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

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 06-319-03**
VINCENT J. FUMO	**:**	

GOVERNMENT'S MEMORANDUM REGARDING RESENTENCING

Table of Contents

I. Introduction.. 1

II. Background.. 4

III. The Guideline Calculation. 15

A. Offense Level and Range. 15

1. Fraud Loss. 16

2. Other Calculations. 20

B. Departures. 22

IV. Discussion of the 3553(a) Factors. 39

A. Variances. 39

1. Loss of public confidence in the integrity of elected public office. 41

2. Loss of reputation and other intangible, non-economic harm suffered by the Independence Seaport Museum and Citizens Alliance. 43

3. Fumo's perjury at trial. 45

4. The exceptionally egregious nature of the obstruction offenses that Fumo committed. 48

B. The 3553(a) Factors.. 49

1. Nature and circumstances of the offense and the history and characteristics of the defendant. 49

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. 54

3. The need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant. 60

4. The need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner. 63

5. The guidelines and policy statements issued by the Sentencing Commission. 64

6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 67

a. John Carter. 69

b. Corey Kemp. 71

c. Richard Mariano. 72

d. Ted LeBlanc. 74

e. Daniel Castro. 76

7. The need to provide restitution to any victims of the offense. *77*

V. Conclusion. 81

I. Introduction.

Defendant Vincent J. Fumo appears before the Court for resentencing. As explained in detail below, Fumo should be sentenced to a term of imprisonment within the guideline range of 210-262 months, and should be ordered to pay restitution in the full amount of the losses his fraud and thievery caused to his victims. Defendant Fumo does not deserve – and justice does not permit – a discounted sentence for a successful track record of legislative service. If this Court is inclined for any reason to permit a sentencing reduction on the basis of public service or any other factor, the sentence imposed in this case should be at least 15 years.

The government proved at trial beyond all reasonable doubt that, for decades, Fumo engaged in repeated abuse of the power of his office as a leader in the Pennsylvania State Senate and, on literally a daily basis for many years, stole from the taxpayers of Pennsylvania and from two charitable organizations. The corruption exposed in this case was astonishing. Fumo used his control of a well-funded Senate committee and of a nonprofit organization he created and supported (Citizens Alliance), as well as his influence over another nonprofit institution, to support a lavish lifestyle and illegally amass political power. In part, he used funds and resources of the Senate and of the nonprofit organizations to provide him with staffers who served his every whim, from running political campaigns, to aiding his personal business ventures, to attending to his needs at the five homes he maintained. He used the funds of the Citizens Alliance charity for political purposes, and to acquire over $1 million of luxury vehicles, merchandise,

farm equipment, and myriad other items. He caused total losses to these entities in excess of $4 million. Just as strikingly, once the federal investigation began, Fumo embarked on a determined effort to obstruct justice, directing his public employees to destroy extensive computer evidence of his crimes. All of these offenses, once exposed, produced what the Third Circuit described as "one of the largest political scandals in recent state history." United States v. Fumo, -- F.3d --, 2011 WL 3672774, *1 (3d Cir. Aug. 23, 2011).

Yet for this persistent and egregious wrongdoing, this Court imposed a sentence of only 55 months' imprisonment, little more than the term imposed on some common thieves. That sentence produced a storm of public protest, an occurrence unprecedented in the history of the criminal justice system in this district.

In fairness to the Court, it reached the final sentence based on its view that the Sentencing Guidelines range was only 121-151 months, and that Fumo deserved a modest accommodation based on his record of public service. The Court of Appeals, however, reversed a number of this Court's guideline decisions, making clear that the actual guideline range is 210-262 months. That range allows and supports a lengthy term of imprisonment, which is more suited to punishing the infamous crimes which Fumo committed and to deter others from doing likewise.

Further, it is essential that Fumo not receive undue credit for his work in public office. He was richly compensated for that work, and never devoted his own personal time or money to helping others. Thus, a lenient sentence in this case would

stand for the proposition that an elected official has greater leeway in committing criminal acts, as he will receive a lower sentence than that imposed on ordinary citizens. Such a result is unjust and intolerable. See, e.g., United States v. Spano, 411 F. Supp. 2d 923, 940 (N. D. Ill. 2006) ("It is this Court's opinion that these persons who commit crimes in the halls of government should be subject to the same consequences as those that commit crimes on the streets. Thus, courts must continue their vigilance in our nation's struggle against public corruption.").

A guideline sentence in this case would appropriately address the nature of the offenses, the need to promote respect for the law, the need to deter others, and the mandate to avoid unwarranted sentencing disparities for similarly situated offenders. Given the notoriety of this case, both because of the nature of the criminal conduct and the reaction to the original sentences, it is assured that the final sentences imposed in this case will be known by every elected official in the Commonwealth of Pennsylvania, and by many of their constituents. It is imperative that the sentences send the message to elected officials that theft of public funds and a breach of the public trust will be severely punished; and reassure citizens that no man is above the law, and even the most powerful officials will not escape the sanctions equally applicable to all.

II. Background.

Vincent J. Fumo was convicted of 137 charges of fraud, tax evasion, and obstruction of justice committed while he served as a Pennsylvania State Senator. He defrauded the State Senate; Citizens Alliance for Better Neighborhoods ("Citizens Alliance"), a nonprofit charitable organization which he had created; and the Independence Seaport Museum ("ISM"), a Philadelphia institution on whose board he served.[1]

Fumo, through his acumen, savvy, drive, and often sheer ruthlessness, was, without dispute, one of the leading public officials 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. He gained that influence, in part, through the criminal acts proven in this case -- the use of

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[1] Specifically, Fumo was convicted of two counts of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371 (Counts 1 and 65); one count of conspiracy to defraud the United States, in violation of Section 371 (Count 99); one count of conspiracy to obstruct justice, in violation of Section 371 (Count 109); 60 counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts 2-33, 66-90, 104-06); 39 counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 34-35, 37-64, 91-98, 107-08); two counts of aiding and assisting the filing of a false tax return, in violation of 26 U.S.C. § 7206(2) (Counts 101 and 103); nine counts of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(2)(B) (Counts 110, 111, 113, 116, 119, 122, 123, 128, 132); two counts of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1) (Counts 117 and 126); and 21 counts of obstruction of justice, in violation of 18 U.S.C. § 1519 (Counts 112, 114, 115, 118, 120, 121, 124, 125, 127, 129, 130, 131, 133-141). The government moved at trial to dismiss two additional wire fraud counts (Counts 36 and 38).

state employees and contractors to assist other individuals' campaigns, leading the successful candidates to repay Fumo's largesse with loyalty to his wishes.

Fraud on the Senate. The first portion of the indictment (Counts 1 through 64) alleged that Fumo engaged in extensive fraud on the Pennsylvania State Senate. In part, Fumo demanded that Senate employees serve him in any manner he desired, even during nights and weekends, to further his political goals and attend to his personal wants. Senate employees were paid with public funds to provide personal and campaign services to Fumo on state time. Moreover, Fumo routinely approved salaries for the most loyal staff members who provided personal and political services on his behalf which were substantially in excess of the salaries designated by a Senate committee (on which Fumo served) for the actual Senate jobs for which the employees were retained. In this manner, Fumo disbursed hundreds of thousands of dollars more than warranted for these employees.

In Philadelphia, Fumo maintained a "district office," where approximately ten employees were hired to provide constituent services to residents of Fumo's senatorial district. These staffers, under Fumo's direction, acted as both his legislative and campaign staff, and provided him with extensive personal services, all in violation of state law. For example, two employees, Gina Novelli and Jamie Spagna, in succession, were given virtually no Senate duties, even though they were compensated only through the public payroll. Instead (in exchange for Senate salaries of $30,000 per year and

more), each organized Fumo's political fundraisers, handled his political mailings, and paid the bills for Fumo's personal accounts and personal businesses.[2] Each also handled the campaign account of a Philadelphia City Councilman who was close to Fumo, during regular Senate business hours. Indeed, Fumo blatantly corrupted the political process, using state resources to wage campaigns on his own behalf and for allies. For example, in 2002, Fumo pressed his Senate staff into service for months in an unsuccessful Pennsylvania gubernatorial campaign of a Democratic candidate.

Fumo similarly used his Senate employees for all of his personal needs. Secretaries and aides handled all of his personal finances, and countless and myriad private affairs and personal tasks. Strikingly, one $31,000 a year aide, Lisa Costello, acted as Fumo's housekeeper, regularly cleaning his Philadelphia mansion. Another assistant, Christian Marrone, spent much of the first 18 months of his tenure on the Senate staff as the "project manager" for the refurbishment of Fumo's 33-room Philadelphia mansion. Fumo had three drivers on his payroll (two in Philadelphia and one in Harrisburg), and when they were not driving Fumo to all of his Senate, political, and personal events and appointments, they ran personal errands for him such as, among many others, shopping, driving his young daughter to school and elsewhere, servicing his cars,

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[2] In a typical e-mail, on May 1, 2004, Fumo wrote to four of his Senate staffers: "Phone number 215-687-1338 My personal cell phone. I just got a call that we currently owe $259.25 on this account! Who pays for this and why the fuck is it not paid?????????? I want an IMMEDIATE answer!!!!!!!!!!!!" Exh. 586.

picking up and delivering packages of merchandise Fumo acquired, and transporting Fumo's dry cleaning to and from the home of Fumo's attorney (where a servant cleaned clothes in a manner Fumo preferred).[3] When Fumo took annual vacations in Martha's Vineyard, Massachusetts, Senate aides drove two vehicles there for him from Philadelphia, loaded with the luggage of Fumo and his guests, while the Fumo party traveled on a private plane. At the end of the vacations, two staffers returned to drive the vehicles and luggage home.

Fumo also supervised more than a dozen Senate staff members in Harrisburg, where Fumo served as the chairman of the Senate Democratic Appropriations Committee (SDAC), and in that capacity controlled a $5 million budget. While by and large the Harrisburg staff was a more professional lot, consisting primarily of career experts in state budget matters, Fumo also misused the assistance of Harrisburg staffers as he deemed necessary. For example, when Fumo acquired a Harrisburg-area farm in 2003, he delegated several Harrisburg employees to undertake the numerous tasks involved in establishing the farm as a residential and commercial enterprise.

Fumo misused the resources of the Senate in other ways. He gave Senate equipment, including laptop computers, to non-Senate employees, including his valet,

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[3] Revealingly, in February 2005, after the investigation began, Fumo informed his ex-wife that he could not arrange any transportation for their daughter while he was in Florida, stating, "Since the Inquirer and the Feds are all over my ass, I want to keep the use of staff for these things at an absolute minimum."

Senate contractors, girlfriends, and family members, and then delegated his Senate computer aides to assist those people with their computer-related problems as well as perform their Senate duties.

Besides exploiting his employees, Fumo abused his authority to use Senate funds to hire "contractors" for legislative-related tasks. For example, Fumo gave a state contract, which ultimately reached over $40,000 a year, to private investigator Frank Wallace. Wallace's duty, supposedly, was to act as an investigator for the SDAC on issues relevant to pending legislation. But while the investigator assisted with a few such tasks, in the main Fumo set him loose on personal and political missions, such as conducting surveillance on Fumo's former wife and girlfriends, as well as the new boyfriends whom ex-girlfriends dated; and endeavoring to dig up defamatory information regarding Fumo's political rivals during campaigns and at other times. All of this was compensated with state money.

Similarly, Fumo gave a state contract, which reached over $80,000 a year, to consultant Howard Cain, whose primary role was to assist Fumo in numerous political races, and also gave a lucrative contract to a younger political operative, Philip Press, for the same purpose. And Fumo used state contracts to compensate his friends, making them ghost employees. One, Michael Palermo, was retained for $45,000 a year and more to provide alleged transportation expertise, but did virtually nothing other than assist Fumo in managing Fumo's farm. Another, Mitchell Rubin, was the boyfriend and later

husband of Fumo's aide, defendant Ruth Arnao, and was paid $30,000 per year for five years, in return for no state work at all.

The government, upon adding up all of the money paid to employees and contractors for personal or political work, as well as other misuses of state funds, conservatively estimated that Fumo defrauded the Senate of at least $2,440,282.49 during the period roughly spanning from 1998 until 2006.[4]

Fraud on Citizens Alliance. The second portion of the indictment concerned Fumo's fraud on Citizens Alliance (Counts 65-98). Citizens Alliance, begun by Senator Fumo as an endeavor of his state staff, undertook the commendable mission of improving Philadelphia neighborhoods. Co-defendant Ruth Arnao, a longtime state-paid aide to Senator Fumo, served as the executive director of Citizens Alliance during the pertinent period.

Fumo and Arnao persistently and routinely skimmed from Citizens Alliance's accounts for their personal benefit, causing a loss to Citizens Alliance of more than $1.6 million. They caused Citizens Alliance to buy tens of thousands of dollars of goods for Fumo. They used Citizens Alliance's money to pay for shopping sprees at the

[4] Needless to say, the loss was actually far higher, given that Fumo acted in this fraudulent fashion throughout his years in office. For instance, Cain testified that his contractual relationship with the Senate, allowing him to be paid by Fumo with taxpayer money for serving as Fumo's campaign operative, began in 1986. But the government necessarily limited its estimate to a time period for which thorough records remained available.

Jersey shore, during the summer months, when Fumo and Arnao met at Sam's Club, Home Depot, and Lowe's locations near Atlantic City to stock up on thousands of dollars of goods for their summer residences.

Citizens Alliance supplied Fumo and his Senate office with expensive vehicles (despite the fact that Fumo always had a leased Cadillac properly paid for by the state). Citizens Alliance bought a new, fully loaded $36,000 minivan which Fumo used at the shore during the summers (and which he sometimes shared with Arnao, and took with him on vacations he took together with Arnao). It bought a fully appointed, $52,000 SUV, complete with navigation devices and video screens, for use by Fumo's drivers at the Philadelphia Senate office. It bought a $25,000 Jeep for Arnao's use, among other vehicles.

Citizens Alliance also became the landlord of the Senator's Tasker Street district office, and then spent extraordinary sums to lavishly furnish and appoint Fumo's office. Although the Senate paid only $90,000 in rent during a five-year period, Citizens Alliance spent over $600,000 to create what had to be the most extravagantly furnished district office in the Commonwealth. Further, this office also served as Fumo's campaign office and 39th Ward headquarters, yet for most of the relevant period Fumo's campaign committee paid no rent at all. Citizens Alliance also paid for cell phones for many of Fumo's Senate employees in Philadelphia, and for Fumo's adult daughter.

Fumo used Citizens Alliance's employees as his personal minions. The laborers were at his beck and call. They routinely traveled during work hours to the Jersey shore, where they repaired and painted his dock and deck, undertook construction tasks there, picked up trash at his two shore properties (at one of which Arnao also had a residence), and provided other assistance. They were dispatched to Fumo's Fairmount home, to pick up trash, clear snow, power-wash his deck, deliver his large amount of Christmas decorations, and more. They traveled to the Harrisburg-area farm, to deliver Citizens Alliance equipment and other personal items obtained by Fumo.

The equipment purchased by Citizens Alliance which Fumo used at his farm included a bulldozer, obtained by Citizens Alliance in 2003 at a cost of $27,000 (plus another $16,000 for repairs a few months later) because Fumo needed to clear parts of the farm; a lawn tractor; a dump truck; an ATV; and a Ford F-150 pickup truck.

Fumo and Arnao used Citizens Alliance money not only to enrich themselves, but also to further Fumo's political goals, in stark violation of the federal limitations on Citizens Alliance's activities as a 501(c)(3) tax-exempt charitable organization. In part, Citizens Alliance paid over $250,000 for political polling which Fumo desired to gauge the strength of various candidates. It paid $20,000 so that Fumo could surreptitiously sponsor a lawsuit against a Senate rival, Robert Jubelirer, in an effort to oust him from the Senate. It paid for expenses of Frank Wallace, the private investigator Fumo used to assist a 2002 gubernatorial campaign. It contributed

significantly to the efforts of a grassroots group which endeavored to stop the government's construction of dunes at the Jersey shore, which Fumo feared would block his ocean view from his Margate home.

Citizens Alliance paid for Fumo and five of his closest friends to travel to Cuba. And it paid for other programs outside Philadelphia, such as $50,000 for the construction of a "war dog" memorial in Bucks County, because those endeavors stood to reflect positively on candidates whom Fumo supported in those areas.

In total, it is conservatively estimated that Fumo and Arnao stole $1,620,472.35 from Citizens Alliance, most of it for Fumo's benefit.

To accomplish these thefts, despite the clear prohibitions in state and federal law regarding such misappropriations from a nonprofit organization, Fumo and Arnao made numerous misrepresentations to others in order to evade the rules and accomplish their ends. For instance, they never disclosed to Citizens Alliance's accountants the benefits given to Fumo, but rather provided false information to the accountants. As a result, as the jury found, Citizens Alliance's tax returns were riddled with false statements designed to conceal its actual payments for Fumo's benefit.

Fraud on the Independence Seaport Museum. In Counts 104 through 108, Fumo was convicted of defrauding the Independence Seaport Museum ("ISM"), by repeatedly using its historic yachts, *Enticer* and *Principia*, for pleasure cruises for which he did not pay. In addition, Fumo took other benefits from the museum, including

expensive ship models he used as decorations in his offices and home. Fumo served on the museum's board of directors, and took all of these benefits, totaling more than $125,000, without disclosing to his fellow directors the material fact that he did not intend to and did not pay for any of them, in violation of the museum's operating rules.

At least once a year, from 1996 through 2003, Fumo vacationed for free on a luxury yacht owned by the museum. The museum owned historic yachts which it chartered in order to raise funds, but Fumo insisted on a free trip every summer, whatever the cost to the museum. For example, in 2000, the museum was required to cancel weeks of bookings for its yacht *Enticer* in order to move it from the Maryland area to Massachusetts, so that Fumo could take his preferred three-day trip at his preferred time. Another time, in 2001, when no museum-owned yacht was available, museum president John Carter authorized the payment of $13,375 to charter another yacht, *Sweet Distraction*, so that Fumo could have his annual New England trip. During all of these cruises, the museum not only paid for the use of the vessels, but for all incidentals, which included lavish catered meals, other groceries and supplies, and occasionally ground transportation. In all, as listed in a government summary of all of the trips, Fumo received goods and services worth $115,306.88 in connection with 12 yacht voyages.

In addition, Fumo took more valuables. Notably, the museum paid thousands of dollars for ship models of its yachts, *Enticer* and *Principia*, which were

given to Fumo. It even paid $10,000 to give Fumo two models of Fumo's personal recreational boat (the "888").

Obstruction of Justice. Fumo was convicted of conspiracy to obstruct justice, and numerous substantive counts of obstruction of justice, in violation of various statutes (Counts 109 through 141). The government's investigation of Fumo's conduct commenced in early 2003, focused on the substantive matters charged in the indictment as well as whether Fumo engaged in attempted extortion in demanding payments from PECO and Verizon to Citizens Alliance. The government proved that, anticipating and then learning of the investigation, Fumo, Arnao, and other aides engaged in a persistent effort to destroy all e-mail communications involving Fumo in general and Citizens Alliance in particular, as well as other evidence.

Throughout 2004, at Fumo's direction, the computer aides on his Senate staff (Leonard Luchko and Mark Eister were the most active) endeavored to destroy Fumo e-mail on scores of computers and other communication devices used by Fumo, Arnao, and dozens of Senate employees. They not only deleted copious information, but then "wiped" numerous computers using sophisticated programs to assure that forensic examiners could not retrieve the deleted data. The effort, along with Fumo's determination, peaked whenever Fumo perceived from publicity or other developments that the federal investigation was broadening or intensifying. The result was the

wholesale destruction of almost all electronic records of Citizens Alliance, and a substantial amount of Senate records as well.

III. The Guideline Calculation.

In United States v. Gunter, 462 F.3d 237 (3d Cir. 2006), the Third Circuit stated that sentencing requires a three-step process:

> (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before Booker.
>
> (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-Booker case law, which continues to have advisory force.
>
> (3) Finally, they are required to exercise their discretion by considering the relevant § 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines.

Id. at 247 (internal quotation marks, citations, and alterations omitted). In ruling on the appeal in this case, as it has in many others, the Third Circuit made clear that the Court must follow these steps individually and sequentially. Fumo, 2011 WL 3672774 at *15. See also United States v. Friedman, -- F.3d --, 2011 WL 4470674, *16 (3d Cir. Sept. 28, 2011) ("District courts should consider the steps separately and sequentially.").

A. Offense Level and Range.

With regard to the first required step, the guideline calculation, that assessment is set. At the original sentencing proceeding, the Court resolved many

guideline issues. The defendant did not appeal any aspect of the guideline sentencing decision; the government did, and the Third Circuit reversed a number of elements. Its decisions lead to a final guideline range of 210 to 262 months.

1. Fraud Loss.

The total fraud loss is $4,038,661.72, consisting of $2,290,282.49 of loss incurred by the Senate, $1,620,472.35 of loss incurred by Citizens Alliance, and $127,906.88 of loss incurred by the Independence Seaport Museum. That loss amount produces an offense level of 25 under Section 2B1.1.

Fraud on the Senate. This fraud loss consists of payments to seven Senate employees for personal and political services on Fumo's behalf and at his behest; overpayments to eight additional employees to reward them for personal and political services to Fumo; payments to "contractors" for providing personal and political services to Fumo; and a conservative estimate of $10,000 for laptop computers and other equipment Fumo stole from the Senate to give to family members and friends.

This Court agreed with the government's estimate, with two exceptions. It eliminated the portion of the loss attributed to overpayment to eight employees, on the grounds that the government's estimate of the total of such overpayments was unreliable. The Third Circuit disagreed and reversed. Fumo, 2011 WL 3672774 at *18.

This Court also excluded $150,000 of loss attributed to the contract given to Fumo's friend, Mitchell Rubin. At trial, the government proved, and the jury found, that

the Rubin contract was fraudulent and that Rubin did no work for the Senate. However, on the eve of sentencing, Fumo presented new evidence which he claimed established that Rubin in fact performed services for the Senate (on a theory entirely different from what Rubin attested to the grand jury before trial). This Court declined to apply the $150,000 loss, stating that resolving the dispute would be complex and delay sentencing. The Third Circuit held that this was error, and directed that "on remand the District Court should carefully consider the evidence and make a determination as to whether, and to what extent, Rubin's contract resulted in a loss to the Senate." Fumo, 2011 WL 3672774 at *19.

However, assuming that Fumo does not present a new challenge to other aspects of the guideline calculation (a development which should not be permitted), the government will withdraw its proposal of a loss attributed to the Rubin contract. We take this step based on recent developments which post-dated the original sentencing and the government's filing of an appeal. First, by agreeing with many of the government's other assertions on appeal, the Third Circuit assured that the total fraud loss will exceed $2.5 million, the threshold at which the offense level increases. Thus, the extra $150,000 loss related to Rubin has no further effect on the guideline calculation (assuming that Fumo mounts no other challenge). Second, after sentencing in this case, Rubin agreed to plead guilty to obstruction of justice related to this matter. While he did not admit that his Senate contract was bogus, he did agree to repay all $150,000 to the Senate, and made

that payment. Thus, assessment of that loss to Fumo also would not affect the restitution judgment in this case. The issue of the Rubin loss has thus become immaterial and not worthy of the Court's or the parties' time.

Accordingly, barring the need to respond to a new argument by Fumo, the total fraud loss is $2,290,282.49, which is the same amount originally advocated by the government less the $150,000 Rubin payment.

Fraud on Citizens Alliance. The total loss to Citizens Alliance is $1,620,472.35. At the original sentencing, this Court found a loss of $958,080.36, significantly below the government's estimate principally because of a $661,391.64 credit the Court granted for the market value of the Tasker Street property involved in the fraud. The Third Circuit reversed that determination, finding any credit based on the property's market value impermissible.

The final calculation of losses caused by the Citizens Alliance fraud is therefore as follows:

Purchases from Tool, Hardware, and Home Improvement Vendors	43,029.52[5]

[5] The government appealed three aspects of the loss calculation related to Citizens Alliance: the total of the loss for stolen tools and other goods; the loss for the improvement and maintenance of the Tasker Street property; and the loss for a painting obtained for Fumo. With regard to the tools, the government estimated a loss of $93,409.52 for stolen tools and other goods. This Court credited Fumo's claim that he did not receive approximately $50,000 worth of the goods listed by the government, and the Third Circuit held that "[i]n light of this credibility determination, we cannot say on this record that the District Court's factual finding was clearly erroneous." Fumo, 2011

Purchases of Other Consumer Goods	40,694.68
Vehicles for Personal Use and Use of Senate District Office	364,825.19
Tasker Street Office Furnishings, Improvements, and Rent	573,608.36[6]
Cell Phones for Senate Office and Staff	11,770.24
Personal Use of Citizens Alliance's Employees (Trips to Shore and Harrisburg)	9,255.69
Farm Equipment	71,813.65
Political Polling	254,560.38
Jubelirer Lawsuit	20,000.00
Ventnor Dunes Project	67,664.64
Cuba Trips	39,000.00

WL 3672774 at *19.

[6] Fumo and Arnao gave Fumo and his political entities free use of valuable and expensively improved office space and a parking lot. The government's estimate, affirmed by the Third Circuit, was based on the value of the improvements, foregone rent, and other expenses not charged to Fumo. The Court of Appeals reversed the credit which this Court granted for the fair market value of the property, holding that no such credit is permissible. That credit was based on the defendants' claim that the fair market value at the time of sentencing was $1,235,000. For the Court's information, we advise that this estimate was wildly incorrect, as the building and parking lot were sold by Citizens Alliance in an arm's length transaction on November 12, 2010, for an aggregate price of $500,000. Thus, while the point is academic at this time, we note that the loss calculation would have been considerably higher even without the error identified by the Third Circuit in giving any credit at all.

Bristol Township War Dog Memorial	50,000.00
Marrone and Coyne Bar Review Fees	11,000.00
Gazela Painting	50,000.00[7]
Hoyne Exhibition	10,000.00
Checks to Frank Wallace	3,250.00

Thus, the total loss to Citizens Alliance is $1,620,472.35.

Fraud on Independence Seaport Museum. This Court found that the loss caused by Fumo's defalcation of resources of ISM was $127,906.88. Neither party challenged that finding.

2. Other Calculations.

Fumo receives a 2-level enhancement, under Section 2B1.1(b)(8)(A), because the defendant misrepresented that he was acting on behalf of a charitable organization; and an additional 2-level enhancement because the offenses involved sophisticated means, § 2B1.1(b)(9)(C). This Court had denied both of these enhancements, but the Third Circuit reversed on each point. With regard to the charitable

[7] Citizens Alliance paid $150,000 for the painting for Fumo. At sentencing, the defendants claimed a credit for the current value of the painting, and of prints created of the painting. This Court granted a $100,000 credit, which the government unsuccessfully appealed. Fumo, 2011 WL 3672774 at *21. For the Court's information, we advise that since sentencing, the *Gazela* painting was sold by Citizens Alliance at auction in August 2010 for $30,000, and while efforts were made to sell the prints, none have been sold and they have proven worthless. Thus, the true loss for the painting is $120,000, not $50,000 as found by this Court, but the government accepts the Court of Appeals' ruling and does not press the issue further.

enhancement, the Court of Appeals stated: "This evidence of Fumo's intent to divert the [PECO contribution] funds was overwhelming, and the District Court's refusal to apply a 2–level enhancement was an abuse of discretion." Fumo, 2011 WL 3672774 at *21. In directing a sophisticated means enhancement, the Court focused on Fumo and Arnao's creation of sham entities to conceal Citizens Alliance's payments for vehicles and other items for Fumo:

> The use of these sham entities, which were created to conceal the flow of funds to Fumo and his associates, strongly resembles the conduct described in Application Note 8(B) as well as conduct that this Court and others have found to fall within the sophisticated means guideline. Here too, we conclude that the District Court abused its discretion in refusing to apply the enhancement.

Id. at *22.

This Court previously held, without dispute, that Fumo also receives a 4-level enhancement, under Section 3B1.1(a), for his leadership role; a 2-level enhancement, under Section 3B1.3, for his abuse of a position of trust; and a 2-level enhancement, under Section 3C1.1, for obstruction of justice. All of these enhancements, added to the offense level of 25 for the loss in excess of $2.5 million, produce a final offense level of 37 for Fumo's fraud offenses.[8]

The tax offenses in this case comprise a separate group. Because the tax loss was between $2.5 million and $7 million (specifically, $4,624,300), the PSR stated,

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[8] The government had originally sought a second 2-level enhancement based on Fumo's perjury at trial. This Court declined, and the government did not challenge that ruling.

the offense level was 24, under Sections 2T1.1(a)(1) and 2T4.1(J). There should be a 2-level increase for sophisticated means, under Section 2T1.1(b)(2), leading to a total offense level of 26. Because this is more than 8 levels below the recommended offense level for the fraud group, it does not add to the final advocated offense level of 37 based on the fraud group. See § 3D1.4.

At offense level 37, criminal history category I, the sentencing range is 210-262 months.

B. Departures.

Turning to the second step of the required sentencing process, the Court must determine whether Fumo is entitled to any downward departure (the government does not seek an upward departure), and if so, must identify the adjusted guideline range. At the original sentencing proceeding, the Court awarded a reduction of 66 months below the guideline range on the basis of Fumo's public service, but did not specify whether this reduction was a departure or a variance. (It stated during the sentencing hearing that it granted a departure, but afterwards wrote that the reduction was akin to a variance.) The Third Circuit held that this was error, and directed that the Court on remand complete the second step of the sentencing process by ruling on any departure request before proceeding to consider the final sentence. Fumo, 2011 WL 3672774 at *24-26 ("Accordingly, on remand the District Court should take care to first address any departures, and if departures are granted, to then calculate a final guidelines range.").

Fumo should not receive any departure based on his public service. While the Third Circuit was not required to and did not resolve this issue, it reminded: "our precedent places certain limitations on courts' abilities to depart based on good works in the case of public officials. United States v. Serafini, 233 F.3d 758, 773 (3d Cir.2000) (holding that "if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants" but that "assistance, in time and money, to individuals and local organizations" that would not ordinarily be part of a defendant's work as a public servant may properly be considered)." Fumo, 2011 WL 3672774 at *26.

Third Circuit law is in fact explicit with respect to the requirements for a downward departure based on public service or charitable activities.[9] The Sentencing Guidelines provide:

> Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

U.S.S.G. § 5H1.11.

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[9] In evaluating the permissibility of the departure, pre-Booker law remains pertinent. United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006).

While the lengthy discussion presented here focuses on the availability of a guideline departure, it will also be pertinent to our later explanation of why Fumo should not receive a variance on this ground either. The fact of the matter is that Fumo's "good works" consisted entirely of employment duties for which he was compensated, and never involved his personal time or funds. That record does not justify any sentencing reduction of any kind.

This provision comports with similar sections which generally decline departures based on employment or economic factors. See, e.g., § 5H1.2 (education and vocational skills); § 5H1.5 (employment record); § 5H1.6 (family ties and responsibilities and community ties); § 5H1.10 (socioeconomic status). The Supreme Court has defined these bases for departures as "discouraged factors," and stated that they may be applied only in "exceptional" cases, bearing in mind the Sentencing Commission's statement that such departures will be "highly infrequent." Koon v. United States, 518 U.S. 81, 95-96 (1996). Further, it is the defendant's "heavy burden" to establish the existence of such exceptional conditions. United States v. Higgins, 967 F.2d 841, 845 & 846 n.2 (3d Cir. 1992).

With regard to a departure for community service, the key applicable case is United States v. Serafini, 233 F.3d 758 (3d Cir. 2000), which also involved the prosecution of a Pennsylvania state legislator. The defendant, as here, attempted to support a downward departure based on community and charitable service. The Court stated:

> As to Serafini's activities as a state legislator, they are work-related and political in character. For example, a letter from the Fire Chief of Greenfield Township Volunteer Fire Company stated that he "had worked tirelessly to obtain grant monies to help the community afford the lifesaving equipment they need." The same letter also referred to Serafini's guidance "on several projects, including writing bid specifications for a new engine . . . and in pushing through legislation which allows smaller fire companies to purchase equipment through state funding."

> Other letters of this nature attest to Serafini's character and quality of legislative service. Others are from grateful constituents who were helped by Serafini or his staff. Conceptually, if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants.

Id. at 773 (citations omitted). As will be seen, this holding eliminates as a ground for a departure virtually every testimonial on which Fumo relied.

In Serafini, the Court did find a modest downward departure justifiable based on evidence that the defendant was an "exceptionally giving person," who spent his own money and time on commendable acts apart from his public duties, including numerous and significant instances of personal charity, id. at 773-75, which the district judge in Serafini concluded were not "acts of just giving money, they were acts of giving time, of giving one's self. That distinguishes Mr. Serafini, I think, from the ordinary public servant, from the ordinary elected official . . . ." Id. at 775. See also United States v. Ali, 508 F.3d 136, 149, 153 (3d Cir. 2007) (a defendant should receive a departure only for good works that are both "substantial" and "personal" in nature; reversing a downward departure granted by a district court to a defendant who had embezzled from the school she operated, based in part on evidence that she had engaged in charitable acts, as attested by 123 letters of support and commendations from various public officials and entities, as there was no record that these actions by a person in the defendant's position were in any way exceptional); United States v. Cooper, 394 F.3d 172, 174-77 (3d Cir. 2005) (a modest departure was allowed where the court cited numerous examples of

personal sacrifice of time and money by a businessman, which were "in a very real way, hands-on personal sacrifices, which have had a dramatic and positive impact on the lives of others."); cf. United States v. Tomko, 562 F.3d 558, 563, 572 (3d Cir. 2009) (en banc) (modest variance was permissible based in part on the defendant's "extensive charitable work," "that involved not only money, but also his personal time.").

Thus, as then-Judge Alito wrote in United States v. Wright, 363 F.3d 237, 248 (3d Cir. 2004), "This is a hard standard to meet." In Wright, the Court affirmed the denial of a downward departure based on good works to a pastor who was convicted of federal offenses based on thefts from the church. "Serafini stands for the proposition that 'the political duties ordinarily performed by public servants' - the sort of duties that are generally needed to stay in office - cannot qualify. It is, rather, only when an individual goes well beyond the call of duty and sacrifices for the community that a downward departure may be appropriate. . . ." Id. at 249.[10]

Fumo never devoted any significant measure of his own time or considerable fortune to help others. Fumo never "sacrificed;" to the contrary, he worked less than a full-time public job, reaped staggering financial rewards from his public

[10] It is also notable that in the cases in which the Third Circuit has affirmed downward departures based on community service and charitable acts, the offenses of conviction were far less serious than those committed by Fumo, and the departures were quite modest. In Serafini, for example, the defendant was convicted of one count of perjury before a grand jury investigating campaign finance violations. The court granted a 3-level downward departure, from a range of 18-24 months, and imposed a sentence of five months' imprisonment and five months' house arrest.

success, and then elected to steal millions more. In the face of this evidence, Fumo lined up hundreds of friends, family members, and supporters merely to attest to his success as a legislator, exactly the type of activity which the Third Circuit held may not support a departure.[11]

The government demonstrated that Fumo, successful as he was in motivating his staff and furthering legislation, did so with great efficiency, allowing him, incredibly, to spend half of every year or more on vacation, and to devote himself to many non-legislative pursuits. These facts were meticulously proven at trial, in order to defeat one of Fumo's defenses. In the opening statements, defense counsel suggested a theory that Fumo's use of his Senate staff for personal tasks was justified because he was a "workaholic" senator, devoted to legislative tasks "24/7," and therefore he permissibly used staff assistance for personal tasks to free his time for more Senate work. The government set out to demolish this canard, and succeeded to the point that the defense was entirely dropped by the time of closing argument. By the end of the trial, the defense shifted to the claim that all of Fumo's employees put in a full week on Senate activities

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[11] The law in other jurisdictions is the same. Most recently, in United States v. Vrdolyak, 593 F.3d 676 (7th Cir. 2010), the appellate court, citing the Third Circuit's decisions in Wright and Serafini, held that a district court erred in giving weight to letters attesting to the defendant's good deeds, in part because "the judge ignored the fact that the defendant was for many years an influential Chicago alderman." Id. at 683. Judge Posner wrote: "Politicians are in the business of dispensing favors; and while gratitude like charity is a virtue, expressions of gratitude by beneficiaries of politicians' largesse should not weigh in sentencing." Id.

and assisted Fumo personally and politically only on their own time, thus causing no loss to the Senate. (The jury rejected that defense as well.)

To debunk Fumo's claim of "24/7" devotion, the government prepared an analysis (Exhibit 894), based on a painstaking review of financial and travel records, which showed that Fumo spent approximately four months of every year at his home in Florida, at his vacation rental in Massachusetts, and elsewhere outside Pennsylvania and New Jersey on vacation. Dorothy Egrie, who was Fumo's girlfriend during most of the pertinent time, stated that she could not stay with Fumo on vacation in Florida during all the time he wanted her to, because she, for one, had a job. 11-17-08 tr. at 36-37.

This assessment did not even account for the time Fumo spent at his shore home in Margate, New Jersey, or at the condominiums/dock he owned in Ventnor, New Jersey. Witnesses testified that Fumo went to the Jersey shore on numerous weekends, often leaving the Philadelphia area on Thursday and returning on Tuesday. 11-17-08 tr. at 35 (Egrie); 2-3-09 tr. at 163 (Nelson). When denying the defendant's post-trial motion for acquittal, this Court agreed with the thrust of this evidence, stating: "Nor does Fumo currently claim, as he did at trial, that these expenditures [for personal assistance by Senate employees] were justified because they allowed him to spend more time being an effective Senator - an argument properly rejected by the jury upon becoming privy to

evidence that Fumo spent more than four months a year on vacation during which time he continued to seek services from his Senate employees." 6-17-09 op. at 10.[12]

The government also endeavored to prove what Fumo did while he was away from Philadelphia and Harrisburg, and the evidence was clear on that point as well. Without question, Fumo took a cell phone, Blackberry, and computer equipment with him, and was available to answer calls and e-mails regardless of where he was. But numerous witnesses, including friends loyal to Fumo, gave a consistent account of how he spent his copious vacation time. They attested that Fumo usually spent the morning hours working on his computer, then spent the afternoons relaxing or devoting himself to his numerous hobbies and extracurricular interests. In the evening, he would spend a couple more hours catching up on e-mails and other computer work. The witnesses who provided this account included Fumo's close friend, Ann Catania, who traveled with Fumo on vacation, as well as girlfriend Egrie, his personal butler, and the captains and stewards of the yachts on which Fumo took annual free trips. 11-17-08 tr. at 37-38 (Egrie); 12-10-08 tr. at 118-20 (Fonseca); 12-11-08 tr. at 9-11 (Mezzaroba); 12-11-08 tr. at 145-46 (O'Brien); 12-11-08 tr. at 167-68 (Todd); 12-17-08 tr. at 177 (A. Catania); 12-17-08 tr. at 212 (G. Catania); 12-18-08 tr. at 175 (Wyatt-Filer). Egrie's testimony was

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[12] Fumo's recreation was possible because, while Fumo's large state-paid staff was on the job every day of the year, and worked particularly long hours during state budget negotiations (usually in June), the Senator himself was only required to be present on session days, which were few in number. During the years at issue, the number of Senate days in session ranged from 45 (2000) to 87 (2003) per year.

typical: "He would work in the morning on the computer and then he'd go to the docks and, you know, mess around with the boats and play in his garage and then do some work on the computer at the end of the day and then we'd go out to dinner." 11-17-08 tr. at 36. Fumo himself, during his testimony, did not dispute their observations.[13]

Further, the evidence showed, Fumo engaged in a good deal of non-legislative work. He was the chairman of the bank started by his grandfather; Fumo testified that during his stewardship, the bank's assets increased from $1.5 million to more than half a billion dollars. 2-9-09 tr. at 26. He was an attorney, who earned close to $1 million every year for soliciting business for a prominent law firm, 10-29-08 tr. at 82; and he ran political campaigns, see, e.g., 11-6-08 tr. at 39-44. Thus, even the time which Fumo spent while on vacation on his phone and computer was not all devoted to his legislative work, but rather concerned his many other affairs. In sum, the evidence clearly showed that Fumo did not devote an inordinate amount of personal time to Senate work, which for him was a part-time job.[14]

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[13] Also telling in this regard was Exh. 858, in which the government presented a list of the daily Federal Express packages which Senate employees sent to Fumo while he was on vacation in Florida for months at a time. For a time, the employees kept a precise record of what they were asked to gather and send. The government presented this exhibit as an example of the myriad personal tasks which Fumo assigned the state workers, but it was also probative in illumining what Fumo did with his vacation time. The shipments included very few items of work materials, and a vast quantity of goods reflecting Fumo's many interests and pursuits, regarding drafting, electronics, boating, aircraft, and farming.

[14] The evidence likewise revealed that Fumo gave very little of his personal wealth to charity, and certainly nothing extraordinary. For example, his 2003 tax return showed

The evidence presented by Fumo at sentencing, both in testimony and through 259 letters submitted to the court, did not refute the trial record, or remotely carry Fumo's burden to establish an extraordinary level of personal sacrifice. Rather, the letters focused almost exclusively on Fumo's success in various legislative initiatives and public accomplishments, exactly the type of evidence deemed insufficient by the Third Circuit in Serafini to warrant a departure.

Revealingly, in his statement at the sentencing hearing on this issue, defense counsel focused on Fumo's purportedly "extraordinary" act in pursuing legislation to secure "hundreds of millions of dollars of youth funding coming into the City of Philadelphia;" the fact "[t]hat he was responsible for passing at least five separate pieces of legislation" for funding of mass transit; and Citizens Alliance's success, with Fumo's backing, in improving neighborhoods in Philadelphia. 7-14-09 tr. at 141-42. Obviously, these are precisely the types of achievements which the Third Circuit explicitly held may not justify a sentencing departure. Yet consistently, the defense stressed such

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donations of less than 1% of his reported adjusted gross income of $629,195. The letters from family and friends likewise described only scant charitable acts over the course of decades. Fumo did not use his public position to advance personal charity; to the contrary, Fumo reaped enormous financial rewards from his Senate service, most notably the nearly $1 million annual fee from a law firm for directing business to it. Indeed, the entire purpose of his fraudulent schemes was to amass more bounty. He obviously did not meet the Serafini test of personal donation of money permitting a downward departure, and this Court did not purport to depart or vary on this ground. We therefore focus on the basis of the Court's decision, which was the quality of Fumo's legislative service.

accomplishments by Fumo, which, after 30 years in office, were numerous. However, the defense determinedly avoided the issue presented by Serafini and persistently stressed by the government, which was whether any of these achievements involved an extraordinary devotion of Fumo's own time or money, which they did not.

The witnesses at the sentencing hearing shed no light whatsoever on the issue, and did nothing to meet Fumo's burden with regard to a departure. First, Malcolm Lazin testified. This Court later stated that it relied on this testimony in granting a departure. 7-14-09 tr. at 224. Lazin testified that (a) in the early 1970s, when Lazin was an assistant United States attorney investigating mortgage fraud, Fumo, as state Commissioner of Occupational and Professional Affairs, promised him complete cooperation and no interference; (b) later, when Lazin was chairman of the Pennsylvania Crime Commission, Fumo contacted him to express the opinion that the Commission should not focus solely on Italian-Americans; (c) when Lazin was president of a real estate development firm, Fumo advocated on behalf of his association for ramps on I-95, and arranged a meeting for him with the state Secretary of Transportation to further a plan to beautify Delaware Avenue; (d) Fumo assisted Lazin in arranging for lighting of the Ben Franklin Bridge; (e) when Lazin was president of the Society Hill Civic Association, he received extraordinary constituent services from Fumo's office; and (f) Lazin appreciated Fumo's advocacy of equal rights for gays. 7-14-09 tr. at 150-56. Lazin said nothing about the time or money Fumo personally devoted beyond normal work hours;

indeed, he said he was not a social friend, id. at 156-57, and thus plainly was not in any position to know. Therefore, this testimony could not conceivably support a departure under Serafini.

Similarly, the entire testimony of the next witness, Senator Christine M. Tartaglione, was as follows:

> In the last fifteen years the City of Philadelphia has received more money than any other part of the state. With Senator Fumo not there it's going to be a hardship for the City of Philadelphia. He brought billions of dollars back. Worked tirelessly. He was always on the phone, always doing something. And I have some fellow colleagues that couldn't even touch Vince in a second, because he worked so hard. He really has.

Id. at 159. On cross-examination, she added that her concern is that "we no longer have someone in Harrisburg that knows the system and knows how to bring the money back to Philadelphia." Id. at 160. She offered no testimony to contradict the personal observations of the friends who actually accompanied Fumo and saw his work habits.

Next, Judge Eugene Maier, a state judge and a board member of St. Joseph's Hospital, credited Fumo with arranging grants and pressing others to develop the North Philadelphia Health System. Fumo, he said, also facilitated the creation of St. Joseph's nursing school, by arranging a state grant, and giving him the names of people to call. 7-14-09 tr. at 161-66.

Along the same lines, the next witness, Sonny DiCrecchio, the Executive Director of the Philadelphia Regional Produce Center (PRPC) and a friend of Fumo, credited Fumo with encouraging the PRPC to start a program to donate distressed

produce to Philabundance, and explained that over the course of seven years, Fumo assisted in assuring that the center obtained land and developed a new produce center, keeping 1,500 jobs in Philadelphia instead of seeing them migrate to New Jersey. 7-14-09 tr. at 167-73.

All of this evidence, clearly, was a testament to Fumo's success as a legislator, which by itself could not warrant a departure. Likewise, the tenor and substance of this testimony was consistent with the hundreds of letters submitted on Fumo's behalf, which attested to Fumo's legislative acumen while offering no reliable evidence whatsoever to contradict the explicit trial evidence regarding Fumo's work habits. The letters revealed, to be sure, that Fumo had many friends and supporters, ranging from the powerful public figures he aided to ordinary constituents. The letters further make clear that many people thought well of Fumo, and saw him as caring of and attentive to his friends and relatives.[15] But the Court properly did not grant leniency

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[15] Fumo presented many laudatory letters from members of his large family, and from friends. In truth, it is difficult to reconcile the conflicting pictures of Fumo presented to the Court -- his friends and relatives' portrayal of him as caring, compassionate, and devoted drastically conflicted with the profane, vindictive, and frequently petty person regularly on display in the hundreds of e-mails introduced at trial. Among countless examples, see, for instance, Exh. 182 (Fumo directed his staff to expend public resources to investigate a person he believed was dating Fumo's ex-girlfriend, concluding, "NAIL this mother fucker!!!"). Further, while letter after letter at sentencing spoke of Fumo's devotion to family, the trial evidence showed how Fumo used his Senate computer aides to intercept and disclose to him his adult daughter's e-mail, and how he used a Senate-paid political consultant, Howard Cain, to work to defeat that daughter when she ran for election to a township position in Montgomery County. 11-10-08 tr. at 107-08. The conflict between the trial evidence and the writers' benign view of Fumo's

based on Fumo's strong friendships and close family relationships, which did not distinguish him from many defendants. The Court, rather, explicitly rested its sentencing reduction on a single consideration -- its conclusion that Fumo's public service had been "extraordinary." But the letters did not support that conclusion in light of the Third Circuit's precedent.

The letters followed the same pattern as the testimony in court, listing numerous public programs which Fumo supported and political positions he took, which the writers appreciated, but saying nothing at all to contradict the evidence that Fumo accomplished his public work in less than a full-time job. The letter of former Congressman Robert Borski was typical:

> He is one of the most effective public servants I have ever known.
>
> His work in the Pennsylvania Senate over the past three decades produced enormous benefits for the citizens of his district, our City and the Commonwealth of Pennsylvania. For many of those years we shared a sizable number of constituents. Without fail, we worked together to resolve concerns small and large that came before us in the best interests of those we represented. I found him tireless in his goal to make government effectively represent the people. The benefits of his industrious efforts have been incalculable to the Commonwealth.

But almost all of the letters were vague, or, more often, completely silent with regard to exactly what Fumo personally did or how much time he personally spent on the matters at issue. Many of the tasks writers praised could be accomplished (and

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character need not be resolved, however, in that the Court did not rely on any of this information in its departure/variance decision, but rather focused solely on Fumo's purported legislative accomplishments.

surely were) with a meeting or a phone call or two. Many simply consisted of Fumo's arranging the expenditure of public money or the use of one of his public employees to advocate on behalf of a constituent.

In fact, it is clear that an enormous amount of the good Fumo accomplished, for which the writers praised him, was performed not by him but by his staff. He had more than two dozen aides in Philadelphia and Harrisburg, who were skilled in constituent service and the ways of state government. Such a team can, and did, accomplish a lot, and even allow their boss to spend half the year on vacation.

This is not to disparage Fumo's success in motivating and deploying staff members to help others; it is to question whether this use of state funds, to pay state employees, to do their appropriate work effectively, entitles a senator to special dispensation to enrich himself through criminal conduct. With regard to a departure, the Court in Serafini answered the question unambiguously in the negative.

Fumo also sought leniency simply based on his ability to disburse state grant money, which rested on his senior position in the Senate and key role in the budget process as Democratic appropriations chairman. His largesse fostered a legion of admirers, but said nothing about the Serafini factors.

Only a handful of letters even addressed Fumo's work habits. For the most part, they did so with the casual hyperbole often appended to public work, stating that Fumo's efforts were "tireless," as in Rep. Borski's letter quoted earlier. See Serafini, 233

F.3d at 773 (citing a letter regarding the defendant which used that term but described ordinary legislative work insufficient to justify a departure).

The gap between hyperbole and reality was evident in the testimony of Paul Dlugolecki, Fumo's chief of staff in Harrisburg, whose false testimony at trial as a defense witness was roundly rejected by the jury, and who, in his letter to the Court at sentencing, compared Fumo to Thomas Jefferson. In his letter, Dlugolecki wrote that Fumo "was on the job 24/7. As you have heard in court, he made round the clock use of email to staff and friends in order to secure objectives." But when questioned about this at trial, Dlugolecki's testimony did not match the casual exaggeration of his letter. At trial, he acknowledged that Fumo spent a couple months of the year in Florida, two weeks in Nantucket, and an unspecified amount of time at the Jersey shore. He said that he exchanged e-mails and phone calls with Fumo when necessary, and that others on the staff did as well, but there could be days without communications. He affirmed that, apart from the e-mail exchanges, he had no idea what Fumo did during his extensive vacations. 1-28-09 tr. at 183-85.

In short, the defense at sentencing presented no evidence whatsoever to rebut the consistent trial testimony regarding Fumo's travel and vacation habits. The trial evidence demonstrated not only that Fumo did not invest his personal time to an extraordinary degree, but the opposite -- that he was able to spend an amazing amount of time vacationing, while staying in touch with the office when necessary. Again, this is

not to say that Fumo did not do his job as a senator; he certainly did, and arguably did it effectively (while at the same time defrauding the citizenry for his personal benefit). But according to the Third Circuit, a departure on that ground is impermissible. The question, according to Serafini and a number of other cases, is whether Fumo devoted his own time to further good causes, and did so in an extraordinary manner. There was no evidence at all of such conduct.

This Court, in sentencing Fumo, stated:

> That's the next factor I have to consider is your character. And in my opinion, you were a serious public servant. You worked hard for the public and you worked extraordinarily hard and I'm therefore going to grant a departure from the guidelines.
>
> I base that departure principally upon my consideration of the letters that I've read in your support. I consider it upon the testimony of Mr. Lazin today -- I probably pronounced his name wrong -- who gave a moving testimonial to what you did and what you could and were capable of doing. I base it on the testimony of Mr. Maier who told me what you did with regard to the hospital and the nurse's hospital. And I base it on my overall assessment that most politicians just don't do as much as you do. They don't spend the time that you do and devote their entire life to politics that I think and found that you did. So on that basis I'm going to grant a departure from the guidelines.

7-14-09 tr. at 224-25. These statements rested on no evidence, but rather contradicted the trial evidence and the Court's own post-trial findings. The government requests that the Court reconsider its conclusion. Based on this record, a departure is impermissible as a matter of law.

Therefore, the guideline range of 210-262 months should be undisturbed by any departure. We now turn to the final stage of the sentencing process.

IV. Discussion of the 3553(a) Factors.

Consideration of the sentencing factors stated in 18 U.S.C. § 3553(a) warrants imposition of a sentence within the advisory guideline range of 210-262 months.

A. Variances.

Notably, no variance is warranted in this case. There should not be a downward variance based on Fumo's public service. The fact that he was a State Senator is an aggravating factor in this case, not a mitigating factor. As explained at length above, Fumo may have been an effective legislator, but this was his job, for which he was richly compensated and rewarded. Further, he did not even devote full-time to this job. A Wall Street trader who embezzled from his firm or engaged in insider trading would not get a variance for criminal activity because, during regular working hours, his successful trades earned millions of dollars for his firm and its customers. A baseball player would not get a variance for criminal activity because, during his day job, he hit home runs. Providing a variance to Fumo sends a pernicious message that elected officials are different, and get special dispensation when they elect to breach the public trust. We urge the Court, upon further deliberation, not to repeat its earlier decision.

It also bears noting that all of the good works described by Fumo's supporters are themselves attributed to the spending of public funds, for grants for favored organizations, for salaries for the numerous staff members who did Fumo's

bidding, and for Fumo's own salary and expenses. If Fumo obtains a variance based on the results this spending generated, that means that an official with control over public money has the ability to gain leniency for criminal acts, based on his eleemosynary use of the money, which is not available to an ordinary citizen. In essence, just as Fumo, to use his favorite phrase, used "other people's money" to support his lifestyle, he then used "other people's money" to gain sentencing lenity. On reflection, it should take little thought to appreciate why Fumo's original sentence was so widely seen as offensive and provoked such a storm of public revulsion.

Should this Court again grant a departure or variance to Fumo based on his good works, then the government again moves for an upward variance based on numerous aggravating factors. This Court did not discuss these grounds at the previous hearing; the Third Circuit then directed that, should this situation recur, the Court must consider and discuss each of the variance grounds. Fumo, 2011 WL 3672774 at *27 ("On remand, the District Court should consider any colorable arguments for a variance that have a basis in fact, whether made by Fumo or the Government."). The grounds for an upward variance are (1) the loss of public confidence in the integrity of elected public office; (2) loss of reputation and other intangible, non-economic harm suffered by the

Independence Seaport Museum and Citizens Alliance; (3) Fumo's perjury at trial: and (4) the exceptionally egregious nature of the obstruction offenses that Fumo committed.[16]

Should the Court, as the government suggests, deny any downward variance, then these circumstances should be considered in the final assessment of the 3553(a) sentencing factors. These aggravating circumstances are as follows.

1. 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, Fumo's actions 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. Fumo's actions have shined a bright spotlight on our democratic institutions and drawn

[16] At the last sentencing hearing, the government also asserted that a variance was warranted based on the inadequacy of the loss determination to measure the actual harm caused by Fumo's conduct. At the time, this Court had eliminated almost $1 million in the Senate loss based on the difficulty of calculation, and the government argued that a variance should be considered given that substantial losses certainly occurred even if the Court was not comfortable with an exact calculation. This assertion is moot in light of the Third Circuit's rulings which increased the guideline loss calculation to the appropriate level.

widespread public attention to the worst kind of abuse of the public trust that is imaginable.

Sadly, 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. Corruption is difficult to detect and damaging to the structure of honest government. "Public corruption demoralizes and unfairly stigmatizes the dedicated work of honest public servants. It undermines the essential confidence in our democracy and must be deterred if our country and district is ever to achieve the point where the rule of law applies to all – not only to the average citizen, but to all elected and appointed officials." Spano, 411 F. Supp. 2d at 940. Courts have repeatedly recognized that the type of harm caused by 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. Paulus, 419 F.3d 693, 697-98 (7th Cir. 2005) (upholding an above-guideline sentence in significant public corruption case involving numerous bribes over an extended time period); 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"); United States v. Newton, 2007 WL 1098479, at *2 (D. Conn. Apr. 10, 2007) ("The [] guidelines calculation also fails to adequately account for the loss of public confidence in the honesty and integrity of their 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.

2. 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, 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. See, e.g., United States v. Dennis, 2002 WL 1397090 (5th Cir. 2002) (not precedential) (affirming 2-level upward departure with regard to theft from a nonprofit organization, based on the harm to the nonprofit institution's reputation and fundraising that resulted from the publicity of the defendant's crimes).

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.

3. Fumo's perjury at trial.

Fumo 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 regarding sentencing calculations submitted on July 6, 2009. The defense has never even tried to rebut most of these assertions, nor could they.[17] The false testimony was rejected in its entirety by the jury in finding Fumo guilty of all 137 counts. Fumo testified, for instance, that his employees and contractors served his personal and political needs only out of friendship, and never on state time; that his attorney told him it

[17] Fumo's complete testimony appears in the transcripts for February 2, 9, 11, 12, 17, and 18, 2009. For the sake of brevity in this brief, the government refers this Court to its July 6, 2009, sentencing memorandum, for an exhaustive description of Fumo's particular false testimony in 27 different areas. See Government's Memorandum Regarding Sentencing Calculations (docket entry 711, July 6, 2009) at 56-99.

was permissible to destroy records during a grand jury investigation; that he was entitled to "gifts" and "perks" from Citizens Alliance, but also did not lie when he suggested exactly the opposite in a 2004 radio interview; that the $36,000 minivan he stole from Citizens Alliance actually belonged to and was used by Arnao; that he sponsored (with Citizens Alliance's money) the opposition to dunes near his shore home only on behalf of constituents, and that he himself did not care about his ocean view from his beach block home; that the bulldozer used at his farm was actually intended for Citizens Alliance's use in the city, and on and on.

As the government previously asserted, any one of the 27 substantial areas of false testimony discussed by the government warrants greater punishment. In this light, the full body of false testimony is simply staggering. Fumo spent close to six days on the witness stand, lying to the jury, hour after hour, on every material issue in the case. That fact is powerfully relevant to sentencing, as the Supreme Court declared:

> It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

United States v. Dunnigan, 507 U.S. 87, 97-98 (1993).

4. 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, 5-20-09 tr. at 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 complete 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. It warrants a within-guideline sentence, or, if the Court departs or varies downward based on Fumo's request, a countervailing upward variance.

B. The 3553(a) Factors.

These aggravating factors are all also pertinent to the final assessment of the 3553(a) factors. In the government's view, the guideline range, unadjusted by any departure, is 210-262 months, and consideration of all sentencing factors warrants a sentence within that range.

1. Nature and circumstances of the offense and the history and characteristics of the defendant.

As discussed throughout this memorandum, Fumo's crimes were detestable. He stole more than $4 million from the state legislature, a nonprofit charity, and a

museum, He engaged in tax evasion. He perpetrated an effort at obstruction of justice so systematic and extensive that, as Judge Yohn wrote, it could justify an upward variance. Then, at trial, Fumo committed perjury for days on end in an effort to escape responsibility for his crimes. This case depicted widespread lawlessness by a public official, motivated by his greed and overwhelming sense of entitlement.

Significantly, Fumo did not need to steal. He 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 then accumulated great wealth while serving as a state senator for 30 years, ultimately earning $1 million per year from a law firm to do no work other than to use his political connections to steer business in its direction, and hundreds of thousands more from a bank he inherited from his father. He spent roughly half of each year on vacation, and lived a lavish lifestyle. He chose to steal not because he had to steal, but because he 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.

The crimes are consistent with his history. 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.

Everything about the nature and circumstances of the offenses and the personal characteristics of the defendant therefore calls for a guideline sentence.

This Court, however, took a different view, appearing at Fumo's sentencing to minimize the offenses. In sentencing Fumo, it began:

> The first factor I consider is the nature and circumstances of the offense and the history and characteristics of the defendant. Now, I ask myself in regard to this, what is the crime we're talking about here? It's not murder, it's not robbery, it's not even assault. It's nothing violent. It's not the selling of a political office. In

> fact, in this case, not a dime went directly to the defendant, although there is no question that he benefitted from what he was able to get from the budget of the Senate. The scheme that the defendant adopted to secure the use of taxpayer's money and Citizens Alliance money was so simple that reporters on the staff of the *Philadelphia Inquirer* could discover it, presumably, without the use of the sophisticated investigation techniques of law enforcement.

7-14-09 tr. at 220.

The government asks the Court to reflect and reconsider. The crimes may not have involved violence, but the guideline calculation is not based on violence. It is based on economic crime at the outer extreme of such offenses.

Further, the Court's statement includes factual misstatements. The notion that "not a dime went directly to the defendant" is inexplicable, given the proof that Fumo used over $4 million of funds of the Senate, Citizens Alliance, and ISM for his personal benefit. The average citizen, who ordinarily makes monthly payments in order to have a car to drive, if given a free minivan akin to the $36,000 vehicle Fumo stole from Citizens Alliance to use at the shore, would not say that he had not "received a dime." Fumo took goods and services worth 100 times the value of that minivan.

The statement that the schemes were so simple that newspaper reporters discovered them is also erroneous. The *Philadelphia Inquirer*'s pre-indictment reporting focused on Fumo's fundraising for Citizens Alliance, which was discerned from public records, and to a lesser extent on his use of Independence Seaport Museum resources. While its efforts were commendable, the media never discovered the vast bulk of the charged offenses, regarding use of Senate and Citizens Alliance staff and resources for

personal and political ends, and the destruction of evidence, until indictments were returned describing those offenses. That was because the offenses were very carefully concealed, buried in thousands of records which only a tireless FBI and IRS investigation uncovered.

The Court also suggested that the public bore some responsibility for Fumo's crimes. It said:

> What is regrettable is that the citizens of the defendant's district didn't seem to care enough to inquire about what to me were some obvious things that should have stood out. Here was an office with a big staff and all kinds of things being distributed, and you wonder why a voter might say what the heck, where's all this money coming from? It didn't happen. There was never any competition for -- really meaningful competition as the senator stood for reelection every year. And I'm afraid, really, that the voters succumbed to that totally repugnant political adage which goes something like this: "Well, our senator may be a crook, but he's our crook."
>
> So this failure on the part of the voters coupled with, in a small part with whatever he calls the media's role in earlier years at least of promoting the mystique of the defendant as a powerhouse politician, together with and singularly most importantly the defendant's own conduct, has led us to where we are today.

7-14-09 tr. at 221-22. This statement also does not withstand scrutiny. There was absolutely no way for average citizens to know how much Senate employees were being paid, or for what. None could know, for example, that a Senate staffer was cleaning Fumo's house as his maid. There was no way for them to ascertain which of the thousands of purchases made by and delivered to Citizens Alliance were diverted to Fumo for his personal use. It took a team of dedicated federal agents literally years to obtain and digest all the pertinent evidence.

And of course, how the crimes were discovered has nothing to do with Fumo's sole responsibility for committing them. In short, the crimes were serious, persistent, and highly damaging, and present no mitigating circumstances.

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.

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 demonstrated toward his victims, the government, and the Court through his perjured testimony at trial. 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.

As if his crimes alone did not make this clear, Fumo testified with clarity that he is someone who is above the law and sees 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 2-11-09 tr. at 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.

Id. at 181-82. 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. . . .

Id. at 184-85.

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.

Id. at 195-96.

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. See, e.g., Newton, 2007 WL 1098479, at *2 ("The fact that the defendant brazenly continued his corrupt conduct at the same time other politicians in this state were being investigated and prosecuted for the same conduct demonstrates to me that a more severe sentence is necessary to deter such conduct in the future.")

As stated at the outset of this memorandum, it is also vital for the Court's sentence, in a case receiving unprecedented attention in the state, to affirm that violations of public trust will be severely punished. Public respect not only for the law but also our democratic institutions depends on confidence that elected officials will not escape appropriate punishment in a case such as this.

This sentencing factor is one of the most important in this case. As this Court is well aware, its original sentences imposed on Fumo and Arnao provoked an unprecedented and nearly unanimous storm of public outrage because, among others, they were so far out of line with the applicable sentencing guidelines, and sentences imposed on other less culpable defendants in analogous cases, and appeared to reward a political insider for a track record of legislative success that occurred while he was stealing from

the public. The reimposition of those sentences, or anything close to them, would do grave damage to the public's respect for the law and expectations of justice.[18]

As stated, the crimes at issue were most severe, involving theft of charitable and public funds, tax evasion, and obstruction of justice. All took place as part of an effort by an elected official to enrich himself at public expense. Promoting public respect for the law demands an appropriate sentence which reflects the severity of the conduct, encourages public servants to act appropriately, and assures the public at large that abuse of office and taxpayer funds will not be tolerated. See Gall v. United States, 552 U.S. 38, 54 (2007) (recognizing "[t]he Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law").

At the first sentencing hearing, the Court appeared to question the extent of the public's concern. It deprecated Internet postings by members of the public which suggested otherwise, and highlighted the fact that "they were also entitled to write to the Court and express their views and I got five letters who are against Senator Fumo. I mean, I'm not beginning to suggest that those numbers mean anything, because they probably don't. But the fact is that those people were entitled to write as well." 7-14-09

[18] The government will submit to the Court a selection of the hundreds of letters, voice mail messages, e-mails, and blog postings which protested the Court's original sentences. We are informed that the Court itself directly received numerous such communications. These events were unprecedented in the collective experience of the prosecutors in this United States Attorney's Office.

tr. at 84. The Court chose instead to reduce Fumo's sentence based on his "extraordinary" public service, as described in 259 letters received by the Court.

We trust that the avalanche of letters, calls, e-mails, and published commentaries which ensued -- even a group's delivery in protest to the Courthouse of hundreds of vacuum cleaners, recalling Fumo's use of thousands of dollars of Citizens Alliance's money to buy 19 high-end vacuum cleaners for his homes -- erased the Court's skepticism. The public does care, and care passionately, about the honesty of its public officials, and about the essential American principle that no individual person in our system of justice is above the law. The sentence imposed in this case must bolster the citizens' respect for the principle of equal justice under the law.

A district court in Illinois squarely addressed the essential requirement that public officials who violate the public trust be punished in order to promote respect for the law: "We need not resign ourselves to the fact that corruption exists in government . . . . The only way to protect the public from the ongoing problem of public corruption and to promote respect for the rule of law is to impose strict penalties on all defendants who engage in such conduct." Spano, 411 F. Supp. 2d at 940. A lengthy period of incarceration within the guideline range will have the tangible effect of forcing public officials to uphold their oaths and act in the public interest.

3. The need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant.

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 Spano, 411 F. Supp. 2d at 940 ("Unlike some criminal justice issues, the crime of public corruption can be deterred by significant penalties that hold all offenders properly accountable."); 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."). See also 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.").

This is a case in which deterrence is a significant Section 3553(a) factor. 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. We rely, as we must, on the 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 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 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.

4. 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. Concerns previously expressed about his health have proven unfounded. We are advised that Fumo's incarceration has been uneventful, and that Fumo's medical conditions, which are

ordinary for a man of his age, have been well managed by the Bureau of Prisons in an ordinary prison setting.[19]

5. The guidelines and policy statements issued by the Sentencing Commission.

The Sentencing Guidelines stand as another essential consideration in this case. The government's recommendation of a within-guideline sentence is based in part on the fact that such a sentence properly reflects the accumulated wisdom and expertise of the Sentencing Commission, and serves the vital goal of uniformity and fairness in sentencing. While, to be sure, "[i]n accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence," Kimbrough v. United States, 552 U.S. 85, 90 (2007), it remains the case that "the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise,'" id. at 108-09 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

[19] At a recent hearing, defense counsel expressed concern that when Fumo was recently placed in segregation for a brief period, he was without access to his medication for two days. The undersigned checked with prison officials and determined that this did not happen, and that inmates are provided with their daily medication wherever they are housed.

Thus, the Supreme Court stated: "We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" Kimbrough, 552 U.S. at 109 (quoting Rita v. United States, 551 U.S. 338, 350 (2007)).

Significantly, the advisory guidelines are the sole means available for assuring some measure of uniformity in sentencing, fulfilling a key Congressional goal in adopting the Sentencing Reform Act of 1984. Reference to the guidelines, while carefully considering the 3553(a) factors particularly relevant to an individual defendant, is the only available means of preventing the disfavored result of basing sentences on the luck of the draw in judicial assignments. The Third Circuit explained:

> Even under the current advisory system, district courts must "meaningfully consider" § 3553(a)(4), i.e., "the applicable category of offense . . . as set forth in the guidelines." The section of *Booker* that makes the Guidelines advisory explains that "the remaining system, while not the system Congress enacted, nonetheless continue[s] to move sentencing in Congress' preferred direction, *helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.*" Booker, 543 U.S. at 264-65 (emphasis added). The Guidelines remain at the center of this effort to "avoid excessive sentencing disparities," and, as the *Booker* Court explained, the Sentencing Commission will continue "to promote uniformity in the sentencing process" through the Guidelines. Id. at 263. We have likewise observed that the "'Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country.'" *Cooper*, 437 F.3d at 331 (quoting *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)).

United States v. Ricks, 494 F.3d 394, 400 (3d Cir. 2007) (emphasis in original).

Therefore, the Supreme Court has held that "district courts must begin their analysis with

the Guidelines and remain cognizant of them throughout the sentencing process." Gall, 552 U.S. at 50 n.6.

In light of this factor, the defendant's likely request for reimposition of his original 55-month sentence is inappropriate. Such an action would require a staggering departure or variance from the minimum term of 210 months recommended by the guidelines. "[A] major departure should be supported by a more significant justification than a minor one." Gall, 552 U.S. at 50. See also United States v. Levinson, 543 F.3d 190, 197 (3d Cir. 2008) ("while we eschew any requirement of direct proportionality, we may look for a more complete explanation to support a sentence that varies from the Guidelines than we will look for when reviewing a sentence that falls within a properly calculated Guidelines range"); United States v. Negroni, 638 F.3d 434, 445-46 (3d Cir. 2011) (vacating extreme variance from range of 70-87 months to term of house arrest). We can attest to the Court that, of the thousands of sentences imposed in this district since Booker was decided, we know of no comparable variance from the Sentencing Guidelines as that suggested by the defense here in the absence of cooperation by the defendant. More importantly, Fumo has never advanced any compelling basis for such an extraordinary reduction.

In short, whatever justification for a low sentence previously existed, that rationale is no longer sufficient in light of the Third Circuit's determination that the guideline range is significantly higher than what this Court previously believed, and the

requirement that the Court give serious consideration to the advisory guideline range. 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 others who commit similar egregious acts, as the Sentencing Commission has found through its national study of sentencing practices.

6. 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).[20]

[20] It bears noting that the Third Circuit has repeatedly held that, if, as here, a party addresses the possibility of an undue disparity, the sentencing court must address the issue and explain why any disparity is illusory or inconsequential. See, e.g., United States v. Friedman, -- F.3d --, 2011 WL 4470674, *18 (3d Cir. Sept. 28, 2011); United States v. Negroni, 638 F.3d 434, 446 (3d Cir. 2011); United States v. Lychock, 578 F.3d 214, 219 (3d Cir. 2009) (holding that the district court erred in not addressing the government's argument regarding sentencing disparity, and that such a discussion was particularly necessary where the final sentence was significantly below those imposed on similar offenders).

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.'"). Given that most sentences imposed nationally are within-guideline terms, the imposition of a below-guideline sentence on Fumo will guarantee inappropriate disparity with offenders elsewhere who committed similar massive crimes.

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 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. Yet the original sentence imposed by this Court for all of Fumo's 137 counts of conviction was barely more than 50% more than the total sentence imposed on Luchko.[21]

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.

a. 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

[21] The comparison to Luchko's sentence is not exact. Luchko was sentenced at offense level 17, which provided for a range of 24-30 months; the Court imposed a sentence at the top of the guideline range. This range included a 2-level credit for acceptance of responsibility, given that Luchko entered a guilty plea. If not for that, Luchko's offense level would have been 19, and a top-of-the-range sentence would have been seven months higher, that is, 37 months. Fumo does not deserve any credit for acceptance of responsibility, and thus the real comparison to the sentence imposed on Luchko is to a term of 37 months.

$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.

b. Corey Kemp.

The 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 entirely unjust.[22]

c. Richard Mariano.

The prosecution of former Philadelphia City Councilman Richard Mariano provides further insight regarding the issue of sentencing disparities. A jury convicted Mariano of one count of conspiracy to commit honest services fraud, eleven counts of

[22] In the rage of protest against the original sentence imposed on Fumo, countless observers decried the disparity with Kemp's well-publicized sentence. Regrettably, many citizens viewed the discrepancy as a reflection of racial and socioeconomic bias in the system of justice, in that Kemp is an African-American from an underprivileged background and Fumo is white and grew up in prosperity. While we know that neither sentencing judge considered such facts at all, this perception, caused by an unjustified sentencing disparity, is another example of why Fumo's sentence must be adjusted to promote respect for the law.

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.[23]

d. Ted LeBlanc

On July 26, 2005, Ted LeBlanc, the former mayor of Norristown, Pennsylvania, was indicted on one count of conspiracy to commit honest services mail fraud, 18 U.S.C. § 371, five counts of honest services mail fraud, 18 U.S.C. §§ 1341, 1346, soliciting a bribe in relation to a program receiving federal funds, 18 U.S.C. § 666, bank fraud, 18 U.S.C. § 1344, and two counts of filing false income taxes, 26 U.S.C. § 7206(1). On April 18, 2006, a jury convicted LeBlanc on all counts except one count of filing a false income tax return. The charges all stemmed from actions taken while LeBlanc was the mayor of Norristown. The indictment alleged, among other things, that

[23] 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.

LeBlanc took a $10,000 cash bribe in February 2003 from Norristown's insurance broker, Herbert Bagley, in exchange for awarding a lucrative Borough insurance contract to Bagley. The crux of LeBlanc's defense at trial was that the $10,000 payment was not a bribe, but rather a personal loan from Bagley to assist LeBlanc in opening a bar.

LeBlanc was sentenced by Judge Yohn to a 51-month term of imprisonment, which was within the guideline range of 51 to 63 months. To say that the criminal actions of LeBlanc pale in comparison to those of Fumo would be a gross understatement. There is simply no comparison between the criminal acts of LeBlanc – a small town mayor who received a $10,000 bribe – and those of Fumo, perhaps the most powerful elected official in Pennsylvania, who stole more than $4 million of public and charitable funds using his official position and office. Yet the sentence that LeBlanc received is very close to the original 55-month term imposed on Fumo which the Third Circuit has now overturned. Fumo's crimes are more numerous and serious than those committed by LeBlanc, occurred over a far longer period of time, involved theft and fraud in an amount 400 times greater than the amount involved in LeBlanc's case, and included an extraordinary effort to obstruct justice. A comparison of the Fumo case to the LeBlanc case compels the conclusion that Fumo's sentence must be at least 4 or 5 times greater than the sentence imposed on LeBlanc, and there is simply no way to justify a sentence for Fumo that is remotely similar to that which LeBlanc received.

e. Daniel Castro.

To the ranks of Carter, Kemp, Mariano, and LeBlanc, we add a more recent defendant, Daniel Castro. The discrepancy in the view of illegal conduct by public officials reflected in this Court's original sentence, as opposed to that consistently expressed by other sentencing judges, is most recently reflected in the sentencing earlier this month of Castro, a former high-ranking Philadelphia police officer convicted of extortion. Castro's crime involved a single effort to use strong-arm tactics to recover a $90,000 debt owed to him, a course of conduct which does not compare to Fumo's decades-long history of theft of public funds. Castro, like Fumo, presented letters and other encomia from numerous community members, extolling his career of personal and professional service in the Philadelphia area. Yet Judge Bartle sentenced Castro to five years in prison, two years *above* the sentence recommended by the government and in excess of the 33-41 month range, stating, "Police officers, unlike many in society, take an oath to uphold the law. . . . Mr. Castro has tarnished all who wear the uniform. . . . He has lost his integrity and damaged the integrity of the department, and he has besmirched the service performed by every law-abiding police officer." *Phila. Inquirer*, "Judge sentences former officer to five years for extortion scheme," Oct. 5, 2011.

Fumo's situation is identical. As an elected public official and leader in the state legislature, he had a duty to uphold the law, and his decision to instead steal from the public, on a daily basis for years on end, grievously damages public confidence in

government and besmirches the diligent efforts of the vast number of ethical officeholders. Anything less than a within-guideline sentence for Fumo is therefore inadequate and sends every wrong message both to the public and to the officials they elect.

7. The need to provide restitution to any victims of the offense.

Previously, as required by the Mandatory Victim Restitution Act, the Court imposed restitution in the amount of the loss to the Senate, Citizens Alliance, and the Independence Seaport Museum, less sums which the defendants had repaid before sentencing. The government successfully appealed the loss determination, and the Court of Appeals vacated the judgment. The new order of restitution should reflect the correct loss amounts.

The restitution amounts should be increased by prejudgment interest. (The Court so ruled at the original sentencing proceeding. Fumo appealed, arguing that prejudgment interest is not allowed. The Third Circuit affirmed this Court's view. Fumo, 2011 WL 3672774 at *27-29.)

In calculating prejudgment interest, we adopt the same method approved by this Court earlier, starting with the loss total as of the time that each fraud scheme ended, and then using the interest rate 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, for the calendar week preceding the date of the judgment") as of the end of each calendar year.[24]

Restitution to the Senate. As explained earlier, the loss to the Senate for guideline purposes is $2,290,282.49, of which none was repaid to the Senate before sentencing.[25] The Senate fraud largely concluded by the end of 2005. The addition of prejudgment interest is as follows:

2006 (increase by 4.99% interest)	2,404,567.59
2007 (increase by 3.42% interest)	2,486,803.80
2008 (increase by 0.40% interest)	2,496,751.01
2009 (increase by 0.41% interest)	2,506,987.69
2010 (increase by 0.30% interest)	2,514,508.66
2011 (increase by 0.11% interest)	2,517,274.61

The total restitution owed to the Senate is $2,517,274.61.

Restitution to Citizens Alliance. After the frauds came to light, Citizens Alliance received reimbursement for some of the stolen goods and services: Michael Palermo paid it $10,000 for the Ford F-150 which had been given to Fumo to use at his farm; Palermo also paid $27,000 to Citizens Alliance for the bulldozer it had acquired for Fumo (although Palermo obtained almost all of the money from Fumo's patron, Stephen Marcus, and the bulldozer remained on Fumo's farm); and Fumo raised funds from

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[24] The rate used for 2011 is 0.11%, which is the most recent weekly rate (as of October 7, 2011).

[25] This sum does not include the $150,000 paid to Mitchell Rubin under his fraudulent contract, which Rubin recently paid back to the Senate pursuant to his plea agreement.

political supporters and paid Citizens Alliance the $254,560.38 it had illegally spent on political polling.

Thus, while the total loss to Citizens Alliance for guideline purposes was $1,620,472.35, as detailed earlier, these repayments reduce the restitution owed to $1,328,911.97. The fraud was largely complete by the end of 2003. Prejudgment interest is added as follows:

2004 (increase by 2.77% interest)	1,365,722.83
2005 (increase by 4.36% interest)	1,425,268.35
2006 (increase by 4.99% interest)	1,496,389.24
2007 (increase by 3.42% interest)	1,547,565.75
2008 (increase by 0.40% interest)	1,553,756.01
2009 (increase by 0.41% interest)	1,560,126.41
2010 (increase by 0.30% interest)	1,564,806.79
2011 (increase by 0.11% interest)	1,566,528.08

The total of restitution owed to Citizens Alliance is therefore $1,566,528.08.[26]

Restitution to the Independence Seaport Museum. Unlike the loss totals for the Senate and Citizens Alliance, which were appealed by the government and altered by the Third Circuit, the ISM calculation made by this Court was unchallenged and is unchanged, except for more prejudgment interest due to the passage of time. As the Court previously determined, the loss to ISM was $127,906.88 for the yacht trips and

[26] With regard to the loss to Citizens Alliance, Fumo should be held jointly and severally responsible to pay restitution along with defendant Arnao, who was convicted of the Citizens Alliance fraud.

other goods taken by Fumo, and he repaid $13,375 in April 2004 for one of the yacht excursions after discovery of the fraud. The balance owed of $114,531.88 is increased by prejudgment interest, beginning in 2004, as follows:

2004 (increase by 2.77% interest)	117,704.41
2005 (increase by 4.36% interest)	122,836.33
2006 (increase by 4.99% interest)	128,965.86
2007 (increase by 3.42% interest)	133,376.49
2008 (increase by 0.40% interest)	133,910.00
2009 (increase by 0.41% interest)	134,459.03
2010 (increase by 0.30% interest)	134,862.40
2011 (increase by 0.11% interest)	135,010.75

The total of restitution owed to ISM is therefore $135,010.75.

Total. In sum, the total of restitution owed by Fumo is:

Senate	2,517,274.61	59.67%
Citizens Alliance	1,566,528.08	37.13%
ISM	135,010.75	3.20%
Total	4,218,813.45	

The government believes that Fumo has the ability to pay this full sum immediately. Any payments by Fumo of less than the total sum owed should be distributed to the victims on a pro rata basis in proportion to each victim's percentage share of the total loss.

V. Conclusion.

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.

Because of Fumo's 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 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.

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. Thus, 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 by the defendant 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.

For all of the reasons stated above, the government respectfully recommends a within-guideline sentence 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 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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