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Judicial Abuse of "Process": Examining the Applicability of Section 2F1.1(b)(4)(B) of the Federal Sentencing Guidelines to Bankruptcy Fraud

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Judicial Abuse of "Process": Examining the Applicability of Section 2F1.1(b)(4)(B) of the Federal Sentencing Guidelines to Bankruptcy Fraud

Hideaki Sano

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INTRODUCTION

The proliferation of bankruptcy filings over the past decade has coincided with a comparable increase in the incidence of bankruptcy fraud.¹ In response to this growing problem, the United States

1. Bankruptcy fraud consists of a knowingly false statement about a material fact made under penalty of perjury and in the course of a bankruptcy proceeding. *See* United States v. Dantuma, No. 97-3077, 1998 WL 567939, at *4 (7th Cir. Aug. 18, 1998) (listing the elements of bankruptcy fraud); *see also* Clymer v. United States, No. 95-55941, 1996 WL 393510, at *1 (9th Cir. July 9, 1996) (same). In Senate hearings on bankruptcy fraud conducted in 1994, Senator Metzenbaum stressed his concern over the proliferation of bankruptcy fraud:

Annual case filings have climbed from 300,000 in 1980 to 944,000 in 1991 and in excess of \$26 billion is at stake in these filings. Commensurate with the rise in filings has been an increase in the number of fraudulent schemes that undermine the goals of Federal bankruptcy. For example, individuals have feigned bankruptcy to avoid debt collection and foreclosure by their creditors. Numerous bank officials and their customers have used the bankruptcy process to shield themselves from discovery or prosecution from fraud. Drug defendants are using bankruptcy filings to frustrate and delay drug asset forfeiture proceedings. Hundreds of typing mills are luring customers with vague promises of solving their credit problems, charging the customer hundreds of dollars while inducing them to sign bankruptcy petitions they often do not understand, and then improperly filing bankruptcy on their behalf.

Department of Justice has placed greater emphasis on federal prosecution of bankruptcy fraud.² As a result, federal judges are increasingly applying the Federal Sentencing Guidelines ("Guidelines")³ to bankruptcy fraud and have begun to implement uniform standards for sentencing defendants convicted of this crime.⁴

Congress enacted the Guidelines pursuant to the Sentencing Reform Act of 1984.⁵ In instituting the Guidelines, Congress sought honesty, reasonable uniformity, and proportionality in sentencing.⁶ Con-

140 CONG. REC. 28,753 (1994) (statement of Sen. Metzenbaum).

2. See Craig Peyton Gaumer, *Protecting the Bankruptcy Process: The Propriety of Enhancing a Bankruptcy Criminal's Sentence for Abuse of Judicial Orders or Process*, AM. BANKR. INST. J., Sept. 1997, at 12, 12. The Attorney General and other high-ranking officials in the Department of Justice have identified bankruptcy fraud as a "high priority" item through memoranda and training programs focusing on bankruptcy fraud. See Judith Benderson, *Bankruptcy Crime: Balancing the Scales*, AM. BANKR. INST. J., Aug. 1994, at 21, 21, 31. Some of these training programs have included several hundred Assistant U.S. Attorneys, Assistant U.S. Trustees, Federal Bureau of Investigation ("FBI") agents, and other federal investigators. See *id.* at 21. The training programs have increased the prosecution of bankruptcy fraud by facilitating the formation of bankruptcy fraud task forces and by raising the level of concern among government attorneys about bankruptcy fraud. See *id.* Other components of the Department of Justice, such as individual U.S. Attorneys' Offices and the FBI, have held their own bankruptcy fraud training. See *id.* at 31. Even newsletters sent to government attorneys nationwide have emphasized the importance of bankruptcy fraud by including numerous articles on the subject. See *id.* at 21, 31.

3. U.S. SENTENCING GUIDELINES MANUAL (1998-99) [hereinafter USSG].

4. See Gaumer, *supra* note 2, at 12. Under the Guidelines, the court determines a defendant's sentence based on a number of factors including the conduct underlying the charged offense (the "base offense") and any relevant adjustments ("any appropriate specific offense characteristics"). See USSG, *supra* note 3, § 1B1.1. A sentencing court must first select the Guidelines' base offense provision most applicable to the nature of the crime of conviction in order to determine a numerical value used to calculate the length of a defendant's sentence (the "base offense level"). See *id.* § 1B1.2 application note 1. In order to guide this determination, the Guidelines include a Statutory Index which provides a list of criminal offenses and the appropriate base offense provision or provisions. See *id.* Each of these provisions lists a base offense level for the particular offense. See *id.* ch. 2. These base offense levels may be subject to an upward ("enhancement") or downward ("reduction") adjustment depending on the applicability of specific offense characteristic provisions that describe aggravating or mitigating circumstances. See *id.* chs. 2-3. After the base offense level is established, the court determines the range of the defendant's sentence by comparing the base offense level to the Sentencing Table. See *id.* § 1B1.1(a)-(g), ch. 5, pt. A. Sentence reductions or enhancements may be appropriate based on specific offender characteristics or specified grounds for departure from the prescribed range. See *id.* § 1B1.1(i), ch. 5, pts. H & K.

5. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-86, 28 U.S.C. §§ 991-98, and scattered sections of 21 U.S.C. (1994)). Also known as Title II of the Comprehensive Crime Control Act, the Sentencing Reform Act requires the development of guidelines to further the goals of criminal punishment, namely, "deterrence, incapacitation, just punishment, and rehabilitation." USSG, *supra* note 3, ch. 1, pt. A(2). Under the Act, Congress has "delegate[d] broad authority to the [U.S. Sentencing] Commission to review and rationalize the federal sentencing process." *Id.* See generally Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 901 (1991) (discussing the purpose of the Guidelines).

6. See USSG, *supra* note 3, ch. 1, pt. A(3). Congress considered pre-Guidelines sentencing confusing and deceptive in that it required courts to impose indeterminate sentences that could be changed by parole commissions. See *id.* Pre-Guidelines sentencing also often

gress attempted to achieve honest sentencing by eliminating parole.⁷ In order to realize uniformity and proportionality, Congress created the United States Sentencing Commission ("Sentencing Commission") to devise a sentencing scheme that balances the tension between uniform and proportional sentencing.⁸

The Sentencing Commission has mandated that courts apply the Guidelines' provisions in a consistent manner in order to maintain this balance.⁹ Most courts agree that bankruptcy fraud should be sentenced under section 2F1.1, the Guidelines' base offense provision for fraud.¹⁰ Courts disagree, however, about the propriety of applying section 2F1.1(b)(4)(B), one of several enhancement provisions under section 2F1.1, to bankruptcy fraud.¹¹ Section 2F1.1(b)(4)(B) (the "process enhancement") allows a sentencing court to increase a defendant's sentence if the defendant violates "any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines."¹² The Sentencing Commission, however, failed to define the word "process" in the text of, or commentary to the Guidelines.¹³

According to *Black's Law Dictionary*, there are two potential definitions of "process."¹⁴ Defined narrowly, "process" means a legal instrument issued by the court and directed at the defendant to inform him of the institution of proceedings against him and to compel his

resulted in a "wide disparity in sentences imposed for similar criminal offenses committed by similar offenders," weakening sentencing uniformity and proportionality. *Id.*

7. *See id.*

8. *See id.* ch. 1, pt. A(2)-(3), at 1-2. This tension exists because, although the complexity and judicial discretion necessary in a proportional sentencing system undermines sentencing uniformity, the simplicity necessary for a uniform sentencing system impedes proportional sentencing. *See id.* ch. 1, pt. A(3), at 2-3.

9. *See id.* ch. 1, pt. A(2); *Stinson v. United States*, 508 U.S. 36, 38, 42 (1993) (stating that the Guidelines bind judges); *United States v. Harriott*, 976 F.2d 198, 203 (4th Cir. 1992) (stating that courts should apply the Guidelines as written).

10. *See, e.g., United States v. Cheek*, 69 F.3d 231, 233 (8th Cir. 1995) (applying section 2F1.1 to bankruptcy fraud); *United States v. Michalek*, 54 F.3d 325, 328 (7th Cir. 1995) (same); *United States v. Bellew*, 35 F.3d 518, 520 (11th Cir. 1994) (finding that "[c]rimes of fraud and deceit" such as bankruptcy fraud should be sentenced under section 2F1.1).

11. *Compare United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (upholding application of the enhancement to bankruptcy fraud), *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996) (same), *Michalek*, 54 F.3d at 332 (same), and *Bellew*, 35 F.3d at 521 (same), with *United States v. Shaddock*, 112 F.3d 523, 531 (1st Cir. 1997) (holding that the enhancement does not apply to bankruptcy fraud), and *United States v. Carrozzella*, 105 F.3d 796, 801 (2d Cir. 1997) (same). Note that the cases predating the 1998 amendments to the Federal Sentencing Guidelines refer to section 2F1.1(b)(3)(B). Under the amendments, this provision was stricken and reenacted as 2F1.1(b)(4)(B).

12. USSG, *supra* note 3, § 2F1.1(b)(4)(B) (emphasis added).

13. *See, e.g., Carrozzella*, 105 F.3d at 800 (discussing the possible definitions of "process"); *Welch*, 103 F.3d at 908 (same).

14. BLACK'S LAW DICTIONARY 1222 (7th ed. 1999).

appearance.¹⁵ Defined broadly, "process" constitutes the "proceedings in any action or prosecution."¹⁶

The different definitions of "process" affect the scope of the process enhancement. With the narrower definition of "process," the enhancement applies only to situations in which a defendant convicted of fraud has violated a formal legal instrument, such as a summons or an order issued by a court and directed specifically at the defendant.¹⁷ With the expansive definition, however, the process enhancement would apply to the more extensive range of misconduct known as abuse of process.¹⁸ Such conduct "includes any serious misuse of judicial or administrative proceedings intended to inflict unnecessary costs or delay on an adversary or to confer undeserved advantages on the actor."¹⁹

The Sentencing Commission's failure to define "process" has resulted in a controversy among several federal circuit courts over the meaning of the process enhancement and its applicability to bankruptcy fraud.²⁰ The majority of circuits have held that the word "process" should be read broadly and that the phrase "violation of judicial process" in the process enhancement should be interpreted as abuse of process (the "abuse of process argument").²¹ Thus, several courts have held that because bankruptcy fraud inherently involves abuse of process, it constitutes a violation of the process enhancement even when the defendant has not violated a specific judicial order, injunction, or decree.²²

15. See *id.* (defining process as "[a] summons or writ, esp. to appear or respond in court").

16. *Id.*

17. See *Carrozzella*, 105 F.3d at 800.

18. See BLACK'S LAW DICTIONARY, *supra* note 14, at 10 (defining "abuse of process" as the "improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope").

19. *Carrozzella*, 105 F.3d at 800. Filing baseless complaints of motions in court and submitting fraudulent filings to an administrative agency, for example, constitute abuses of process. See *id.*

20. See *supra* note 11.

21. See, e.g., *United States v. Kubick*, 199 F.3d 1051, 1060 (9th Cir. 1999) (upholding process enhancement for abuse of process); *United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998) (holding that "the term 'judicial process' as used in § 2F1.1(b)(3)(B) includes bankruptcy proceedings"); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) ("The district court's interpretation of judicial 'process' to embrace judicial proceedings . . . is more reasonable."); *United States v. Welch*, 103 F.3d 906, 907-08 (9th Cir. 1996); *United States v. Michalek*, 54 F.3d 325, 333 (7th Cir. 1995) (stating that including a defendant's abuse of the bankruptcy proceeding within the process enhancement "is consistent with the realities of bankruptcy practice").

22. See, e.g., *Guthrie*, 144 F.3d at 1010; *Michalek*, 54 F.3d at 332; *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991).

Other circuits have upheld enhancement of a bankruptcy fraud sentence under the process enhancement based on a different rationale: they rely on the defendant's violation of several bankruptcy rules and forms that mandate truthful and complete disclosure of assets and liabilities by debtors.²³ Although such rules and forms are not technically instruments issued by a court, several courts have analogized them to court or administrative orders or directives within the meaning of the process enhancement (the "analogy argument").²⁴ Under this interpretation, the process enhancement would apply to bankruptcy fraud even if the Sentencing Commission intended "process" to be read narrowly.²⁵

A third group of circuits, however, has held that bankruptcy fraud does not necessarily merit an adjustment pursuant to the process enhancement.²⁶ The First Circuit has rejected the analogy argument and held that the process enhancement pertains only to defendants who violate a formal legal instrument issued by the court, such as a summons or court order.²⁷ Moreover, by analyzing "process" only in its narrow sense, the First Circuit logically foreclosed the abuse of process argument.²⁸ The Second Circuit has explicitly rejected the abuse of process argument in dicta by indicating that in the context of the process enhancement, "process" should be read narrowly.²⁹ These courts

23. See, e.g., *United States v. Saacks*, 131 F.3d 540, 546 (5th Cir. 1997) ("[E]ven when the fraudulent debtor takes the very first act by filing his petition in bankruptcy, he is acting subsequently to the previously adopted and promulgated standing orders and standard forms."); *Michalek*, 54 F.3d at 333 (stating that bankruptcy fraud defendants act "in direct violation of the requirements of the rules and forms of the Bankruptcy Rules"); *United States v. Bellew*, 35 F.3d 518, 519-21 (11th Cir. 1994).

24. See *Saacks*, 131 F.3d at 546; *Michalek*, 54 F.3d at 333 (stating that the defendant falls under the process enhancement for fraudulently filing forms "in direct violation of the requirements of the rules and forms . . . to declare truthfully all assets and liabilities"); *Bellew*, 35 F.3d at 519-21 (stating that the defendant violated a "judicial order" by fraudulently filing forms that mandated truthful disclosure).

25. See, e.g., *Saacks*, 131 F.3d at 546 (analogizing the "standing orders and standard forms" of the bankruptcy court to court orders); *Michalek*, 54 F.3d at 333 (same).

26. See *United States v. Thayer*, 201 F.3d 214, 226-28 (3d Cir. 1999) (holding that the process enhancement should only be applied where a defendant violates a court order); *United States v. Rowe*, 144 F.3d 15, 23 (1st Cir. 1998) (stating that the district court, on remand, should specify the order that the defendant violated if it still deemed a process enhancement appropriate); see also *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997) (stating that the process enhancement does not seem to apply to abuse of process).

27. See *Rowe*, 144 F.3d at 23 (stressing that the district court needed to identify a specific order that the defendant violated before invoking the process enhancement); *United States v. Shaddock*, 112 F.3d 523, 529-30 (1st Cir. 1997) (same); see also *Thayer*, 201 F.3d at 228.

28. See, e.g., *Shaddock*, 112 F.3d at 529-30 (analyzing whether any bankruptcy forms constitute orders). The First Circuit explicitly declined to address the abuse of process argument in *Shaddock* because the district court had failed to reach this question and should be given the chance to address the issue on remand. See *id.* at 531.

29. See *Carrozzella*, 105 F.3d at 799-802 (stating that the process enhancement should be applied only where the defendant violates a specific court order or decree but failing to de-

have concluded that the process enhancement should only be invoked where a bankruptcy fraud defendant violates a judicial or administrative order or decree.³⁰

This Note argues that neither the abuse of process argument nor the analogy argument justifies applying the two-level process enhancement to bankruptcy fraud. Rather, sentences should only be enhanced under this provision when defendants violate legal instruments issued by courts or administrative agencies, such as orders or decrees. Part I explains why the abuse of process argument fails to justify applying the process enhancement to bankruptcy fraud. Part II discusses why the analogy argument also does not justify enhancing the sentence of a defendant convicted of bankruptcy fraud under the process enhancement. Part III contends that allowing courts to apply the process enhancement to bankruptcy fraud regardless of whether the defendant violated an order and based solely on a desire for proportionate sentencing undermines the policy of the Guidelines. Part IV argues that courts that wish to punish a bankruptcy fraud defendant's abuse of process should sentence bankruptcy fraud under section 2J1.3, the Guidelines' base offense provision for perjury, instead of under section 2F1.1. This Note concludes that sentencing bankruptcy fraud defendants under section 2J1.3, as opposed to adopting a broad definition of "process" in section 2F1.1(b)(4)(B) or applying the provision by analogy, would best fulfill the Sentencing Commission's goals of uniform and proportional sentencing.

I. THE ABUSE OF PROCESS ARGUMENT FOR APPLYING SECTION 2F1.1(b)(4)(B) TO BANKRUPTCY FRAUD

A majority of the circuits that have examined the application of the process enhancement to bankruptcy fraud have read the word "process" broadly and interpreted the phrase "violation of process" to mean abuse of process.³¹ These courts have held that reading "process" in the process enhancement broadly to include submitting a false

cide the issue because the defendant's conduct was more appropriately punished under the enhancement provision for abusing a position of trust). The Third Circuit has also rejected the abuse of process argument. See *Thayer*, 201 F.3d at 227-28.

30. See *supra* notes 26-29.

31. See, e.g., *United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998) (holding judicial process to include bankruptcy proceedings); *United States v. Webster*, 125 F.3d 1024, 1036 (7th Cir. 1997) ("[T]he knowing concealment of assets . . . constitutes a violation of a judicial process . . ."); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (holding the district court's interpretation of judicial process which included judicial proceedings to be more reasonable than limiting the term to judicial instruments, such as subpoenas); *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996) (stating that the process enhancement applies to violations of bankruptcy proceedings); *United States v. Michalek*, 54 F.3d 325, 333 (7th Cir. 1995) (holding violation of process to mean abuse of process); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991).

bankruptcy petition is more reasonable than reading "process" narrowly.³² They have reached this conclusion, however, with little or no analysis of the text of, or commentary to the process enhancement.³³

This Part analyzes the abuse of process argument as a basis for applying the process enhancement to bankruptcy fraud. Section I.A discusses why the text of the process enhancement would favor reading "process" narrowly rather than broadly. Section I.B argues that the commentary to the process enhancement contradicts the inference that the Sentencing Commission intended "violation of any judicial . . . process" to mean abuse of process. This Part concludes that both the text of and the commentary to the process enhancement support the position that the Sentencing Commission intended the process enhancement to be applied only to misconduct in contravention of a court or administrative order or decree.

A. *The Text of Section 2F1.1(b)(4)(B)*

An analysis of the text of the process enhancement demonstrates several flaws in the majority's logic. First, the use of "violation" in the phrase "violation of any judicial or administrative . . . process" indicates that process should be read narrowly. The word "violation" "strongly suggests the existence of a command or warning followed by disobedience."³⁴ Courts, for example, commonly describe conduct in contravention of a preexisting court order as a violation.³⁵

By contrast, the conduct that courts characterize as an abuse of process focuses more on the misuse of the power and time of the court rather than a violation of a particular rule.³⁶ The court in *United States*

32. See *Guthrie*, 144 F.3d at 1010; *Messner*, 107 F.3d at 1457; *Michalek*, 54 F.3d at 332-33; *Lloyd*, 947 F.2d at 340.

33. See *infra* note 47.

34. *Carrozzella*, 105 F.3d at 800; see also *United States v. Linville*, 10 F.3d 630, 633 (9th Cir. 1993) (stating that although "[e]veryone is presumed to know the law," the Sentencing Commission intended the enhancement to apply to criminals with "the aggravated mental state that can be found when a special law in the form of a formal order, injunction or decree is violated").

35. See, e.g., *Public Serv. Co. v. Patch*, No. 99-1754, 2000 WL 39123, at *1 (1st Cir. Jan. 24, 2000) (stating that the state "violated bankruptcy court orders"); *United States v. Deutsch*, 987 F.2d 878, 885 (2d Cir. 1993) (stating that "Deutsch had held himself out as an attorney in violation of a judicial order"); *In re Howe*, 800 F.2d 1251, 1252 (4th Cir. 1986) (stating that a court may issue sanctions to limit "violations of the judicial process" such as discovery orders).

36. See, e.g., *Washington v. DEA*, 183 F.3d 868, 875 (8th Cir. 1999) (stating that "[t]he essence of a claim for abuse of process is the use of process for some collateral purpose" (internal quotation marks omitted)); *Meyer v. Conlon*, 162 F.3d 1264, 1274 (10th Cir. 1998) (listing an ulterior purpose and the willful, improper use of the process as the essential elements of abuse of process); *Lunsford v. American Guarantee & Liab. Ins. Co.*, 18 F.3d 653, 655 (9th Cir. 1994) (defining abuse of process similarly); *Stegall v. Great Am. Ins. Co.*, 996 F. Supp. 1060, 1070 (D. Kan. 1998) (stating that "[t]he gist of [abuse of process] is the misuse or misapplication of process, justified in itself, for an end other than that which it was designed

v. Lloyd, for example, held that the defendant abused the bankruptcy court process because he "sought protection from his creditors under the shelter of bankruptcy . . . and [then] hindered the orderly administration of the bankruptcy estate," not because he violated any particular rule or form.³⁷ Other examples of abuses of process include use of pleadings to coerce payment of a debt or surrender of property unrelated to the litigation, unreasonable use of force or excessive attachment to enforce a right of action, use of process to gain a collateral advantage extraneous to the merits, and improper use of a subpoena.³⁸ Thus, disrupting "process" in its broad sense would be more appropriately described as an abuse rather than a violation.

Reading "process" in the process enhancement broadly would also contravene the restrictive language in the process enhancement that indicates that the provision only covers violations of process "not addressed elsewhere in the guidelines."³⁹ Section 3C1.1 provides an enhancement for obstruction of justice, including the submission of false documents to a court.⁴⁰ Many courts have applied section 3C1.1 to enhance the sentences of defendants who have submitted false documents in the context of a formal hearing.⁴¹ Bankruptcy fraud involves

to accomplish"); BLACK'S LAW DICTIONARY, *supra* note 14, at 10 (defining "abuse of process").

37. 947 F.2d 339, 340 (8th Cir. 1991). In fact, the court specifically stated that "Lloyd did not violate a specific judicial order, injunction, or decree." *Id.*

38. See *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 114 (2d Cir. 1996); see also *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314 (1978) (using a court's summons power for an improper purpose); *Washington*, 183 F.3d at 875 (using process for some collateral purpose constitutes abuse of process); *Podolsky v. Alma Energy Corp.*, 143 F.3d 364, 372 (7th Cir. 1998) (stating that under Illinois law a claim for abuse of process requires an ulterior purpose and "some act in the use of legal process not proper in the regular prosecution of the proceedings"); *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) (making "misrepresentations . . . in the adjudicatory process" and pursuing "a pattern of baseless, repetitive claims" (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972))), *aff'd*, 508 U.S. 49; *In re Spectee Group, Inc.*, 185 B.R. 146, 155 (Bankr. S.D.N.Y. 1995) (bad faith filing of a bankruptcy petition for the sole purposes of delaying payment to its creditors).

39. USSG, *supra* note 3, § 2F1.1(b)(4)(B). The commentary to section 2F1.1 reiterates that the process enhancement provision "does not apply to conduct addressed elsewhere in the guidelines." *Id.* § 2F1.1 application note 6.

40. See *id.* § 3C1.1 (providing an enhancement where "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense"). Application notes 4(c) and 4(f) to section 3C1.1 state that the provision applies to "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding" and to "providing materially false information to a judge or magistrate." *Id.* § 3C1.1 application notes 4(c) & 4(f). But see *Lloyd*, 947 F.2d at 340 (stating that section 3C1.1 should be used only for "obstructive conduct that occurs 'during the investigation, prosecution, or sentencing of the [charged] offense'" (citing USSG, *supra* note 3, § 3C1.1) (alteration in original)).

41. See, e.g., *United States v. Luca*, 183 F.3d 1018, 1022-23 (9th Cir. 1999) (upholding enhancement for willfully submitting false or misleading documents in response to an investigative subpoena); *United States v. Case*, 180 F.3d 464, 466-67 (2d Cir. 1999) (upholding

an analogous abuse of process.⁴² Since reading "process" in the process enhancement broadly would make section 3C1.1 redundant, courts should interpret "process" narrowly. Moreover, where possible, statutes should be read in a way to minimize the overlap between different provisions.⁴³

Finally, if the Sentencing Commission had meant to include abuse of process as a ground for enhancement, they would have used language consistent with this intent. Congress, for example, regularly uses the term "abuse of process" in its statutes.⁴⁴ Although the Sentencing Commission does not use the term "abuse of process" in the Guidelines, it does use terms analogous to "abuse of process."⁴⁵ Therefore, the use of the phrase "violation of process" by the Sentencing Commission favors reading "process" narrowly.⁴⁶

B. *The Commentary to Section 2F1.1(b)(4)(B)*

The commentary to the process enhancement, which consists of application notes and background, also indicates that the Sentencing Commission did not intend the process enhancement as a catchall provision to punish abuse of process.⁴⁷ Commentary provides impor-

enhancement for submitting false Internal Revenue Service forms to a court); *United States v. Williams*, Nos. 95-50402 & 95-50413, 1996 WL 506190, at *2 (9th Cir. Sept. 4, 1996) (upholding enhancement for producing false documents in a grand jury investigation); *Lloyd*, 947 F.2d at 340 (stating that "Lloyd did violate a judicial process by fraudulently concealing assets from bankruptcy court officers").

42. See, e.g., *United States v. McIntosh*, 124 F.3d 1330, 1332-33 (10th Cir. 1997) (indicating that the defendant's "alleged omissions from the schedules and reports required in connection with [the chapter 11] petition formed the basis" of the bankruptcy fraud charge); *Lloyd*, 947 F.2d at 340 (stating that "Lloyd did violate a judicial process by fraudulently concealing assets from bankruptcy court officers").

43. See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (stating that "[o]ur cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment").

44. See, e.g., 11 U.S.C. § 105(a) (1994) (using "abuse of process"); 18 U.S.C. § 1505 (using "obstruction of proceedings"); 19 U.S.C. § 1337(c) (using "abuse of process"); 28 U.S.C. § 1605(a)(5)(B) (same).

45. See, e.g., USSG, *supra* note 3, § 3C1.1 (applying to obstruction of justice); *id.* § 2J1.2 (same); see also *id.* § 2J1.2 background (using "obstructing a civil or administrative proceeding"); *id.* § 3C1.1 application note 4(c) (listing "producing or attempting to produce a false, altered, or counterfeit document or record during [a] . . . judicial proceeding" as an obstruction of justice); *id.* application note 4(f) (listing "providing materially false information to a judge or magistrate").

46. See *United States v. Shaddock*, 112 F.3d 523, 530 (1st Cir. 1997) (citing the background commentary to the process enhancement provision); see also *United States v. Carrozzella*, 105 F.3d 796, 799-801 (2d Cir. 1997) (noting that while the section adjusts the offense level based on a violation of judicial process, "abuse" of process seems to have crept into the lexicon of the process enhancement through the case law of other circuits).

47. Most courts that have held that section 2F1.1(b)(4)(B) applies to bankruptcy fraud have not examined the background or application notes to the provision. See, e.g., *United States v. Guthrie*, 144 F.3d 1006, 1010 (6th Cir. 1998) (electing to follow the majority position

tant guidance in interpreting the Guidelines' provisions.⁴⁸ The Supreme Court has held that commentary "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation' " and that even unambiguous provisions should be applied in light of commentary.⁴⁹ Unfortunately, many of the courts that have held that section 2F1.1(b)(4)(B) applies to bankruptcy fraud have not examined the background or application notes to the provision.⁵⁰

Application notes constitute one type of commentary.⁵¹ The application notes to the process enhancement indicate that it should be used to increase the sentences of defendants who commit fraud that violates a preexisting legal instrument proscribing the misconduct.⁵² Application note 6 states that courts should apply the process enhancement "[i]f it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order."⁵³ As an illustration, the application note refers to "a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product," as an individual whose sentence should be enhanced under this provision.⁵⁴ This example reinforces the conclusion that the process enhancement should

because it found the reasoning of these courts to be persuasive); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (finding the more reasonable interpretation of judicial process to include judicial proceedings despite acknowledging that "a textual argument may be made that the term 'process' refers only to 'a specific judicial mechanism such as a subpoena or summons' "); *United States v. Michalek*, 54 F.3d 325, 332-33 (7th Cir. 1995) (making no mention of commentary except in reference to a variety of frauds covered by the fraud provision); *Lloyd*, 947 F.2d at 340 (finding a violation of judicial process by fraudulent concealment of assets from bankruptcy court officers but making no mention of the commentary). One court has also suggested that because *Black's Law Dictionary* defines an "order" as a mandate and the bankruptcy rules mandate truthful disclosure, violating these rules constitutes a violation of an order. See *United States v. Bellew*, 35 F.3d 518, 521 (11th Cir. 1994). The few courts that have mentioned the commentary do so only in passing, and with only a cursory analysis of its content. See, e.g., *United States v. Saacks*, 131 F.3d 540, 544-46 (5th Cir. 1997) (holding against the defendant without analyzing the defendant's argument based on the commentary).

48. See, e.g., 18 U.S.C. § 3553(b) (1994) (stating that "[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission"); USSG, *supra* note 3, § 1B1.7 (stating that commentary "may interpret the guideline or explain how it is to be applied[.] . . . may suggest circumstances which may warrant departure . . . [and] may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline").

49. *Stinson v. United States*, 508 U.S. 36, 38, 44-45 (1993).

50. See *supra* note 47.

51. See, e.g., USSG, *supra* note 3, § 2F1.1.

52. See *id.* application note 6.

53. *Id.*

54. *Id.*

be used only if the defendant has acted in contravention of an administrative or court decree or order.⁵⁵

Moreover, the absence of any other examples or discussion in the application notes regarding when courts should apply the process enhancement bolsters the conclusion that the Sentencing Commission meant to limit application of the provisions to situations in which a defendant has violated a court or administrative order or decree.⁵⁶ If the Commission had intended the provision to cover abuse of process, it would have incorporated examples in the commentary indicative of this intent.⁵⁷ The failure of the Sentencing Commission to include such examples in the application notes to the process enhancement suggests that it did not intend abuse of process to fall within the purview of this provision.⁵⁸

In addition, where the Sentencing Commission intends the application notes to provide an illustrative but nonbinding interpretation of a provision, it usually expresses this intent explicitly.⁵⁹ The application notes to section 3C1.1, for example, repeatedly indicate that the enumerated examples should not be considered exhaustive.⁶⁰ By contrast, the application note to the process enhancement does not contain any such qualification.⁶¹ The Sentencing Commission's inclusion of discussion related only to violations of court orders or decrees in the application notes to the process enhancement indicates that it intended for courts to apply the provision only when a defendant violates an order or decree.⁶²

55. *See id.* The November 1, 1993 amendment to application note 6 also supports this conclusion. The amendment states that "[t]his subsection does not apply to conduct addressed elsewhere in the Guidelines; e.g., a violation of a condition of release or a violation of probation." *Id.* § 2F1.1, 1993 amendments (reference omitted). That the Sentencing Commission chose as examples two provisions related to violations of legal instruments issued by courts, as opposed to provisions punishing abuses of process, suggests that the Commission had legal instruments in mind when it used the word "process" in this context.

56. *See generally id.* § 2F1.1 application notes, background (giving only example and discussion that would support the narrow reading of "process").

57. The Sentencing Commission has explicitly used language analogous to abuse of process in other parts of the Guidelines. *See supra* note 45.

58. *See USSG, supra* note 3, § 1B1.7.

59. *See, e.g., id.* § 3E1.1 application note 1 (indicating that the list includes appropriate but not exclusive factors to be considered by the court in determining whether to apply the provision); *id.* § 2F1.1 application note 5 (listing "[e]xamples of conduct to which this factor applies" in order to demonstrate the scope of section 2F1.1(b)(4)(A)); *id.* § 2G2.1 application note 2 (indicating that enumerated entities should be considered examples of parties subject to this enhancement).

60. *See id.* § 3C1.1 application note 3 (stating that application notes 4 and 5 only set forth examples); *id.* application note 4 (stating that application note 4 sets out a "non-exhaustive list of examples").

61. *See id.* § 2F1.1 application note 6.

62. *See id.* § 1B1.7 (stating that "commentary . . . may interpret the guideline or explain how it is to be applied").

A second type of commentary is the background, which also provides important guidance in interpreting the Guidelines' provisions.⁶³ The background to the process enhancement buttresses the conclusion that the Sentencing Commission intended courts to apply this provision only where a defendant violates a formal legal instrument issued by a court. The Sentencing Commission indicated in the background to section 2F1.1 that it included the process enhancement specifically to deter recidivist criminal misconduct, particularly in situations where courts have previously disciplined the defendant.⁶⁴ Thus, the background to the process enhancement also supports the use of this provision to punish defendants who have violated a court order, and not simply to punish defendants for abuse of process.

Further evidence of the Sentencing Commission's intent can be found in its narrow use of "process" in similar contexts in the commentary. The commentary, for example, speaks of "judicial process or orders issued by federal, state, or local administrative agencies."⁶⁵ Moreover, the placement of "process" in section 2F1.1(b)(4)(B) at the end of an enumeration that includes only specific types of judicial instruments issued after a formal proceeding reinforces the conclusion that "process" should be read to include only judicial instruments similar to "orders," "injunctions," or "decrees."⁶⁶ Of course, the Sentencing Commission might have intended "process" as a catchall term,

63. See, e.g., *id.* (stating that commentary may be used to interpret a "guideline or explain how it is to be applied" and "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline" (emphasis added)); 18 U.S.C. § 3553(b) (1994) (stating that "[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission").

64. See USSG, *supra* note 3, § 2F1.1 background (stating that "[a] defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment").

65. *Id.*; see also *id.* § 5D1.3(c)(4) (stating that the defendant should comply with "the terms of any court order or administrative process"). But see USSG, *supra* note 3, § 2F1.1 background (stating that "[d]iplomatic processes often must be used to secure testimony and evidence").

66. The canons *ejusdem generis* and *noscitur a sociis* indicate that, absent language or commentary to the contrary, the specific enumeration in section 2F1.1(b)(4)(B) restricts the meaning of process. "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). The canon *noscitur a sociis* holds that the meaning of a word in a series is affected by other words in the same series. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 694 (1995). Statutes commonly use "process" as a catchall term for legal instruments issued by a court in the context of a proceeding. See, e.g., 11 U.S.C. § 105(a) (1994) (discussing a court-issued "order, process, or judgment"); 15 U.S.C. § 260a(c) (discussing judicial action "by writ of injunction or by other process, mandatory or otherwise, restraining against further violations"); 16 U.S.C. § 1540(e)(2) (stating that courts may "issue such warrants or other process as may be required for enforcement").

making the broader definition of "process" more reasonable.⁶⁷ The similarity of the instruments enumerated on the list, however, supports the conclusion that even a catchall term should be limited by the common characteristics of the instruments mentioned by the Sentencing Commission.⁶⁸

In sum, the Sentencing Commission's use of "process" in the process enhancement reflects its intent to define the term narrowly.⁶⁹ Moreover, the commentary to the process enhancement discusses "process" exclusively in its narrow sense.⁷⁰ As such, courts should apply the process enhancement only when a defendant violates an order, injunction, decree, or a process issued by the court, such as a summons or mandate, not when a defendant engages in any conduct that can be described as abuse of process.

II. THE ANALOGY ARGUMENT FOR APPLYING SECTION 2F1.1(b)(4)(B) TO BANKRUPTCY FRAUD

Several federal courts have relied on the analogy argument as a justification for enhancing the sentences of bankruptcy fraud defendants under the process enhancement.⁷¹ They have concluded that a defendant who commits bankruptcy fraud falls under the judicial process language of the process enhancement, not because he has violated a court order, but because he has committed acts analogous to violating a court order or decree.⁷² These courts have equated several bankruptcy rules and forms that mandate truthful and complete disclosure of assets and liabilities by debtors to court orders or decrees.⁷³ Thus, although concealment of assets in a bankruptcy proceeding does not literally violate a court order or decree, several courts have held such

67. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996) (reading term broadly as a catchall term because it seems consistent with legislative intent).

68. See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (stating that a catchall provision should be interpreted as "bringing within a statute categories similar in type to those specifically enumerated"). See also *infra* notes 91-97 and accompanying text for a discussion of the similarities among orders, injunctions, and decrees.

69. See, e.g., *International Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (reading a statutory provision narrowly, in part because of the restrictive language in the provision); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (same).

70. See, e.g., *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997) (indicating that the provision should be read narrowly).

71. See *supra* notes 23-24 and accompanying text.

72. See *id.*; *United States v. Bellew*, 35 F.3d 518, 519-21 (11th Cir. 1994).

73. See, e.g., *Bellew*, 35 F.3d at 520-21 (analogizing bankruptcy forms and rules to a court order); see also Official Bankr. Form 1, 11 U.S.C.A. (West Supp. 1999) (requiring disclosure under penalty of perjury); Official Bankr. Form 6, 11 U.S.C.A. (West Supp. 1999) (same); Bankr. Rule 9011(b), 11 U.S.C.A. (West Supp. 1999) (mandating good faith submission of the forms).

incomplete disclosure to be tantamount to violating a judicial process within the meaning of the process enhancement.⁷⁴

This Part analyzes the analogy argument for applying the process enhancement to bankruptcy fraud. Section II.A discusses why neither the text of nor the commentary to the process enhancement indicates that the Sentencing Commission intended that courts should have the discretion to apply it by analogy. Section II.B argues that courts should not apply the process enhancement to bankruptcy fraud because fraudulent filing of bankruptcy disclosure forms does not manifest the necessary aggravated criminal intent to apply the process enhancement. Section II.C contends that applying the process enhancement to bankruptcy fraud constitutes impermissible double counting. This Part concludes that the analogy argument is an insufficient justification for applying the process enhancement to bankruptcy fraud.

A. *The Text of and Commentary to Section 2F1.1(b)(4)(B)*

The Sentencing Commission created the sentencing framework of the Guidelines to reduce judicial discretion and idiosyncratic sentencing decisions.⁷⁵ As such, the Guidelines should generally be applied as written.⁷⁶ This Section argues that courts should not apply the process enhancement by analogy because neither the text of nor the commentary to the process enhancement manifests an intent to allow judicial discretion to do so.

The process enhancement contains no language that manifests any intention of conferring discretion on courts to apply the provision to misconduct analogous to violations of judicial orders or decrees.⁷⁷ The absence of an open-ended invitation for judicial discretion in the commentary to the process enhancement favors a narrower construction of the provision. The Sentencing Commission, for example, could

74. See *Bellew*, 35 F.3d at 519-21. The Tenth Circuit in *Michalek*, when faced with a similar fact pattern, also held that a defendant's submission of bankruptcy forms with fraudulent information violated bankruptcy rules requiring full and complete disclosure. See *United States v. Michalek*, 54 F.3d 325, 333 (7th Cir. 1995).

75. See USSG, *supra* note 3, ch. 1, pt. A(3) (stating that broad discretion results in courts "exercis[ing] their discretionary powers in different ways" and causes "the wide disparity that Congress established the Commission to reduce").

76. See *id.* ch. 1, pt. A(1) (stating that the Sentencing Commission promulgated "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes"); *id.* ch. 1, pt. A(2) (stating that "sentencing court[s] must select a sentence from within the guideline range" except in atypical cases); see also *supra* note 9.

77. Compare, e.g., USSG, *supra* note 3, § 2X5.1 ("If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline."); *id.* § 2M1.1(a)(2) (directing courts to apply "the offense level applicable to the most analogous offense"); *id.* § 2K1.4(c)(1) ("If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A . . ."); *id.* § 2J1.1 (referencing section 2X5.1).

have enunciated a wider range of relevant circumstances where courts should apply the process enhancement or could have used broader language in the text of the provision.⁷⁸ Moreover, even if similar to court orders, preexisting disclosure forms should not be read into the language of the process enhancement because the section specifically lists several types of legal documents but omits general disclosure forms.⁷⁹

In fact, where the Sentencing Commission intends to give sentencing courts discretion to apply a provision by analogy, the commentary typically reflects this intent.⁸⁰ The commentary to section 3C1.1, for example, states that “[o]bstructive conduct can vary widely in nature, degree of planning, and seriousness” and offers examples to “assist the court in determining whether application of this adjustment is warranted in a particular case.”⁸¹ Where the text and commentary do not indicate that the Sentencing Commission intended to allow a provision to be applied by analogy, sentencing courts should apply the Guidelines as written.

B. *Aggravated Criminal Intent in the Context of Section 2F1.1(b)(4)(B)*

The commentary to the process enhancement indicates that the Sentencing Commission intended courts to apply the process enhancement only where a defendant engages in “fraudulent conduct [that] demonstrates aggravated criminal intent.”⁸² Aggravated criminal intent describes a *mens rea* beyond simply knowing disobedience

78. See *United States v. Carrozzella*, 105 F.3d 796, 779-800 (2d Cir. 1997); cf. *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (analyzing the definition of “enterprise” based on its context).

79. See *Dugan v. Smerwick Sewerage Co.*, No. CIV.A.95-C3223, 1996 WL 535306, at *5 (N.D. Ill. Sept. 18, 1996) (stating that the canon *expressio unius est exclusio alterius* means “when specific items are listed without any more general or inclusive terms, other items, although similar in kind are excluded”).

80. See, e.g., USSG, *supra* note 3, § 2E1.1 application note 2 (stating that “the offense level corresponding to the most analogous federal offense is to be used”); *id.* § 2K2.1 application note 14 (stating that “if death results” courts should sentence the defendant “under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide)”; *id.* § 2M1.1 background (stating that “[t]he guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous offense guideline in lesser cases”).

81. *Id.* § 3C1.1 application note 3 (referring to examples laid out in application notes 4 and 5).

82. *Id.* § 2F1.1 background; see, e.g., *United States v. Shadduck*, 112 F.3d 523, 530 (1st Cir. 1997) (stating that the commentary indicates that “the enhancement was meant to apply to defendants who have demonstrated a heightened mens rea”); *United States v. Linville*, 10 F.3d 630, 633 (9th Cir. 1993) (citing the commentary for the proposition that the process enhancement was intended as an “extra” penalty for crimes of “aggravated criminal intent”).

of the law.⁸³ It describes the mindset of a defendant who "commits a fraud in contravention of "judicial process or orders issued by federal, state, or local administrative agencies."⁸⁴ Courts that have applied the process enhancement to bankruptcy fraud have attempted to infer aggravated criminal intent from the serious ramifications of the crime.⁸⁵ These courts have equated the "standing orders and standard forms" of the bankruptcy court that require "complete and truthful disclosure" with court orders.⁸⁶ This Section argues that fraudulent filing of bankruptcy forms does not demonstrate aggravated criminal intent.

Bankruptcy fraud does not inherently involve aggravated criminal intent.⁸⁷ Violation of a court order, injunction, or decree does not constitute an element of bankruptcy fraud.⁸⁸ An individual need only make a knowingly false statement about a material fact made under penalty of perjury and in the course of a bankruptcy proceeding.⁸⁹

Moreover, the criminal culpability of falsely filing bankruptcy disclosure forms falls short of the culpability inherent in the violation of court orders, injunctions, or decrees.⁹⁰ Judges issue orders and decrees

83. See *id.*; see also *United States v. Gunderson*, 55 F.3d 1328, 1333 (7th Cir. 1995) (stating that the enhancement applies to a defendant who has had a previous warning); *Linville*, 10 F.3d 630, 633 (9th Cir. 1993) (stating that the enhancement should be limited to defendants who violate a preexisting order or decree).

84. USSG, *supra* note 3, § 2F1.1 background; see also *Shadduck*, 112 F.3d at 529 (stating that a defendant demonstrates aggravated criminal intent by "violating a prior order specifically enjoining the defendant . . . from engaging in the fraudulent conduct" (emphasis removed)); *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997) (stating that application of the process enhancement is limited to situations in which defendants "commit their fraud in the face of some type of official warning or order directed specifically to them"); *Linville*, 10 F.3d at 633 (finding aggravated criminal intent where the defendant violates a "special law in the form of a formal order, injunction or decree").

85. See, e.g., *United States v. Kubick*, 199 F.3d 1051, 1062 (9th Cir. 1999) (stating that the defendant demonstrated "aggravated criminal intent" because his "abuse of the bankruptcy process [made him] more culpable" (alteration in original) (internal quotation marks omitted)); *United States v. Michalek*, 54 F.3d 325, 331-32 (7th Cir. 1995) (stating that such violations "involve a higher level of culpability" because of the serious ramifications of bankruptcy fraud).

86. *United States v. Saacks*, 131 F.3d 540, 546 (5th Cir. 1997); see also *Michalek*, 54 F.3d at 333; *United States v. Bellew*, 35 F.3d 518, 520 (11th Cir. 1994).

87. See *Shadduck*, 112 F.3d at 530 (stating that not all bankruptcy fraud cases involve aggravated criminal intent); *Carrozzella*, 105 F.3d at 800 (stating that bankruptcy fraud defendants who are trustees do not demonstrate aggravated criminal intent because the "command" they violate is "not specifically directed" at them).

88. See, e.g., *Clymer v. United States*, No. 95-55941, 1996 WL 393510, at *1 (9th Cir. July 9, 1996) (listing the elements of bankruptcy fraud as "(1) the existence of bankruptcy proceedings; (2) that the defendant made a statement in the bankruptcy proceeding under penalty of perjury; (3) that the statement was false; (4) that the statement pertained to a material fact; and (5) that the statement was knowingly and fraudulently made" (citing 18 U.S.C. § 152)).

89. See 18 U.S.C.A. § 152 (West Supp. 1999); 18 U.S.C. § 157 (1994); see also *Clymer*, 1996 WL 393510, at *1 (listing elements of bankruptcy fraud).

90. See, e.g., *United States v. Thayer*, 201 F.3d 214, 228 (3d Cir. 1999) ("Bankruptcy Rules and Forms have more in common with statutes and procedural rules of general appli-

in the context of formal adversarial hearings that parties are compelled to attend.⁹¹ Orders or decrees are directed at specific parties and dictate compliance without the parties' consent.⁹² Courts use these formalities to convey the gravity of orders and decrees.⁹³ Furthermore, where the defendant's offense violates a court order or decree, a court has often already determined that the defendant has engaged in some illegal conduct.⁹⁴ In fact, many courts have interpreted the process enhancement to apply only where defendants receive prior notice.⁹⁵ At a minimum, the order "indicate[s] in specific terms what [the named] parties are required to do."⁹⁶ Thus, violating an order in this context demonstrates aggravated criminal intent because it involves not just illegal conduct, but illegal conduct that a court has specifically forbidden a party from undertaking.⁹⁷

The fraudulent filing of generalized disclosure forms lacks many of the characteristics that make violating a court order or decree a crime

cation than with orders of the court . . ."); *Shadduck*, 112 F.3d at 529-30 (lack of specificity of the bankruptcy court's disclosure requirements prevent finding of aggravated intent for violation of such existing rules); *Carrozzella*, 105 F.3d at 800 (full disclosure requirement not specifically directed at the defendant); *United States v. Gunderson*, 55 F.3d 1328, 1333 (7th Cir. 1995) (upholding enhancement where defendant violates a "court-directed course of conduct" rather than "general laws against fraudulent conduct").

91. See *United States v. Gist*, 79 F.3d 52, 53-54 (7th Cir. 1996); *United States v. Linville*, 10 F.3d 630, 632-33 (9th Cir. 1993).

92. See *Thayer*, 201 F.3d at 228; *Shadduck*, 112 F.3d at 529; *Gist*, 79 F.3d at 53-54; *Linville*, 10 F.3d at 632-33; see, e.g., Official Bankr. Form 12, 11 U.S.C.A. (West Supp. 1999) ("Order and Notice for Hearing on Disclosure Statement"); Official Bankr. Form 13, 11 U.S.C.A. (West Supp. 1999) ("Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof").

93. See *Linville*, 10 F.3d at 632-33 (discussing the importance of the formalities surrounding the issuance of orders, injunctions and decrees in conveying the gravity of the prohibition).

94. See, e.g., *United States v. Burke*, 125 F.3d 401, 404-05 (7th Cir. 1997) (stating that the defendant had sold fraudulent promissory notes in violation of a consent decree); *Gunderson*, 55 F.3d at 1333 (noting that the defendant had violated a court order proscribing his conduct); *United States v. Deutsch*, 987 F.2d 878, 885 (2d Cir. 1993) (stating that the defendant had held himself out as an attorney in violation of a court order that had been issued by a judge in the course of an earlier criminal trial of the defendant).

95. See *Carrozzella*, 105 F.3d at 800 (interpreting the enhancement to apply only to those defendants who act in contravention of an existing order); *Gunderson*, 55 F.3d at 1333 (noting the importance of the defendant's having a previous warning); see also USSG, *supra* note 3, § 2F1.1 background (stating that "[a] defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent" because he has "not conform[ed] with the requirements of judicial process or orders").

96. *Thayer*, 201 F.3d at 228; see also *United States v. Mohammad*, 53 F.3d 1426, 1437 (7th Cir. 1995) (stating that the court had ordered the defendant not to sell assets).

97. See *Burke*, 125 F.3d at 405 (stating that the defendant had not only sold fraudulent securities but had also committed the separate offense of doing so in contravention of a consent decree); *Gunderson*, 55 F.3d at 1333 (stating that a defendant shows aggravated criminal intent where he "defies a specific court-directed course of conduct").

of aggravated criminal intent.⁹⁸ In most cases, parties voluntarily complete bankruptcy disclosure forms and voluntarily file them with the court.⁹⁹ The disclosure forms consist of generic documents with generalized warnings given to all individuals filing for bankruptcy.¹⁰⁰ Such forms generally do not emanate from a formal hearing where the court has compelled the attendance of the party seeking to file bankruptcy.¹⁰¹ Moreover, the bankruptcy rules and forms do not "indicate in specific terms what . . . parties are required to do."¹⁰²

The bankruptcy disclosure forms do require the filer to sign a declaration under penalty of perjury as to the truthfulness of the matters within the petition.¹⁰³ Such a declaration, standing alone, however, does not provide these documents with the gravity of court orders in this context because it involves neither the formalities surrounding the issuance of a court order or decree, nor a specific command from the court not to engage in a particular course of conduct.¹⁰⁴ The declaration and signature simply create and inform the declarant of a legal obligation.¹⁰⁵ Thus, courts have not applied the process enhancement to the fraudulent filing of generalized forms such as tax returns and employment-eligibility verification forms that require a similar decla-

98. See, e.g., *Linville*, 10 F.3d at 632-33 (holding that defendant's violation of USDA letters and notice warning her to cease her violation did not merit the process enhancement because they did not involve formalities analogous to those used by the court in issuing a court order); *United States v. Scarano*, 975 F.2d 580, 583 (9th Cir. 1992) (holding that generalized bail conditions do not constitute judicial orders within the meaning of the process enhancement).

99. See 11 U.S.C. § 301 (1994) (indicating that bankruptcy proceedings commence when the debtor voluntarily files a petition with the bankruptcy court).

100. Form Number 1, which a petitioner must file in order to initiate the proceedings, contains language that the named petitioner "declare[s] under penalty of perjury that the information provided in th[e] petition is true and correct." Official Bankr. Form 1, 11 U.S.C.A. (West Supp. 1999). Form Number 6, a separate schedule of assets and liabilities, similarly requires complete disclosure, "under [p]enalty of [p]erjury." Official Bankr. Form 6, 11 U.S.C.A. (West Supp. 1999). Such forms require the signature of the petitioner as an affirmation that the party has made inquiry to the best of its ability and has complied in good faith. See Bankr. Rule 9011(a), 11 U.S.C.A. (West Supp. 1999).

101. See 11 U.S.C. § 301 (1994). Although bankruptcy proceedings may also be initiated involuntarily, most of the published cases discussing the application of section 2F1.1(b)(4)(B) to bankruptcy fraud involve involuntary bankruptcy proceedings. See, e.g., *United States v. Michalek*, 54 F.3d 325, 327 (7th Cir. 1994) (stating that the defendant filed bankruptcy petitions to protect his business and assets); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (stating that the defendant filed his Chapter 11 petition).

102. *United States v. Thayer*, 201 F.3d 214, 228 (3d Cir. 1999).

103. See Official Bankr. Form 1, 11 U.S.C. (1994); Official Bankr. Form 6 (1994); Official Bankr. Form 9, 11 U.S.C. (1994).

104. See *United States v. Carrozella*, 105 F.3d 796, 800 (2d Cir. 1997); *Sun World, Inc. v. Lizarazu Olivarría*, 144 F.R.D. 384, 389-90 (E.D. Cal. 1992); see also *supra* notes 90-98 and accompanying text.

105. See *United States v. Shaddock*, 112 F.3d 523, 530 (1st Cir. 1997).

ration.¹⁰⁶ Applying the process enhancement to violations of general disclosure forms would "subject every recipient of . . . official notifications and warnings" to a penalty that the Sentencing Commission intended to reserve for acts of fraud committed with an "aggravated criminal intent."¹⁰⁷

The application of the aggravated criminal intent standard in non-bankruptcy contexts buttresses the conclusion that courts should not use the process enhancement to punish all bankruptcy fraud defendants. Outside of the bankruptcy context, courts have found the requisite aggravated criminal intent where the defendant violates a pre-existing court order or some other legal instrument.¹⁰⁸ The Second Circuit, for example, upheld application of the process enhancement to the sentence of a defendant who repeatedly represented himself as a lawyer despite a court order prohibiting him from perpetrating this fraud.¹⁰⁹ By contrast, criminals who violate a nonspecific prohibition such as generalized bail conditions or United States Department of Agriculture ("USDA") warnings have been held to lack aggravated criminal intent.¹¹⁰ These cases draw a distinction between the criminal intent of a defendant who violates a generalized warning that applies to a broad range of people, and a specific order, decree, or process that is directed specifically at the defendant and involves a previous finding by the court that the defendant engaged in fraudulent conduct.¹¹¹

106. See, e.g., *United States v. Richardson*, No. 96-1326, 1997 WL 43351, at *1 (2d Cir. 1997) (rejecting application of enhancement to filing of false accounts in probate court); *United States v. Fritzon*, 979 F.2d 21, 21-22 (2d Cir. 1992) (failing to apply enhancement to defendant who filed false tax returns).

107. *United States v. Linville*, 10 F.3d 630, 633 (9th Cir. 1993) (quoting the background commentary to the process enhancement provision); see also *United States v. Gist*, 79 F.3d 52, 53-55 (7th Cir. 1996) (stating that "[u]nder U.S.S.G. § 2F1.1(b)(3)(B) . . . [t]he defendant must have 'knowledge of the prior decree or order' " (quoting USSG, *supra* note 3, § 2F1.1 application note 5)); *United States v. Gunderson*, 55 F.3d 1328, 1332 (7th Cir. 1995) (same).

108. See, e.g., *United States v. Austin*, 54 F.3d 394, 403 (7th Cir. 1995) (approving a process enhancement based on defendant's violation of an FTC injunction by selling lithographs); *United States v. Paccione*, 751 F. Supp. 368, 375 (S.D.N.Y. 1990) (justifying a process enhancement where defendant transported illegal waste and operated an illegal landfill in violation of injunction).

109. See *United States v. Deutsch*, 987 F.2d 878, 883-85 (2d Cir. 1993); see also *United States v. Eve*, 984 F.2d 701, 703 (6th Cir. 1993) (approving a process enhancement for a defendant who obtained a false social security number to operate a motor vehicle in contravention of a court order).

110. See *Linville*, 10 F.3d at 631.

111. See, e.g., *Gist*, 79 F.3d at 55-56 (distinguishing between an informal administrative warning and a judicial injunction that prohibited the defendant from engaging in her fraudulent activities); *United States v. Scarano*, 975 F.2d 580, 583 (9th Cir. 1992) (noting that "the Sentencing Commission did not intend to include general bail conditions among the judicial orders covered by section 2F1.1").

Nor do the serious ramifications of the abuse of process caused by bankruptcy fraud, standing alone, demonstrate aggravated criminal intent. Many courts that have held fraudulent filing of bankruptcy forms to be punishable under 2F1.1(b)(4)(B) argue that the crime demonstrates a higher level of culpability than other types of fraud because of its serious ramifications.¹¹² The commentary to the process enhancement, however, indicates that the provision should be used to punish recidivist conduct that manifests the requisite *mens rea*, not simply fraud with serious ramifications.¹¹³ Thus, even a defendant who commits bankruptcy fraud with an awareness of the impact of his crime on the bankruptcy system does not exhibit aggravated criminal intent within the meaning of the process enhancement, unless he does so in violation of a judicial order, decree, or process.¹¹⁴

In sum, the process enhancement should only be invoked where the defendant commits a fraud despite an order issued by a court or an administrative entity directing him to cease the misconduct.¹¹⁵ Bankruptcy fraud involves a knowingly false statement related to a material fact made under penalty of perjury and in the course of a bankruptcy proceeding.¹¹⁶ It does not necessarily involve aggravated criminal intent. Of course, violating the rules and forms of the bankruptcy court is a reprehensible crime worthy of punishment.¹¹⁷ Courts should, however, refrain from *enhancing* the defendant's sentence under the process enhancement unless the defendant demonstrates the "aggravated criminal intent which [the enhancement] was designed to redress."¹¹⁸ Therefore, unless a bankruptcy judge enters a pertinent order, decree, or injunction directing a party to disclose property, merely violating

112. See, e.g., *United States v. Michalek*, 54 F.3d 325, 332 (7th Cir. 1995) (stating that the enhancement ought to apply because of the defendant's abuse of the bankruptcy process); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (same).

113. See USSG, *supra* note 3, § 2F1.1 application note 6 (stating that section 2F1.1(b)(4)(B) should be applied "[i]f it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case"); *supra* note 64; see also *United States v. Shadduck*, 112 F.3d 523, 530 (1st Cir. 1997) (noting that the commentary requires knowledge of the prior order or decree).

114. See, e.g., USSG, *supra* note 3, § 2F1.1 application note 6 (stating that the provision applies to a party with knowledge of the prior decree or order); *Shadduck*, 112 F.3d at 530 (stating that the defendant needs the required "mens rea"); *Linville*, 10 F.3d at 633 (describing aggravated criminal intent as a "mental state"). Many courts, however, apply the enhancement without ever considering the defendant's mental state. See, e.g., *Michalek*, 54 F.3d at 332.

115. See *supra* note 113.

116. See *supra* note 88.

117. See *infra* Part IV.

118. *Shadduck*, 112 F.3d at 530. But see *United States v. Cheek*, 69 F.3d 231, 233 (8th Cir. 1995) (the fact that enhancement might apply in most cases of bankruptcy fraud does not demonstrate the inappropriateness of enhancement).

the general rules or forms of the bankruptcy court does not create a sufficient basis to adjust a defendant's sentence upward under the process enhancement.¹¹⁹

C. *The Analogy Argument Permits Double Counting*

Double counting occurs when a court sentences a defendant or enhances the sentence of a defendant under one provision of the Guidelines, and subsequently enhances the defendant's sentence based on the same conduct punished in the first instance.¹²⁰ This Section examines the problem of double counting in sentencing and argues that courts double count when they enhance a bankruptcy fraud defendant's sentence under section 2F.1(b)(4)(B) for abuse of the bankruptcy process.

The Guidelines implicitly prohibit double counting.¹²¹ In a general sense, double counting would conflict with the Guidelines' goal of honest and proportional sentencing by allowing courts to punish the defendant several times for the same misconduct.¹²² The policy statements to the Guidelines, for example, speak of the "defendant's actual conduct" as imposing a "natural limit" on a defendant's sentence.¹²³ Specific provisions within the Guidelines also reflect this intent.¹²⁴ A court sentencing a defendant under the obstruction of justice base offense, for example, may only apply the obstruction enhancement where the defendant's obstructive conduct is so aggravated that it ex-

119. See *Shaddock*, 112 F.3d at 529-30.

120. See, e.g., *United States v. Campbell*, 967 F.2d 20, 23-24 (2d Cir. 1992) (finding double counting when courts consider the same factor in setting the initial Guidelines range and in choosing to depart from that range); *United States v. Lincoln*, 956 F.2d 1465, 1471 (8th Cir. 1992) (finding double counting "when one instance . . . of a defendant's conduct forms the basis for a conviction . . . and is also employed to adjust one or more other sentences").

121. In fact, the Sentencing Commission drafted the Guidelines to eliminate one form of double counting: count manipulation stemming from multicount convictions. See USSG, *supra* note 3, ch. 1, pt. A(4)(a). The Guidelines, however, allow double counting where the Sentencing Commission has expressed such an intent. See *id.* § 1B1.1 application note 4 (stating that adjustments from different guideline sections are applied cumulatively).

122. See *id.* ch. 1, pt. A(4)(a); see also *United States v. Lamere*, 980 F.2d 506, 517 (8th Cir. 1992) (stating that the Sentencing Commission realized that double counting is inconsistent with proportional sentencing); *United States v. Werlinger*, 894 F.2d 1015, 1018 (8th Cir. 1990) (same).

123. USSG, *supra* note 3, ch. 1, pt. A(4)(a).

124. See, e.g., *id.* § 2J1.3 application note 3 (stating that where the defendant is convicted for both perjury and the "underlying offense," the court should ensure that such treatment does not impermissibly double count); *id.* § 3D1.2 application note 5 (stating that "[s]ubsection (c) provides that when conduct that represents a separate count . . . is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor . . . [to prevent] 'double counting' of offense behavior"); *id.* § 5K2.7 policy statement (proscribing departures for actions inherent to the underlying offense).

ceeds that necessary to satisfy the basic elements of the underlying offense.¹²⁵

Not surprisingly, many courts have interpreted the Guidelines to prohibit double counting unless the Sentencing Commission has expressed a contrary intent.¹²⁶ In *United States v. Greenfield*, for example, the Second Circuit held that enhancing a defendant's sentence for a leadership role, under section 3B1.1, and for more than minimal planning, under section 2F1.1(b)(2), constituted double counting because the court based both enhancements on the same conduct.¹²⁷ Likewise, many courts have also interpreted the Guidelines to require that an enhancement relate to conduct beyond the essential elements of the base offense.¹²⁸

Applying the process enhancement to bankruptcy fraud by analogizing the defendant's failure to accurately disclose assets to a violation of a court order constitutes impermissible double counting. The central element of bankruptcy fraud consists of the knowing and fraudulent concealment of assets from the bankruptcy court.¹²⁹ This nondisclosure is the conduct that several courts have analogized to violating a court order in order to apply the process enhancement.¹³⁰

125. See *id.* § 3C1.1 application note 7 (stating that defendant's conduct should manifest obstruction exceeding that inherent in the underlying offense).

126. See, e.g., *United States v. Gibson*, 135 F.3d 257, 260-61 (2d Cir. 1998); *United States v. Dawson*, 1 F.3d 457, 462 (7th Cir. 1993); *Lamere*, 980 F.2d at 517; *Werlinger*, 894 F.2d at 1017.

127. 44 F.3d 1141, 1146 & n.3 (2d Cir. 1995) (noting that the court based both enhancements on the defendant's involvement in extensive planning and preparation); see also *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (reversing the district court's application of an obstruction of justice enhancement in part because the conduct underlying the enhancement also formed the basis of the base offense). Neither case involved an enhancement provision explicitly condoning double counting.

128. See, e.g., *United States v. Kaster*, No. 97-3210, 1998 WL 78995, at *1 (7th Cir. Feb. 19, 1998) (upholding enhancement under section 2J1.3(b)(2) because defendant's perjury resulted in a "substantial interference with the administration of justice"); *United States v. Burke*, 125 F.3d 401, 404-05 (7th Cir. 1997) (stating that the "base offense level did not take into account . . . that Burke sold the fraudulent securities while under a consent decree not to sell such securities"); *Lamere*, 980 F.2d at 517 (reversing a section 3C1.1 enhancement for concealing evidence where the defendant's crime of conviction included concealment of counterfeit currency).

129. See 18 U.S.C.A. § 152 (West Supp. 1999); 18 U.S.C. § 157 (1994); *United States v. Webster*, 125 F.3d 1024, 1029 (7th Cir. 1997) (citing 18 U.S.C. § 152), *cert. denied*, 522 U.S. 1051 (1998); *Metheany v. United States*, 390 F.2d 559, 561 (9th Cir. 1968); *Burke v. Dowling*, 944 F. Supp. 1036, 1064-65 (E.D.N.Y. 1995).

130. See, e.g., *United States v. Saacks*, 131 F.3d 540, 542, 546 (5th Cir. 1997) (stating that the government based its case on the defendant's concealment of assets and false reports on the "Bankruptcy Schedules and Statement of Financial Affairs," and then enhancing defendant's sentence based on his violation of "standing orders and standard forms"); *United States v. Michalek*, 54 F.3d 325, 332-33 (7th Cir. 1995) (stating that Michalek committed bankruptcy fraud by failing to disclose assets, and then upholding the enhancement of the defendant's sentence under section 2F1.1(b)(3)(B) for violating the "rules and forms of the Bankruptcy Rules to declare truthfully all assets and liabilities").

In *United States v. Bellew*,¹³¹ for example, the defendant pleaded guilty to two counts of bankruptcy fraud for "conceal[ing] assets by knowingly failing to list the assets in bankruptcy filings and knowingly failing to disclose the assets during bankruptcy hearings."¹³² The Eleventh Circuit subsequently upheld an upward adjustment of the defendant's sentence under the process enhancement for failing to disclose assets to the bankruptcy court by relying on the analogy argument.¹³³ Thus, the court's application of the process enhancement in *Bellew* double counted the defendant's failure to disclose assets to the bankruptcy court.

Although some courts have held that the Guidelines allow double counting where neither of the relevant provisions contains language proscribing the practice, they have limited this exception to separate enhancement provisions.¹³⁴ Thus, courts engage in double counting where both the fraud charge and the process enhancement stem from a defendant's failure to disclose assets in a bankruptcy proceeding.¹³⁵ The only conduct that arguably falls under the process enhancement, defendant's fraudulent submission of disclosure documents, also forms the basis for the underlying fraud charge. Therefore, permitting courts to enhance the defendant's sentence based on this conduct would allow double counting in contravention of the intent of the Sentencing Commission as manifested in the Guidelines.

131. 35 F.3d 518 (11th Cir. 1994).

132. *Bellew*, 35 F.3d at 519.

133. *See id.* at 521.

134. *See, e.g., United States v. Maurello*, 76 F.3d 1304, 1315 (3d Cir. 1996) (stating that "[n]othing in the Guidelines indicates that § 3B1.3 and § 2F1.1(b)(3)(B) may not be applied in tandem"); *United States v. Wong*, 3 F.3d 667, 670-71 (3d Cir. 1993) (holding that two enhancements may be applied to the same conduct unless the Guidelines explicitly state otherwise); *United States v. Rappaport*, 999 F.2d 57, 60-61 (2d Cir. 1993) (finding that enhancement of defendant's sentence under both USSG, § 3B1.1(a) and USSG, § 2F1.1(b)(2)(A) was not double counting because the enhancements addressed different aspects of the defendant's misconduct); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993) (finding no double counting unless Guidelines forbid application of two sections). None of these cases, however, address the propriety of double counting via an enhancement provision punishing conduct accounted for in the base offense. *Compare Lamere*, 980 F.2d at 517 (reversing an enhancement).

135. *See, e.g., United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (refusing to impose a section 3C1.1 enhancement for bankruptcy fraud because concealing assets formed the basis of the defendant's fraud charge); *see also Rappaport*, 999 F.2d at 60-61 (stating that enhancements relate to conduct beyond that which underlies the base offense). *But see United States v. Mohammad*, 53 F.3d 1426, 1437 (7th Cir. 1995) (holding that application of the process enhancement to cases of bankruptcy fraud does not implicate double counting because the concealment forms the basis of the bankruptcy fraud charge, and the violation of "a specific judicial order or the judicial process" forms the basis of the enhancement).

III. THE POLICY OF THE GUIDELINES

This Part examines the policy rationales used by those courts that rely on the abuse of process argument and the analogy argument to justify applying the process enhancement to bankruptcy fraud. These courts have relied on a defendant's abuse of the bankruptcy process as a basis for applying the process enhancement to bankruptcy fraud.¹³⁶ Because the process enhancement does not encompass abuse of process, though, this factor cannot justify application of the enhancement provision to bankruptcy fraud. Moreover, relying on such utilitarian justifications contravenes the underlying policy of the Guidelines. This Part concludes that Congress or the Sentencing Commission, and not courts, should remedy any problems with the Guidelines.

Many courts have justified applying the process enhancement to bankruptcy fraud because they claim that, unlike most fraud crimes, bankruptcy fraud inherently involves abuse of process.¹³⁷ These courts consider a defendant's abuse of the bankruptcy process as a material characteristic that differentiates bankruptcy fraud from other section 2F1.1 fraud crimes.¹³⁸ Bankruptcy fraud, unlike many other forms of fraud, wastes judicial resources, hinders the administration of the bankruptcy estate, and misuses the automatic stay of the bankruptcy court.¹³⁹ Section 2F1.1, however, does not include any enhancement provision that specifically punishes abuse of process.¹⁴⁰

The absence of an enhancement that accounts for this difference has troubled these judges not only because it violates their innate sense of fairness but also because they feel that it subverts the Guidelines' goal of proportional sentencing.¹⁴¹ One court characterized section 2F1.1 as "a dragnet guideline that sweeps within its ambit a great number of offenses involving dishonesty . . . that impact our society in a variety of ways."¹⁴² Without the process enhancement, defendants convicted of bankruptcy fraud would be subject to the same sentence

136. See, e.g., *supra* note 85.

137. See *supra* note 85.

138. See *Lloyd*, 947 F.2d at 340 (identifying the defendant's abuse of process as a factor that differentiates him from other defendants convicted of fraud); *United States v. Michalek*, 54 F.3d 325, 332 (7th Cir. 1994) (same).

139. See *Lloyd*, 947 F.2d at 340 (stating that the defendant's sentence should be enhanced because he hindered the administration of the bankruptcy estate and misused the judicial stay); see also *Michalek*, 54 F.3d at 332 (agreeing with *Lloyd*).

140. See USSG, *supra* note 3, § 2F1.1; see generally *supra* Part I (discussing why section 2F1.1(b)(4)(B) does not apply to abuses of process).

141. See, e.g., *Michalek*, 54 F.3d at 331-32 ("The district court must make the punishment fit the crime or, to be more precise, to reflect accurately the intent of the Congress with respect to the seriousness of each of the many proscribed acts [B]ankruptcy fraud in violation of 18 U.S.C. § 152 . . . deserve[s] greater punishment . . .").

142. *Id.* at 331.

as criminals who have committed fraud crimes that do not involve abuse of process.¹⁴³

Courts may also perceive a specific enhancement directed at such abuse of process to be an important deterrent, especially in light of the rapid spread of bankruptcy fraud. The Tenth Circuit in *United States v. Messner*,¹⁴⁴ for example, characterized the process enhancement as essential to "protecting the integrity of the bankruptcy system."¹⁴⁵ These considerations probably served as the impetus for courts to apply the process enhancement to bankruptcy fraud and explain its continuing application.¹⁴⁶

The policy statements to the Guidelines, however, undermine this justification for applying the Guidelines in a way that contravenes the intent of the Sentencing Commission.¹⁴⁷ Policy statements comprise an important tool in interpreting the Guidelines.¹⁴⁸ In fact, the Supreme Court has held that prohibitive policy statements should be treated as "an authoritative guide to the meaning of the applicable Guideline."¹⁴⁹

The policy statements to the Guidelines indicate that the Commission imposed the rigid structure of the Guidelines to curb judicial discretion, to eliminate variations in the administration of sentences, and to maintain the balance it established between these competing goals.¹⁵⁰ As part of the balance, Congress recognized the importance of preserving "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."¹⁵¹ The Sentencing Commission, however, carefully cabined the discretion

143. See *id.* at 331-32.

144. 107 F.3d 1448, 1457 (10th Cir. 1997).

145. *Messner*, 107 F.3d at 1457.

146. See, e.g., *United States v. Guthrie*, 144 F.3d 1006, 1010-11 (6th Cir. 1998) (stating that the enhancement serves to protect the bankruptcy system); *Messner*, 107 F.3d at 1457 (same); see also *United States v. Cheek*, 69 F.3d 231, 233 (8th Cir. 1995) (stating that bankruptcy fraud is a more culpable crime than most frauds).

147. See *United States v. Crawford*, 18 F.3d 1173, 1179 (4th Cir. 1994); *United States v. Harriott*, 976 F.2d 198, 202-03 (4th Cir. 1992).

148. See 18 U.S.C. § 3553(b) (1994); *Stinson v. United States*, 508 U.S. 36, 38, 42 (1993); *Williams v. United States*, 503 U.S. 193, 200-01 (1992); *United States v. Garrison*, 133 F.3d 831, 848 n.31 (11th Cir. 1998).

149. *Williams*, 503 U.S. at 201.

150. See USSG, *supra* note 3, ch. 1, pt. A(3) ("The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court.").

151. 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1999).

that it allowed in the Guidelines.¹⁵² Rather than granting courts broad discretion to account for such factors, the Commission built flexibility into the Guidelines by creating a detailed system that included "a list of relevant distinctions" for courts to invoke where necessary to guarantee appropriately different sentences for criminal conduct of differing severity.¹⁵³ Thus, in order to effectuate the intent of the Sentencing Commission, the Guidelines must be applied as written.¹⁵⁴

Allowing sentencing courts to misapply Guidelines' provisions to achieve just ends would give courts the very discretion that the Sentencing Commission sought to minimize in enacting the Guidelines.¹⁵⁵ Reading "process" broadly in the process enhancement, for example, would create the type of "simple, broad category" rejected by the Sentencing Commission in drafting the Guidelines.¹⁵⁶ Abuse of process includes any misuse of judicial or administrative proceedings, including filing baseless complaints, making false representations to courts or agencies, and perhaps even filing false tax returns.¹⁵⁷ Because of the breadth of the term and its imprecise definition, different courts might apply the term inconsistently.¹⁵⁸ "Granting such broad discretion" to sentencing courts would result in sentencing disparities and "would

152. See USSG, *supra* note 3, ch. 1, pt. A(3); see also *Koon v. United States*, 518 U.S. 81, 92 (1996) (stating that Congress created the Sentencing Reform Act and the Sentencing Commission to combat the "perception[] that federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances" (internal quotation marks omitted)). The Commission viewed broad judicial discretion as adverse to uniformity and proportionality because it increased the likelihood that different courts would interpret and apply the Guidelines in different ways. See USSG, *supra* note 3, ch. 1, pt. A(3).

153. USSG, *supra* note 3, ch. 1, pt. A(3); see *id.* ch. 1, pt. A(4)(b). The Sentencing Commission also allows for two other forms of judicial discretion. Where courts perceive a relevant distinction not reflected in the Guidelines, courts may depart from the Guidelines' sentencing procedure. See *id.*; see also *Koon v. United States*, 518 U.S. 81, 95-96 (1996) (stating that the court should depart when circumstances take a case "out of the Guideline's heartland"). Departure, however, should be reserved for the rare instances in which a court encounters a case with characteristics so unusual that the Sentencing Commission probably did not account for them in drafting the Guidelines. See *Koon*, 518 U.S. at 96. The Sentencing Commission also occasionally expresses its intent to give sentencing courts discretion in the text or commentary of Guidelines' provisions. See *id.* Despite realizing the need for some judicial discretion, the Commission still sought to "minimize the discretionary powers of the sentencing court" in the sentencing process. See USSG, *supra* note 3, ch. 1, pt. A(3).

154. See *supra* note 76; see also *United States v. Harriott*, 976 F.2d 198, at 203 (4th Cir. 1992) (stating that courts must apply the Guidelines as written given the Sentencing Commission's goal of sentencing uniformity).

155. See *Harriott*, 976 F.2d at 203.

156. USSG, *supra* note 3, ch. 1, pt. A(3).

157. See *United States v. Carrozzella*, 105 F.3d 796, 800 (2d Cir. 1997).

158. See, e.g., *id.* at 800 (noting uncertainty as to whether certain types of conduct constitute an abuse of process); *United States v. Linville*, 10 F.3d 630, 633 (9th Cir. 1993) (holding process to mean something akin to court or administrative orders); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (construing process to mean the entirety of a bankruptcy court's proceedings).

[be] contrary to the Commission's mandate."¹⁵⁹ The ambiguity created by reading the process enhancement broadly, for example, has led to conflicting decisions, even within the same circuit, as to whether or not to apply the process enhancement to bankruptcy fraud.¹⁶⁰ Although reading "process" narrowly would not completely eliminate judicial discretion, it would minimize it.

Allowing courts to apply the process enhancement by analogy would also violate the intent of the drafters. It would require courts to make the type of discretionary decisions that the Guidelines were designed to minimize.¹⁶¹ A court sentencing a bankruptcy defendant, for example, would need to decide whether the underlying crime consists of conduct analogous to a violation of a court order and then, depending on its conclusion, what additional enhancements, if any, the misconduct merited.¹⁶² In *United States v. Spencer*,¹⁶³ for example, the Second Circuit upheld an enhancement under the process enhancement by analogizing the negotiation and resultant agreement between the defendant and the Department of Transportation to an informal administrative process or decree.¹⁶⁴ Such ad hoc analogies undermine consistent sentencing and lead to the disparate sentences that the Sentencing Commission sought to eliminate.¹⁶⁵ Unless the commentary or policy statements indicate an intent to allow courts to engage in such

159. USSG, *supra* note 3, ch. 1, pt. A(3) (stating that the use of broad categories in the Guidelines would have given broad discretion to courts and would have resulted in the wide disparity in sentences that Congress intended to reduce).

160. Compare *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996) (applying a process enhancement to the sentence of a defendant convicted of bankruptcy fraud), with *United States v. Lindholm*, 24 F.3d 1078, 1082 (9th Cir. 1994) (not applying a process enhancement to the sentence of a defendant convicted of bankruptcy fraud).

161. See USSG, *supra* note 3, ch. 1, pt. A(3). Although such a determination does not seem innately difficult, the division of the circuits on the question of whether or not bankruptcy fraud involves a violation of judicial process demonstrates the differences of opinion that can result where courts are allowed to apply a provision by analogy. Compare, e.g., *United States v. Bellew*, 35 F.3d 518, 519-21 (11th Cir. 1994) (finding the violation of disclosure forms to be analogous to violating a court order), with *United States v. Shadduck*, 112 F.3d 523, 529-30 (1st Cir. 1997) (finding the violation of disclosure forms not to be analogous to violating court orders).

162. Compare, e.g., *United States v. Webster*, 125 F.3d 1024, 1036 (7th Cir. 1997) (approving the application of the process enhancement on abuse of process grounds), with *United States v. Rowe*, 144 F.3d 15, 23 (1st Cir. 1998) (rejecting a process enhancement without evidence of a specific court order). Several district courts, presumably because they viewed the punishment as insufficient, also have attempted to increase the defendant's sentence by invoking other provisions such as section 3C1.1 for perjury. See, e.g., *Webster*, 125 F.3d at 1036-37 (imposing both a process enhancement and a section 3C1.1 enhancement).

163. 129 F.3d 246 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1388 (1998).

164. See *id.* at 252-53.

165. See generally USSG, *supra* note 3, ch. 1, pt. A(3) (discussing how the Sentencing Commission viewed discretionary decisions as a source of pre-Guidelines sentencing disparity).

discretionary judgments, provisions should be interpreted to make the sentencing process as simple and uniform as possible.¹⁶⁶

A desire to reach a "proportionate" or "just" result does not provide a sufficient justification for manipulating the Guidelines.¹⁶⁷ In fact, this type of judicial discretion fueled much of the criticism of pre-Guidelines sentencing and played a significant role in Congress's eventual decision to enact the Sentencing Reform Act.¹⁶⁸ The Guidelines represent the Sentencing Commission's balance of competing goals.¹⁶⁹ The failure of the Commission to account for abuse of process in the fraud provision suggests that either courts have not traditionally considered this factor important in sentencing or that the Commission purposefully excluded such an enhancement for some important reason.¹⁷⁰ The Sentencing Commission, for example, may not have included an enhancement for abuse of process because it did not consider bankruptcy fraud to be a uniquely culpable crime as compared to other fraud crimes punished under section 2F1.1.¹⁷¹ The similar sentences of various fraud crimes punished under section 2F1.1 support the conclusion that Congress might not consider bankruptcy fraud to be a particularly culpable form of fraud.¹⁷²

Moreover, such manipulation by courts ignores the "evolutionary" nature of the writing process of the Guidelines.¹⁷³ The Sentencing Commission has intermittently amended the Guidelines to correct problems in the sentencing procedure as identified by federal courts in

166. *See id.*

167. *See United States v. Harriott*, 976 F.2d 198, 203 (4th Cir. 1992) (stating that "[a]ttempts, in effect, to manipulate the Guidelines in order to achieve the 'right result' in a given case are inconsistent with the Guidelines' goal of creating uniformity in sentencing"). Although such attempts to reach a just sentence might promote individualized sentencing, they would alter the balance between proportionality and uniformity established by the Sentencing Commission. *See USSG, supra* note 3, ch. 1, pt. A(3).

168. *See USSG, supra* note 3, ch. 1, pt. A(3).

169. *See id.*

170. The Sentencing Commission looked to empirical data on pre-Guidelines sentencing to decide the relevant distinctions that it would include in the Guidelines. *See id.* It looked "to those distinctions that judges and legislators have, in fact, made over the course of time." *Id.* The categories "include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions." *Id.* The categories will only rarely fail to reflect relevant distinctions. *See id.* The Commission, however, did omit relevant distinctions reflected in established practices where it felt that doing so would effectuate important policy goals. *See id.*

171. *See, e.g., id.* (stating that the Sentencing Commission looked to the treatment of crimes by Congress as one guide in establishing the framework of the Guidelines).

172. Compare 18 U.S.C. § 157 (1994) (giving a sentence range of 0 to 5 years for bankruptcy fraud), with *id.* § 286 (sentence range of 0 to 10 years for conspiracy to defraud the government with respect to claims), *id.* § 287 (sentence range of 0 to 5 years for false, fictitious, or fraudulent claims made against the government), and *id.* § 288 (sentence of 0 to 1 year for false claims for postal losses).

173. *See USSG, supra* note 3, ch. 1, pt. A(2).

their opinions.¹⁷⁴ If the Sentencing Commission intends to provide an enhancement for the abuse of process inherent in bankruptcy fraud, then it will revise the Guidelines to reflect this intent.¹⁷⁵

Until the Sentencing Commission makes such revisions, however, courts should apply the Guidelines as written.¹⁷⁶ Gaps that courts perceive in the sentencing scheme are "more appropriately a legislative concern."¹⁷⁷ A contrary position would allow courts to apply the Guidelines based on ad hoc justifications or idiosyncratic motivations and present the very same risks as broad judicial discretion in terms of creating "the wide disparity that Congress established the Commission to reduce."¹⁷⁸ It would also contravene the Sentencing Commission's intent of creating "detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."¹⁷⁹

IV. PERJURY AS AN ALTERNATIVE TO FRAUD

This Part examines the applicability of the Guidelines' base offense provision for perjury to bankruptcy fraud. It argues that bankruptcy fraud is more appropriately punished under the perjury provision than the fraud provision of the Guidelines. This Part concludes that punishing bankruptcy fraud under the perjury provision would facilitate the Sentencing Commission's goals of uniform and proportionate sentencing.

Many courts believe that sentencing bankruptcy fraud under the fraud provision without the process enhancement is problematic because the base sentence imposed by section 2F1.1 does not reflect the severity of the defendant's abuse of process.¹⁸⁰ As noted by the court

174. See *id.* ch. 1, pt. A(5); see also T.R. Goldman, *Awaiting Sentence: Vacancies, Politics Bring Sentence Panel to Brink of Paralysis*, LEGAL TIMES, Aug. 24 & 31, 1998, at 1 (stating that the Sentencing Commission resolved 5 of 22 circuit splits it put out for comment in 1997, and 6 of 14 in 1998).

175. See USSG, *supra* note 3, ch. 1, pt. A(5).

176. See *Stinson v. United States*, 508 U.S. 36, 38, 42 (1993); *United States v. Harriott*, 976 F.2d 198, 203 (4th Cir. 1992).

177. *Harriott*, 976 F.2d at 203.

178. USSG, *supra* note 3, ch. 1, pt. A(3) (stating that the Commission views the Guidelines' writing process as "evolutionary" and that the Commission will submit amendments to Congress as it deems necessary based on its "research, experience, and analysis").

179. *Id.* ch. 1, pt. A(1).

180. See, e.g., *United States v. Guthrie*, 144 F.3d 1006, 1009 (6th Cir. 1998) (stating that the enhancement is necessary to distinguish defendants convicted of bankruptcy fraud from defendants who commit other fraud crimes); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (same); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (same); see also *United States v. Michalek*, 54 F.3d 325, 331 (7th Cir. 1995) (noting that section 2F1.1 "covers a variety of crimes involving fraud" and "must be adjusted through the use of the specific offense characteristics"). See generally *supra* Part III (discussing policy justifications advanced by courts for applying the process enhancement to abuses of the bankruptcy process).

in *Lloyd*, bankruptcy defendants violate the sanctity of bankruptcy proceedings by illegitimately seeking shelter from creditors and hindering the orderly administration of the bankruptcy estate.¹⁸¹ The reasoning of such courts highlights a potential shortcoming of sentencing bankruptcy fraud offenses under the fraud provision.¹⁸² Although the fraud provision accounts for a defendant's aggravated criminal intent, demonstrated by violating a court or administrative decree or order, it does not provide an enhancement that would punish bankruptcy fraud defendants for their abuse of process.¹⁸³ This undermines the Guidelines' goal of proportional sentencing.

A plausible response to such concerns would be to sentence defendants convicted of bankruptcy fraud under section 2J1.3, the Guidelines' base offense provision for perjury, instead of under section 2F1.1, the fraud base offense provision.¹⁸⁴ Sentencing bankruptcy fraud defendants under section 2J1.3 ("the perjury provision") would facilitate two separate goals of the Guidelines.¹⁸⁵ Requiring courts to sentence bankruptcy fraud under the perjury provision would promote uniformity, eliminating the division between the circuits as to the appropriateness of the process enhancement. Sentencing bankruptcy defendants under the perjury provision would also promote proportionality by accounting for a defendant's abuse of process, a characteristic that differentiates bankruptcy fraud from fraud in general.

The Guidelines indicate that courts should sentence defendants under the base offense "most applicable to the offense of conviction"¹⁸⁶ and "most appropriate for the nature of the offense conduct charged."¹⁸⁷ Bankruptcy fraud consists of any number of knowing or fraudulent representations or omissions made in the course of a bankruptcy proceeding.¹⁸⁸ In essence, bankruptcy fraud punishes the defendant for "fraud upon the court."¹⁸⁹ Perjury similarly punishes a defendant's "deliberately making material false or misleading statements

181. See *Lloyd*, 947 F.2d at 340.

182. See *United States v. Carrozzella*, 105 F.3d 796, 800-01 (2d Cir. 1997).

183. See USSG, *supra* note 3, § 2F1.1.

184. See *id.* § 2J1.3 ("Perjury or Subornation of Perjury; Bribery of Witness"); *United States v. Kaster*, No. 97-3210, 1998 WL 78995, at *3 (7th Cir. Feb. 19, 1998) (approving of use of section 2J1.3 because it found that, in this particular instance, the defendant did not harm his creditors); *Michalek*, 54 F.3d at 331 n.11 ("The Sentencing Guidelines recognize that the statute's prohibitions against bribery and perjury are best addressed outside the scope of § 2F1.1." (citing USSG, *supra* note 3, app. A)). The base offense level for perjury is 12. See USSG, *supra* note 3, § 2J1.3.

185. See *supra* notes 6-8 and accompanying text.

186. USSG, *supra* note 3, § 1B1.2(a).

187. *Id.* app. A, introduction.

188. See 18 U.S.C.A. § 152 (West Supp. 1999); 18 U.S.C. § 157 (1994).

189. *United States v. Beard*, 913 F.2d 193, 197 (5th Cir. 1990).

while under oath.”¹⁹⁰ Most courts state that the abuse of process caused by the defendant’s perjury, and not by the fraud, constitutes the “gravamen” of bankruptcy fraud.¹⁹¹ In fact, the bankruptcy disclosure forms indicate on their face that incomplete disclosure constitutes perjury.¹⁹² Thus, the perjury provision, not section 2F1.1, would seem to be the base offense provision most applicable to bankruptcy fraud.¹⁹³

The few cases that have examined the applicability of the perjury provision to the crime of bankruptcy fraud, however, have chosen not to apply it to bankruptcy fraud.¹⁹⁴ The courts in these cases have based their conclusion primarily on their characterization of bankruptcy fraud as a “fraud.”¹⁹⁵ The court in *United States v. Kaster* for example, although upholding the sentencing of a defendant convicted of bankruptcy fraud under the perjury provision of the Guidelines, indicated in dicta that it would not reach the same conclusion in most bankruptcy cases where defendants “do not disclose their assets” because they “want to maintain their interest in those assets at the expense of their creditors.”¹⁹⁶

190. BLACK’S LAW DICTIONARY, *supra* note 14, at 1160; *see also* 18 U.S.C. § 1621 (1994) (making a willful declaration under penalty of perjury as to any material matter that one “does not believe to be true”); *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (defining perjury as “false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory”).

191. *United States v. Kaster*, No. 97-3210, 1998 WL 78995, at *2 (7th Cir. Feb. 19, 1998); *United States v. Michalek*, 54 F.3d 325, 332 (7th Cir. 1995) (citing *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991)); *see also United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (stating that a bankruptcy fraud defendant “works a fraud on the entirety of the proceeding”).

192. *See e.g.*, Official Bankr. Form 1, 11 U.S.C.A. (West Supp. 1999); Official Bankr. Form 6, 11 U.S.C.A. (West Supp. 1999).

193. *See Kaster*, 1998 WL 78995, at *3.

194. *See, e.g., id.* at *3 n.4 (upholding application of section 2J1.3 to the particular case but indicating that, in general, courts should use section 2F1.1 to sentence bankruptcy fraud); *Beard*, 913 F.2d at 197-98 (holding section 2F1.1 to be the most appropriate provision for sentencing bankruptcy fraud because it constitutes a “fraud upon the court,” and the Statutory Index did not include section 2J1.3 as an appropriate basis to sentence bankruptcy fraud); *see also United States v. Turner*, 182 F.3d 934 (unpublished disposition), 1999 WL 357500, at *2 (10th Cir. June 6, 1999) (upholding the district court’s application of section 2F1.1 and not 2J1.3 because the “[d]efendant’s false statement under bankruptcy petition was made for purposes relating to fraudulent activity”).

195. *See, e.g., Turner*, 1999 WL 357500, at *2 (characterizing the defendant’s actions as relating to a “fraudulent activity”); *Kaster*, 1998 WL 78995, at *3 n.4 (stating that in general bankruptcy petitioners fraudulently fail to disclose assets); *Beard*, 913 F.2d at 197-98 (holding bankruptcy to be a “fraud upon the court”). The court in *Beard* also based its holding on the Guidelines Statutory Index, which listed section 2F1.1 as the appropriate provision for sentencing bankruptcy fraud. *See id.* at 197-98.

196. 1998 WL 78995, at *3 (stating that in the specific case before it, the defendant’s crime resembled perjury more than fraud because the defendant perjured himself “for the purpose of hiding an alter-ego created because of a prior felony conviction” and “not pecuniary gain — a characteristic normally associated with fraud”).

Several factors favor the application of the perjury provision to bankruptcy fraud despite this precedent. First, an examination of the reasoning of these courts reveals a subtle, yet material, misapprehension of the nature of bankruptcy fraud.¹⁹⁷ Congress's definition of bankruptcy fraud, as well as that of most courts, centers on the defendant's deception of the bankruptcy court.¹⁹⁸ The courts that have concluded that bankruptcy fraud should be sentenced under the Guidelines' fraud provision, however, have relied on the defendant's deception of creditors.¹⁹⁹ Because Congress and most courts view bankruptcy fraud primarily as a fraud on the court rather than a fraud on creditors, the perjury provision is the most appropriate provision for sentencing bankruptcy fraud defendants.

Moreover, the commentary to section 2F1.1 indicates that where a fraud-based crime is subject to divergent characterizations, the court should apply a provision other than section 2F1.1 if it "more aptly cover[s]" the offense of conviction.²⁰⁰ Courts, for example, punish false statements to customs officials under section 2T3.1, the Guidelines' provision for false statements to customs officials, and not under section 2F1.1, despite the fact that such conduct could easily be characterized as a fraud.²⁰¹ The Sentencing Commission's 1990 amendment of the Statutory Index to include section 2J1.3 for sentencing bankruptcy fraud indicates the Commission's approval of the perjury provision as an appropriate alternative to section 2F1.1.²⁰²

By applying the perjury provision, courts would no longer have to manipulate the process enhancement in order to impose proportional sentences. Since perjury inherently involves abuse of process, sentencing defendants under the perjury provision would obviate the type

197. Compare, e.g., *id.* (focusing on the nonpecuniary motive of the defendant in defrauding his creditors), with 18 U.S.C.A. § 152 (West Supp. 1999) (focusing on the fraudulent concealment from the court).

198. See 18 U.S.C.A. § 152 (West Supp. 1999) (focusing on defendant's deception of the bankruptcy court); see also *United States v. Michalek*, 54 F.3d 325, 332 (7th Cir. 1994) (stating that abuse of process of the bankruptcy court constitutes the gravamen of bankruptcy fraud (citing *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991))).

199. See *Kaster*, 1998 WL 78995, at *3 (finding it "reasonable to assume that the majority of bankruptcy petitioners who do not disclose their assets simply want to maintain their interest in those assets at the expense of their creditors"); see also *Beard*, 913 F.2d at 197 (characterizing bankruptcy fraud as a "fraud upon the court").

200. USSG, *supra* note 3, § 2F1.1 application note 14.

201. See, e.g., *United States v. Carrillo-Hernandez*, 963 F.2d 1316, 1317-18 (9th Cir. 1992) (holding that a defendant convicted of "knowingly transporting money in excess of \$10,000 without making a report" should be sentenced pursuant to section 2T3.1, which punishes false statements to customs officials, not under section 2F1.1). Courts also do this with other fraud-like crimes. See, e.g., *United States v. Rubin*, 999 F.2d 194, 197 (7th Cir. 1993) (sentencing a defendant convicted of mail fraud under the Antitrust Guideline, section 2R1.1, as opposed to section 2F1.1, because price-fixing, not fraud, was the goal of the criminal enterprise).

202. See USSG, *supra* note 3, app. A, 1990 amendments.

of policy concerns driving courts to enhance the sentences of bankruptcy fraud defendants under the process enhancement.²⁰³ At the same time, bankruptcy fraud defendants would receive longer sentences under the perjury provision than under section 2F1.1, reflecting the importance of protecting the integrity of the bankruptcy process.²⁰⁴ Moreover, such an approach would reserve the process enhancement for the type of crimes that the Sentencing Commission intended the process to apply to, namely those involving defendants who demonstrate aggravated criminal intent in perpetrating a fraud by violating a court or administrative order or decree.

Thus, sentencing courts should apply the perjury provision because perjury constitutes the "gravamen" of bankruptcy fraud. Applying the perjury provision would allow courts to impose on bankruptcy fraud defendants the sentences that account for the harm they wreak on the bankruptcy system while providing for a uniform system of sentencing bankruptcy fraud.

CONCLUSION

Bankruptcy fraud constitutes an emerging epidemic in the federal criminal justice system. While bankruptcy fraud wastes judicial resources and undermines the integrity of the bankruptcy system,²⁰⁵ such negative consequences do not give courts free rein to interpret the Guidelines' provisions, such as the process enhancement, as they see fit. Although Congress and the Sentencing Commission intended to create a flexible sentencing system, responsive to the multitude of scenarios that courts might face, courts do not have unlimited discretion.

203. See, e.g., *Kaster*, 1998 WL 78995, at *2 (finding that defendant's "actions most harmed the integrity of the court and, therefore, more resemble[] perjury than fraud"). Some bankruptcy fraud defendants would also qualify for a section 2J1.3(b)(2) enhancement for substantial interference with the administration of justice, depending on the stage of the bankruptcy proceeding at which the government discovers their fraud. See *id.* at *1 (sentence of bankruptcy fraud defendant enhanced under § 2J1.3(b)(2)). This enhancement punishes conduct that, among other circumstances, results in "any judicial determination based upon perjury, false testimony, or other false evidence." USSG, *supra* note 3, § 2J1.3 application note 1.

204. The Guidelines also direct that where more than one Guidelines' provision is applicable to a given crime, the provision that results in the "greater offense level" should be used. See USSG, *supra* note 3, § 1B1.1 application note 5. The perjury provision is arguably the more appropriate provision because it will more often result in the greater offense level. The base offense level for fraud is 6. See *id.* § 2F1.1. Under the perjury provision, the defendant's base offense would be 12, and with the substantial interference with the administration of justice enhancement would reach 15. See *id.* § 2J1.3. If loss, however, is factored in under the fraud provision, any loss over \$200,000 will result in an enhancement of 8 (for a total level of 16) and make the fraud provision the harsher of the two provisions. See *id.* § 2F1.1.

205. See, e.g., *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997) (stating that "[b]ankruptcy fraud undermines the whole concept of allowing a debtor to obtain protection from creditors, pay debts in accord with the debtor's ability and thereby obtain a fresh start"); Gaumer, *supra* note 2, at 12 (noting the special nature of bankruptcy proceedings).

Applying the process enhancement in a manner that contravenes the literal language of the provision and the Sentencing Commission's intent, as expressed through the Guidelines' policy statements and commentary, exceeds the discretion conferred on sentencing courts by the Guidelines. Moreover, basing the process enhancement on idiosyncratic reasoning creates the potential for nonuniform treatment of similarly situated defendants. As such, it contravenes one of the central goals of the Guidelines, to create "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."²⁰⁶ In fact, by applying the process enhancement to bankruptcy fraud, courts ironically perpetuate the very disproportionate sentencing that they are attempting to eliminate. Thus, despite their reservations and until such a time as the Sentencing Commission chooses to address the issue through revision or amendment of section 2F1.1, courts must remain true to the Guidelines as they exist. Although reading the process enhancement to exclude fraudulent nondisclosure in bankruptcy fraud contradicts the interpretation of the majority of federal circuits, it nevertheless seems to be the fairest reading of the process enhancement provision.

Sentencing courts have other options. Courts can utilize the Guidelines' perjury provision to sentence defendants convicted of bankruptcy fraud. The perjury provision may be preferable to section 2F1.1 in the eyes of many courts because it accounts for a defendant's abuse of process. By sentencing bankruptcy fraud under the perjury provision, courts can create a consistent paradigm for sentencing bankruptcy fraud defendants. Such a system would facilitate proportional sentencing by subjecting defendants convicted of bankruptcy fraud to the higher sentences of the perjury provision, while obviating the need for sentencing courts to engage in creative interpretations of the Guidelines that undermine the Sentencing Commission's goal of uniform sentencing.

206. USSG, *supra* note 3, ch. 1, pt. A(3).