G. 2B1.3 and U.S.S.G. 2K1.4. According to DOJ, this provision used to catch “prankster” more than terrorist.</p> <p>Statute limits prison term to 20 years.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 1361</li> </ul>	All critical infrastructures.	Government property or contracts	<p>This provision applies to government only. DOJ considers this provision to be the most generic provision for destruction of Federal property.</p> <p>Penalties of zero to ten years, based on property damage and harm to human life. Statute limits maximum prison term to ten years.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 1992</li> </ul>	<p>Transportation facilities - railroads and railroad facilities.</p>	<p>“Wrecking trains” statute.</p> <p>If act is to intrastate facility, DOJ applies 18 U.S.C. 844I – five to 15 years for first offense is prison range.</p>	<p>Does not cover mass transit. Must be in interstate commerce; where facility is solely intrastate, statute might not apply.</p> <p>Maximum prison term is 20 years. Sentencing Guidelines set forth increase terms where act involves:</p> <ul style="list-style-type: none"> <li>homicide (U.S.S.G. 2A1.1)</li> <li>terrorism (U.S.S.G. 3A1.4).</li> </ul> <p>Where train is carrying high-level radioactive waste or spent nuclear fuel, term increases from 30 years to life.</p> <p>Under this scenario, same U.S. Sentencing Guidelines apply to calculate actual term.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 32</li> </ul>	Airport facilities.	Destruction of aircraft facilities.	<p>For destroying or an act of violence against an aircraft facility. Includes aircraft and facilities. Congress sets penalty at maximum of 20 years.</p> <p>Where the act involves kidnapping, homicide, or terrorism, U.S. Sentencing Commission instructs courts to increase sentences accordingly.</p> <p>Does not apply to “international airports.”</p>
<ul style="list-style-type: none"> <li>18 U.S.C. 37</li> </ul>	International airport facilities.	Any act of violence at international airport facilities.	<p>Applies only to airport facilities at international airports.</p> <p>Does not cover aircraft (see 18 U.S.C. 32, above).</p> <p>Applies to acts outside the U.S. if offender is subsequently found in the U.S.</p> <p>Congress sets limit at 20 years.</p>
<ul style="list-style-type: none"> <li>18 U.S.C. 33</li> </ul>	Motor vehicles or vehicle facilities.	Destruction of motor vehicles or motor vehicle facilities.	<p>Congress sets limit at 20 years.</p> <p>DOJ also uses 844I (compare with application of 844I to intrastate criminal act to a railroad, discussed above).</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>18 U.S.C. 2271-2281</li> </ul>	Vessels; mixed platforms.	Vessels.	<p>Wide range of Congressional statutes covering crimes regarding vessels. Comprehensive. Specific as to party committing act.</p> <p>U.S. Sentencing Guidelines cover adequately.</p>

Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<p>49 U.S.C. 60123 and 49 USCA 60114(c )</p>	<p>Pipelines; pipeline facilities.</p>	<p>Acts of destruction to pipelines.</p>	<p>Congress sets forth different penalties depending on act:</p> <ul style="list-style-type: none"> <li>• damage or destroy facility - 5 to 15 years</li> <li>• destroy sign or natural gas marker - not more than one year;</li> <li>• failure of owner/operator to mark adequately - not more than 5 years (See 49 USCA 60114(c ).</li> </ul> <p>Also sets forth penalties from not following marking rules.</p> <p>NOTE: Application of the U.S. Sentencing Guidelines to these statutes suggests that Act lacks any real “teeth.”</p> <p>U.S. Sentencing Guidelines for destruction to property suggest extremely low penalties—often zero to six months. See U.S.S.G. 2B1.3.</p>





Legal Authority	Critical Infrastructure	Protection/Description	Sufficiency of Protection Penalty-Sentencing
<ul style="list-style-type: none"> <li>42 U.S.C. 2284</li> </ul>	Nuclear fuel facility.	Any act of destruction, violence, sabotage.	
<ul style="list-style-type: none"> <li>18 U.S.C. 1362</li> </ul>	Telecommunication lines.	Any act of destruction.	<p>This provision, which Congress intended to protect telecommunication lines and stations, may lack necessary teeth. Similar to the energy facility and pipeline examples above, an offender who does not use a firearm or other destructive device, could end up causing substantial damage and not be subject to a commensurate prison term.</p> <p>The basis for this is U.S. Sentencing Guideline 2B.1.3. Congress sets forth a maximum term of ten years. The Guidelines will suggest a higher term where weapons are involved (U.S.S.G. 2K1.4) or if part of a terrorist scheme (U.S.S.G. 3A.1.4) However, where no weapons are used, and the offender has no previous crimes, the Guidelines will militate toward a far shorter term – perhaps zero to six months – where no “weapons” are used.</p>

## APPENDIX B

---

---

# The United States Sentencing Commission

---

---

- |   |
|---|
| <ol style="list-style-type: none"><li>1. What is the United States Sentencing Commission's mission?</li><li>2. Why did Congress create the Sentencing Commission?</li><li>3. How do the Sentencing Guidelines Work?</li><li>4. How is the Sentencing Commission Structured?</li><li>5. Who are the Commissioners?</li><li>6. What is the process for amending the Sentencing Guidelines and how much time would the Sentencing Commission require to amend the existing Guidelines?</li></ol> |
|---|

### 1. What is the United States Sentencing Commission?

---

The United States Sentencing Commission is an independent agency in the judicial branch of government. The Commission's principal purpose is to establish sentencing policies and practices for the Federal courts, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of Federal crimes. While the development, monitoring, and amendment of the sentencing guidelines is the centerpiece of the agency's work, the Commission provides training, conducts research on sentencing-related issues, and serves as an information resource for Congress, criminal justice practitioners, and the public.

The U.S. Sentencing Commission was created by the *Sentencing Reform Act* provisions of the *Comprehensive Crime Control Act of 1984*, and its 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.<sup>1</sup>

Congress charged the Commission with three significant ongoing responsibilities:

---

<sup>1</sup> See 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b).

1. *Evaluating the effects of the sentencing guidelines on the criminal justice system,*<sup>2</sup>
2. *Recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and*
3. *Establishing a research and development program on sentencing issues.*

In addition to creating the Sentencing Commission, the *Sentencing Reform Act* abolished parole for offenders sentenced under the guidelines so that the sentence received would be basically the sentence served.<sup>3</sup>

## 2. Why did Congress Create the Sentencing Commission?

---

Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public. After decades of research and debate, Congress decided that the previously unfettered sentencing discretion accorded Federal trial judges needed to be structured. Congress created a permanent commission charged with formulating national sentencing guidelines to define the parameters for Federal trial judges to follow in their sentencing decisions.

Organized in October 1985, the U.S. Sentencing Commission submitted its initial set of Guidelines and Policy Statements to Congress on April 13, 1987. Prior to this submission, the Commission held 13 public hearings, published two drafts of guidelines for public comment, and received more than 1,000 position papers from individuals and organizations. After the required period of congressional review, the guidelines became effective on November 1, 1987, and apply to all offenses committed on or after that date.<sup>4</sup>

---

<sup>2</sup> The Sentencing Guidelines are designed to incorporate the purposes of sentencing:

- just punishment, deterrence, incapacitation, and rehabilitation;
- certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct;
- sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; and
- advancement in the knowledge of human behavior as it relates to the criminal justice process.

<sup>3</sup> Under the law, inmates may earn up to only 54 days of credit a year for good behavior.

<sup>4</sup> Shortly after implementation of the guidelines, Defendants throughout the country began challenging the constitutionality of the *Sentencing Reform Act*, claiming improper legislative delegation and violation of the separation of powers doctrine. On January 18, 1989, in the landmark case of *Mistretta v. United States*, the Supreme Court rejected these challenges and upheld the constitutionality of the Act and the Commission as an independent judicial branch agency.

### **3. How do the Sentencing Guidelines Work?**

---

The United States Sentencing Commission has authority to submit guideline amendments each year to Congress between the beginning of a regular congressional session and May 1. Amendments automatically take effect 180 days after submission unless a law is enacted to the contrary.

The Guidelines take into account both the defendant's count of conviction and actual nature of the criminal conduct by assigning a base offense level (a number) that serves as a starting point in assessing the seriousness of an offense. This base offense level can increase or decrease based on the circumstances of the particular case. The factors that modify the base offense level ("specific offense characteristics") are enumerated in the guidelines. A base offense level, modified by specific offense characteristics and general adjustments, forms one axis of the table used to determine sentencing ranges. The sentencing table's offense axis extends from level 1 (least serious) to level 43 (most serious).

The other axis reflects the defendant's criminal history as expressed in one of six categories (Category I-Category VI). The point at which the offense level and criminal history category intersect on the sentencing table determines an offender's guideline range. In order to provide flexibility, the top of each guideline range exceeds the bottom by no more than six months or 25 percent (whichever is greater). Ordinarily, the judge must choose a sentence from within the guideline range unless the court identifies a factor that the Sentencing Commission failed to consider that should result in a different sentence. However, the judge must in all cases provide the reasons for the sentence. Sentences outside the guideline range are subject to review by the courts of appeals for "reasonableness," and all sentences can be reviewed for incorrect guideline application or sentences imposed in violation of law.

### **4. How is the Sentencing Commission Structured?**

---

Unlike many special-purpose "study" commissions within the executive branch, Congress established the U.S. Sentencing Commission as an ongoing, independent agency within the judicial branch. The seven voting members on the Commission are appointed by the President and confirmed by the Senate. The Attorney General is an ex officio member of the Commission, as is the Chairman of the U.S. Parole Commission.

The Commission staff of approximately 100 employees is divided into five offices with the director of each office reporting to the Staff Director who in turn reports to the Chairman. The five offices are: General Counsel, Monitoring, Training and Technical Assistance, Policy Analysis, and Administration.

In addition to developing the initial guidelines, the Commission:

- monitors the guidelines' operation through a comprehensive data collection system;
- conducts sentencing-related research;
- collects and disseminates information on Federal sentencing practices;
- provides reports and technical assistance to Congress and the judiciary on sentencing issues;
- revises the guidelines as necessary;
- trains thousands of judges, probation officers, prosecutors, defense attorneys, and others involved in the sentencing process;
- operates hotlines to assist judges, probation officers, and prosecuting and defense attorneys with guideline application;
- assesses the guidelines' effectiveness in achieving the sentencing purposes of just punishment, deterrence, incapacitation, and rehabilitation; and
- responds to requests for information from the courts, inmates, the general public, the defense bar, students, professors, the business community, and Congressional offices.

## 5. Who are the Current Commissioners?

---

Congress set forth slots for nine commissioners: seven voting and two non-voting, *ex-officio*. Commissioners are appointed by the President. Currently, there are only five sitting Commissioners: two others are waiting for confirmation by the Senate. The following is a listing of the current U.S. Sentencing Commission commissioners:

**Richard P. Conaboy** of Scranton, Pennsylvania, was sworn in as Chair of the U.S. Sentencing Commission on October 11, 1994. He currently serves as a United States District Judge for the Middle District of Pennsylvania. In 1989, he became Chief Judge; he took senior status in 1992. Formerly Judge of the Court of Common Pleas of Lackawanna County (PA), Hearing Examiner for the Pennsylvania State Liquor Control Board, Pennsylvania Deputy Attorney General, and a practicing attorney in Pennsylvania. From 1977 to 1980, he served as Chairman of the Pennsylvania Commission on Sentencing. He also served as Chairman of the Pennsylvania Joint Council on Criminal Justice, Chairman of the Pennsylvania Conference of State Trial Judges, and Vice-Chairman of the Pennsylvania Governor's Justice Commission.

**Michael S. Gelacak** of Centreville, Virginia, formerly practicing attorney in Washington, D.C. and Buffalo, NY. He served as Chief Counsel of the United States Senate Subcommittee on Penitentiaries, Staff Director of the Senate Subcommittee on Criminal Laws, and Minority Staff Director of the Senate Judiciary Committee. He also served as Legislative Director for Senator Joseph R. Biden, Jr., from 1983 to 1985.

**Michael Goldsmith** of Salt Lake City, Utah, Professor of Law at Brigham Young University. Formerly Assistant Professor of Law at Vanderbilt Law School, Counsel to the New York State Organized Crime Task Force, Assistant U.S. Attorney for the Eastern District of Pennsylvania, Senior Staff Counsel to the House Select Committee on Assassinations, and Deputy State's Attorney for Chittenden County, Vermont. Professor Goldsmith received the Order of the Coif from Cornell University Law School. He has written numerous articles on a wide range of criminal law topics, including sentencing and Federal guidelines.

**Deanell R. Tacha** of Lawrence, Kansas, United States Circuit Judge for the Tenth Circuit. Formerly Chair of the Judicial Conference's Committee on the Judicial Branch, Vice Chancellor for Academic Affairs at the University of Kansas, Associate Dean at the University of Kansas School of Law, Professor of Law at the University of Kansas, and a practicing attorney in Kansas and Washington, D.C. Listed in Outstanding Young Women in America. Received Jaycee's "Outstanding Young Woman in Kansas" Award in 1980 and Girl Scout's "Women of Distinction" Award in 1994 among numerous other awards.

*Ex-Officio Members:*

**Michael J. Gaines** of Little Rock, Arkansas, was designated as Chairman of the U.S. Parole Commission on February 4, 1997. Formerly, he served as Commissioner of the Parole Commission's National Appeals Board, Chairman of the Arkansas State Board of Parole and Community Rehabilitation, Executive Director of the State Supreme Court Committee on Professional Conduct, and Criminal Justice Liaison and Pardon and Extradition Counsel to then Governor Clinton.

**Mary Frances Harkenrider** of Chicago, Illinois, Counsel to the Assistant Attorney General for the Criminal Division, United States Department of Justice. Formerly a Federal prosecutor in the Northern District of Illinois and a Senior Supervising Attorney for the City of Chicago. She has taught Trial Practice and Pretrial Procedure classes as an Adjunct Professor at Northwestern University School of Law.

## **6. What Is The Process For Amending The Sentencing Guidelines And How Much Time Would The Sentencing Commission Require To Amend The Existing Guidelines?**

---

Congress did not legislate minimum or maximum time requirements in the Sentencing Reform Act.<sup>5</sup> Rather, the Sentencing Commission is left with discretion to select relevant issues and topics for sentencing reform and enhancement. In principle, changes proposed by Congress or the Sentencing Commission may take effect on an expedited basis—in some cases, as quickly as several months’ time. All other amendments require at least six months to one year, assuming there is no opposition.

The Sentencing Commission operates under its Rules of Practice and Procedure.<sup>6</sup> Pursuant to the Rules, Amendments are introduced into the process in three ways:

- (1) by Congress, as a mandated Emergency Guideline Amendment (Rule 4.1);
- (2) by the Sentencing Commission, pursuant to authority delegated from Congress and approved by four of the Commissioners (Rules 2 and 4.1);
- (3) by any party, via submission, as a proposed Guideline Amendment (Rules 4.1 - 4.5).

Congress may direct the Sentencing Commission to amend the Guidelines where a new statute requires an addition to the Guidelines. Congress may also force an amendment where Guidelines are inconsistent with existing Statutes. In both cases, Congress notifies the Commissioners, provides the necessary language, and the amendment occurs without public debate or Sentencing Commission deliberations. This is the most efficient method and requires the least amount of time.

The Sentencing Commission may draft the Guideline Amendment when instructed to by Congress. In contrast to Congress’ unilateral action to amend the Guidelines, the Sentencing Commission has authority to discuss and to draft Amendments, but only on an “emergency amendment basis”. *See* 28 U.S.C. § 994(a); Rules of Practice 2.2 (1997).<sup>7</sup> Under both scenarios, Congress must instruct or delegate the power to the Sentencing Commission to amend the Guidelines outside of the normal process.

---

<sup>5</sup> 28 U.S.C. § 1991(b) (1995).

<sup>6</sup> Rules of Practice and Procedure, U.S. Sentencing Commission (July 1997) (the “Rules of Procedure”). The Sentencing Commission promulgates the Rules of Procedure pursuant to Congressional mandate. 28 U.S.C. § 995(a)(1). The Sentencing Commission amended its Rules of Procedure in June 1997. For background information on the recent changes, refer to 61 Fed. Reg. 39493-39496 (July 19, 1996) and 61 Fed. Reg. 52825-52826 (October 8, 1996).

<sup>7</sup> Note that the two ex-officio Commissioners do not have voting authority. Rules of Practice 2.1 (1997).

Other interested parties may propose amendments to the Sentencing Guidelines. The proposals take the form of submissions and set forth all arguments and rationale for the proposed amendments. The cycle—which lasts one full year—typically follows the following time frame:

- December to February - Received Submissions for Amendments.
- March - April - Debates and considers public reaction; votes on Amendments.
- May 1 - Sends Amendments to Congress.
- May - November - Congress Reviews.
- Enacted in November, unless Congress explicitly rejects.

Under this third scenario, any organization may propose an Amendment to the Guidelines. The cycle technically lasts one year. In reality, however, the Commission often takes up to two to three cycles before hashing out a particular change to the Guidelines.<sup>8</sup>

The Sentencing Commission may also invite the airing of an issue, or series of issues. According to the Rule of Practice, the Sentencing Commission publishes a “Notice of Priorities” in the Federal Register. The purpose of this Notice is to—

*“make available to the public a notice of the tentative priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary.”<sup>9</sup>*

It may be appropriate that the Sentencing Commission immediately list critical infrastructure assurance as a priority issue.

---

<sup>8</sup> Based on conversations with John Steer, General Counsel to the U.S. Sentencing Commission. See Angeli, A “Second Look” at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection, 34 AM. CRIM. L. REV. 1211 (1996) (Demonstrates the political and legal complexities of amending the Sentencing Guidelines).

<sup>9</sup> Rules of Practice, 5.2 (May 1997).