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Pam Barron
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U.S. Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Re: Border tunnels and passages (18 U.S.C. § 554);
Narco-Terrorism (21 U.S.C. § 960a);
Public employee insignia and uniform (18 U.S.C. § 716);
Fallen Heroes (38 U.S.C. § 2413);
International Marriage Brokers (8 U.S.C. § 1375a)

Dear Ms. Barron:

This letter is to provide preliminary thoughts on behalf of the Federal Public and Community Defenders regarding responses by the Commission to the five new offenses listed above.¹ We understand that Paula Desio is in charge of the last two offenses, but understand that she will be out for a period of time, so include our comments on those issues here.

I. Border tunnels and passages (18 U.S.C. § 554)

Congress directed the Sentencing Commission to promulgate or amend guidelines for persons convicted of offenses involving tunnels. 18 U.S.C. § 554(c) doubles the otherwise applicable statutory maximum for using a tunnel to unlawfully smuggle an alien, goods, controlled substances, weapons of mass destruction, or a member of a terrorist organization. We suggest that you refer 18 U.S.C. § 554(c) offenses to §§ 2L1.1 (aliens), 2T3.1 (goods), 2D1.1 (controlled substances), 2M6.1 (weapons of mass destruction), and 2M5.3 (material support to terrorists).

¹ Thanks to Sara E. Noonan, Heather Williams, Margy Meyers, Brian Rademacher, Clare Koontz, Jack Schisler, Carol Whitehurst, Judith Mizner and Randy Alden for their assistance in preparing these comments.

Beyond that, the Commission should proceed with caution. As far as we know, tunnel cases are quite rare and the Commission has no data on such cases. The Commission should not at this point add any specific offense characteristics for use of a tunnel. Nor should the Commission add any cross references to guidelines for more serious offenses, given that the Commission has pledged to undertake a simplification effort which includes reconsidering the use of uncharged, dismissed and acquitted separate crimes.

With regard to alien smuggling, before November 1, 2006, § 2L1.1 already contained adjustments for intentional or reckless creation of a substantial risk of death or serious bodily injury, for various levels of bodily injury and for death. Effective November 1, 2001, the Commission raised the base offense level for an offense involving an alien who is inadmissible because of “security or related grounds” to 25, and amended the cross reference for cases in which death results to refer to any of the homicide guidelines. Congress did not direct those amendments and they were not yet in effect when it enacted 18 U.S.C. § 554(c). At most, the Commission should add to the commentary for (b)(5) that this may apply to use of a tunnel *if* it in fact constitutes reckless endangerment.

With regard to use of a tunnel to smuggle weapons of mass destruction or a member of a terrorist organization, § 3A1.4 would most likely apply. For smuggling goods or controlled substances, the Commission could identify tunnel use as a potential basis for departure where such use presents special dangers or special sophistication beyond that already reflected in the guidelines for the offense of conviction.

Without using a tunnel, a defendant may be convicted under 18 U.S.C. § 554(a) for constructing or financing construction of a tunnel, or 18 U.S.C. § 554(b) for permitting tunnel construction on one’s property. The Commission might consider a new guideline in Subchapter 2X (which includes incomplete criminal attempts and conspiracies, aiding and abetting and accessories after the fact, referencing to the nearest applicable guideline for offenses without specific guidelines, using a minor to commit a crime of violence). For 18 U.S.C. § 554(b), the Commission might consider the approach taken in U.S.S.G. § 2D1.8, the guideline for renting or managing a drug establishment. This guideline establishes the offense level for the underlying offense as the base offense level and subtracts four levels if the defendant did not participate in the underlying offense. *See* U.S.S.G. § 2D1.8(a) and (b).

II. Narco-Terrorism (21 U.S.C. § 960a)

Congress enacted a new crime, referred to as Narco-Terrorism, at 21 U.S.C. § 960a, which states: “Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not

less than twice the minimum punishment under section 841(b)(1) of this title, and not more than life.”

We suggest that this offense be given a new guideline, similar to §§ 2B1.6 and 2K2.4, under which Chapter Three and Chapter Four would not apply. For offenses under 21 U.S.C. § 841(b)(1)(A), (B) or (C) carrying a mandatory minimum penalty, the guideline sentence would be twice the otherwise applicable mandatory minimum. For offenses under 21 U.S.C. § 841(b)(1)(C) that do not carry a mandatory minimum penalty, the guideline sentence would be twice the mandatory minimum for the analogous offense under 21 U.S.C. § 841(b)(1)(B) (*i.e.*, 10 years for first offense, 20 years for subsequent offense). For offenses under 21 U.S.C. § 841(b)(1)(D), the guideline sentence would be the statutory maximum.

As we discussed, in cases involving safety valve or cooperation, there is no conflict with other federal statutes, as 18 U.S.C. §§ 3553(e) and (f) are federal statutes.

III. Public employee insignia and uniform (18 U.S.C. § 716)

Section 1191 of the Violence Against Women Act expanded 18 U.S.C. § 716 to prohibit the transfer, transportation or receipt of any public employee insignia or uniform² that is either counterfeit or intended to be given to a person not authorized to possess it, *see* 18 U.S.C. § 716(a), and added a statutory defense. *See* 18 U.S.C. §§ 716(b) and (d). Congress directed the Commission to “make appropriate amendments to sentencing guidelines, policy statements, and official commentary to assure that the sentence imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of section 716 of title 18, United States Code, reflects the gravity of this aggravating factor.” *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, 3129 (2006).

Section 716 violations are Class B misdemeanors punishable by up to six months imprisonment. As such, they are petty offenses to which the guidelines do not apply. *See* 18 U.S.C. § 19; U.S.S.G. § 1B1.9.

It is our understanding that potential responses to the congressional directive include taking no action or adding a Chapter Three enhancement. We recommend that the Commission take no action.

In amending § 716, Congress was concerned about “closing loopholes” in the statute’s reach. *See* 151 Cong. Rec. H4822-02 at H8430, 2005 WL 2384782 (Sept. 28, 2005) (statement of Rep. Weiner); *see also* 151 Cong. Rec. H8433-01 at H8477-78, 2005 WL 2384785 (September 28, 2005) (statement of Rep. Slaughter). Though Congress

² The statute had previously only applied to police badges. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, 3128-29.

directed the Commission to make “appropriate amendments,” it did not increase the statutory maximum, so there is no offense guideline to amend.

A Westlaw search reveals only one case involving a § 716 violation. *See United States v. Sash*, 396 F.3d 515 (2d Cir. 2005). In that case, the defendant pled guilty to violating 18 U.S.C. § 1028, 18 U.S.C. § 1029, and 18 U.S.C. § 716 in connection with producing, receiving and transferring unauthorized and counterfeit police badges. He was sentenced under § 2B1.1, and received an enhancement under what is now § 2B1.1(b)(10)(C)(ii) for possessing five or more means of identification that were produced by or obtained from another means of identification.

In any type of case, a crime committed through the unlawful use of public employee uniforms or insignia would be subject to a 2-level enhancement for abuse of trust under 3B1.3. *See* U.S.S.G. § 3B1.3, Application Note 3 (“This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of public or private trust when, in fact, the defendant does not.”); *United States v. Bailey*, 227 F.3d 792, 802 (7th Cir. 2000) (“Police officers occupy positions of public trust, and individuals who have apparent authority of police officers when facilitating the commission of an offense abuse the trust that victims place in law enforcement.”).

To the extent a concern exists that false insignia or uniforms could be used to provide opportunities for terrorists, *see, e.g.*, 150 Cong. Rec. E174-02, 2004 WL 257208 (February 11, 2004) (extension of remarks by Rep. Slaughter), the short answer is that there appear to be no such cases. The Commission ought not to revise the guidelines on the basis of hypothetical concerns. Further, § 3A1.4 provides for an increase of the greater of 12 levels or to level 32 and an automatic criminal history category VI if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism.

IV. Fallen Heroes (38 U.S.C. § 2413)

Pub. L. 109-228, Respect for America’s Fallen Heroes Act, prohibits unapproved protests at cemeteries under the control of the National Cemetery Administration or on the property of the Arlington National Cemetery, and creates a no-protestor zone around military funerals that begins one hour before a funeral and ends one hour after its conclusion. *See* 38 U.S.C. §2413. The statutory maximum is one year, *see* 18 U.S.C. §1387, making it a Class A misdemeanor.

This new offense should be referred to §2B2.3, Trespass. The background note to this section recognizes that most trespassing offenses occur on federal lands or property, which, in this case would include cemeteries under the control of the National Cemetery Administration and at Arlington National Cemetery. The base offense level for this guideline is 4. There is a specific offense characteristic that provides a 2 level enhancement where the trespass is on a secured government installation, a nuclear energy facility, on a U.S. vessel or aircraft, in a secured airport, at a residence or on a critical

computer system. *See* U.S.S.G. §2B2.3(b)(1). Given the comparatively minor nature of this offense, not to mention the First Amendment implications, the likely small number of potential offenders,³ and the non-mandatory nature of the guidelines, the Commission should not add a specific offense characteristic for trespassing in violation of 38 U.S.C. §2413.

V. International Marriage Brokers (8 U.S.C. § 1375a)

Section 833 of the Violence Against Women Act requires international marriage brokers to collect information and makes it a crime to disclose that information, subject to a one-year statutory maximum, or a five-year statutory maximum. We recommend that you refer the misdemeanor violation to § 2X5.2, and the felony to § 2H3.1.

We hope that this input is helpful and look forward to our continuing work with you on these and other issues.

Very truly yours,

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³ Title 38 U.S.C. §2413 was passed primarily in response to “the renegade Westboro Baptist Church led by the Rev. Fred Phelps in Topeka, Kansas.” This group asserts that members of the U.S. Armed Forces have been killed in conflicts because the United States tolerates homosexuals. [US House votes to restrict demonstrations at military funerals](#), Tom Henry, Wednesday May 10, 2006, Jurist Legal News & Research, University of Pittsburgh, School of Law.