

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

:

v.

:

CRIMINAL NO. 06-319

VINCENT J. FUMO

:

GOVERNMENT'S SENTENCING MEMORANDUM

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I. INTRODUCTION.

The importance of the sentence which the Court will impose in this case cannot be understated. It is important, to be sure, to the prosecution and to the defendant, who must be punished for criminal wrongdoing that transpired for two decades and involved a gross breach of the public trust. And it is uncommonly important to all citizens and lawmakers in the Commonwealth of Pennsylvania, who will learn whether a powerful public official is or is not above the law, and what price is to be paid for corrupt conduct and obstruction of lawful authority.

Vincent J. Fumo, through his acumen, savvy, drive, and often sheer ruthlessness, was, without dispute, the leading public official of his time in Pennsylvania. His influence permeated all levels of government in the state, including the executive and judicial branches, and local government affairs in his hometown of Philadelphia. As he himself admitted at trial, he gained that influence, in part, through the criminal acts proven in this case -- the use of state employees and contractors to assist other individuals' campaigns, leading the successful candidates to repay Fumo's largesse with loyalty to his wishes.

Because of his prominence, the sentencing in this case will not be heard only in a quiet courtroom, soon to be forgotten except by the defendant and his friends and family. Rather, this Court's sentence will echo in every corner of the state, and

perhaps beyond, declaring to powerful officials and common citizens alike the tolerance of federal law for those who abuse their positions of power.

The message sent must be unmistakable: That it is impermissible for an elected official to use public money, in any measure, let alone the millions of dollars at issue in this case, for personal and political gain. That it is unconscionable for a public official to create and fund a charitable organization, and then skim at least \$1 million from the charity for his personal pleasure and political benefit. And that it is unacceptable for any citizen, let alone an elected Senator, to endeavor to thwart the lawful process of the federal government by destroying evidence and enlisting other public employees in a determined effort to obstruct justice.

Further, an appropriate sentence in this case will not only deter others, but will punish this defendant for his wrongful acts and assure that he does not have any further opportunity to defraud and deceive others. The evidence in this trial depicted a man who truly believes himself above the law, who exhibited such hubris that he demanded that employees of the state and of a charity serve him as if he were royalty and they were chattel, and then, once he was investigated, furiously acted to destroy evidence and, ultimately, commit extensive perjury at trial.

In this case, only a lengthy sentence of incarceration will punish and incapacitate the defendant, and provide essential deterrence to others. The government recommends a sentence of more than 15 years of imprisonment.

The defense, and many of Fumo's supporters, see it differently. They tout Fumo as an "effective" Senator, who arranged large appropriations for the City of Philadelphia and for local institutions, and sponsored other legislative successes. Some of them claim that Fumo's effectiveness "outweighs" the crimes he committed, and should result in leniency at sentencing. The very suggestion is outrageous.

As explained at length in the Government's Memorandum Regarding Sentencing Calculations, filed July 6, 2009, at pages 121-139, and articulated at the hearing on July 8, 2009, Fumo never exhibited any of the traits of personal sacrifice or generosity which the Third Circuit has held may warrant sentencing leniency. To the contrary, Fumo is being commended for using his public position to arrange public financing of good causes, which is exactly what he was elected to do.

As we stated in the earlier memorandum, what Fumo's allies suggest, however well-meaning they are, is downright nefarious -- that an elected official is entitled to receive lesser punishment for criminal acts, and that the more "effective" the official is, the more leeway he should get. Such a position is manifestly at odds with decades of declarations, by Congress in its legislative enactments, by the Sentencing Commission in its guideline proposals, and by judges in sentencing decisions, that public office is a public trust (and, as in Fumo's case, usually a well-rewarded and well-compensated one at that), and that a breach of that trust warrants significant punishment. To hold otherwise would soon convert our representative democracy into a kleptocracy.

To impose a sentence which does not affirm these principles runs the risk of declaring open season on public treasuries by corruptible officials.

Over 100 years ago, assaying the state of government in the city, journalist Lincoln Steffens famously described Philadelphia as “corrupt and contented.” Sadly, the letters submitted to this Court suggest that contentment with official corruption may remain in some quarters. Only this Court may declare that thievery and obstruction of justice are not acceptable, and make clear the stern price that a public official will pay for thinking otherwise.

II. SENTENCING GUIDELINES RANGE.

The Supreme Court has declared: “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.” Gall v. United States, 128 S. Ct. 586, 596 (2007). Thus, the Sentencing Guidelines remain an indispensable resource for assuring appropriate and uniform punishment for federal criminal offenses.

A. The Court’s July 10, 2009 Order.

In its ruling on July 10, 2007, the Court made specific findings regarding loss and restitution as follows:

	<u>Loss</u>	<u>Restitution</u>
Senate Fraud: ¹	\$1,293,927.42	“at least \$1,293,927.42”
CABN Fraud:	\$958,080.36	“at least \$676,519.98”
ISM Fraud:	\$127,906.88	\$114,531.88
<u>Total:</u>	<u>\$2,379,914.66</u>	<u>“at least” \$2,084,979.28</u>

The Court’s order does not explain its calculations or identify the items that were included or excluded from loss and restitution, and it is not possible for us to make that determination. As explained later in this memorandum, the government is seeking an upward variance based on the fact that the Court’s loss determinations and corresponding guideline calculations substantially understate the harm actually caused by the offense conduct. Therefore, because it is essential to consideration of that motion and to clarifying the record in the event of an appeal by the United States or the defendant, or both, the United States respectfully requests that the Court specifically identify what is and is not included in the loss and restitution figures, and the reason for exclusion of such items.

Without explanation, the Court also sustained the defense objections to enhancements based on defendant Fumo’s acting on behalf of a charitable organization and a public agency, using sophisticated means, and committing perjury. The United States respectfully urges the Court to reconsider these rulings, which it submits are clearly

¹ The calculation of the Senate loss and restitution numbers do not include the amount of \$150,000 with regard to Mitchell Rubin, to be discussed in the next section of this memorandum.

erroneous based on the clear evidence submitted to the Court and the controlling legal authorities cited in the government's submissions to the Court.

With respect to the determination of the offense level based on the Court's rulings, there is a disparity between the Court's rulings and its finding that the total offense level, "[a]s it now stands," is an offense level of 33. The draft presentence investigation report calculated the total offense level to be 39. That figure did not include any multiple count adjustment for the tax loss associated with the criminal tax offenses of which Fumo was convicted because there was a 13-level difference between the group with the highest offense level, *i.e.*, the fraud and obstruction group, which was 39, and that of the tax group, which was 26. The Court's July 10, 2009, rulings result in a total reduction of 8 levels from the draft PSR (a loss figure below \$2.5 million results in a 2-level reduction, and removal of sophisticated means, acting on behalf of a charity and public agency, and perjury, adds up to another 6-level reduction). This 8-level reduction reduces the total offense level from 39 to 31. However, this offense level of 31 must be increased by 1 level as a result of the multiple count adjustments set forth in U.S.S.G. § 3D1.4.

Group I (Fraud and Obstruction):	31
Group II (Tax Offenses):	24 ²

² This is reduced from offense level 26 to account for the fact that the Court has declined to apply a 2-level enhancement for sophisticated means and is based on a tax loss of \$4,624,300, to which Fumo did not object.

Under Section 3D1.4(b), because there is a difference of 5 to 8 levels between Group I and Group II, Group II counts as one-half Unit, resulting in a requirement that one additional level be added to Group I. Thus, the combined offense level is 32.

Should the Court decide to include the loss amount of \$150,000 relating to the Mitchell Rubin Senate fraud, as it should, then the loss number would increase to \$2,529,914.66, resulting in a 2-level increase in the fraud offense level from 31 to a 33. In that event, there would then be a 9-level difference between Group I and Group II, which would therefore eliminate any increase in the combined offense level pursuant to Section 3D1.4(c), which instructs the Court to disregard any group that is 9 or more levels less serious than the group with the highest offense level.

Thus, to recap, for the moment, based on the Court's July 10, 2009, ruling, the total offense level is properly calculated at 32, not 33 as stated in the Court's order, which translates into an advisory guideline range of imprisonment of 121-151 months. Should the Court decide to include the Mitchell Rubin loss figure of \$150,000, then the total offense level increases to 33, with a corresponding advisory imprisonment range of 135-168 months.

B. Loss Amount Relating to Rubin Contract Should Be Included in Loss and Restitution Amounts.

In its order dated July 10, 2009, the Court stated that it was reserving judgment regarding the \$150,000 loss assigned in the presentence report to the contract of Mitchell Rubin. At the July 8, 2009, hearing, defense counsel stated that they will

provide additional information in an effort to rebut the jury's conclusion that, as the government alleged, Rubin was given a no-work contract which paid him \$150,000 over a five-year period.

As a prosecutor stated at the July 8 hearing, counsel for Rubin in recent months have provided the government with documentation which they contend demonstrates that Rubin acted as a liaison for Fumo in meetings with public officials and other constituents. These documents show nothing other than credit card bills and calendar entries, which document that Rubin met with people, but provide no information about the reason.³

In addition, the government has been provided with a document which purports to be a calendar kept by Rubin's wife, Ruth Arnao, beginning in October 2003 (during the last year of Rubin's five-year contract). This is a very odd document. It includes a number of appointments and reminders for Arnao, as well as a handful of lunch appointments for Rubin each month with various officials and business people. The document (regarding which no one has testified before this Court) is highly suspicious, in that almost none of Rubin's busy affairs (as a businessman, government official, and politically involved citizen) are listed in the daily calendar, except for these scattered lunch meetings. The calendar bears no explanation of why they are the only

³ The defense has also provided what they describe as reports of interviews with people with whom Rubin met. Those second-hand reports are inconclusive, and the defense has not called any actual witness to testify.

ones listed, creating the likelihood that this is an after-the-fact invention designed to deceive the government. Further, as in the case of all the other Rubin documents, there is no explanation of what the meetings were actually for.

In sum, it remains the case that there is no document which evidences in any way that Rubin performed any work on behalf of the Senate. Rather, in the government's view, Rubin's counsel are expanding the effort which the Fumo defense began at trial, to retroactively examine meetings which Rubin had in the course of his varied affairs and recast them as meetings regarding subjects of interest to Fumo.

More significantly, no witness has testified to this Court, and been subject to cross-examination, regarding any of the new documents. What we have are benign documents, like credit card slips, accompanied only by a claim of counsel that the documents related to work performed on behalf of the Senate. That is clearly unreliable.

Notably, Rubin himself has not testified, except before the grand jury, where he told a totally different story (at that time attempting to shift attention from Fumo). Whereas the defense now claims that Rubin was an essential adviser to and liaison for Fumo (the claim resoundingly rejected by the jury), this is part of what Rubin said under oath on March 28, 2006:⁴

⁴ In reading this transcript, the relevant context is that Rubin operated B&R Services, which provided court retrieval and other services, and the actual Senate contract was with B&R (which the government argued was done in order to make the contract look legitimate and conceal the fact that the contract was simply a giveaway to Rubin). In this testimony, Rubin perpetuated this fiction, claiming that the services to the Senate were

Q. What types of services did your company provide to the Senate Democratic Appropriations Committee?

A. Well, different types of, there's so I know these are some of the things we went over which was a copy of a deed, a search, informational use at City Hall whether it be looking up records. Part of how we work, and I don't know that we went through this, is that 90 percent of all the clients that B&R has in that particular capacity we make regular stops to those offices. And I would be the person that, contact person on this contract and the person servicing the Senate office and Senate Appropriations by stopping at the office, whatever. This was very hard to me to explain. We were a tool of I guess the Senator's staff for all different types of issues whether it was constituent services, whether it was research on a project that was either being built, going to be built. It is just a myriad of different things.

Q. When you say the Senator, are you talking about Senator Fumo?

A. Yes.

Q. So from whom would you receive your work assignments?

A. Most of them from his staff.

.....

Q. How did you come up with \$2,500 a month as the amount that your company would bill the Senate Appropriations Committee?

A. I stopped at his office just about everyday. I probably was stopping there more than any other client that I have. And we have clients that, well, no, I have other clients I pass more. It's very difficult to explain because it is a combination of the time spent going to the office and the time spent doing actual work.

Q. What types of constituent services did your company do for Senator Fumo's office?

provided by B&R.

A. It could be anything from a copy of a deed, to getting a major license, to tracking down some old information about some judgment. They were all different types. I mean everyday was different. It's not that type of business, it's not that we did 400 of this, 300 of that, 200 of this.

.....

Q. What role did Fumo play in your company receiving this contract award?

A. I don't think any.

Q. Why do you think that?

A. I remember I I remember I you know, we're back to the wife issue in dealing with Sue Swett on different things that we did. I don't remember ever having a conversation with Vincent, with Senator Fumo to give me this contract.

Q. Well, he's the one who has to approve you getting the contract, doesn't he?

A. I would think so, I would assume so. At some point I guess he has.

Q. There's actually a contract that you have to sign?

A. Correct.

Q. And that he has to sign too, right?

A. I know I signed it. Don't remember his signature being on it when I signed it.

Rubin N.T. at pp. 26-29, 33-34.

So this is what happened here -- Fumo created a bogus contract with B&R Services in order to give his friend \$30,000 per year. When the government began to investigate, Rubin appeared before the grand jury and loyally parroted the prepared story, that this was a legitimate B&R contract which had nothing to do with Fumo. But then the

government investigated, and found that no Senate employee used B&R for anything, or even knew that Rubin had a Senate contract (the evidence which the government presented at trial). So Fumo, in his testimony, tried a new and equally false tack, claiming that Rubin was an essential aide who reported only to him. This shifting of defenses and invention of tales was repeated over and over in this case, leading to the jury's decisive verdict rejecting everything Fumo said.

Plainly, the defendant and his cohorts have not been honest -- not with the grand jury, not with the trial jury, and not with this Court. The new defense claims that Rubin did work for Fumo as an adviser and liaison are worthless in the absence of reliable evidence contradicting the jury's verdict. There is none, and the entire \$150,000 loss must be assessed. This leads to a final sentencing range of 135-168 months in this case, in accord with the Court's July 10 ruling.

III. THE COURT SHOULD GRANT AN UPWARD VARIANCE ABOVE THE APPLICABLE SENTENCING GUIDELINES RANGE.

As explained below, there are at least five separate grounds on which this Court should impose an upward variance in this case based on harm caused by defendant Fumo's criminal offense conduct that is not adequately taken into consideration in the determination of the applicable sentencing guidelines range. These include (1) inadequacy of the loss determination to measure the actual harm caused by Fumo's conduct; (2) the loss of public confidence in the integrity of elected public office; (3) loss

of reputation and other intangible, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance; (4) Fumo's perjury at trial; and (5) the exceptionally egregious nature of the obstruction offenses that Fumo committed.

A. An Upward Variance Should Be Granted Because the Loss Calculation Fails to Sufficiently Consider the Harm Caused by Defendant Fumo's Criminal Conduct.

While the Court has not explained the basis for its reduction in the loss amount determined by the government, we surmise that the Court did so in some respects because of the difficulty in reaching a precise calculation. For example, with regard to some Senate employees, Fumo argued that it is unduly difficult to determine the proper classification for employees who were overpaid in order to perform personal and political work for him. Likewise, with regard to the Citizens Alliance fraud, Fumo challenged the government's ability to state with precision which of the thousands of wrongful purchases made by Citizens Alliance ended up in his possession. These crimes unquestionably happened -- the jury so found, beyond a reasonable doubt. But the full loss, this Court apparently held, cannot be determined.

Thus, based on the Court's current loss determination, it is obvious that the assessment understates the actual loss suffered by the victims. The only reason that this is so -- and that, as a result, the taxpayers of Pennsylvania and Citizens Alliance will never recover the full amounts which Fumo stole from them -- is because of the manner in which Fumo committed his crimes. In the Senate, Fumo used public money to establish

an office which served all of his myriad political and personal needs. While directing employees on a daily basis to work on campaigns and serve him personally, he determinedly kept no records, and directed his staff to do likewise. His chief of staff submitted grossly false information to the Chief Clerk about the employees' job duties. As a result, the full loss is unknowable and the guideline range is plainly and unduly low.

For instance, it appears that the Court has decided not to include any loss in the Senate fraud based on the misuse of Ruth Arnao's services during the time that she was a Senate employee, even though the jury found beyond a reasonable doubt that that crime and every other theory advanced by the government was proven beyond a reasonable doubt.⁵ The Court's judgment can only be based on the difficulty of determining her proper classification. Yet the trial evidence was clear that Arnao spent most if not all of her time as a Senate employee, during the years in question, either serving Fumo's personal needs (for example, she was the treasurer of various campaign committees), or operating Citizens Alliance, a task for which she was separately paid and

⁵ At the hearing on July 8, 2009, the Court said that it was reserving judgment on the Arnao portion of the loss, based on the promise of defense counsel to provide more information regarding her duties. However, today's order states that the Court has made a final determination on loss except with regard to Mitchell Rubin. We therefore assume that the estimated loss regarding Arnao's services (approximately \$250,000) has not been included. The government had prepared a detailed discussion of the Arnao issue to submit in response to the anticipated submission of the defense, but we will now withhold that absent further direction from the Court.

which lawfully may not be compensated by the Senate.⁶ For this work, Fumo fraudulently caused the taxpayers of Pennsylvania to pay Arnao over \$400,000 from 1998 through 2003, money which the citizens of the state will now never get back due to the Court's ruling, and loss which apparently is not accounted for in the guideline range. This is just one of several similar examples resulting from the Court's order.

Similarly, the Citizens Alliance scheme was explicitly designed to shield Fumo and Arnao's thievery from detection and precise calculation. As the government exhaustively demonstrated, Fumo purposely acquired goods from the same stores that Citizens Alliance patronized (like Home Depot), and often bought items of the same type that Citizens Alliance might logically require (like tools and equipment). As a result, as the government has consistently acknowledged, it is not possible other than through

⁶ Chief Clerk Faber testified:

Q. Can a Senate employee run a non-profit organization as part of their duties as a Senate employee?

A. On Senate time? No.

Q. Why is that?

A. Because it's not a legislative function.

Faber N.T. 10/22/08 at p. 41. See also Contino N.T. 11/5/08 at p. 4 (it is a violation of the Ethics Act for an elected official to use state employees to run a nonprofit organization which provides gifts or other compensation to the elected official).

estimation to assess how much loot Fumo took, and to distinguish his haul from the goods properly acquired by Citizens.

To the extent that the Court has cut the loss in this case because of these difficulties of measurement, it is clear that there should be an upward variance to reflect the fact that the final guideline range significantly understates the applicable loss in this case.

B. An Upward Variance Should Be Granted Based on the Loss of Public Confidence in the Integrity of Elected Public Office.

Vincent Fumo is a man who violated the sacred public trust that every elected official owes to the public. Rather than serve the public interest, he chose to serve himself. In addition to the shame and disgrace that he has brought upon himself, defendant Fumo's actions have caused immeasurable harm to the public's confidence in the integrity of our elected officials in state government. He is living proof of the very worst that state government has to offer – a place where powerful officials can take public money for personal enrichment and political advantage, and use the resources of the state, including its employees, office space, and equipment, for private benefit rather than public good. Defendant Fumo's actions have shined a bright spotlight on our democratic institutions and drawn widespread public attention to the worst kind of abuse of the public trust that is imaginable.

Sadly, defendant Fumo's crimes confirm many of the public's worst fears about its elected officials in our state. The decline of public confidence in our democratic

institutions in general and in our elected representatives in particular is a loss that cannot be lightly cast aside. Courts have repeatedly recognized that the type of harm caused by defendant Fumo is an intangible harm that can never be measured in dollars, and is one that cannot easily be remedied. See, e.g., United States v. Ganim, 2006 WL 1210984, at *5 (D. Conn. May 5, 2006) (“Government corruption breeds cynicism and mistrust of elected officials. It causes the public to disengage from the democratic process because, as the Court stated at sentencing, the public begins to think of politics as ‘only for the insiders.’ Thus corruption has the potential to shred the delicate fabric of democracy by making the average citizen lose respect and trust in elected officials and give up any hope of participating in government through legitimate channels.”).

Further, courts have recognized that the harm to the public’s confidence in its elected officials is one that is not adequately considered by the sentencing guidelines. See, e.g., United States v. Saxton, 53 Fed. Appx. 610, 613 (3d Cir. 2002) (not precedential) (affirming three-level upward departure where fraud caused non-monetary harm of “loss of public confidence and trust in elected officials”). In the annals of our rich history, one must reach far back into the past to find a more egregious case of a public official whose abuse of public office has caused such damage to the public’s view of our democratic institutions in this state. This intangible harm is not addressed by the sentencing guidelines that apply to Fumo because there is no price that can be placed upon it. Therefore, in the interests of justice, the government respectfully requests that

the Court grant the government's request for an upward variance that takes this harm into account in the formulation of a just sentence.

C. An Upward Variance Should Be Granted Based on the Loss of Reputation and Other Intangible, Non-economic Harm Suffered by the Independence Seaport Museum and Citizens Alliance.

As the Independence Seaport Museum stated in its victim impact statement to the Court, the criminal fraud that Fumo committed with respect to the museum occurred at a time when the museum suffered many financial difficulties, and needed all revenue produced by its historic yachts that were available for public charter. The loss figures attributed to Fumo in connection with the museum fraud do not include the loss of charter income that resulted from the fact that the yachts were moved to distant ports to accommodate his vacation plans.

In addition, and more importantly, according to the museum's victim impact statement, following adverse publicity regarding Fumo's actions, "[i]t will take years for the Museum to recover its reputation and its standing in the Philadelphia museum community and among national maritime museums." As this Court is aware, Fumo's criminal actions brought embarrassment and disgrace upon the museum, which was targeted in a series of unfavorable articles appearing in the *Philadelphia Inquirer* beginning in March 2004 which identified Fumo's relationship with the museum and his abuse of museum yachts.

Similarly, Citizens Alliance, in its victim impact statement, has also asserted that it has suffered severe harm to its reputation and its ability to perform its mission of providing services to residents of Philadelphia:

Notwithstanding its valuable contribution to maintaining and improving the quality of life in South Philadelphia, CABN's reputation in the South Philadelphia communities it serves as well as throughout the region has suffered and been damaged irreparably as a result of its constant association with the illegal activities of the Defendants. In turn, the irreparable damage to its reputation has put at serious risk CABN's ability to attract grants and other financial support as well as to continue to serve the residents of the community.

CABN Victim Statement, at p. 5. In addition, Citizens Alliance reports in its victim statement that it was even forced to discharge 15 of its employees who had, for many years, provided much needed community services such as street cleaning and trash and graffiti removal to many thousands of residents of Philadelphia. Id.

This injury to the reputation of the Independence Seaport Museum and Citizens Alliance is an intangible harm that is not taken into consideration by the Sentencing Guidelines, and is a matter worthy of an upward variance, as courts have found. For example, in United States v. Dennis, 2002 WL 1397090 (5th Cir. 2002) (not precedential), the court affirmed an upward departure under circumstances similar to those presented here. In Dennis, the defendant was convicted of stealing from a nonprofit organization that administered grants from various federal agencies. On appeal, the court affirmed the district court's decision to grant a motion for a two-level upward departure based on the harm to the nonprofit institution's reputation that resulted from the

defendant's crimes. The upward departure was based on the fact that the nonprofit organization's reputation and fundraising efforts suffered as a result of media reports of the defendant's criminal conduct.

Moreover, in the case of Citizens Alliance, in addition to the injury to its reputation and ability to attract state grants or private donations, and the loss of its entire workforce, it was forced to advance over \$2 million in legal fees to defendant Ruth Arnao, and it will likely never see those funds again. Citizens Alliance has spent countless additional amounts on legal fees in responding to grand jury subpoenas and government inquiries. None of these amounts are included in or accounted for by the sentencing guidelines calculation. Nonetheless, these consequential financial harms are appropriately considered in the context of an upward variance or departure, as courts have found. See, e.g., United States v. Marlatt, 24 F.3d 1005, 1007-08 (7th Cir. 1994) (under commentary to earlier version of fraud guidelines, holding that court may depart upward for consequential damages not included in loss calculation); United States v. Newman, 6 F.3d 623, 630 (9th Cir. 1993) (under commentary to earlier version of Section 2B1.1, holding that financial harm in excess of losses considered under ordinary guideline calculation may provide basis for upward departure); United States v. Flinn, 987 F.2d 1497, 1505 (10th Cir. 1993) (approving upward departure under Sections 5K2.0 and 5K2.5 where defendant caused financial damage to property that was not included in loss calculation); United States v. Wilson, 993 F.2d 214, 217-18 (11th Cir. 1993) (under

earlier version of fraud guidelines, court notes that a district court may depart for financial harm in excess of the guideline loss calculation).

D. An Upward Variance Should Be Granted Based on Fumo's Perjury at Trial.

This Court decided, for reasons which have not yet been stated, not to impose an upward departure based on Fumo's perjury during the trial. Plainly, an upward variance should now be granted on this basis.

Fumo has received a 2-level assessment in the guideline calculation for obstruction of justice under Section 3C1.1. That is based solely on the effort, for which the jury convicted, in which he caused the wholesale destruction of electronic evidence on dozens of computers and servers in 2004 and 2005. In sentencing Leonard Luchko, as will be discussed later, Judge Yohn opined that that obstruction was so pervasive, continuous, and severe that an upward variance from the obstruction guidelines would ordinarily be appropriate based on the offenses of conviction alone. (Judge Yohn did not impose one on Luchko, and instead imposed only a within-guideline sentence, solely because Luchko played a subservient role in carrying out Fumo's commands.)

The existing obstruction enhancement, however, involves no consideration of Fumo's separate perjury at trial. And that perjury was as extensive as anything the undersigned have ever witnessed, occurring over six days of trial testimony during which Fumo lied regarding every material issue in the case. Just a summary of the false testimony, on 27 highlighted areas, spans nearly 40 pages of the government's

memorandum submitted on July 6, 2009. The defense has not even tried to rebut most of these assertions, nor could they.

Given the fact that Fumo has already received an enhancement for the egregious obstruction which preceded his indictment, it is essential to impose an upward variance based on his perjury at trial. To conclude otherwise would be to give a free pass to anyone accused of obstruction of justice, leaving the defendant free to attempt to pervert justice by giving any measure of false information to a trial court and a trial jury. An upward variance is necessary to address and punish Fumo's effort to fraudulently affect the process of justice in this case.

E. An Upward Variance Should Be Granted Based on the Exceptionally Egregious Nature of the Obstruction Offenses that Fumo Committed.

In sentencing co-defendant Leonard Luchko for his role in the conspiracy to obstruct justice, the Honorable William H. Yohn, Jr. addressed the issue of the seriousness of the obstruction offenses, describing them as "egregious" and worthy of an upward variance. In sentencing Luchko, Judge Yohn stated:

The obstruction occurred both in Philadelphia and at the homes on the Jersey Shore and also in Harrisburg. It involved computer information with reference to Senator Fumo, Mrs. Arnao, Citizens' Alliance and other Senate employees. It is fair to say in reading the allegations of the superseding indictment and the pre-sentence report and the government's sentencing memorandum that he [Luchko] was tireless in his efforts to basically delete the electronic information in order to cover up the crimes that were being committed and he was tenacious in pursuing those efforts for a long period of time. It was an effort that was largely successful with reference to e-mails and other electronic communications that occurred prior to 2005 and which, in particular, prevented the government from doing a full investigation with reference to allegations concerning PECO and Verizon, efforts

to obtain payments from PECO and payments from Verizon. And it occurred both before and after the search warrants and subpoenas were issued and involving, at the end, securing some files in his own home.

So the nature and circumstances of the offenses are particularly egregious, and, in my mind, that aspect of the case which would – would justify a variance from the guideline application of twenty-four to thirty months.

* * *

It seems to me that these offenses were very serious, occurred over a long period of time, involved almost a daily effort, involved his leadership role in conducting the technical effort pursuant – to conceal the e-mails that were the subject of his efforts, all of which was done at the senator's request. And as I've indicated, the seriousness of the offenses suggest a sentence above the guideline range.

Remarks of Judge Yohn at Luchko Sentencing, 5/20/2009, N.T. at pp. 2-3.

While Judge Yohn stated that the obstruction offenses in this case were more serious than those to which the obstruction guidelines ordinarily apply, in Luchko's case he ultimately decided not to vary upwards, upon taking into account that Luchko was a dependent person who acted in subservience to Fumo. The Court instead decided a within-guideline sentence would suffice. Fumo, of course, does not have this excuse. To the contrary, he is far more culpable, for exploiting Luchko and all the other public employees who did his criminal bidding.

The obstruction of justice that Fumo personally directed is, as Judge Yohn stated, "particularly egregious," and of a kind and duration that is far beyond the typical offense conduct contemplated by the sentencing guidelines. Thus, in the interests of justice and in order to adequately take into consideration the full measure of this

extraordinary obstructive conduct, this Court should impose an upward variance and sentence Fumo accordingly.

IV. DISCUSSION OF THE SENTENCING FACTORS.

Once the Court has properly calculated the guideline range, the Court must next consider all of the sentencing considerations set forth in Section 3553(a). Those factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner; (5) the guidelines and policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C.

§ 3553(a).⁷ In this case, no unusual circumstances exist which would warrant any

⁷ Further, the “parsimony provision” of Section 3553(a) states that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” The Third Circuit has held that “district judges are not required by the parsimony provision to routinely state that the sentence imposed is the minimum sentence necessary to achieve the purposes set forth in

variance below the applicable guideline range of imprisonment; rather, as already stated, the circumstances of this case call for a sentence in excess of the advisory guideline range.

A. Nature and Circumstances of the Offense and the History and Characteristics of the Defendant.

Defendant Vincent Fumo engaged in a series of elaborate and devious fraud schemes over a period of many years. He used his status, power, and influence as an elected public official, along with the resources of the Commonwealth of Pennsylvania, to enrich himself at the expense of taxpayers. His crimes were driven by an insatiable greed and lust for material possessions and personal fealty, despite the fact that he was richly compensated by a variety of sources, including a law firm that paid him \$1 million per year to do no work other than to use his political connections to steer business in its direction, and a bank he inherited from his father which paid him hundreds of thousands of dollars each year, again for little or no work. His crimes fall squarely within the class of cases to which the applicable guidelines are addressed, and thus consideration of the nature of the offense, § 3553(a)(1), counsels in favor of a sentence that is within the range established by the guidelines.

§ 3553(a)(2). . . . “[W]e do not think that the “not greater than necessary” language requires as a general matter that a judge, having explained why a sentence has been chosen, also explain why some lighter sentence is inadequate.” United States v. Dragon, 471 F.3d 501, 506 (3d Cir. 2006) (quoting United States v. Navedo-Concepcion, 450 F.3d 54, 58 (1st Cir. 2006)).

Defendant Fumo committed daily crimes over a period of time that, with respect to his misuse of Senate contractors to work on political campaigns, dates back to the 1980s. His pervasive misuse of state employees as his personal servants and campaign workers has been ongoing since that time, and grew even more widespread as his power and stature in the legislature increased, along with the size of his Senate payroll.

The evidence demonstrated that Fumo engaged in fraud on a daily basis for years, using his Senate office as a base of operations to plunder the resources of the State Senate, along with those of a nonprofit organization he created, Citizens Alliance for Better Neighborhoods. With respect to Citizens Alliance, the government proved that, from its very inception, it existed to serve Fumo's political agenda. It acquired equipment to supplement city services, but it was essential at every turn that Fumo receive full political credit for its good works. Citizens Alliance, funded with taxpayer money, was not created to merely serve the public. It was created to serve Vincent Fumo, and, over the years, grew to become an essential cog in the political machine commonly known as "Fumo World." Citizens Alliance vehicles carried placards identifying Fumo as the source of its work. Fumo took full political credit for every good deed that Citizens Alliance accomplished. Yet that was not enough. As with his legislative career, it was not enough for Fumo to earn political credit for Citizens Alliance's good works. Fumo

believed he was entitled to rich financial rewards for his efforts on behalf of this nonprofit, and engaged in a fraud scheme to ensure he received them.

As Citizens Alliance's coffers swelled in the late 1990s with the proceeds of Fumo's settlement with PECO, so, too, did the opportunities for Fumo to steal. Citizens Alliance's funds were diverted to satisfy Fumo's appetite for power tools and for consumer goods. It paid for luxury vehicles, farm equipment, polling, and much more. Citizens Alliance workers joined the ranks of Senate employees trooping to his homes to improve his residences, take out his trash, and carry out any other task he conceived, rather than spending their time furthering Citizens Alliance's mission to better Philadelphia neighborhoods.

Yet, for this defendant, the fraud did not end with the Senate scheme. It did not stop with Citizens Alliance. Fumo's thefts of luxury cruises from the Independence Seaport Museum also illustrates the depravity of this man's morals and his insatiable thirst to take advantage of every possible opportunity to spend other people's money. Although he testified on cross-examination during the trial that he understood the concept of fiduciary duty and the principle that board members of any organization are expected to place the interests of the organization above personal interests, see Fumo N.T. 2/11/09 at pp. 148-49, Fumo ignored those principles and used the luxury yachts owned by the museum as if they were his own. In disregard of museum policies that clearly prohibited the personal use of museum assets for private benefit, Fumo made regular use of yacht

cruises for his personal vacations, causing the museum to cancel paying charters and divert its yachts to distant harbors to be at this defendant's disposal – all without Fumo ever paying a dime.

The effort to obstruct justice also illumines the history and characteristics of the defendant, and the nature of the offenses. It was not a one-time event, or even a brief endeavor, but a determined effort that transpired for more than one year, in which Fumo directed public employees to destroy public records held on scores of computers in his Senate offices and in private residences. A more systematic effort to obstruct justice cannot be imagined. And then, at trial, Fumo further endeavored to justify his actions and protect himself by providing extensive false testimony to the jury, which included blaming others for his own wrongdoing.

Fumo's efforts to obstruct justice in this case were nothing short of shocking. They began on December 1, 2003, just a week after the publication of a series of articles in the *Philadelphia Inquirer* questioning the propriety of Citizens Alliance's expenditures, its sources of funds, and its relationship with Fumo. On January 25, 2004, when the *Inquirer* published a front page story with the headline, "FBI Probes Fumo Deal," Fumo dramatically expanded the scope and intensity of the efforts to delete e-mail and wipe computers, and enlisted the assistance of his aides, including Mark Eister, Leonard Luchko, Daniel Coyne, and Donald Wilson. When Citizens Alliance received a grand jury subpoena on April 28, 2004, Fumo immediately learned of the existence of the

subpoena and instructed Luchko to ensure that all of the Citizens Alliance computers were cleared of e-mail to or from Fumo, and wiped to ensure the completeness of the destruction. When the *Inquirer* published a story on May 21, 2004, titled, “Fumo Probe Moves to Harrisburg,” Fumo immediately ordered his staff to implement a plan to ensure that all of his e-mail in Harrisburg was deleted and his computers wiped. Then, in January 2005, when Fumo learned that the FBI planned to copy the hard drives of the Citizens Alliance computers to try to recover the e-mail that had never been produced in response to grand jury subpoenas, Fumo put his staff back to work, tirelessly deleting e-mail and wiping more computers in anticipation of an FBI search warrant.

An examination of the personal history and characteristics of defendant Fumo is particularly relevant here and further demonstrates why a long prison sentence is both necessary and just. Fumo grew up in a wealthy household and was afforded opportunities not available to many Americans – he attended St. Joseph’s Prep; graduated from Villanova University with an undergraduate degree; earned an MBA from the Wharton School; and received a law degree from Temple University. He accumulated great wealth while serving as a state senator for 30 years, including a luxurious mansion in Philadelphia, multi-million dollar beach homes in Florida and at the Jersey Shore, and a 100-acre farm on the Susquehanna River just north of Harrisburg. He spent at least one-third of each year on vacation, and did so in grand style. He shopped at the finest stores, drove luxury vehicles, cruised around in a Hinckley powerboat worth more than a half-

million dollars, ate in the finest restaurants, and traveled the world, staying in the grandest hotels. He was a member of Mensa; a licensed pilot; an attorney; a banker; even a licensed electrician. In short, this defendant is someone who was afforded every privilege that our society has to offer to its rich and famous. As the trial evidence demonstrated, in his very own words it is clear that he fancied himself as a member of royalty,⁸ deserving of every benefit that his lofty status could possibly afford, including, most significantly, the ability to use other people's money, or "OPM," as he fondly used the term.

In this regard, the "social history" provided by the defense to the Court on July 10, 2009, which is a stunningly opinionated piece written by a local social worker based solely on discussion with Fumo and his friends and relatives, is almost beneath comment. Among other revelations, we learn that Fumo thought he was picked on as a young boy. That he hesitated at school dances in approaching girls. That he had problems with fidelity, and that various family members did not like each other. That he is allegedly a shy and withdrawn person. And on and on. On this basis, the defense no doubt asks the Court to conclude, Fumo should not be punished for his crimes.

Say all of this to the defendants who have actually known hardship and despair. Say it to the teenage drug dealer who comes before this Court, who had no father, who had no schooling, who has known nothing but abuse and deprivation, and

⁸ In a February 27, 1999 email to then-girlfriend Dorothy Egrie, Fumo stated: "Jeannie always says that being a Senator is the next best thing to Royalty. I guess she is right except for the pay!" Exh. 861.

now faces decades in federal prison because he turned to the crack cocaine trade. Say it to the person with an actual mental impairment, who scrapes by to find support and the means of daily life, who wrongfully decides to rob a bank in a desperate effort to better her situation. Say it to any one of the hundreds of defendants who come before this Court facing guidelines as severe as those calculated here, who did not have one iota of the wealth, education, adulation, and privileges showered on Fumo throughout his life. Tell them that Fumo, who committed criminal acts in order to use others' money to live in a mansion, own a farm, enjoy houses at the shore and on a Florida beach, and take free yacht trips, wants to avoid jail time. Tell them that Fumo's friends and relatives forgive his theft from the taxpayers and a charity of millions of dollars. Tell them that the crimes happened while Fumo himself legitimately earned millions of dollars per year, and had no reason to steal other than to feed his greed and need for status. Let them respond to the despicable request for leniency based on Fumo's "social history."⁹

Fumo knew better. He is an intelligent, educated, wealthy man who could have lived a comfortable life without resorting to the types of fraud schemes of which he now stands convicted. Yet he chose to steal not because he had to steal, but because he

⁹ In a public corruption case, tell it to Corey Kemp, the former treasurer of the City of Philadelphia, whose case is discussed in more detail later. Kemp actually came from an impoverished background and a difficult neighborhood, and worked his way through school to a position of prominence. Let him respond to Fumo's "social history," while he serves his 10-year sentence properly imposed by Judge Baylson for committing crimes that pale in comparison to those of Fumo's.

could. He stole because he believed that he was entitled to more financial rewards than his modest state salary, itself more than most Pennsylvanians earn each year, could provide. He stole because of a sense of entitlement, and greed, that epitomizes one of the worst imaginable combinations of characteristics that we can find in an elected official. It was not good enough for defendant Fumo that he enjoyed power and privilege, and that he was feared and respected in the political and professional arenas. It was not sufficient for Fumo that he was a successful and accomplished legislator who was constantly recognized as such and who received adoration from grateful constituents, awards from political and civic organizations, and praise in the professional and political circles in which he traveled.

Fumo committed to his unlawful course long ago. The history is remarkable. In the late 1970s, Fumo was accused of participating in a scheme to place ghost employees on the payroll of the state legislature. After a four-week trial before Judge Clifford Scott Green, during which Fumo testified in his defense and denied criminal intent, he heard the jury find him guilty on all counts. He was about to lose his Senate seat, his law license, and likely his freedom, when Judge Green vacated the convictions on the technical ground that the government had charged one unitary fraud scheme but had proven two separate schemes (Fumo had been part of one faction which ran the illegal scheme on behalf of the City Democratic Committee, and then the Committee was taken over by a rival faction which continued the same scheme).

Most people would take care in their later dealings, after such a harrowing experience. Not Fumo. His criminal misuse of public resources likely did not stop for a day; and by 1985, just three years after the Court of Appeals affirmed Judge Green's ruling and ended the case, Fumo hired Howard Cain with public money to begin running campaigns and expanding Fumo's political power. The experience of narrowly escaping a federal conviction emboldened this defendant, contributing to his belief that he is someone who is above the law.

B. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense.

The sentence that is imposed in this case must not only punish defendant Fumo for his criminal conduct, but also for his obstruction of justice, his stubborn refusal to accept responsibility for his crimes, and the utter contempt he has demonstrated toward his victims and the government. The sentence imposed in this case must clearly signal that such conduct will not be tolerated, and promote respect for the law, which is one of the most important sentencing principles established by Congress. See Gall, 128 S. Ct. at 599 (recognizing “[t]he Government’s legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law . . .”). Indeed, in a House Committee Report on one of the competing bills that led to passage of the 1994 Crime Bill, which was codified as Title 18, United States Code, Section 3553, the House Judiciary Committee provided:

[This] [p]aragraph . . . provides that a criminal sentence must not cause disrespect for the law. This purpose is avoided when excessively lenient sentences are avoided.

H. Rep. 98-1017, 98th Cong. 2d Sess., Judiciary Committee Report on Sentencing Revision Act of 1984, at 39.

During the trial, Fumo testified with clarity that he is someone who is above the law and who has no obligation to be informed of the rules for ethical conduct. Despite having to concede that the state ethics law he voted for as a legislator defines conflicts of interests, and that he was a public official who falls within the scope of the ethics law, see Fumo N.T. 2/11/2009, at pp. 160-61, Fumo nonetheless testified that he had no obligation to become informed as to the law's prohibitions on his conduct:

Q: Here's my question. I'm going to try it again. Do you agree that you have an obligation to become informed as to what types of conduct violates the Ethics Act in the performance of your official duties as a state senator?

A: Have an obligation --

Q: Yes, do you?

A: No, I don't --

Q: You have no obligation to inform yourself?

A: No.

Q: You have no obligation to become aware of the types of conduct that public officials in Pennsylvania get in trouble for when they violate the Ethics Act?

A: I have no obligation to. My only obligation as a senator is to go to Harrisburg and vote.

Fumo N.T. 2/11/2009, at pp. 181-182. When pressed further on the subject of whether Fumo considered himself obliged to become aware of Ethics Commission decisions that directly addressed the conduct of elected public officials, the following exchange ensued:

Q: Okay. And is it your testimony then that the cases that you feel obligated to inform yourself about are the ones that fall into this latter category?

A: I don't feel obligated to inform myself of any of those things. Obligation is a word that requires me to do something by law. I have no obligation as a senator except to go to Harrisburg and vote. I don't have to go to work. I don't have to have a district office. I don't have to do anything. . . .

Fumo N.T. 2/11/2009, at pp. 184-185.

Not only did Fumo proudly testify that he had no obligation to become aware of the ethics rules that applied to his conduct, he also ridiculed the notion that there was anything wrong with his conduct, analogizing his criminal behavior to that of a petty offense that is never prosecuted:

Q: The fact is that you made no distinction – I think you said this during your direct examination – you paid no – made no distinction between personal, political and legislative when it came to the work that was being done every day inside your Tasker Street office.

A: Did not specifically make any kind of segregation of those activities –

Q: Well, tell us what safeguards you put into place in your district office to insure that state employees were not using state facilities and state equipment to run campaigns or aid campaigns.

A: I was probably wrong in not telling them that they had to go to the second floor to do those things. And I was probably wrong for allowing them to use Senate computers when they did, but I believe we also had campaign computers so I'm not sure which ones they did. As to phones, we had a

separate line for the campaign. Mailings, we always used our own postage. What else did you say?

Q: Probably – your testimony is you probably shouldn't have done that?

A: Oh, I probably should have told her to go to the second floor rather than do it in a basement, yes.

Q: Because it's a violation of state law for you to have your employees using state facilities, state equipment to work on campaigns, correct?

A: It is. It is. It is also a violation to spit on the sidewalk but I don't know that it's enforced.

Fumo N.T. 2/11/2009, at pp. 195-196.

Defendant Fumo's testimony is a clear example of why the sentence in this case must take into account in a meaningful way the importance of promoting respect for the law. In order to promote respect for the law, the sentence imposed must clearly demonstrate that there are severe penalties associated with the type of conduct in which Fumo engaged and the arrogance he displayed during the course of his fraud schemes, the criminal investigation of his conduct, and the trial itself. While Fumo has openly and shamelessly ridiculed the laws that apply to his conduct, others who would engage in similar criminal conduct must see that such disrespect of the law results in serious consequences.

The alternative proposed by Fumo is unthinkable. If he does not receive appropriate punishment and incapacitation for his crimes, the future is easy to predict. He will continue to enjoy his lavish lifestyle, he will earn more millions from his politically

connected friends, and he will thumb his nose at the Court and the government, standing for years as an example of how to commit crime and get away with it.

C. The Need to Afford Adequate Deterrence to Criminal Conduct, and to Protect the Public from Further Crimes of the Defendant.

When passing the Sentencing Reform Act, Congress explained:

[It is our] view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures ... and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of [a white collar criminal] may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact.

S. Rep. No. 98-225, at 91-92 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3274-75.

As numerous courts have recognized, the Guidelines serve a particularly important purpose in the area of white-collar crime. For instance, the Supreme Court in Mistretta v. United States, 488 U.S. 361, 375 n.9 (1989), noted that the Senate Report on the Sentencing Reform Act “gave specific examples of areas in which prevailing sentences might be too lenient, including the treatment of major white-collar criminals.” Accord United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006) (“[T]he Guidelines reflect Congress' judgment as to the appropriate national policy for [white-collar] crimes....”); United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006) (noting the

importance of “the minimization of discrepancies between white- and blue-collar offenses”). In United States v. Martin, the Court of Appeals for the Eleventh Circuit provided the following explanation:

Our assessment is consistent with the views of the drafters of § 3553. As the legislative history of the adoption of § 3553 demonstrates, Congress viewed deterrence as ‘particularly important in the area of white collar crime.’ S.Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259. Congress was especially concerned that prior to the Sentencing Guidelines, ‘[m]ajor white collar criminals often [were] sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.’ Id.

455 F.3d 1227, 1240 (11th Cir. 2006).

A sentence of more than 15 years of imprisonment for a corrupt politician who abused the power of his office, violated the public trust, stole millions of dollars in taxpayer and other funds, obstructed the criminal investigation of his conduct, and then committed perjury during his trial, will send a critically important message of deterrence, *i.e.*, that the punishment will be so severe that it is not worth committing the crime. See, e.g., Stephanos Bibas, *White-Collar Plea Bargaining & Sentencing After Booker*, 47 *Wm. & Mary L. Rev.* 721, 724 (2005) (“[W]hite-collar crime is more rational, cool, and calculated than sudden crimes of passion or opportunity, so it should be a prime candidate for general deterrence. An economist would argue that if one increased the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease.”); Martin, 455 F.3d at 1240 (“Defendants in white

collar crimes often calculate the financial gain and risk of loss, and white collar crimes therefore can be affected and reduced with serious punishment.”).

This is a case in which deterrence is perhaps the most important of all of the Section 3553(a) factors. Public office is, as Governor Rendell correctly observed during his trial testimony, a public trust. When the citizens of Pennsylvania elect public officials to represent them, there is a sacred trust and a solemn obligation to act in the public interest that is created. There are thousands of elected officials throughout Pennsylvania, from the lowest levels of township government to the highest levels, including the General Assembly and the Office of the Governor. Regardless of the position, every elected official in this state is obligated to serve the public interest. There are no exceptions to this fundamental principle of a democratic government, and the sentence that is imposed in this case must directly consider the crucial importance of the message that it will deliver not just to the thousands of public officials in Pennsylvania, but also to the public at large.

The federal government simply does not have the resources to investigate every public official, or to perform integrity audits of public officials to ensure that taxpayer funds are not being diverted for private benefit.¹⁰ We rely, as we must, on the

¹⁰ To understand this fact, consider that, during the 20-year period between 1988 and 2007, the total number of persons prosecuted by the U.S. Department of Justice across the entire United States in public corruption cases was 23,415. Of that amount, 20,446 were convicted. *See Report to Congress on the Activities and Operations of the Public Integrity Section for 2007*, at p. 67. This report can be found at <http://www.usdoj.gov/>

integrity of our public officials. This case best illustrates the point. Defendant Fumo committed these crimes over a period of more than a decade. The investigation of his conduct took more than four years. Fumo stole in small ways and in large ways. He committed these crimes in part because of his ability to use his power and influence to intimidate, bully, and demand. There are simply too many people in this case who never questioned defendant Fumo and who never stood up to him. This defendant became, over time, extremely powerful and surrounded himself with a group of sycophants who did not know how to say no. The corruption of his public office and the misuse of public and nonprofit funds and resources was pervasive and occurred on a daily basis for many years. Yet despite the widespread nature and duration of the defendant's schemes, it went on unchecked for many, many years.

The sentence in this case must therefore be sufficiently severe to not only deter public corruption by other officials, but also the employees of these public officials, who need to see that such conduct is not tolerated and should not be accepted by them as the way that government service is provided. The simple truth is that the sycophants who worked for Fumo never believed that he would ever be prosecuted. Everyone believed that Fumo was above the law, and that the rules did not apply to him. Fumo was considered to be untouchable, which was a belief that was reinforced by his ability to beat a federal conviction in 1980, and to escape other brushes with the law earlier in his

criminal/pin/docs/arpt-2007.pdf.

career. The sentence imposed in this case must reinforce that no public official is above the law and deter others from traveling down the same path as this defendant.

In an effort to mitigate the punishment he now faces, Fumo touts his legislative accomplishments. The Court should not be swayed by this familiar smokescreen that is always used by other corrupt politicians who are convicted of similar offenses. The public expects and demands that its elected officials, including Fumo, will use their talents and abilities to achieve success on behalf of their constituents. Defendant Fumo was richly rewarded for the success he achieved during his career, and was consistently reelected with the expectation of the public that he would continue to be a leader worthy of our respect. He deserves no special consideration for doing that which he was elected to do, and he should not be permitted to escape the punishment that he so richly deserves by claiming an offset to the harm he has caused as a result of his criminal offenses.

D. The Need to Provide the Defendant with Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner.

There is no need in this case to adjust the sentence in order “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” § 3553(a)(2)(D). The defendant is a college graduate with an MBA and a law degree. Defendant Fumo’s greatest educational need is one that, unfortunately, he has never learned and which

cannot be taught: the existence of a moral compass that points away from fraud, deceit, and thievery, and a conscience that guides an individual to not only know the difference between right and wrong, but also the will to act on that knowledge. Defendant Fumo acts only in his own self-interest, and his standing before this Court is the product of decades of choices made by him without regard to their moral or legal consequences.

Defendant Fumo has raised his health conditions as a reason why this Court should impose a lenient sentence. While it is true that Fumo has coronary artery disease, diabetes, and other medical conditions that require treatment and medication, none of these conditions is extraordinary enough to warrant a downward departure or a variance from the guidelines. As explained at the hearing on July 8 and as stated in the letter from Barbara Cadogan, Regional Health Administrator for the U.S. Bureau of Prisons, the defendant's medical needs can be more than adequately addressed in prison.

It also bears noting that Fumo has lived with his ailments for many years. In other words, throughout the years when he was diagnosed with coronary artery disease and other conditions, he willfully elected to continue to engage in criminal conduct. Fumo committed crimes while entering his later years, and then stands before the Court and states, in effect, that he cannot be sentenced because he is now too old and infirm. Such an audacious position should not be tolerated or rewarded.

E. The Guidelines and Policy Statements Issued by the Sentencing Commission.

As stated earlier, the Guidelines remain of significant importance in advising judges regarding appropriate sentences. Uniformity in sentencing should be a paramount goal; in order to rid the criminal justice system of unpredictability and possible bias, like offenders should receive like sentences, to the extent possible. The only vehicle for achieving such a goal is through application of the Sentencing Guidelines. Here, Fumo stole millions of dollars; he obstructed justice; he committed perjury at trial; he grossly abused his position of trust; he took advantage of a charitable organization; and he directed others in their criminal activities. Only application of the Guidelines assures that he will be treated in the same manner as, the Sentencing Commission has found through its national study of sentencing practices, others who commit similar egregious acts are treated. Indeed, as discussed earlier, the suggested guideline sentence is actually inadequate because of the numerous harms committed by Fumo which the applicable guidelines do not address.

F. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct.

A sentence of more than 15 years is particularly necessary when considering the importance of avoiding unwarranted sentencing disparities, another factor that is set forth in Section 3553(a). As an initial matter, this Section 3553(a) factor is not primarily concerned with sentencing disparities in a particular case; it is designed to ensure

sentencing consistency among similarly situated defendants across the entire nation. See United States v. Parker, 462 F.3d 273 (3d Cir. 2006); United States v. Carson, 560 F.3d 566, 586 (6th Cir. 2009) (“Although it is true that § 3553(a)(6) requires a sentencing judge to consider ‘the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,’” that “factor ‘concerns national disparities between defendants with similar criminal histories convicted of similar criminal conduct – not disparities between codefendants.’”).

Although the importance of avoiding unwarranted disparities applies more to national disparities than those that may be present in an individual case, any sentencing analysis should take into consideration the sentences imposed on other co-defendants where, as here, co-defendants were convicted of some of the same offenses as defendant Fumo. As the Court is aware, Fumo’s co-defendant, Leonard Luchko, received a 30-month prison sentence for his part in the conspiracy to obstruct justice. The hapless Luchko had no involvement in any of the fraud schemes of which Fumo was convicted, and received no financial rewards other than his paycheck from the Senate. Luchko was not among the fortunate Fumo insiders who were classified into higher paying positions than their actual job duties permitted. Fumo, as the leader of the conspiracy to obstruct justice who stood to gain or lose the most from the effort, is far more culpable than Luchko; in fact, Fumo deserves particular condemnation for the manner in which he selfishly exploited Luchko and doomed Luchko to a felony conviction and prison term.

On the obstruction charges alone, Fumo's sentence should be at least double the 30-month sentence that Luchko received.

A comparison and analysis of several recent public corruption prosecutions and sentences in the Eastern District of Pennsylvania also demands a sentence in excess of 15 years' imprisonment for defendant Fumo.

1. John Carter.

Notably, in a related case, John Carter, the former president of the Independence Seaport Museum of Philadelphia, was sentenced to a 15-year term of imprisonment in connection with his efforts to defraud the museum out of approximately \$2.6 million. Carter agreed to plead guilty and did so pursuant to an information that charged him with two counts of mail fraud and one count of tax evasion. There are a number of similarities to the present case. Carter, like Fumo, occupied a position of trust and used sophisticated means to commit his fraud offenses. Carter, like Fumo, purported to be acting on behalf of a charitable organization in connection with his offenses. Carter, like Fumo, obstructed justice, although Carter did so after he pled guilty while Fumo did so more extensively during the criminal investigation and again during his trial. The loss amount in the Carter case, like here, was more than \$2.5 million. Carter, like Fumo, was convicted of tax offenses. Carter, like Fumo, suffers from coronary artery disease and diabetes, and, like Fumo, had suffered heart attacks.

There are several differences between the Carter and Fumo cases that must be considered and which firmly support a more severe sentence than that imposed on Carter. Carter pled guilty and spared the government the cost of a lengthy trial. Fumo put the government to its burden of proof and substantial public resources were consumed in the prosecution of a trial that spanned a total of six months. Carter was convicted of two fraud schemes and one tax offense. Fumo was convicted of four separate conspiracies, three separate fraud schemes involving three separate victims, multiple tax offenses, and dozens of substantive obstruction offenses. Most critically, Carter, unlike Fumo, was not an elected public official entrusted with safeguarding taxpayer funds. Fumo's offense conduct is far more serious than that of John Carter, and a comparison of the two cases clearly demonstrates that Fumo should receive a punishment more severe than that imposed on Carter.

2. Corey Kemp.

The recent prosecution and conviction of Corey Kemp, the former treasurer of the City of Philadelphia who received a 10-year prison sentence, must also be considered in examining the issue of sentencing disparities. Kemp was convicted at trial in connection with his illicit relationship with attorney Ron White, who plied Kemp with gifts in exchange for Kemp's assistance in steering city contracts to White's allies and business associates. To be sure, Kemp was proven to be a corrupt public official who abused his office for personal gain. However, a comparison of Kemp's offenses,

including the value of benefits he received as a result of his participation in the corrupt schemes, pales in comparison to the conduct of which Fumo has now been convicted. The evidence established that White arranged for Kemp to receive tickets to the NBA All-Star Game and related festivities; cash totaling \$10,000; a \$10,350 deck; transportation and tickets to the Super Bowl in San Diego as well as accommodations and meals; four tickets to a USA basketball game; trips to New York and Detroit; and numerous meals. White also promised to help Kemp advance his post-treasurer career. United States v. Kemp, 500 F.3d 257, 265 n.5 (3d Cir. 2007). In addition, Kemp participated in a separate scheme to defraud his church. While the criminal conduct of Corey Kemp was dishonest and corrupt, defendant Fumo received far more personal financial benefits than did Kemp.

Fumo's crimes amounted to millions of dollars, not the tens of thousands of dollars involved in the Kemp case, and extensive obstruction of justice and perjury, which was absent in the Kemp case. Just as significantly, the positions of the defendants were drastically different. Kemp was a junior official in the city administration; he had scant authority to make binding decisions, but rather his value to White was that Kemp's recommendations to his superiors were usually accepted. Fumo, in contrast, was a powerful state Senator, the chairman of the Senate Democratic Appropriations Committee, whose power and authority extended throughout the state, and into nonprofit organizations including Citizens Alliance and the Independence Seaport Museum. For

Fumo to receive a sentence any less than that imposed on Kemp, or even in the vicinity of Kemp's sentence, is unimaginable and would be entirely unjust.

3. Richard Mariano.

The recent prosecution of former Philadelphia City Councilman Richard Mariano provides further insight regarding the issue of sentencing disparities. A jury convicted Richard Mariano of one count of conspiracy to commit honest services fraud, eleven counts of honest services mail and wire fraud, two counts of money laundering, three counts of bribery, and one count of filing a false tax return. The court sentenced him to a 78-month term of imprisonment. At trial, the government presented evidence that Mariano acted to further the interests of a scrap metal business in his district. In February 2003, Mariano recommended that the scrap metal firm's property be included as one of the new properties in a taxpayer-subsidized program, and in May 2003, Mariano twice voted in favor of legislation to accomplish that objective. See United States v. Mariano, 2008 WL 2470911, at *1 (3d Cir. June 20, 2008).

The evidence established that, for his efforts, Mariano received financial rewards, including payments of over \$23,000 between the months of May 2002 and December 2002, consisting of a check payable to one of Mariano's credit card issuers in the amount of \$5,873.75, a check payable to a third party in the amount of \$6,672 that Mariano converted to his personal benefit, and another check payable to a third party in

the amount of \$10,900 which Mariano used toward the payment of his personal credit card expenses.

Once again, the conduct of defendant Fumo simply cannot be compared to that of Mariano. Fumo's fraud schemes caused losses of millions. He stole directly from the Senate of Pennsylvania, and from two nonprofit organizations, and in the process used his public position to execute the crimes. He defrauded the IRS and caused the filing of false tax returns, and engaged in a widespread scheme to obstruct justice. Mariano received a total of about \$23,000 for his corrupt efforts, yet received a sentence of 78 months. In order to avoid unwarranted sentencing disparities, the sentence imposed on Fumo, a preeminent elected public official who stole millions of dollars from the public coffers and two nonprofit organizations, must take into consideration the fact that his offense conduct was dramatically more serious, and caused far more harm, than that of former Councilman Mariano. Accordingly, a sentence of more than 15 years' imprisonment is both fair and just under the circumstances.¹¹

¹¹ In addressing this case, Fumo has regularly boasted that he has not been accused of "selling his office" through bribery or similar offenses such as those committed by Kemp and Mariano. That is hardly a claim to nobility. What Fumo did, instead, was simply steal directly from the public treasury, using his power and reputation to avoid inquiry. His conduct is just as reprehensible as that engaged in by other corrupt politicians, but on a much larger scale than that seen in most cases.

G. The Need to Provide Restitution to Any Victims of the Offense.

“As its name suggests, the Mandatory Victims Restitution Act, which was enacted by Congress in 1996, mandates that defendants who are convicted of or plead guilty to certain crimes pay restitution to their victims.” United States v. Quillen, 335 F.3d 219, 222 (3d Cir. 2003) (quoting United States v. Simmonds, 235 F.3d 826, 830 (3d Cir. 2000)). Full restitution is appropriate in this case; Fumo should be ordered to pay to the Senate, Citizens Alliance, and the Independence Seaport Museum the full losses determined by the Court. Fumo has the financial ability to pay those sums immediately.

In addition, counsel for Citizens Alliance has suggested that Fumo should also be ordered to repay the staggering amount of \$2.1 million which Citizens Alliance expended in the defense of Ruth Arnao in this case, and prejudgment interest on all losses from the time of the criminal offenses until the entry of the judgment in this case. The government disagrees with the former suggestion, and agrees with the latter.

The fact that Citizens Alliance, a nonprofit charity, was forced to spend \$2.1 million to defend Arnao is, without a doubt, appalling. This is just one more way in which Fumo and Arnao caused the organization to do their bidding, caring only for their own interests. It is yet another act which this Court may consider in determining the sentence of incarceration. But under the law, this is not a subject of restitution. Section 3663A(b)(4) of the Mandatory Victims Restitution Act (MVRA) requires that the defendant “reimburse the victim for lost income and necessary child care, transportation,

and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense,” but it cannot be said that paying to defend Arnao was the type of participation in the investigation or prosecution contemplated by the statute. Under its bylaws, Citizens Alliance was authorized to spend funds to defend Arnao, its former executive director, and now that she has been convicted of felonies, it may take action itself against Arnao to recover the fees.

Citizens Alliance’s position regarding prejudgment interest, however, is correct, and indeed supports the conclusion that Fumo should be ordered to pay such interest to all victims in the case. In Government of Virgin Islands v. Davis, 43 F.3d 41 (3d Cir. 1994), the Third Circuit held that under the predecessor statute, the Victim Witness Protection Act (VWPA), it is appropriate to include prejudgment interest. The Court stated:

[I]t is an aspect of the victim's actual loss which must be accounted for in the calculation of restitution in order to effect full compensation. Lost interest translates into lost opportunities, as it reflects the victim’s inability to use his or her money for a productive purpose. Accordingly we find that the district court’s incorporation of prejudgment interest in the restitution amount was proper to effect full compensation.

Id. at 47.

The result under the MVRA, which is applicable in this case, is identical. “[T]he purpose of both the VWPA and the MVRA is, to the extent possible, to make victims whole, to fully compensate victims for their losses, and to restore victims to their original state of well-being.” United States v. Simmonds, 235 F.3d 826, 830-31 (3d Cir.

2000). Further, the pertinent statutory language identifying how to measure restitution -- 18 U.S.C. § 3663(b)(1) (VWPA) and 18 U.S.C. § 3663A(b)(1) (MVRA) -- “is *identical* in all relevant respects. Therefore, absent unique and highly persuasive MVRA legislative history, of which there is none, Third Circuit cases interpreting the language of the § 3663(b)(1) control” in interpreting both provisions. Simmonds, 235 F.3d at 831 n.2 (emphasis in original). In identical language, both statutes direct the Court to restore to a victim “(i) the value of the property on the date of the damage, loss, or destruction, or (ii) the value of the property on the date of sentencing,” whichever is greater. The imposition of interest is required to make the victims whole as of the date of sentencing. See United States v. Gordon, 393 F.3d 1044, 1058 (9th Cir. 2004) (relying on Davis and numerous cases from other circuits to find that MVRA allows imposition of prejudgment interest).

In terms of the applicable rate, Gordon suggests use of the Treasury rate which is decreed for civil judgments, in 28 U.S.C. § 1961 (“a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System”). While other rates could be conceived, see, e.g., United States v. Jaffe, 314 F. Supp. 2d 216, 224 (S.D.N.Y. 2004) (suggesting a flat 9% interest rate), the government here adopts the Gordon court’s suggestion of a modest rate at the Treasury standard. The government proposes that, upon this Court’s final determination at sentencing regarding the amount of restitution and the applicability of interest, it be

afforded seven days to provide the Court with an exact calculation of interest for suggested inclusion in the final judgment.

V. CONCLUSION.

For all of the reasons stated above, the government respectfully recommends a sentence of more than 15 years' imprisonment in this case, including an order of full restitution. That sentence is essential to punish Fumo for his persistent, decades-long crimes; to assure respect for the law; and to deter others.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this pleading with the Clerk of Court through the Electronic Case Filing system, thereby resulting in a copy automatically being sent to all counsel of record by electronic mail. Further, I have caused to be sent by electronic mail a true and correct copy of the foregoing pleading to the following:

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