Written Testimony of Frank Bowman

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At the outset, I wish to thank Judge Murphy and all the members of the Sentencing Commission for inviting me to testify before you. It is always a pleasure to see so many good friends -- Commissioners, members of the Commission's wonderful staff, and other participants in the vital enterprise of designing just and effective rules for sentencing offenders in the courts of the United States.

Our subject today is amendments to guidelines governing economic offenses that the Commission has been considering following the enactment of the Sarbanes-Oxley Act of 2002. Since December 2002, I have responded to Commission requests for comment on various proposed amendments with a series of four letters to Judge Murphy and the Commission.[1] All of these letters address one or more points still under consideration by the Commission. Thus, in order to avoid duplication, I have appended them to this written testimony and request that they be made a part of the record of this hearing.

The Commission is to be commended for the emergency amendments passed in January 2003 in response to directives in the Sarbanes-Oxley Act. Taken as a whole they represent a thoughtful, responsible, and wisely restrained response to both the letter and spirit of the Act. The question before you now is whether any further amendments are required.

This statement addresses three topics: (1) whether additional sentence increases for economic crimes are either required by the Sarbanes-Oxley Act or are warranted based on available evidence; (2) whether the Guidelines should be modified to add an additional offense level for crimes which involve "fraud" or which have a specified statutory maximum sentence; and (3) if the Commission were to proceed with a general sentence increase for economic crimes, which of the proposed models for doing so is least harmful.

I. Sentence Increases for Economic Crime

A. History

Federal Economic Crime Sentences Before Sarbanes-Oxley: The sentences prescribed by federal law for economic crimes have been increasing steadily since

[1] The dates and subjects of these letters are as follows: December 13, 2002 (whether Sarbanes-Oxley requires across-the-board sentence increases for economic crime; specific enhancements: more than 50 victims, endangering solvency of substantial number of victims, officers and directors of publicly traded corporations, loss calculation, expansion of loss table), January 4, 2003 (responding to DOJ letters urging across-the-board sentence increases for economic crime), February 10, 2003 (examining empirical arguments for across-the-board sentence increases for economic crime), February 18, 2003 (responding to proposal to de-link theft and fraud sentencing).

1987. When the Guidelines came into effect in November 1987, penalty levels for economic offenses were consciously increased over pre-Guidelines practice. Since 1987, the Guidelines relating to economic crime have been amended repeatedly to increase penalties further. I described these amendments and their effects in my letter of February 10, 2003 (pp. 6-11), and I will not reiterate them here. However, the facts, set out in that letter and undisputed by any party to the present debate, are these:

- The *rate of imprisonment* of federal economic crime defendants, the *severity of sentences* called for by the Guidelines, and the *length of sentences of imprisonment actually imposed* are now at all-time highs.
- Federal economic crime sentences are, on average, higher than economic crime sentences in the states.
- The misleadingly low average federal white-collar crime sentence is attributable primarily to the predominance of low-level, low-loss cases in the federal system. Fully **55% of all federal defendants** sentenced for economic crime offenses caused **losses less than $40,000**. More than 30% were responsible for losses less than $10,000. *And 15% of all federal economic defendants, or one out of seven, took less than $2,000*.[2]
- Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence.

Moreover, the effects of the round of sentence increases incorporated in the 2001 Economic Crime have not yet been felt in the courts or measured by the Sentencing Commission.

The Sarbanes-Oxley Legislation: In the summer of 2002, when the Sarbanes-Oxley legislation was under consideration in Congress, *no one* suggested that economic crime penalties were, in general, too low. The only entity which now maintains that economic crime penalties are, in general, too low is the U.S. Department of Justice. Consequently, the position of the Justice Department during the Sarbanes-Oxley debate calls for some brief examination.

When called before Senator Biden's Subcommittee on Crime and Drugs on June 19, 2002, the Justice Department's spokesman, James B. Comey, Jr., U.S. Attorney for the Southern District of New York, expressed some concern about the fact that the 2001 Economic Crime Package reduced or in some instances lowered sentences for defendants who caused losses of $70,000 or lower. At no point did he suggest or intimate that sentences for offenses with larger losses were inadequate. Instead, he stated that, "we believe that the changes made by the Package are consistent with the principles of appropriate certainty and severity

[2] *See, Proceedings of the Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12-13, 2000,* Fig. Semisch-2: Number of Offenders in Each Loss Amount Category (2001).

and are generally a step in the right direction."[3] Similarly, when Assistant Attorney General Michael Chertoff appeared before the same subcommittee on July 10, 2002, he spoke of increasing statutory maximum sentences for wire and mail fraud and of the necessity of tough penalties to deter "white collar crime" by "business criminals" and "corporate criminals," but nowhere suggested that the Department of Justice desired across-the-board sentence increases for all defendants who committed any form or degree of economic offense. Indeed, Mr. Chertoff attached Mr. Comey's earlier testimony, with its endorsement of the accomplishments of the 2001 Economic Crime Package, to his own.[4] It was only after the passage of Sarbanes-Oxley that the Justice Department determined, for the first time, that sentences for all economic crimes, regardless of type or loss amount, should be increased.

A. The Current Position of the Justice Department

Considered carefully, the argument over increasing economic crime sentences has two separate, though related, threads. The first question is whether there should be an across-the-board sentence increase for all economic crime offenders, regardless of loss level. The second issue is the more particular question of the loss amount for which some prison time should ordinarily be required. The Justice Department wants to modify the Section 2B1.1 loss table to accomplish two ends: (1) to increase economic crime sentences generally, and (2) to limit judicial discretion to impose alternative, non-prison sanctions on low-loss offenders by lowering the loss amount that would make a defendant eligible for a Zone A, B, or C sentence.

1. The Argument from Statutory Interpretation

To date, the Justice Department's argument for raising sentences and reducing judicial discretion has rested almost entirely on the claim that the Sarbanes-Oxley Act requires it. This approach is understandable from a tactical perspective because it allows the Department to duck two difficult questions: First, if, after the 2001 Economic Crime Package, economic crime sentences were still too low and across-the-board sentence increases for all economic crimes were genuinely necessary, why did the Department not say so in June and July 2002? Second, and more importantly, *why* are current sentences too low and *why* should they be increased? In short, the argument from statutory interpretation allows the Department to avoid explaining its own inconsistent positions and to avoid

[3] Written Statement of James B. Comey, Jr., United States Attorney, Southern District of New York, Before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, Concerning Penalties for White Collar Criminal Offenses, June 19, 2002, p. 7.
[4] Testimony of The Honorable Michael Chertoff, Assistant Attorney General, Criminal Division United States Department of Justice, Before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, July 10, 2002 (*see* http://www.senate.gov/~judiciary/testimony.cfm).

engaging in a debate on the merits of an across-the-board sentence increase.

The weakness in the Department's chosen tactic is that no serious observer believes that Sarbanes-Oxley mandates an *across-the-board* economic crime sentence increase. Indeed, the argument from Sarbanes-Oxley is weakest on the one issue where the Department has been consistent -- raising sentences for offenses with losses less than $70,000. Sarbanes-Oxley was passed out of concern about serious, high-level corporate crime, crime so serious that it impaired confidence in American capital markets.[5] Whatever else Sarbanes-Oxley may require, neither its language nor its legislative history can fairly be read to <u>mandate</u> sentence increases for embezzling bank tellers, postal workers who steal from the mail, students who lie on loan applications, welfare cheats, old ladies who defraud the Social Security Administration of their dead husband's benefit checks, small-time credit card thieves, and the rest of the cast of characters who make up the bulk of low-loss economic criminals.

2. <u>Official DOJ Arguments on the Merits</u>

Of course, nothing in Sarbanes-Oxley prohibits the Commission from raising all economic crime sentences. But if an increase is not statutorily required, it should only be enacted if there is a strong case for doing so on the merits. It bears repeating that no one except the Justice Department -- not judges, not probation officers, not defense attorneys, not legal academics, not Commission staff -- has taken the position that economic crime sentences are now generally too low. Thus, as the sole proponent of a sentence increase, the Department bears the burden of proving its desirability.

To date, the Department has simply refused to engage in a debate on the merits. Indeed, those like myself who question the necessity of the sentence increases the Department seeks have been reduced to imagining the arguments the Department might make, if it were to make any, and responding to those.[6] Department representatives have reportedly derided this exercise as setting up straw men. Needless to say, I disagree with this facile dismissal of serious objections to the Department's position. But even if the Department's characterization were accurate, at the least a man of straw has some substance, provides some point of aim for the blade of reasoned argument. The Department refuses to send forth real arguments clad in the armor of statistical evidence, penological theory, or common sense. So, (with apologies to Shakespeare) until the Department's pen

[5] For a detailed analysis of the text and legislative history of the criminal sentencing provisions Sarbanes-Oxley Act, see my letters to the Commission of December 13, 2002 and January 4, 2003.

[6] *See*, Letter of Frank Bowman to Judge Diana E. Murphy, February 10, 2003.

turns "things unknown …into shapes, and gives to airy nothing a local habitation and a name,"[7] it can hardly complain if the rest of us pass the time by eviscerating imagined arguments and wondering why the Department of Justice will not risk a debate on the merits.

3. DOJ Statements in the Press

In recent weeks, Justice Department officials speaking to reporters have offered a justification for an across the board economic crime sentence increase. The argument is that sentences for low-ranking defendants must be raised to provide pressure to cooperate against higher-ranking defendants in the same case. According to a DOJ official, "Sometimes we build our cases from the bottom up, and we need to be able to make clear to people at the low end of the range how serious the consequences are. If we want to get the big fish, we have to start with the minnows."[8] If this is indeed the Department's position, it cannot withstand scrutiny.

In the first place, the argument suggests a surprising lack of familiarity with Guidelines sentencing. Sentence length for defendants sentenced under the current economic crime guideline, U.S.S.G. § 2B1.1, is driven by three primary considerations; these are, in descending order of influence: the amount of the loss, the applicability of specific offense characteristics (SOCs) under § 2B1.1, and the applicability of role adjustments under Chapter 3B. In virtually every case involving multiple conspirators or complicitors, the relevant conduct rules of U.S.S.G. § 1B1.3, applied together with the newly enacted definition of loss as "reasonably foreseeable pecuniary harm," dictate that the loss figure will be the same for all defendants, regardless of their position in the criminal enterprise. The same will be true of most, if not all, SOCs. Virtually the only difference in guideline offense level for high and low-ranking defendants in the same case will be provided by Chapter 3B role adjustments.

By way of example, assume several mid-level bank employees assisted a bank president in defrauding the bank of $10 million, thus endangering the bank. In such a case, both the president and the employees would have base offense levels of 6, a 20-level enhancement for more than $7 million in loss, and a 4-level enhancement for jeopardizing the safety and soundness of the bank. The president might well face additional enhancements for leadership role, or for being an officer in the bank corporation. But even without such enhancements, the

[7] William Shakespeare, *A Midsummer Night's Dream*, Act. 5, Sc. 1.
[8] Statement of Drew Hruska, senior counsel to Deputy Attorney General, in Sue Reisinger, *Government Seeks Tougher Sentences*, NATIONAL LAW JOURNAL, March 10, 2003 (available at http://www.nlj.com/business/031003sentencing.shtml).

"small fish" would still have offense levels of 30, and would face sentences of 97-121 months (70-87 months with a timely guilty plea). In short, "small fish" in complex high-loss cases, the kind of cases in which cooperation is required, already face very substantial sentences. The idea that the government presently has inadequate leverage in such cases is unsupportable.

Moreover, the moral premises of the Department's argument are disturbing. The Department does not argue that all economic crime offenders *deserve* greater punishment than the Guidelines now prescribe. Nor does the Department argue that an additional increment of punishment for all economic offenders is necessary to achieve an acceptable level of deterrence. Instead, it argues that sentences must be increased for <u>everybody</u> -- big fish or small, small loss or large, bank tellers and bank presidents alike -- in order to coerce cooperation from some tiny fraction of low-level defendants in a tiny minority of high-level cases. As a prosecutor, I used cooperators regularly. As an academic, I have defended the institution of the substantial assistance departure.[9] But the idea that the U.S. Sentencing Commission should increase the sentences of all defendants so that the Justice Department can more easily induce cooperation from a few is indefensible.

II. <u>The Proposal to Add an Additional Offense Level for Crimes With High Statutory Maxima and/or Those Involving Fraud</u>

In my letter of February 18, 2003, I commented negatively on the suggestion that the Commission should, in effect, decouple the sentencing of "theft" and "fraud" offenses and thus undo a central feature of the 2001 Economic Crime Package. The Criminal Law Committee took the same view. As I understand it, the decoupling proposal has been shelved. However, it has now been suggested that the Commission should increase from six to seven the base offense level of defendants convicted of crimes with a specified statutory maximum sentence and/or defendants who "committed, or intended, attempted, or conspired to commit fraud, [embezzlement,] or counterfeiting." This revised proposal is only slightly less objectionable than its progenitor. The Commission should reject it.

A. <u>The Heart of the Matter</u>

This proposal has arisen, not because the Commission or its staff thinks it a good idea, but because the Commission is seeking the least damaging means of accommodating the Department's demand for

[9] *See* Frank O. Bowman, III, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENT. REP. 45 (1999); Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Follows a Decade of Prosecutorial Indiscipline*, 24 STETSON L.R. 7 (1999).

generally higher sentences, while maintaining low sentences and judicial flexibility for low seriousness offenders. Hence this amalgam of two oddly matched notions -- the idea that offense seriousness is related to statutory maximum sentence of the offense of conviction, and the idea that "frauds" are intrinsically more serious than "thefts."

B. Statutory maximum sentences as proxies for offense seriousness

Unlike state laws, the federal criminal code has no system of offense ranking. Statutory maximum sentences for felony economic offenses vary randomly from two or three years to twenty years or more. Congress has never attempted to rationalize either the substance or the penalty levels of the higgledy-piggledy array of federal economic crime statutes. It was for this very reason that the original Sentencing Commission was forced to create a system based on offense conduct, rather than offense of conviction. For the Commission to inject a provision based on an imagined correlation between statutory maximum sentence and offense seriousness[10] would be to ignore the fundamental premises on which the Guidelines are based.

C. "Fraud" as a proxy for offense seriousness

In my letter of February 18, 2003, I discussed the many reasons why recreating two separate guidelines for "theft" and "fraud" offenses would be undesirable. Virtually all of the objections to deconsolidation are equally applicable to the current proposal. Moreover, the new proposal has some uniquely objectionable features. In summary:

- Separate theft and fraud guidelines coexisted in the pre-2001 guidelines because they were essentially identical -- regardless of which guideline was applied, the resulting sentence was the same in virtually every case. Because the theft-fraud distinction made no practical difference, there was never a need to parse the bewildering distinctions between theft and fraud. By contrast, the proposal to add an additional offense level for "fraud" sets different sentencing levels for "fraud" and non-"fraud" cases -- just as the now-abandoned deconsolidation proposal did. Therefore, because the categorization of

[10] In preparation for the February meeting, Commission staff generated statistics showing the correlation between certain statutory maximum sentences and whether an offense is a "theft" or "fraud." Commissioners apparently expressed concern that even a 20-year statutory maximum would continue to impact 16% of "theft" offenders. It was therefore suggested that the new one-level increase should apply only where both a specified statutory maximum sentence and "fraud" are present. If the Commission's purpose is to limit the one-level increase to "fraud" offenders only, it makes little sense to require both a statutory maximum sentence *and* a finding of "fraud." Reintroducing the theft/fraud distinction into federal sentencing law in any form is a bad idea, but if it must be done, it should be done straightforwardly, without the additional gloss of a statutory maximum sentence requirement.

an offense as a "fraud" would now affect sentencing outcomes, the "fraud" categorization will have to be litigated. Just as would have been the case with deconsolidation, the new proposal would render a now-meaningless formal distinction central to thousands of plea negotiations, sentencing hearings, and appeals.

- The Commission should only create sentencing categories that require litigation if two conditions are met: (1) The categories can be readily distinguished from each other in all but the most unusual cases. (2) The categories separate defendants into groups that are genuinely different for sentencing purposes. That is, if the Guidelines separate defendants into a Group A with offense level X and a Group B with offense level X+1, we should be able to say with confidence that, all else being equal, the Group B defendants are more culpable, more dangerous, or otherwise more deserving of longer punishment than Group A. Just as was true with deconsolidation, the new proposal meets neither of these conditions.

- In my February 18, 2003 letter, I discussed the many historical and practical difficulties one encounters in trying to define the difference between "theft" and "fraud" cases. I will not repeat them here. The flaw in the current proposal is that it seems to assume that these definitional difficulties can be made to vanish by the simple expedient of not using the word "theft" in the guidelines. The only difference between the current proposal and deconsolidation is that courts will now be forced to determine the difference between "fraud" and "non-fraud" cases instead of between "fraud" and "theft" cases.

- The conundrums a fraud/non-fraud distinction will breed are evident from even a brief perusal of the proposed Application Note 2(C). As written, the application note combines unhelpful tautologies ("the offense of conviction establishes that the defendant committed … fraud … if the defendant (i) committed, or intended, attempted, or conspired to commit, or aided in the commission of fraud") with attempts to define "fraud" by using another undefined term: "swindles." In making this observation, I cast no aspersions on those who drafted the application note. The fact is that "fraud" has no universally recognized definition. If this proposal passes, the Commission will either have to create such a definition or dump that task into the laps of the courts.

- Proposed Application Note 2(C) illustrates another, in my view crippling, defect in this proposal. As written, the note is unclear as to whether the application of the fraud enhancement is to be based on the offense of conviction or on the defendant's actual conduct. If the former is intended, this amendment would be a striking deviation from the Guidelines' real-offense structure. If, on the other hand, the Commission intends that judges should apply this enhancement based on the defendant's actual conduct, then the Commission is requiring courts to adjudicate, in every case sentenced under § 2B1.1, whether the defendant or his criminal partners engaged in conduct attended by badges of "fraud," regardless of the offense of conviction.

- It might be argued that because most cases are resolved by plea bargain, I am painting too alarmist a picture of the litigation this proposal will breed. But the prevalence of plea bargaining raises yet another problem. The laudable motivation of this proposal is to retain judicial discretion in the sentencing of low-seriousness offenders. However, in an environment dominated by plea bargaining, creation of a sentencing enhancement based on the categorization of a defendant's conduct as "fraud" or "non-fraud" only confers additional discretion on the government. Given that the vast majority of federally prosecuted economic crimes are attended by some element of deception, the fraud/non-fraud distinction will simply become a bargaining point in plea negotiations. Judges may have more sentencing options for defendants who do not receive the "fraud" enhancement, but in bargained cases, the discretion to decide who should receive the enhancement will rest largely with the government.

- Finally, the most compelling reason not to adopt an enhancement for "fraud" crimes is that the presence or absence of "fraud" has no demonstrable relationship to offense seriousness. In my February 18, 2003 letter, I explained why there is no necessary difference in offense seriousness between "fraud" and "theft." The exact same points are applicable to "fraud" and "non-fraud." So far as I am aware, no Anglo-American jurisdiction has ever created a sentencing scheme in which "fraud" was treated as intrinsically more serious than other forms of dishonest acquisition of property. If any examples of such a scheme can be found, they represent a tiny minority. Modern American sentencing systems almost universally treat a defendant's choice among non-violent *means* of dishonest acquisition as irrelevant to offense seriousness. No compelling argument for deviating from this staple of American practice has so far been advanced. To repeat the question I posed in my earlier letter, by what logic does a thief who steals by guile *always* deserve a longer sentence than one who brazenly takes what he pleases?

The simple truth is that neither statutory maximum sentence nor the presence of "fraud" is a good indicator of offense seriousness. The best universal proxy for offense seriousness in economic crime is, as it always has been, loss amount. If what the

Commission is trying to do is preserve sentencing flexibility for low-seriousness offenders, it should do so by firmly refusing to raise sentences for low-loss defendants. If the Commission ultimately decides that it must compromise, it should do so in a straightforward, principled, logical way that is consistent with the fundamental design of the Guidelines. Pretending that defendants with high statutory maximum sentence crimes or those charged with "frauds" are intrinsically worse than otherwise similarly situated defendants is irrational and will create endless headaches for judges, probation officers, and lawyers.

The best pragmatic reason not to adopt a "fraud" / high statutory maximum enhancement is that it will not solve the basic political problem that led to the proposal. The Department of Justice will not be satisfied with a one-level increase for an oddly-defined subset of economic crime defendants. Only a table increase will satisfy them. Again, if compromise is thought necessary, the compromise should be hammered out in the form of alterations to the loss table, not by introducing confusing innovations at odds with the principles and structure of the Sentencing Guidelines.

I. Choosing Among the Four Table Options

Of the four current options (A-D) for revising the loss table, Option D is by far the most desirable. It impacts the fewest offenders. It gives some ground on the cutoffs for Zone A-C sentences, but preserves current sentencing levels for offenders under $60,000 in loss. Finally, it raises sentences primarily for those offenders whom one can fairly argue were the targets of Sarbanes-Oxley -- persons involved in serious corporate or white collar offenses that caused large victim losses.[11]

The leverage the Department of Justice wields in this debate flows primarily from its threat to go to Congress for additional legislation if its demands are not met. If the Commission were to enact Option D, the combination of that table increase and the targeted specific offense characteristics adopted in January would generate very substantial sentence increases for almost all serious white collar offenders. Under these circumstances, the Department would be hard pressed to make the case that the Commission had not responded appropriately to both the letter and spirit of the Sarbanes-Oxley Act.

[11] Option D would raise sentences for defendants who caused losses between $60,000 and $200,000, and on defendants who caused losses exceeding $800,000.