

**Written Statement of Lesley Whitcomb Fierst  
On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission  
Public Hearing on Proposed Amendments for 2009**

**March 17-18, 2009**

**Re: William Wilberforce Trafficking Victims Protection Reauthorization Act**

Thank you for the opportunity to provide this testimony on behalf of the Federal Public and Community Defenders on the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (PL 110-457) (“the Act”). The Act revised numerous laws relating to human trafficking, created two new offenses, and contains one directive to the Commission.

The Commission seeks comment regarding what amendments may be appropriate in light of the Act. Specifically, it asks (1) whether the guidelines need to be amended to ensure conformity between the guidelines for alien harboring and those for promoting a commercial sex act pursuant to the congressional directive; (2) whether the two new offenses created by the Act should be referred to existing guidelines and/or whether the guidelines should be amended to accommodate the new offenses; and (3) whether the guidelines should be amended to accommodate the changes to existing offenses made by the Act.

***1. No Changes Should Be Made to the Guidelines for Alien Harboring Because They Already Conform to the Guidelines for Promoting a Commercial Sex Act***

Section 222(g) of the Act directs the Commission to “review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if -- (1) the harboring was committed in furtherance of prostitution; and (2) the defendant to be sentenced is an organizer, leader, manager, or supervisor of the criminal activity.” *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(g), 122 Stat. 5044, 5071 (2008).

The guidelines for alien harboring offenses committed under the circumstances described in the directive already fully conform with – and at times exceed – the guidelines for promoting a commercial sex act. We therefore recommend that the Commission make no changes to the guidelines in response to the directive.

In our experience, these cases are very infrequent, and the culpability of the defendants who are prosecuted can be relatively low. In one case, for example, the defendant was charged with alien harboring and sex trafficking. He was a young illegal

alien, unable to obtain work because of his status, who became romantically involved with a 15-year-old prostitute in his neighborhood. He began providing her and her colleagues with protection in exchange for money, but played no part in bringing the women into the country or in their decisions to engage in prostitution. In another case, the defendant was a woman who worked as a receptionist in her sister-in-law's "massage parlor" for a short period of time, and essentially turned a blind eye to the prostitution that was occurring there. Again, she played no part in bringing the women to the country or in recruiting them to engage in prostitution.

These types of cases are more common in our experience than those involving the international and predatory sex traffickers that Congress had in mind when directing the Commission to review sentences for alien harboring. *Compare* William Wilberforce Trafficking Victims Protection Reauthorization Act, 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Leahy) (describing trafficking as a "modern-day form of slavery, involving victims who are forced, defrauded or coerced into sexual or labor exploitation") *with* Jerry Markon, *In D.C. Area, Most Cases Involve Prostitution*, *The Washington Post*, Sept. 23, 2007, at A8 (noting that "shades of gray can permeate cases that the federal government considers trafficking").

There are three ways to commit the crime of illegal harboring under federal law. First, 8 USC § 1328 makes it a crime to, among other things, illegally import an alien into the United States for the purposes of prostitution or any other immoral purpose, and to harbor any alien for the purpose of prostitution or any other immoral purpose in pursuance of such illegal importation. The statutory maximum for a violation of § 1328 is 10 years. Second, 18 U.S.C. § 1591 makes it a crime to harbor any person, knowing or in reckless disregard of the fact that force, threats of force, fraud, or coercion will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act. *See* 18 U.S.C. § 1591(a). A person convicted under § 1591 is subject to a statutory maximum of life in prison, and either a 15-year mandatory minimum if the offense was committed by means of force, threats of force, fraud, or coercion, or involved a minor under the age of 14; or a 10-year mandatory minimum otherwise. Third, 8 USC § 1324(a)(1)(A)(iii) makes it a crime to, among other things, harbor or attempt to harbor any alien knowing or recklessly disregarding that the alien came to, entered or remains in the United States in violation of law; the statutory maximum for a violation of § 1324(a)(1)(A)(iii) ranges from 5 years for the basic offense, to 10 years if committed for commercial advantage or private financial gain or as part of a conspiracy, to 20 years if the defendant caused serious bodily injury during and in relation to the offense or placed anyone's life in jeopardy, to death or life if death resulted.

Offenses under both 8 U.S.C. § 1328 and 18 U.S.C. § 1591 are already referred to §2G1.1 (if involving adults) and §2G1.3 (if involving minors). This makes sense, because both offenses necessarily involve commercial sex acts. Indeed, in alien harboring cases committed in furtherance of prostitution, the government appears to regularly charge the defendant with a § 1328 violation in addition to various other charges (which often, but not always, includes charges under §§ 1324 and/or 1591). *See*,

*e.g.*, *United States v. Arami*, 536 F.3d 479 (5<sup>th</sup> Cir. 2008); *United States v. Byun*, 539 F.3d 982 (9<sup>th</sup> Cir. 2008); *United States v. Malcolm*, 260 Fed. Appx. 681 (5<sup>th</sup> Cir. 2007); *United States v. Latysheva*, 162 Fed. Appx. 720 (9<sup>th</sup> Cir. 2006) (*aff'd following remand sub nom United States v. Mezheritsky*, 266 Fed. Appx. 634 (9<sup>th</sup> Cir. 2008)); *United States v. Cheung*, 10 Fed. Appx. 522 (9<sup>th</sup> Cir. 2001); *United States v. Morales*, 107 F.3d 5 (2d Cir. 1997); *United States v. Gonzalez-Lopez*, 972 F.2d 1345 (9<sup>th</sup> Cir. 1992); *United States v. Mendez*, 2008 WL 2561962 (C.D. Cal. June 25, 2008); *United States v. Valenzuela*, 2008 WL 5381217 (C.D. Cal. Dec. 22, 2008); *United States v. Merino-Torres*, 2007 WL 541723 (E.D. Va. Feb. 16, 2007); *United States v. Santos*, 2006 WL 2092388 (N.D. Ga. July 15, 2006); *United States v. Chin*, 1986 WL 286 (S.D. N.Y. June 24, 1986). As a result, the vast majority of alien harboring cases committed in furtherance of prostitution are already sentenced under §§2G1.1 or 2G1.3.

Unlike §§ 1328 and 1591 offenses, alien harboring offenses under 8 U.S.C. § 1324 cover a broad range of conduct that is not necessarily sexual in nature. They are thus appropriately referred to §2L1.1, which covers general alien harboring offenses. Section 2L1.1 has a base offense level of 12, slightly lower than §2G1.1's base offense level of 14, and lower than §2G1.3's base offense level of 24. For § 1324 cases that match the directive's description, however, §2L1.1 contains numerous specific offense characteristics that result in sentences as high or higher than those called for under the commercial sex act guidelines. For example, most of the harboring offenses committed in furtherance of prostitution that Congress had in mind will involve involuntary detention through coercion or threats, or in connection with a demand for payment. *See, e.g., Malcolm*, 260 Fed. Appx. at 682; *Cheung*, 10 Fed. Appx. at 522; *Morales*, 107 F.3d at \*2; *United States v. Valenzuela*, 2008 WL 2824958, \*4 (C.D. Cal. July 21, 2008); *United States v. Gereb*, 547 F.Supp.2d 658, 659 (W.D. Tex. Feb. 4, 2008). Section 2L1.1(b)(8) automatically raises the base offense level in such cases to a minimum of 18, which is 4 levels *higher* than §2G1.1's offense level floor and is close to §2G1.3's base offense level. *See* §2L1.1(b)(8). Section 2L1.1 also requires a minimum increase of 3 levels if the offense involved more than 5 aliens (§ 2L1.1(b)(2)); most of the alien harboring cases committed in furtherance of prostitution that Congress had in mind will involve well over that number. And, of course, every defendant in the type of case described in the directive will also receive an increase of between 2 and 4 levels for aggravating role under §3B1.1.

As a result of these specific increases, which we expect would apply in most if not all of the cases Congress had in mind, a defendant convicted of this type of § 1324 violation will receive a minimum offense level of 23, or a guideline range of 46 to 57 months, *if s/he* has no prior criminal history and none of the many other enhancements under the guideline.<sup>1</sup> Such sentences easily conform to the sentences available under

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<sup>1</sup> Higher potential increases exist under §2L1.1, including 2 levels if the harboring involved a minor who was unaccompanied by a parent or grandparent (§2L1.1(b)(4)); 6 levels or a floor of 22 if a firearm was discharged, 4 levels or a floor of 20 if a dangerous weapon was brandished or otherwise used, or 2 levels or a floor of 18 if a dangerous weapon was possessed (§2L1.1(b)(5)); 2 levels or a floor of 18 for intentionally or

§§2G1.1 and 2G1.3 Moreover, Application Note 3 to §2L1.1 provides for an upward departure in any case where the defendant harbored an alien knowing that the alien intended to engage in “serious criminal behavior,” which has been interpreted to include prostitution. *See Malcolm*, 260 Fed. Appx. at 683. This guidance provides courts ample opportunity to increase the guideline range in appropriate cases.

Given the severe sentences already available under §2L1.1, there is no reason for the Commission to add yet another cross-reference to the Manual for this specific type of § 1324 violation. Cross references generally tend to complicate and confuse the sentence calculation. *See, e.g., Mark P. Rankin & Rachel R. May, Traps for the Unwary: Cross References and Guideline Sentencing*, THE CHAMPION, September/October 2006, at 52, 55. Moreover, cross references encourage punishment “on the cheap” by “allow[ing] sentencing judges, once a jury has found beyond a reasonable doubt that a defendant has committed *one* crime, then to find him guilty by a preponderance of the evidence of *other* crimes for which he was not tried – or worse, tried and acquitted – and to sentence him as if he had been convicted of *them* as well.” *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring in the judgment) (emphasis in original). The Supreme Court has recognized that it would be an “absurd result” if “a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it,” and has criticized a system of justice that treats the jury verdict as “a mere preliminary to a judicial inquisition into the facts of the crime that the State *actually* seeks to punish.” *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (emphasis in original). Similarly, it would be absurd to sentence a defendant for trafficking in humans to commit prostitution when s/he was convicted of simply harboring an alien. The dual interests in simplifying the Manual and ensuring public confidence in our justice system cautions against adding any new cross references, especially where, as here, there is no empirical evidence indicating that the current guideline is inadequate to serve the purposes of punishment.

Nor is there a need to add any specific offense characteristics to §2L1.1 in order to ensure that § 1324 violations are appropriately punished. The guideline already has nine specific offense characteristics (a third of which have multiple subparts) that take into account harboring an unaccompanied minor, possessing or using a dangerous weapon, causing or substantially risking bodily injury, involuntarily detaining people through threats or coercion, the number of aliens harbored, and the defendant’s criminal history. *See* U.S.S.G. §2L1.1(b)(2)-(8). It also already presumes that the offense was committed for profit. *See id.* at §2L1.1(b)(1).

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recklessly creating a substantial risk of death or serious bodily injury to another person (§2L1.1(b)(6)); 2 levels if any person sustained bodily injury, 4 levels for serious bodily injury, 6 levels for permanent or life-threatening bodily injury, or 10 levels for death (§2L1.1(b)(7)); and a potential cross-reference to the homicide guideline if death resulted. Additional increases under Chapter Three may also be available, including enhancements for vulnerable victims (§3A1.1), using restraint (§3A1.3), abuse of trust (§3B1.3), and using a minor to commit a crime (§3B1.4).

The Commission’s statistics reflect that sentences under §2L1.1 are not too low; to the contrary, the statistics reflect that they are too high in nearly 1 out of every 2 cases. Only 50.8% of the cases sentenced under §2L1.1 in 2007 were within the guidelines. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* at Table 28 (2007). Almost half of all sentences – 41.8% – involved a government-sponsored downward departure. *Id.* Even without a government recommendation, courts were more than twice as likely to depart or vary down from the guideline range as they were to go above. *Id.* This data shows that there is no empirical reason to add more specific offense characteristics or to otherwise increase sentences under §2L1.1.

**2. *New 18 U.S.C. §§ 1589(b) and 1593A Should Be Referred to §2H4.1 with a Downward Departure Provision for Less Culpable Defendants***

The Act created 18 U.S.C. § 1593A, which prohibits benefiting financially from peonage, slavery and trafficking in persons. Specifically, § 1593A states that anyone who “knowingly benefits financially or by receiving anything of value from participation in a venture that has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or with reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.” The Act also added an identical provision to 18 U.S.C. § 1589 (forced labor). *See* 18 U.S.C. § 1589(b).

The Commission has asked whether it should refer offenses under §§ 1589(b) and 1593A to §2H4.1, which is the same guideline to which offenses under §§ 1581(a) and 1592 are referred.<sup>2</sup> This would be consistent with prior Commission practice. Sections 1589(b) and 1593A appear to be patterned after a similar provision in 18 U.S.C. § 1591(a)(2). The guidelines do not differentiate between convictions under § 1591 for “venture”-based liability and convictions based on active misconduct, but instead refer both types of violations to the same guideline.

If the Commission chooses this course of action, however, we recommend that it add a downward departure consideration to §2H4.1 for those defendants who did not know or intend that anyone commit the substantive crime. “Venture”-based prosecutions appear to be infrequent. We believe that most if not all prosecutions alleging “venture” liability under § 1591(a)(2) actually proceed on a theory of aiding and abetting the substantive § 1591 offense. *See, e.g., United States v. Jennings*, 280 Fed. Appx. 836, 843-44 (11<sup>th</sup> Cir. 2008); *United States v. Wild*, 143 Fed. Appx. 938, 943 (10<sup>th</sup> Cir. 2005). It makes sense to punish people who actively assist (and intend to assist) a substantive crime as though they committed the crime themselves. It does not make sense, however, to impose the same punishment on people who may have been reckless in not discovering that other people were committing crimes, but did not themselves intend that any crimes be committed and did not actively assist the commission of any crimes. For this reason,

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<sup>2</sup> Section 1593A appears to refer in error to “violations” of 18 U.S.C. § 1595(a). That statute sets forth a civil remedy provision for any person who is a victim of a violation, but does not set forth a substantive criminal offense.

we recommend that the Commission add an Application Note to §2H4.1 that states as follows:

Downward Departure Provision. A downward departure may be warranted in any case where the defendant was convicted under 18 U.S.C. § 1589(b) or 18 U.S.C. § 1593A of recklessly disregarding the criminal acts of others, but did not intend that those acts be committed and did not know of or actively participate in the commission of them. In such a case, reference to the principles of U.S.S.G. §2X3.1 (Accessory after the fact) may be appropriate.

Alternatively, the Commission may want to simply refer violations of §§ 1589(b) and 1593A directly to §2X3.1. At the very least, we recommend that the Commission study the data on convictions based on “venture” liability to ensure that it is not advising courts to impose sentences in such cases that are greater than necessary to satisfy the purposes of sentencing.

### **3. *New 18 U.S.C. § 1351 Should Be Referred to §2B1.1***

18 U.S.C. § 1351 prohibits fraud in foreign labor contracting. Specifically, § 1351 makes it a crime to knowingly and with intent to defraud recruit, solicit or hire a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment. The statutory maximum for a violation of § 1351 is five years. The statute does not require that the defendant know or intend that the defrauded person be subjected to peonage, involuntary servitude, or forced labor, or that the defendant have any intent beyond the intent to defraud.

The Commission has asked whether it should refer violations of § 1351 to §2B1.1, §2H4.1, or some other guideline. We recommend that the Commission refer the new offense to §2B1.1. Congress clearly intended § 1351 to function as a fraud offense, not a human rights violation. Section 1351 is listed in Chapter 63, which covers “Mail Fraud and Other Fraud Offenses.” All of the other Chapter 63 offenses are referred to §2B1.1. Moreover, the legislative history related to § 1351 makes clear that Congress intended it to be a “new fraud crime” that would apply to conduct that is not “sufficient to reach the level of the Chapter 77 Slavery/Trafficking offenses.” *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 154 Cong. Rec. H10888-01 (daily ed. Dec. 10, 2008) at H10904.

In contrast, §2H4.1 covers peonage, servitude and slave trade offenses. It does not, and is not intended, to punish for mere frauds, but instead reaches grave human rights violations. For this reason, sentences under §2H4.1 are far too severe for the conduct described in § 1351. Section 2H4.1 starts at a base offense level of 22, or a sentence range of 41 to 51 months for a first offense. A sentence at the top of that range is only 9 months shy of § 1351’s statutory *maximum*. In contrast, the base offense level for fraud offenses with statutory maximums of less than 20 years is 6. The large disparity

between the starting point for these two guidelines counsels against adding § 1351 fraud offenses to §2H4.1.

If the Commission feels that it is appropriate to distinguish between § 1351 offenses and other types of fraud in light of Congress’s concern that the conduct described in § 1351 presents a “risk” that a person may end up in involuntary servitude, *see* 154 Cong. Rec. at H10904, we recommend that the Commission refer § 1351 to §2H1.1, which punishes offenses involving individual rights. That referral would demonstrate (if appropriate) the belief that § 1351 offenses potentially involve something more than mere financial harm without inappropriately suggesting that § 1351 offenses rise to the level of §2H4.1 offenses or should otherwise be punished as though they did. Section 2H1.1 already covers offenses with statutory maximums ranging from six months to life, so there is no need to add a specific offense characteristic to ensure that § 1351 offenses are adequately punished.

#### ***4. The New Obstruction Offenses Should Be Referred to §2J1.2***

The Act amended 18 U.S.C. §§ 1583, 1584, 1590, 1591 and 1592, to provide that anyone who obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of the particular statute at issue “shall be subject to the penalties” set forth for substantive violations.<sup>3</sup> See 18 U.S.C. § 1583(a)(3), 1584(b), 1590(b), 1591(d), and 1592(c). The Commission requests comment on whether the guidelines are adequate as they apply to these offenses.

The new provisions mirror 18 U.S.C. § 1581(b), which prohibits obstruction in relation to enforcement of the peonage statute. Violations of § 1581 are referred to §2H4.1, regardless of whether the defendant committed the substantive crime or obstructed enforcement of the statute.<sup>4</sup> If the Commission were to do nothing, the new obstruction provisions would, similarly, be referred to §2H4.1 or, in the case of a § 1591 violation, to §§2G1.1 and 2G1.3. Or, the Commission could explicitly direct the new offenses to §2J1.2.

We recommend the latter course. Whether or not the new obstruction offenses carry the same statutory maximum as the substantive offenses, they punish markedly different types of misconduct. As the Commission has noted, the conduct that gives rise to the obstruction of justice may “range from a mere threat to an act of extreme violence.” See U.S.S.G. §2J1.2 cmt. background. The same is true of the new obstruction offenses created by the Act. None of the new provisions contains either a

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<sup>3</sup> The language of the new obstruction offense in 18 U.S.C. § 1591 differs slightly from the other obstruction provisions. Under 18 U.S.C. § 1591(d), a person convicted of an obstruction offense is subject to imprisonment for up to 20 years. This language removes application of the mandatory minimum to obstruction offenses.

<sup>4</sup> We are not aware of any case in which the defendant was sentenced under §2H4.1 simply on the basis of a § 1581(b) conviction.

*mens rea* requirement or a defined conduct element. They thus can reach anyone who even unknowingly interferes with the enforcement of any of the listed statutes – for instance, by throwing away documents that would incriminate a family member.

Referring the new provisions to §2J1.2 will easily permit severe sentences in appropriate cases. Those convicted of both obstruction and the underlying offense would receive a sentence of between 51 months and life, depending on the circumstances of the offense and the defendant’s criminal history. *See* U.S.S.G. §§2H4.1, 3C1.1. Those who are only convicted of obstruction would still be subject to a potential life sentence under §2J1.2, depending on the circumstances of the offense and the defendant’s criminal history. *See* U.S.S.G. §§2J1.2, 2X3.1. At the same time, because §2J1.2 has a base offense level of 14 (compared to §2H4.1’s base offense level of 22), courts could impose a more appropriate sentence within the guideline range for the least culpable defendants, such as those who unknowingly or unintentionally interfered with a statute’s enforcement.

**5. *Conspiracies Should Be Sentenced under the Same Guideline as the Substantive Offense so Long as Certain Amendments Are Made to Allow for Appropriate Sentences***

The Act amended the general provisions of Chapter 77 to explicitly state that a conspiracy to commit an offense under 18 U.S.C. §§ 1581, 1583, 1589, 1590, and 1592 shall be punished in the same manner as a completed violation of such section. *See* 18 U.S.C. § 1594(b). We acknowledge that this language appears to suggest that such conspiracies should be sentenced under §2H4.1, which governs punishment for the completed offenses. Nonetheless, we recommend that the Commission add a downward departure provision to allow flexibility to reduce sentences for less culpable defendants who operated on the periphery of a conspiracy (for instance, the receptionist at a “massage parlor”) or were induced to participate because of some mitigating circumstance, such as an abusive relationship, an addiction, extreme poverty, or some other circumstance that left them highly vulnerable. Specifically, we recommend that the Commission adopt the following language:

Downward Departure Consideration. There may be cases involving a conviction under 18 U.S.C. § 1594(b) in which the offense level determined under this guideline substantially overstates the seriousness of the defendant’s conduct. In such cases, a downward departure may be warranted.

The Act also created conspiracy liability for offenses under 18 U.S.C. § 1591. *See* 18 U.S.C. § 1594(c). Section 1594(c), however, uses different language than § 1594(b); it states that conspiracies to violate § 1591 shall be punished “for any term of years or for life.” The effect of this distinct language is to ensure that conspiracies to violate § 1591 are not subject to the mandatory minimum sentences required by § 1591(b)(1) and (2). Accordingly, we recommend that the Commission refer such offenses to §§2G1.1 (if involving adults) and 2G1.3 (if involving minors). However, because the base offense levels under §§2G1.1 and 2G1.3 for § 1591 violations are keyed



to the mandatory minimums – which Congress clearly did not intend to apply to conspiracies to violate § 1591 – we recommend that the Commission amend the guidelines to reflect that intent. Specifically, we recommend that it adopt the changes set forth below:

**§ 2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other Than a Minor**

(a) Base Offense Level:

- (1) **34**, if the offense of conviction is a substantive violation of 18 U.S.C. § 1591(b)(1); or
- (2) **14**, otherwise.

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Application Notes

1. Definitions. – For purposes of this guideline:

\* \* \*

“Substantive violation of 18 U.S.C. § 1591(b)(1)” means a conviction under that specific statutory provision. It does not include a conviction under 18 U.S.C. § 1594(c) of conspiring to violate 18 U.S.C. § 1591.

**§ 2G1.3 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor**

(a) Base Offense Level:

- (1) **34**, if the defendant was convicted of a substantive violation under 18 U.S.C. § 1591(b)(1); or
- (2) **30**, if the defendant was convicted of a substantive violation under 18 U.S.C. § 1591(b)(2); or

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## Application Notes

1. Definitions. – For purposes of this guideline:

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“Substantive violation under 18 U.S.C. § 1591(b)(1)” and “substantive violation under 18 U.S.C. § 1591(b)(2)” means a conviction under those specific statutory provisions. It does not include a conviction under 18 U.S.C. § 1594(c) of conspiring to violate 18 U.S.C. § 1591.

6. ***The Commission Should Study Why §2H4.1 Over-Punishes in a High Percentage of Cases***

The Commission seeks comment on whether §2H4.1 is adequate as it applies to violations of 18 U.S.C. §§ 1583, 1584, 1589, 1590, and 1592. It appears from the Commission’s statistics that the guideline frequently over-punishes these offenses. In 2007, for example, out of thirteen cases sentenced under § 2H4.1, only six (42.6 %) were sentenced within the guideline range. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2007) at Table 28. The other eight all received a below-guideline sentence (three of which were government sponsored). *Id.* In 2006, only three out of eleven cases involved a within-guideline sentence, or 27.8%. *See* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2006) at Table 28. One case received an above-guideline sentence, but the remaining seven – 63.6% of all §2H4.1 cases – received a sentence below the guideline range (two of which were government sponsored). *Id.* We urge the Commission to review its data on these cases to determine, as best as possible, why courts are finding that §2H4.1 over-punishes in such a high percentage of cases, and to amend the guidelines to reflect the results of that review.