personal safety, or mission readiness was at risk as a result of the inferior product.

The IG is presently reviewing sentencing patterns in all categories of cases investigated by the DCIS that resulted in convictions. Our preliminary findings indicate that from September 1982 through February 1, 1989, 43% of all individuals convicted were actually incarcerated. In product substitution cases the figure rose slightly to 53% incarcerated.

In conclusion, the IG urges adoption of the amendment to the sentencing guidelines which will increase the above percentages, send a loud and clear message of zero tolerance to product substitution, and will work to improve the quality of the materials that the Government relies on in the defense of this country.

I will be pleased to answer any question you may have at this time.

Written Comments on Proposed Sentencing Guidelines
For Violation of Rules Against Insider Trading

in anticipation of oral testimony before the

United States Sentencing Commission
April 7, 1989

Jonathan R. Macey
Professor of Law
Cornell University

I. Introduction

Recently, the U.S. Sentencing Commission has asked for public comment on whether there should be a higher offense level for insider trading than for other types of fraud. I welcome the opportunity to address this important matter. In addition, I would like to express my views on what I believe to be a related issue, which is whether it is appropriate to increase the offense level for instances of insider trading that involve: (1) more than minimal planning, or (2) a scheme to defraud more than one victim (see Section 2F1.1 (b) (2) (A) and (C).

For many of the same reasons that lead me to the conclusion that higher offense levels are not warranted for insider trading than for other sorts of fraud, I believe that it is inappropriate to increase the penalties for violations of the rules against insider trading on the basis of the planning involved or on the basis of whether such trading involved a scheme to defraud more than one victim. Indeed, it seems clear that some of the most benign forms of insider trading may involve some of the most elaborate planning, while some of the most egregious forms of securities fraud may involve virtually no planning. Similarly,

some of the worst sorts of securities fraud may only involve a single victim, while some of the most benign forms of insider trading may involve very large numbers of victims.

Thus, insider trading must be distinguished from other forms of fraud in these respects. In the following section of these remarks, I wish to address the factors that are most often given as the basis for favoring strict penalties for insider trading.

II. Factors Possibly Favoring Increased Penalties

When Congress enacted the Insider Trading and Securities Fraud Enhancement Act of 1988, it evinced a concern that substantial prison sentences would be necessary to deter insider trading (See H. Rep. 100-910, 100th Cong., 2d Sess., at 23 (1988)). There are three arguments that suggest that Congress and the Sentencing Commission should apply stricter sentences for this crime than for other forms of fraud. While one of these arguments has merit, the other two do not withstand close inspection.

First, as is well known, it is very difficult and costly to detect insider trading. The ability of those involved in insider trading to consummate illegal transactions through conduits and through accounts located outside of the United States makes detection extremely difficult. It is well known that where the probability of detection for a particular offense is high, stiff penalties are required to achieve deterrence.

Similarly, the ease with which inside traders can conceal their actions makes it very costly to detect such activity.

Detection involves costly "stock watch" programs that not only require sophisticated computer technology, but constant monitoring by highly trained professional enforcement officials as well. These factors suggest that relatively heavy penalties are appropriate.

Second, it is often said (particularly by the Securities and Exchange Commission) that penalties for insider trading ought to be particularly stiff because the activity undermines the confidence that small investors have in the capital markets, and therefore impairs the capital formation process. This argument is without foundation. Evidence from foreign markets indicates that the operation of capital markets does not suffer from the existence of insider trading. Indeed the Japanese experience indicates that even where insider trading is rampant, investors are not deterred from purchasing securities.

The reason for this is simple. In capital markets where insider trading is widespread, investors without access to confidential inside information are not harmed by insider trading so long as they hold a diversified portfolios of securities, or so long as they adopt a "buy and hold" strategy for their investments. Such investors would not benefit from a ban on insider trading because such a ban would still leave them at an informational disadvantage vis-a-vis market professionals in their quixotic attempts to outguess the direction in which stock prices are likely to move.

Thus small investors are not in fact harmed by insider

trading because they are capable of eliminating the risks associated with such trading, both by holding a diversified portfolio of stock and by adopting a buy and hold investment strategy based on an evaluation of the fundamental factors that effect price levels.

The marketplace appears to recognize the fact that small investors are not harmed by insider trading because the lack of sanctions against insider trading has not retarded the capital formation process in other countries.

Finally, it is often said that insider trading should be severely punished because it effects a large number of disaggregated shareholders who, because of the collective action problems facing such large groups, do not have sufficient incentives to protect their rights in private damages suits. As the following section shows, this argument is fallacious. Contrary to popular belief, logic, as well as the decisions of the Supreme Court on the subject, make it clear that the laws against insider trading enforce highly specific fiduciary duties that are owed by traders to individuals and firms towards whom such traders have a pre-existing relationship of trust. Thus the laws against insider trading do not protect amorphous, unspecified interests of broad groups such as "market participants," or "investors" or even purchasers or sellers of securities who trade contemporaneously with insiders.

Properly construed, the rules against insider trading vindicate the interests of firms and individuals whose property

rights in valuable, non-public corporate information are wrongfully misappropriated by insiders.[1] The assumptions that insider trading rules are designed to vindicate such values as "investor confidence" or the "integrity of the marketplace" are not only wrong; they are dangerous. Applying legal rules or draconian penalty provisions under such an erroneous assumption will create a harmful disincentive to market analysts and other professionals, whose legitimate efforts to obtain non-public information about misvalued public companies drives securities prices to more efficient levels. As the Supreme Court has emphasized, these efforts should be applauded not condemned because they further societal interests by improving the capital formation process.

III. The Real Concerns About Insider Trading

As the preceding discussion suggests, to understand the dynamics of insider trading, one must view inside information for what it really is -- a financial asset. Possession of insider information is the possession of an asset that can be converted into cash by trading in the financial markets on the implications of such information. The issues of who is harmed by insider trading and by how much can only be resolved by examining how the property rights in information have been allocated by the legal system.

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[1] See Macey, From Fairness to Contract: The New Direction of the Rules Against Insider Trading 13 Hofstra Law Review 1 (1984).

The Supreme Court has recognized this fact in its decisions in Chiarella v. U.S. (445 U.S. 222 (1980)) and Dirks v. SEC (463 U.S. 646 (1983)) which are the most important opinions on insider trading in the 1980s. Both of these opinions reject the earlier contentions of the SEC that the duty to refrain from trading on inside information stems from some generalized duty of fairness to the securities marketplace. In these opinions the Supreme Court, in effect rejected the contention that the obligation to abstain from insider trading stems from a theory that allocates property rights in valuable corporate information to the markets generally.

In place of its rejection of a generalized fiduciary duty to the trading markets, the Supreme Court repeatedly emphasized that insider trading restrictions are derived from specific breaches of pre-existing fiduciary duties. This means that for an individual to be convicted of violating the rules against insider trading, he must have violated a pre-existing duty to the individual or firm that was rightfully in possession of the property rights in the information upon which the trade was predicated.

Hypothetical #1:

To illustrate the point I am trying to make, suppose for example, Company X, which is owned by a single shareholder, is planning to acquire all of the stock of Company Y at a substantial premium over the current trading price of Company Y's shares. An investment banker for Company X learns of the pending

acquisition in advance of any public announcement, because his firm has been hired by Company X to advise it in connection with the offer. If that investment banker purchases shares in Y for personal gain on the basis of his knowledge of the pending tender offer, he would be guilty of violating the laws against insider trading, particularly SEC Rule 10b-5. But, as the Supreme Court repeatedly has emphasized, the investment banker's conviction would not be based on the fact that he has cheated Y's shareholders, or that he has violated any general duty to the securities market. The investment banker did not owe any pre-existing duty to Y's shareholders or to the securities markets generally. Rather, the investment banker owed a specific fiduciary duty to Company X because it hired him to advise it on its tender offer for Y.

The point becomes even more clear once we recognize the fact that the property rights in the information regarding the pendency of the takeover do not belong to the capital markets generally and certainly do not belong to Y's shareholders. Rather, the information belongs to X: X legally can acquire stock in Y without violating any insider trading rule.[2]

The above example illustrates what I believe to be a

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[2] X's purchases would, of course be subject to the restrictions of the Williams Act, which is the federal law governing corporate takeovers. The Williams Act would require that X make certain disclosures simultaneously with the announcement of any tender offer. X could, however, acquire all of Y's shares without making any disclosures at all, provided that it could acquire these shares within 10 days of acquiring 5 percent of Y's shares.

particularly serious breach of the laws against insider trading that should result in a stiff penalty. Note, however, that this incident may not have involved more than minimal planning. Moreover, properly construed the incident did not defraud more than one victim: the only victim was Corporation X.

The above hypothetical case illustrates a situation in which there is only one victim. Let me now provide an example of a case in which insider trading involves a multitude of victims and an elaborate planning process, but does not warrant a particularly high penalty.

Hypothetical # 2:

Suppose that Company A is a large, publicly held corporation and is planning to acquire a controlling interest in Company B, another large, publicly held corporation, by means of purchasing shares in B on the open market in an acquisition that does not involve a tender offer within the meaning of the Williams Act. Suppose that Company A approaches an arbitrageur and discloses its plans. The arbitrageur, in exchange for this tip, agrees to purchase shares in B on A's behalf. The arbitrageur expects to profit by reselling B's shares to A at a profit in the near future.

This practice, known as "parking," or "frontrunning," is considered to involve insider trading. This scheme also will involve a violation of the Williams Act if, as is likely, Company A and the arbitrageur do not file a Schedule 13D with the SEC within ten days of acquiring five percent of B's stock. But

where is the harm associated with this transaction? As we have seen in the above example, it is erroneous to conclude that harm falls to B's shareholders. Neither the arbitrageur or Company A owes any fiduciary duty to this group. And, unlike our example above, here there really is no damage to A's shareholders, since here the insider trading was done to facilitate a welfare-increasing transaction. By contrast, in hypothetical #1, X potentially was harmed by the investment banker's purchases because such purchases raised the costs of Y's shares, thereby raising the cost of X's acquisition and increasing the chances that it would fail.

By contrast, where the insider trading violations involve parking or front-running schemes, any harm to investors involves the rather amorphous -- and controversial -- policies surrounding the Williams Act. Thus, despite the intricate planning often involved in these schemes, and the specious arguments that more than one victim is harmed in such arrangements, the penalties for these practices should be very light: certainly lighter than the penalties where the insiders' trading involves an actual breach of fiduciary duty.

The above discussion has implications for certain other aspects of the sentencing guidelines regarding insider trading. For example, because the harm associated with insider trading involves the breach of a fiduciary duty, the harm associated with such trading involves damages to the party to whom that duty was owed, rather than to the defendant's trading partners. This

realization obviously will effect the loss calculations associated with a conviction for insider trading, and hence the penalties involved.

Damages ought not be calculated in terms of the losses incurred by traders who sold to insider-purchasers, or traders who bought from insider-sellers. Rather, the losses borne by the party to whom the fiduciary duty to refrain from trading was owed should represent the actual losses involved in an insider trading case. So for example, hypothetical # 1 involving X corporation's acquisition of shares in Y corporation, the damages would not be the losses to shareholders in Y who sold to the investment banker. Rather, the damages would be the losses to X resulting from the fact that the investment banker's purchases raised its costs of acquiring Y, and lowered the probability that the X's planned acquisition would be successfully completed.

Conclusion

Contrary to popular belief, the law of insider trading in fact does not vindicate damage done to the securities markets generally, or even to individual buyers or sellers who trade with insiders. Rather, properly applied, the law vindicates only the interests of discrete owners of the property rights in valuable, non-public corporate information. Thus, despite all of the publicity surrounding recent insider trading scandals, the concerns about insider trading are not widespread societal concerns so much as they are concerns about violations of specific breaches of pre-existing fiduciary duties. As such, the

concerns regarding insider trading enforcement issues should focus on the individuals and firms to whom the fiduciary duty to refrain from insider trading is directed.

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April 18, 1989

Mr. Paul Martin
Communications Coordinator
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

At the hearing on April 7, Commissioner Block asked me to elaborate my views on sentences for insider trading. The enclosed is a response to that request.

Sincerely,

Larry E. Ribstein
Professor of Law

SENTENCING GUIDELINES FOR INSIDER TRADING

Larry E. Ribstein
George Mason University

While the current gain-based standard for insider trading sentencing (Guideline 2f1.1) is basically sound, I believe the guideline should be qualified in several respects. The qualifications should be in the direction of diminishing rather than increasing the sentences provided for under the current guidelines.

The principal problem with the gains-based test is that it potentially over-deters securities trading. Because of the uncertainty of the law, there is some risk that legitimate trading gains -- i.e., gains that represent an increase in social welfare rather than merely a redistribution of wealth -- will be the basis of criminal penalties. Hence, some traders may refrain from welfare-increasing trades because, in light of the uncertainty of the law, the risk of criminal liability outweighs gains from the trades.

There are many sources of uncertainty. As discussed in my original testimony, the Dirks "personal benefit" test for determining whether there is a breach of a duty not to trade creates a hazy line for tippers and tippees. Second, insider trading is illegal only if the trader knows or should know that the information is non-public. For example, an analyst who hears a rumor at a convention may be unable to determine whether the information is sufficiently

nonpublic. See Investors Management Co., 44 S.E.C. 633 (1971). Third, nonpublic information is actionable only if it is material. The test of materiality for inside information looks both to the probability that the event that is the subject of the information will occur and the magnitude of its effect if it does occur. Traders often cannot easily determine whether either prong of the test is satisfied as to a given piece of information. The Supreme Court recently applied this test to preliminary merger discussions, rejecting a bright-line test that would have characterized as immaterial discussions prior to reaching agreement on price and structure of the transaction. Basic, Inc. v. Levinson, 108 S.Ct. 978 (1988).

The unclarity of insider trading rules casts a shadow of risk over the following important activities, among others:

1. The activities of securities analysts.

Analysts provide an important service in filtering non-public information into the market. Deterring securities analysts from relying on information from insiders may increase their search costs, and accordingly decrease market efficiency. Direct disclosure to the market by issuers is not a perfect substitute for disclosure through analysts because, among other things, such disclosure may lack credibility. Analysts can verify issuers' disclosure, in effect "bonding" their own disclosures by staking their reputations.

2. Ordinary securities trading. Market liquidity could be impaired if ordinary investors had reason to fear long prison sentences for trading on non-public information.

3. Use of common stock as incentive compensation for corporate executives. The value of this type of compensation could be seriously impaired by employees' concerns that granting or exercising stock options could trigger criminal liability.

4. The activities of risk arbitrageurs in takeovers. "Arbs" purchase target stock in takeover bids, thereby absorbing the risk that the takeover will fail. Because they diversify the risk of takeover, and because they have substantial specialized knowledge about the takeover business, arbs can bear the risk of failure of a particular takeover at a lower marginal cost than ordinary investors. In order to minimize their risk, arbs acquire substantial information about bidders and targets, some of which may be nonpublic. Fear of criminal penalties for insider trading may substantially decrease the level of the arbs' activities. This, in turn, may increase the costs of takeovers, and hence the efficiency of the market for control.

Because of the effect of insider trading liability on these activities, the gain-based sentencing levels should be reduced from present levels rather than increased.

Despite the problems associated with a gains-based test, however, the gains test is still preferable to a test

based on loss. As discussed in my initial testimony, there is considerable doubt about the appropriate theory of insider trading losses. For the reasons discussed in that testimony, the loss to other traders in the market is a wholly inappropriate test. If insider trading harms anyone, it is the owner of the information. To the extent that the trading affects stock price, this decreases the benefit the owner could have reaped either by trading itself or by selling the information to someone else. Consistent with this approach, the Supreme Court has hinged insider trading liability on a direct or indirect fiduciary relationship between the trader and the issuer of the traded stock where the information was owned by the issuer. See Dirks v. SEC, 463 U.S. 646 (1983). Although the Supreme Court has so far not explicitly extended this theory to non-issuer owners of information, an evenly divided Court did affirm without discussion an insider trading conviction based on misappropriation of inside information. See U.S. v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), aff'd 108 S.Ct. 316 (1987).

The relevant question is whether losses by owners of information are sufficiently likely to exceed trader gains that a gains-based test under-deters insider trading. In many cases the loss to the owner of the information will equal the trader's gains since these gains measure what the trader would have paid for the information. That is not always the case. For example, in Carpenter, where a

reporter profited from advance knowledge of stories to be published in the Wall Street Journal, the Journal's lost reputation might well be worth more than the employee's gain. Nevertheless, because such losses are hypothetical and difficult to measure, there are problems with incorporating them into a penalty schedule. Moreover, possible under-deterrence resulting from losses exceeding trader gains is largely offset by the over-deterrence problems mentioned above.

The problem of losses exceeding trader gains can be handled by applying aggravating factors within the general framework of a gains-based test. In particular, if the party from whom inside information was misappropriated has warned its employees or other agents against insider trading, this indicates that trading may seriously damage the employer. Additionally, perhaps heavy losses resulting from defendant's trading that can be proved with some certainty should be an aggravating factor.

Apart from basic penalty levels, there is an additional question concerning which offenses are covered by the penalties. The "Background" note states that other offenses, such as those under 7 U.S.C. Section 13(e), might involve misuse of inside information. The Commission should proceed carefully in this area. For example, suppose a potential tender offeror informs another party of a bid in order to encourage that party to buy target stock. This fact situation may involve an evasion of the requirements of

the Williams Act since the "tippee" is, in effect, buying stock for the bidder without triggering the Williams Act disclosure requirement. Accordingly, this conduct may violate S.E.C. Rule 14e-3. But without any breach of fiduciary duty or misappropriation there is no insider trading. Thus, any penalty should be consistent with that imposed for violation of other securities act disclosure requirements.

In summary, I would propose the following changes to current Guidelines dealing with insider trading:

1. Reduce the Base Offense Level.

2. Reduce the increases in penalties corresponding to levels of defendant's gains.

3. Include in the Application Notes to Guideline Section 2F1.2 the following as aggravating factors:

(a) Defendant's conduct violated his employer's or principal's posted rule or policy against insider trading.

(b) The trading caused specific and provable loss substantially in excess of defendant's gains.

4. Include an Application Note clarifying that insider trading does not include violation of disclosure provisions of the securities laws.

I believe these changes will permit severe penalties for socially harmful conduct consistent with the increase in maximum penalties provided for in the Insider Trading and Securities Fraud Enforcement Act of 1988, while at the same

time avoiding the problem of deterring legitimate securities trading.

The Heritage Foundation

A tax-exempt public policy research institute

April 5, 1989

Paul Martin
Communications Coordinator
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Dear Mr. Martin:

Please find enclosed a statement, for inclusion in the record of your April 7 hearing, regarding proposed amendments to the sentencing guideline on insider trading.

Sincerely,

James L. Gattuso

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STATEMENT OF

JAMES L. GATTUSO
MCKENNA SENIOR POLICY ANALYST
IN REGULATORY AFFAIRS
THE HERITAGE FOUNDATION

TO

THE UNITED STATES SENTENCING COMMISSION

ON

PROPOSED AMENDMENTS TO INSIDER TRADING GUIDELINE

APRIL 7, 1989

As an analyst specializing in regulatory issues at The Heritage Foundation, a non-profit public policy research institute, I wish to express my concern about possible adverse consequences from amending section 2F1.2 of the Commission's guidelines so as to increase the penalties for insider trading violations.[1] Because of the vagueness of the insider trading laws, and confusion as to how losses caused by such trading should be measured, such action may actually deter beneficial trading activity, to the detriment of the stock market and the economy as a whole.

The buying and selling of stocks in the market is a crucial part of the U.S. economic system. It is through this process

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[1]The opinions expressed in this statement are my own, and do not necessarily reflect those of The Heritage Foundation.

that the resources of the economy are allocated to various enterprises. For the system to work efficiently, however, it is important that information be transmitted smoothly through the marketplace. Holders of information as to the value of particular enterprises should therefore, to the greatest extent possible, be able to convey that knowledge to the market through their trading. When this knowledge cannot be conveyed, resources are not allocated to their most valuable use, to the detriment of the economy.

By their very nature, the insider trader laws constrain the transmission of valuable information: persons with knowledge as to the value of an enterprise are prohibited from acting on that information. This has been justified on the ground that the loss of marketplace efficiency is outweighed by the benefits of marketplace fairness.[2] Yet, because of the vagueness and ambiguity of the insider trading laws, they can deter conduct which is generally accepted as legitimate. Because actions constituting insider trading are not specifically defined, persons engaging in seemingly legitimate activities can find themselves the target of an insider trading action.

For instance, important issues -- such as the degree of

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[2]This is far from a unanimous view, as a number of scholars have taken the view that insider trading should not be prohibited at all. See, Manne, "Insider Trading and Property Rights in New Information," 4 Cato Journal 933 (1985).

personal interest a "tipper" or "tippee" must have to be found liable -- remain unsettled. Other questions, such as whether a "tippee" knew of a "tipper's" motivation, or whether a particular piece of information was "inside" information or just a general rumor may be difficult to determine in court.[3]

Many of the ambiguities in the law have been intentionally preserved in the law so as to preserve the flexibility of prosecutors. Yet, the result can be a deterrence of legitimate, and desirable, activity. A market analyst, for instance, may be deterred from using information gained from an industry source, even though it could be useful to investors, if there is even a slight chance that liability would later be found.

Resolving the uncertainties of insider trading law is, of course, an issue for the SEC and Congress, rather than this Commission. Yet, a general increase in penalties could significantly increase the deterrence of beneficial economic activity. Increasing the base "offense level" for insider trading violations would deter many from taking actions which could have positive economic effects, simply out of fear of an overzealous prosecutor. Investors and consumers would be hurt, rather than helped, by such action. Increasing penalties based on the defendant's gain would suffer from the same problems.

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[3]For a further description of these problems, see, "Fuzzy Laws Help Blur the Boundaries," The New York Times, March 19, 1989, F3.

Since the size of the gain has little relation to whether a transaction has positive or negative economic effects, many legitimate and economically beneficial transactions would be deterred.

I therefore urge that the penalty levels for insider trading, as contained in the sentencing guidelines, not be increased. The increased penalties for insider trading authorized by Congress can instead be accommodated by the guidelines through the existing adjustments for such factors as abuse of a position of trust and prior criminal history. Deterrence of potentially beneficial activity thus would not be increased.

Thank you for the opportunity to present these comments to the Commission. I hope they will be useful to you in your important work.

MORALITY IN MEDIA, INC. 475 RIVERSIDE DRIVE, NEW YORK, NY 10115 (212) 870-3222

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April 5, 1989

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, D.C. 20004

Attn.: Paul Martin

Re: Proposed Amendments 126-128,
Pertaining To Obscenity

Dear Mr. Chairman:

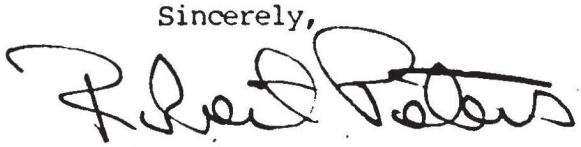
Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. The founder and President of Morality In Media (until his death in 1985) was Rev. Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography" [two copies enclosed].

Morality In Media, Inc. files the attached Comments with a genuine appreciation of the complexity of the task faced by the Commission, but also with deep concern about the impact that the Guidelines and Proposed Amendments 126, 127 and 128 [pertaining to obscenity] will have on the future enforcement of both federal and state obscenity laws.

The Proposed Amendments 126, 127 and 128 are set forth verbatim. Our Comments follow.

Sincerely,



Robert Peters
Attorney

RP/mtb

COMMENTS REGARDING THE
PROPOSED AMENDMENTS 126-128 (OBSCENITY)
TO THE FEDERAL SENTENCING GUIDELINES

Prepared by:
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115

126. Proposed Amendment to Section 2G3.1 Of the Guidelines [pertaining to Title 18, Sections 1460-1463 and 1465-1466].

"§2G3.1 Importing, Transporting, Mailing, or Distributing (Including Possessing With Intent to Distribute) Obscene Matter

Base Offense Level: 6

Specific Offense Characteristics:
(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2P1.1 corresponding to the retail value of the material but in no event by less than 5 levels
(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. **"Base Offense Level: 6"**

Comment: The proposed Amendment does not change the Base Level Offense established under the existing Guidelines. The existing Guidelines permit a sentence range between 0-6 months for an Offense Level 6, which may be satisfied solely by probation. Under the existing Guidelines, even repeat obscenity offenders have little to fear, so long as their offenses are not "related to distribution for pecuniary gain."

In contrast Sections 1461, 1462 and 1465 of Title 18 permit a maximum prison term of 5 years for a first offense and Sections 1461 and 1462 permit a maximum term of 10 years for each subsequent offense, irrespective of whether there is a commercial element. In United States v. Orito, 413 U.S. 139 (1973), the United States Supreme Court upheld 18 U.S.C. 1462 as applied to a person who allegedly transported the obscene material (which included 83 reels of film) by private carriage and "solely for the private use of the transporter." The Court stated:

> That the transporter has an abstract proprietary power to shield the obscene material from all others...is not controlling. Congress could reasonably determine such regulation to be necessary..., based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In July 1986 the Attorney General's Commission on Pornography released its Final Report—revealing both an explosive increase in the quantity of pornographic materials and a radical degenerative change in their content since 1970. The Commission had access to testimony from victims, victimizers, law enforcement officials, physicians, psychologists and pastoral counselors, as well as social scientists, which showed the destructive impact that substantial, habitual exposure to pornographic materials can have on users. The Commission found that youth, ages 12 to 17, constitute the largest audience for pornographic material in America today. Several Commissioners noted the moral harms of pornography as well as its destructive impact on family life--concerns which the Supreme Court has also raised in its decisions upholding obscenity laws.

The harms associated with obscene material occur irrespective of whether distribution is for pecuniary gain, and we respectfully suggest that the Commission's classification of obscenity offenses at Base Offense Level 6 neither promotes respect for the federal obscenity laws nor reflects the nature and degree of harm caused by the crime.

Of course, if the Proposed Amendment is accepted, the Base Level Offense will be 6 even where the act is "related to distribution for pecuniary gain"--if the defendant is not also "in the business."

B. "Specific Offense Characteristics

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels."

Comment: The proposed Amendment changes the existing Guideline which reads, in part:

> "(1) If the offense involved an act related to distribution for pecuniary gain, increase by...."

The **"Reason for Amendment"** provided in the Proposed Amendment states:

> "The purpose of this amendment is to incorporate the new offenses created by sections 7521 and 7526 of the Omnibus Anti-Drug Abuse Act of 1988..., and to make clarifying changes." (emphasis supplied)

The "new offenses" noted are Sections **"1466. Engaging in the business of selling or transferring obscene matter"** and **"1460. Possession with intent to sell, and sale, of obscene matter on federal property."** Section 1466 does include an "engaged in the business" requirement. Section 1460 includes only a "sale" requirement. As stated previously, it is not necessary to prove a commercial element in order to convict under Sections 1461-1465 of Title 18.

Under the existing Guidelines, a showing that the offense "involved

an act related to distribution for pecuniary gain" is necessary to upgrade the Base Offense Level to eleven (11). Such a showing would seldom place an additonal burden of proof on the U.S. Attorney. On the other hand, a showing that the defendant "denotes time, attention, or labor to such activities, as a regular course of business, with the objective of earning a profit" may very well add such a burden—a burden Congress placed on a prosecutor only regarding Section 1466.

Further, the Proposed Amendment relegates an offense involving "pecuniary gain" to a Base Offense Level 6, unless it can also be proved that the defendant is, so to speak, "in the business." At the same time, the Proposed Amendment does not increase the Base Level Offense beyond grade 11 even where a defendant is in fact "in the business." Of course, the Base Level Offense can, theoretically, be increased beyond grade 11 if the "retail value of the material" exceeds $100,000. This, however, will almost never happen in obscenity cases because of the requirement that the trier of fact must make an obscenity determination for each item. Prosecutors will seldom if ever ask a jury to make such a determination for each of hundreds, even thousands, of individual magazines, films, and books.

C. "Specific Offense Characteristics

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(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Under the existing Guideline, the offense need only "involve" material depicting sadomasochistic abuse. The Proposed Amendment also requires a "distribution" element. Presumably, the terms "distributed" and "distribute" mean that defendant would have to sell, rent, lend, or give the material to others or intend to do so. Accordingly, if an American travelling abroad returned with boxes of sadomasochistic tapes and magazines "solely for private use" [i.e. no distribution or "intent to distribute"], the Base Level Offense would not be increased—despite the fact that much of the material would almost certainly "find its way" into others' hands--including children's. See United States v. Orito, supra.

But there is a further problem with both the existing Guideline, as well as the Proposed Amendment--to wit, the special treatment accorded material "that portrays sadomasochistic or other violent conduct." It is for the trier of fact to determine what is obscene, and there is no concept of "degrees of obscenity" in the obscenity law field. Nor is it clear that materials depicting "sadomasochistic abuse" per se pose a greater threat of harm to society, or to individual victims, than do materials "portraying," for example:

1. incest;
2. man/boy love—with "performers" who look 14 but are 18 or over;
3. bestiality;

4. sodomy, group sex, or promiscuous sex, in the age of AIDS;
5. adultery, in the age of family breakdown; or
6. excretory activities or products.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, the United States Supreme Court spelled out the various governmental interests that justify obscenity legislation. These include:

> "[T]he interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers...."

The Paris Court continued:

> "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature...could quite reasonably determine that such a connection does or might exist. ...[t]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis supplied)

In Roth v. United States, 354 U.S. 476, at 502 (1957), Mr. Justice Harlan, in a concurring opinion, elaborated:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.
>
> [E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

Few would quarrel with the assertion that materials depicting sadomasochistic abuse are heinous, but it is a great and tragic mistake to ignore or downgrade the harms associated with other types of hardcore pornography.

Congress has not made distinctions, and we respectfully urge this Commission to also avoid doing so.

127. Proposed Amendment to Section 263.2 of the Guidelines [pertaining to 47 U.S.C. 223(b)]

"**263.2 Obscene Telephone Communications for a Commercial Purpose**
(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved material that describes sadomasochistic or other violent conduct, increase by 4 levels.

(2) If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

A. "(a) Base Offense Level: 6"

Comment: The "dial-a-porn" industry is a multi-million dollar business and a major U.S. distributor of hardcore pornography. Congress in part recognized this by upgrading the penalty from misdemeanor to felony status for making any "obscene communication for commercial purposes." Yet, the Proposed Amendment simply turns a "blind eye" to the commercial aspect of the dial-a-porn industry, relegating all offenses to Base Level 6, unless the communication describes sadomasochism or the person receiving the communication is a child. We think this ignores the nature and degree of the harm caused by the crime, as well as the community view of the gravity of the offense.

Kim Murphy (Staff writer), "Regulators Answer Protests Of Huge 976 Phone Charges," Los Angeles Times, Sept. 28, 1987, at p. 3:

> Clester Jones' 15-year-old son hid the...phone bill when it arrived, so Jones did not see it until the phone was shut off for nonpayment of $5,312 for calls to a 976 number that offered sexually explicit conversation. "The boy didn't realize it was going to cost that much. He got hooked.... He just got so that he couldn't keep from calling," said [the boy's Aunt].... Complaints like the Jones' have drawn the attention of regulators [of] the nation's booming dial-a-message industry, which is expected to expand by 80% this year....

Dr. Victor Cline (psychologist), NFD Journal, Nov. 1985:

> With the sponsorship of the U.S. Justice Department, I conducted a pilot field study of the effects of Dial-a-Porn on child consumers in January 1985.... With everyone of the children we studied we found an "addiction" effect in making these calls. In every case...the children (girls as well as boys) became hooked on this sex by phone and kept going back for more.... I next found that nearly all of the children had clear memories of a great deal of the content of the calls they heard.... We also found that almost without exception the children felt guilty, embarrassed, and ashamed.... In nearly all cases there were some problems and tensions generated in the parent-child relationships....

Dr. Cline continues:

> When one makes a call to Dial-A-Porn, it is usually answered by a very sexy, seductive sounding female (actually a recording) who talks directly to the caller about how bad she wants to have sex with him now. She then tells the caller all the things she wants to

do to him--oral sex, vaginal sex, anal sex, etc. This is done with a lot panting and groaning suggesting that she is in intense heat. She may discuss the turgid state of her sex organs or that of the caller. There may be a second female on the line and they may talk about having sex together as well as with the caller. They may mention having a sex marathon today will all the explicit details. In some cases bondage is a part of the scenario.... Sex with animals is also included as well as group sex (e.g., five guys at once), lesbianism, anal sex, rape, having sex with a "baby sister," a school teacher having sex with class members, inviting the married male to have sex with the babysitter, inviting the caller to urinate in the woman's face, inviting beatings, torture and physical abuse as part of the sexual activity. The messages keep changing every hour or so and new numbers are given out in order to encourage constant call backs.

From a letter to a public official. Names have been changed:

I must relate to you a terrible incident that happened to our family.... It occurred July 26, 1987. My 13 year old son Tim called the dial-a-porn number.... Tim's friend Edward, aged 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me Tim's 14 year old brother was listening on another line with his two friends.... Karen, age 10, was also listening on her extension. Within the next 48 hours, Edward and his 11 year old brother molested my daughter Karen. Police were notified and in their investigation revealed that Karen had encouraged the boys by asking them to touch her and "do it with her." She actually used phrases she heard on the "Dial-a-Porn."

From an article in the Daily News (LA), 10/3/87:

"A man who ran up nearly $38,000 in phone-sex bills has been ordered to spend 180 days in a psychiatric hospital and repay the money he embezzled from a North Hollywood insurance agency to support his habit." (emphasis supplied)

From a May 1987 letter from a Christian ministry to people coming out of homosexuality:

"But there is another matter I would like to address and that is the possibility of proposing and lobbying for legislation that would prohibit the networking of gay telephone sex across this nation.... All I can tell you is that many, many men and women I counsel are being dragged into sexual addiction in this form of perverse activity." (emphasis supplied)

B. **"(b) Specific Offense Characteristics**

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(2) If a person who received the communication was less than

18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

Comment: The Commission is certainly aware that in early 1988, Congress amended 47 U.S.C. 223(b) to prohibit obscene or indecent communication for commercial purposes to any person, regardless of the caller's age, and to abolish the "defense" under the old law for those who complied with FCC regulations intended to restrict access to adults only. Congress did so because it concluded that a "safe harbor" for obscene or indecent dial-a-porn was not constitutionally required for adults or minors.

On July 19, 1988, the United States District Court for the Central District of California upheld the prohibition in 47 U.S.C. 223(b) on obscene commercial messages, but invalidated 223(b)'s prohibition on indecent commercial messages. The United States Supreme Court agreed to hear the appeal of that decision, and oral argument is scheduled for April 19. [Sable Communications of California, Inc. v. FCC, 88-515 & 88-525.]

We fully expect the Supreme Court to uphold Section 223(b), as amended, and urge the Commission to follow the good example of Congress which did away with both the distinction in the previous law between adults and minors and with the statutory "defense" for those complying with ineffective FCC regulations--lest the Commission unwittingly grant dial-a-porn operators what is in effect a "partial immunity" for following its ineffective "rules."

It is to be noted that the Guidelines do not elsewhere make distinctions based on the age of the recipient of obscene (or indecent) matter. There is no reason to do so here.

128. Proposed Amendment: Adding An Additional Guideline, §2G3.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

(a) Base Offense Level: 6
(b) Specific Offense Characteristic:
(1) If the offense involved the broadcast of material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Again, the Commission chooses to treat obscenity offenses as "low grade;" again, chooses to turn a "blind eye" to the commercial element in most broadcast and cable TV programming; again, attempts to determine "degrees of obscenity."

Conclusion

We genuinely appreciate the difficulty faced by the United States Sentencing Commission in determining appropriate Sentencing Guidelines for the hundreds of criminal provisions contained in the United States Code. We fear, however, that in determining sentencing ranges for obscenity offences, the Commission has been unduly influenced by a policy of non-enforcement of obscenity laws that existed for approximately 20 years, roughly from the United States Supreme Court's Fanny Hill-Memoirs decision in 1966 (requiring proof that material was "utterly without redeeming social value"--a burden almost impossible to discharge) until the Final Report of the Attorney General's Commission on Pornography in 1986. The prosecution and sentencing practices of the late 1960's, the 1970's and early 1980's are simply an inadequate basis for determining appropriate sentencing ranges for obscenity offenses.

This is not to say that every obscenity offense should be put in the the highest possible offense level. Nor is it to say that noncommercial offenders, those who profit financially from the distribution of obscenity, and those who are "in the business" of distributing obscene material should be treated exactly alike.

It is to say that those who violate the federal obscenity laws, like those who violate federal drug laws, should know that if apprehended, they will not be treated with "kid gloves." It is to say that if a prosecutor expends the office resources needed to investigate and successfully prosecute a major distributor of obscene matter in his or her district—including a "dial-a-porn" provider, he or she can know that the defendant will not get off with a "slap on the wrist" simply because the defendant is a "first offender" or because the dollar value of the materials that formed the basis of the prosecution is relatively small.

We think too that it is not for the Commission to attempt to establish "degrees of obscenity." Hardcore pornography by its very nature reduces human beings to objects for sexual gratification, and, as noted by the United States Supreme Court in its Paris Adult Theatre I v. Slaton, supra, decision:

> The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Congress passed laws punishing the transportation and dissemination of obscene material, and all obscene materials endanger the social fabric.

U.S. Department of Justice

United States Attorney
New England Drug Task Force

1009 J.W. McCormack POCH
Boston, Massachusetts 02109

April 5, 1989

Honorable William Wilkins
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: Upgrading Sentencing Offense Level for Certain Alien "Aggravated Felons"

Dear Judge Wilkins:

As coordinator of the New England Region Organized Crime Drug Enforcement Task Force, I am writing to urge that the Sentencing Commission upgrade the offense level for certain aliens defined as "aggravated felons" under the Sentencing Guidelines.

As you know, under the current guidelines an alien who is convicted of unlawfully entering the country after deportation is sentenced for that offense based on an offense level of 8. Even if the alien had a criminal record in this country before being deported, the offense level is not enhanced. Similarly, the use of false papers by an alien unlawfully to enter this country is a level 8 offense, regardless of whether the alien previously was deported or had a criminal record in this country.

The classification of the above-mentioned immigration crimes as level 8 offenses has deterred us from prosecuting these crimes, for two reasons. First, judges and magistrates will hesitate to detain defendants before trial, because the duration of sentences under the guidelines will often be less than the time from arrest until trial. Yet, these defendants are almost certain to flee if released before trial. Second, even if defendants are successfully prosecuted, the short sentences will have virtually no deterrent effect on the most serious offenders, those aliens who enter the country illegally to ply the lucrative drug trade.

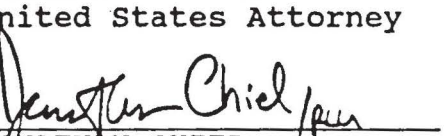
Our office recently prosecuted an alien, under the immigration laws, who had entered the country illegally after prior convictions on drug and weapons charges. After illegally entering the country but before his arrest, the defendant was the

assailant in a shooting and a separate assault on law enforcement officers. Because the crime predated the effective date of the guidelines, the government recommended -- and the defendant agreed to -- an 18-month sentence. It is discouraging to think that under the guidelines, based on the offense level and the defendant's acceptance of responsibility, the defendant would have received a sentence of less than eight months.

Enforcement of the immigration laws should be a crucial component of the federal effort against the illegal drug trade. Those of us throughout New England hope that the Sentencing Commission will upgrade the offense level for certain immigration law violators to reflect the seriousness of their immigration crimes.

Very truly yours,

PETER A. MULLIN
United States Attorney

By: 

JONATHAN CHIEL
Assistant U.S. Attorney
Coordinator, New England Region
OCDETF

U.S. Department of Justice

KJA:nmd/LTRSent

United States Attorney
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April 3, 1989

Paul Martin, Esquire
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Proposed Amended Sentencing Guidelines
for 8 U.S.C. Section 1326

Dear Mr. Martin:

Ronnie Scotkins of your office kindly forwarded to me a copy of the proposed amendments to Section 2L1.2 of the Sentencing Guidelines relating to the unlawful re-entry of an alien to the United States. As you are aware Section 7345 of the Omnibus Anti-Drug Abuse Act of 1988 amended 8 U.S.C. Section 1326 and set up a three-part sentencing structure: For an alien who re-enters after a prior deportation and does not have any prior convictions, the maximum penalty remains two years; for a defendant who was deported after a conviction of a felony and returned to the United States, the maximum penalty is five years imprisonment; and for a person who was convicted of an aggravated felony (which includes any drug trafficking crime), the maximum penalty is fifteen years imprisonment. The Sentencing Commission has proposed amendments to the current guidelines to accommodate these new statutory changes.

The proposed amendments which relate to those aliens who return and have no prior convictions or have a plain felony conviction seem appropriate. The suggested "specific offense characteristic" which would raise the offense level from 8 another four levels would reflect the seriousness of the offense. The proposed enhancement for those defendants convicted of an "aggravated felony" does not seem to be adequate however. The proposed guidelines suggest that in the case of an illegally re-entering defendant previously convicted of an aggravated felony "an upward departure <u>should</u> be considered." We are concerned that the proposal does not provide adequate deterrence to re-entering aliens, especially for those defendants who have been convicted of prior drug offenses because the enhancement

does not set a definite, stern term of imprisonment that an alien knows will be imposed if he returns illegally.

Our district has experienced numerous cases of drug dealers who have been previously deported and then have returned to the United States illegally in order to continue to carry on their drug business. If we had definite, stringent sentences for those returning aliens, we believe word would soon filter back to their counterparts in Jamaica and elsewhere and the flow of illegally re-entering aliens could be stemmed. Some case illustrations of the problems facing our district might be helpful to the Commission. Last month we arrested a previously convicted Jamaican drug dealer, Henry Gilbert Martin, who had been deported two different times by the Immigration and Naturalization Service. We have an arrest warrant outstanding for another previously convicted Jamaican drug dealer who also had been deported two times. Our Immigration agents know of at least four other Jamaican drug dealers whom we had previously deported but who have returned to the Maryland area and are involved in drugs again. Obviously to defendants of this kind, the risk of spending some time in jail is considered just a cost of their doing business as an American drug dealer. The problem of these re-entries will not abate, we believe, until a heavier, definite guideline range is created.

The proposal to have the court "consider" an upward departure in the case of these aggravated felons we believe would not provide sufficient deterrence. It would lead to highly variable sentences from district to district and in many cases it might lead to a sentence that is not lengthy enough to be deemed a deterrent to other returning drug dealers. It should be noted that the returning aliens often are part of an organization that has members both in the United States and in other countries. News between members of the organization people does travel. If we intend to provide both specific and general deterrence to those who are considering re-entry after deportation, a special offense characteristic level which would raise the offense level to 24 would provide such a deterrent. The time of incarceration then would range between five and twelve years. This would provide the kind of deterrence that we believe would be effective and commensurate with the seriousness of the offense.

In sum we hope the Commission will raise the offense level so that returning drug dealers will realize that their actions will result in long-term incarceration, rather than a brief stop on their way back to dealing drugs in the United States.

Thank you for your consideration.

Very truly yours,

Breckinridge L. Willcox
United States Attorney

Katharine J. Armentrout/dkt
Katharine J. Armentrout
Assistant United States Attorney

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March 31, 1989

Honorable William Wilkins
United States Sentencing Commission
Suite 1400, 1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Upgrading the Sentencing Classification Level for Certain Alien "Aggravated Felons"

Dear Judge Wilkins:

I am writing to lend my support to the Immigration and Naturalization Service's efforts to get the Sentencing Commission to upgrade the sentencing classification level for certain "aggravated felons." In the Service's view, such an upgrade is necessary to more fully carry out the Congressional intent in this area as expressed in the recently enacted Anti-Drug Abuse Act of 1988 (ADAA). I have been advised that INS Headquarters has already discussed this matter with Peter Hoffman of the Commission's staff.

One of the many provisions within the ADAA that directly impacts upon the mission of the Immigration & Naturalization Service is the enhancement of criminal penalties under Title 8, United States Code, Section 1326. Subtitle J, Title VII, of the ADAA (attached), is designed to return credibility to the Immigration and Nationality Act regarding criminal aliens in general and "aggravated felons" in particular. In accordance, the spirit of the law and the manner in which the INS will implement it are designed to accomplish three things:

1. to effectively remove "aggravated felon" criminal aliens from the streets of America through mandatory detention;

2. to facilitate an expeditious order of deportation by shifting the onus from the United States to the "aggravated felon" alien in administrative proceedings. A "conclusive presumption" of deportability now attaches to an alien convicted of murder or narcotics trafficking, as well as an attempt or conspiracy to commit either of these offenses; and

3. to create a meaningful deterrent for "aggravated felons" re-entering the United States through enhancement of the criminal penalties. The legislative intent regarding this provision is found in a statement by Senator Lawton Chiles when he first introduced the measure in the First Session of the 100th Congress:

> This provision is intended to strengthen immigration law by creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States. In addition, this criminal offense will give law enforcement authorities a broader arena for prosecuting the drug offenders as current tax fraud and mail fraud violations provide.

While implementation procedures for points one and two of this three-pronged approach are fairly well developed, the INS has an immediate problem regarding point three. The fifteen year enhancement on reentry was originally designed as a mandatory minimum sentence. This was deleted, however, in the informal conference between the House and Senate. At present, the Congressional intent of the measure is severly hampered by the very low level attached to this violation in the Federal Sentencing Guidelines. To rectify this situation, an upgrading of the sentencing classification for these alien offenders to a level 24 would be appropriate in that "aggravated felons" would then receive from five and one-half to ten and one-half years "real time." This would provide the meaningful deterrent for alien aggravated felons intended by Congress.

Thank you for your attention to this most important matter.

Very truly yours,

JOSEPH P. RUSSONIELLO
United States Attorney

Enclosure

(1) by inserting "(A)" before "crime"; and

(2) by inserting after the semicolon the following: "or (B) is convicted of an aggravated felony at any time after entry;".

(b) APPLICABILITY.—The amendments made by subsection (a) shall apply to any alien who has been convicted, on or after the date of the enactment of this Act, of an aggravated felony.

SEC. 7345. CRIMINAL PENALTIES FOR REENTRY OF CERTAIN DEPORTED ALIENS.

(a) IN GENERAL.—Section 276 (8 U.S.C. 1326) is amended—

(1) by striking out "Any alien" and inserting in lieu thereof "(a) Subject to subsection (b), any alien"; and

(2) by adding at the end thereof the following new subsection:

"(b) Notwithstanding subsection (a), in the case of any alien described in such subsection—

"(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 5 years, or both; or

"(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.".

(b) APPLICABILITY.—The amendments made by subsection (a) shall apply to any alien who enters, attempts to enter, or is found in, the United States on or after the date of the enactment of this Act.

SEC. 7346. CRIMINAL PENALTIES FOR AIDING OR ASSISTING CERTAIN ALIENS TO ENTER THE UNITED STATES.

(a) IN GENERAL.—Section 277 (8 U.S.C. 1327) is amended by inserting "(9), (10), (23) (insofar as an alien excludable under any such paragraph has in addition been convicted of an aggravated felony)," immediately after "212(a)".

(b) APPLICABILITY.—The amendment made by subsection (a) shall apply to any aid or assistance which occurs on or after the date of the enactment of this Act.

(c) CONFORMING AMENDMENTS.—(1) The section heading for such section is amended by striking out "SUBVERSIVE ALIEN" and inserting in lieu thereof "CERTAIN ALIENS".

(2) The table of contents of such Act is amended by amending the item relating to section 277 to read as follows:

"Sec. 277. Aiding or assisting certain aliens to enter the United States.".

March 29, 1989

The Honorable William Wilkins
U.S. Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington D.C. 20004

Re: Upgrade to Level 24 of 8 U.S.C. 1326 (Re-Entry After Deportation of an Aggravated Felon)

Dear Honorable Wilkins:

This letter is to voice my support, and that of the Assistant U.S. Attorneys in my District involved in prosecuting Immigration Federal Crimes, to upgrade 8 U.S.C. 1326 violations for aggravated felons, as that term is defined under the 1988 Anti-Drug Abuse Act (Drug Traffickers, Weapons Traffickers, Murderers and those who attempt or conspire to commit these offenses) to a Grade 24 rather than the low level grade presently attached to this violation under the Federal Sentencing Guidelines.

We feel that the upgrading of this offense to a Level 24 would be a more appropriate Level for such aggravated felons as there would then be a very real deterrent since these individuals, if convicted, would receive from five and one half to ten and one half years real time.

Sincerely,

Byron "Pete" Dunbar
United States Attorney
District of Montana

Memorandum

UNITED STATES IMMIGRATION & NATURALIZATION SERVICE

Subject	Date
Enhancing Criminal Penalties Under The U.S. Sentencing Commission Guidelines for Aggravated INS Felons	March 29, 1989

To	From
PETE DUNBAR U.S. Attorney Billings, Montana	ROBIN L. HENRIE District Counsel Helena, Montana

The Immigration and Naturalization Service is presently attempting to create a meaningful deterrent for "aggravated felons" re-entering the United States through enhancement of the criminal penalties involved.

The 1988 Anti-Drug Abuse Act (ADAA) contains a statement, in the legislative intent, by Senator Lawton Chiles:

> "This provision [15 year enhancement on re-entry as a mandatory minimum] is intended to strengthen Immigration Law by creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States. In addition, this criminal offense will give law enforcement authorities a broader arena for prosecuting the drug offenders as current tax fraud and mail fraud violations provide."

Unfortunately this 15 year enhancement on re-entry provision was deleted along with other provisions, in the informal conference between the House and Senate. This means that at present the Congressional intent of the measure is severely hampered by the very low level attached to this violation under the Federal Sentencing Guidelines.

The Immigration and Naturalization Service needs support through the United States Attorneys to bring this topic up on the agenda

and to pass it at an upcoming hearing of the Sentencing Commission in early April.

Accordingly, it is respectfully requested that you review the letter which I have attached and forward the same to the Honorable William Wilkins, U.S. Sentencing Commission.

Sincerely,

ROBIN L. HENRIE
District Counsel

S7:ER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, N. Y. 11201

CHAMBERS OF
JOHN R. BARTELS
SENIOR JUDGE

December 22, 1989

Honorable William W. Wilkens, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkens:

I enjoyed the conference with Commissioner Ilene Nagel and other members of this Court last Monday, December 18, 1989, in an effort to explore any possible changes and innovations in the Sentencing Guideline System.

Inasmuch as this district has jurisdiction over JFK International Airport, a great volume of alien narcotic mules come before this Court for sentencing. The guideline ranges for these couriers are usually between 33-41 months to 78-97 months. I suggested that consideration be given to some type of amendment to both the sentencing guidelines and statutory provisions which would reduce the penalty of such foreign national couriers from the aforementioned ranges of imprisonment to 6 to 12 months imprisonment with a legislative provision providing that such alien mules be immediately deported after service of sentence without going through the very cumbersome and delaying procedures of the Immigration and Naturalization Service. A chart outlining the previously mentioned 6-12 months imprisonment ranges is attached.

It is suggested that the law provide that after completing the 6 to 12 months of custody followed by summary deportation, the offenders' subsequent return to this country would be an offense punishable by a mandatory 10-year term of imprisonment.

This proposal would provide sufficient punishment and deterrence for such offenders and, in addition, would save this country an enormous sum of money and a large amount of prison space. Such a program would greatly

impact on those districts covering major ports of entry, such as Eastern New York, Southern Florida, Southern Texas and Southern and Central California. The program would be limited to those who import narcotics from outside of the country and are foreign nationals.

Of course, this change would be ineffective unless Congress passed a special law providing for the summary, accelerated deportation of those offenders within two or three weeks after they serve their prison term. I believe the program is practical.

Would you be kind enough to let me have your reaction to this program which would save the country much money and prison space.

Sincerely yours,

JOHN R. BARTELS
United States District Judge

Copy to:

Commissioner Stephen G. Breyer
Commissioner Helen G. Corrothers
Commissioner George E. MacKinnon
Commissioner Ilene H. Nagel

Honorable Joseph R. Biden
Chairman, Senate Committee on the Judiciary

Honorable Jack Brooks
Chairman, House Committee on the Judiciary

SENTENCING CHART

Cocaine

Under 1 kilogram - 6 months

1 - 4.99 kilograms - 9 months

5 or more kilograms - 12 months

Heroin

Under 200 grams - 6 months

200 grams - 999 grams - 9 months

1 or more kilograms - 12 months

Other Controlled Substance

6 months

STEER

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)

March 10, 1989

MEMORANDUM

TO: All Commissioners
Sid Moore
John Steer
Peter Hoffman
Phyllis Newton

FROM: Brenda A.

The attached letter from Stephen Saltzburg is for your information.

Attachment

U.S. Department of Justice

Criminal Division

SAS:RAP:VP:vp/bjl

Deputy Assistant Attorney General

Washington, D.C. 20530

MAR - 8 1989

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Billy:

Enclosed is information we obtained from the Immigration and Naturalization Service that may be helpful to the Commission in revising the guidelines on immigration offenses. As indicated in a Commission meeting considering immigration offenses and a guideline amendment we submitted, we believe that the guideline should provide enhancements depending upon the number of illegal aliens smuggled, the use of a weapon, and any injury that may result.

The INS collects data concerning smugglers it has targeted by category of offender. We were told, however, that the agency does not maintain records regarding the number of illegal aliens actually smuggled in each case. The categories of offender are described in the enclosed INS material. For example, Category I smugglers are those who control or operate a criminal alien smuggling enterprise and who smuggle more than 100 illegal aliens per month, earn more than $10,000 monthly, or commit certain other specified offenses. The data indicate for Category I smugglers that in 1988 there were 637 cases completed and 5,800 smuggled aliens apprehended. In response to questions we posed to INS about the data, we learned that Category I smugglers typically operate as part of groups of about four people. The figures do not reflect the offenses that did not result in the apprehension of smugglers and aliens.

If you have any questions regarding the data, please contact Arthur K. Dunlap, Deputy Assistant Commissioner, Anti-Smuggling,

at 633-2554. In addition, we would be pleased to provide further assistance you or your staff may request.

Sincerely,

Stephen A. Saltzburg
Deputy Assistant Attorney General

Enclosure

CLASSIFICATION OF ALIEN SMUGGLERS

IMPACT LEVEL I - MAJOR VIOLATORS

CATEGORY I

DEFINITION - A Level I violator is an individual who controls or operates a criminal alien smuggling enterprise engaged in transporting, harboring, and smuggling illegal aliens into the United States, and which includes three or more of the following organizational functions:

- o recruiting illegal aliens for travel to the United States
- o guiding illegal aliens along the smuggling route
- o transporting illegal aliens to/within the United States
- o operating safehouses
- o labor brokering, job finding
- o providing fraudulent identification, travel, employment, benefits documents
- o facilitating smuggling in other ways

Level I violators are major participants in a criminal alien smuggling enterprise and who:

1.1 are known to smuggle more than 100 illegal aliens per month,

or

1.2 are known to earn more than $10,000 monthly

or

1.3 whose primary criminal activity is alien smuggling and are also engaged in other criminal activities, such as:

- 1.3(a) document fraud
- 1.3(b) other immigration-related fraud
- 1.3(c) drug trafficking
- 1.3(d) prostitution and other vice
- 1.3(e) grand larceny, auto theft
- 1.3(f) burglary
- 1.3(g) baby smuggling
- 1.3(h) weapons smuggling
- 1.3(i) transporting known terrorists
- 1.3(j) felony violators of federal and local laws who are the targets of joint federal/local criminal investigations;

or

1.4 whose alien smuggling activity is directly or indirectly abetted by U.S. or foreign government officials;

or

1.5 are designated by COASA as principals of a "national impact" investigation.

CATEGORY II

The DEFINITION presented in Category I pertains to Category II violators. Category II violators:

2.1 are known to smuggle more than fifty (50) illegal aliens per month;

or

2.2 are known to earn more than $5,000 monthly.

or

(Items #1.3 and 1.4 do not pertain to Category II.)

IMPACT LEVEL II - LOWER LEVEL VIOLATORS

CATEGORY III

DEFINITION - Category III violators do not meet any of the criteria under Categories I or II but are engaged in alien smuggling activities on an intermittent basis. Generally, the purpose for a Category III investigation is to cause the violator to discontinue alien smuggling activities, to impose effective legal action against the violator, and/or to collect information and investigative leads to identify higher-level alien smuggling violators.

Feb. 27, 1989

FY'88
ANTI-SMUGGLING PROGRAM STATISTICAL
BREAKDOWN BY CATEGORY

	TOTAL FY'88	Cat. I	Task Forces	Cat. II	Cat. III
Smugglers Apprehended	13,200	2,302	419	2,165	8,314
Smuggled Aliens Apprehended	28,108	5,800	839	814	20,655
Cases Completed	6,138	637	194	185	5,122
Prosecutions Authorized	7,281	1,480	1,233	1,686	2,882
Convictions					
Felonies	1,121	535	188	91	307
Misdemeanors	4,868	271	2,071	573	1,953
Sentences	29,780	9,409	11,931	798	7,642

Feb. 27, 1989

FY'87
ANTI-SMUGGLING PROGRAM STATISTICAL
BREAKDOWN BY CATEGORY

	TOTAL FY'87	Cat.I	Task Forces	Cat.II	Cat.III
Smugglers Apprehended	11,072	2,294	726	491	7,561
Smuggled Aliens Apprehended	31,707	4,775	532	1,200	25,200
Cases Completed	5,217	553	59	219	4,386
Prosecutions Authorized	8,361	2,210	669	884	4,598
Convictions					
Felonies	1,239	617	94	176	352
Misdemeanors	5,638	1,331	524	1,318	2,465
Sentences	20,619	11,053	2,496	978	6,092

U.S. Department of Justice

United States Attorney

Middle District of Tennessee

879 United States Courthouse
Nashville, Tennessee 37203-3870

615/736-5151
FTS/852-5151

February 13, 1989

MEMORANDUM TO: Andy Purdy
U.S. Sentencing Commission

FROM: Joe B. Brown
Chairman
Sentencing Guidelines Subcommittee
Attorney General's Advisory Committee

I have spent a good part of the weekend reviewing the various materials that you have sent that the Commission will be considering this week. I apologize for rather limited comments but, quite frankly, the amount of material and the scope of the proposed amendments is a little more than I can absorb in the time allotted. Accordingly, I will try to hit only the high points. I have also been sending you directly other U.S. Attorneys comments. Those comments have been reviewed and I am certainly in general agreement with them also.

The first and what I consider a major point deals with counting prior convictions. Question 39 in the memorandum from the Sentencing Commission to the U.S. Attorneys dealing with Guideline § 4A1.2(a)(2) treats two separate bank robberies committed by an individual as only a single act when calculating criminal history points if the two robberies were consolidated for trial or for sentencing. Likewise, under § 4B1.1 career criminal, using the definition in § 4B1.2(3)(B), the two prior offenses must be counted separately under Part A of Chapter 5 to qualify.

The long and short of this is that an individual who commits, for example, five bank robberies over a substantial period of time, will not be eligible for career offender status if he is fortunate enough to have his cases consolidated in one trial or, once having been caught, he is again fortunate enough to be able to consolidate them at one time for sentencing.

This appears to me to create a serious disparity in sentencing of criminal defendants based solely on the happenstance of joint trials or joint sentencing.

I would note that in determining the sentence for an individual convicted of five bank robberies in one trial that the robbers are not grouped together but are treated separately for determining punishment.

To give an example, in this district we had a well known bank robber who committed approximately eight bank robberies over a 3-year period of time, all in the Middle District of Tennessee. These robberies over a number of years were tried together and he was convicted. A number of years later, upon release, he went out and returned to his past life and again robbed a bank in Middle Tennessee. Even though this individual had been convicted for five prior bank robberies, he would not be eligible for career offender status nor would his criminal history reflect anything other than a single prior conviction. Had this same individual committed these bank robberies in different judicial districts and gone to trial, he would, of course, had sentences in different districts and would have been eligible for an enhanced criminal history level and for criminal status. Similarily, in our local state courts, so long as the offenses are committed in one state judicial district, they are often consolidated for sentencing, even though the defendant may have gone to trial on several offenses separately. Under the Commission's policy, even though the cases were tried separately, so long as they are sentenced in one proceeding, they are counted only as a single offense. Unless the Commission intends to encourage individuals to commit all their offenses in the same judicial district, I cannot see the logic of this grouping. It should also be noted that under § 3D1.2, bank robbery, for instance, is specifically excluded from the grouping rules and they are treated separately.

I would strongly urge that the Commission amend the Chapter 4 definitions and treat as separatel criminal offenses which would not be grouped together under § 3D1.2 even though they are consolidated for trial or sentencing.

Turning now to the 129 pages or so of proposed amendments beginning with Section § 2A2.1, I will try to provide at least some limited comment.

I see no particular objections to the changes in § 2A2.1.

Likewise, I see no particular objections to § 2B5.1.

I agree that we need to enhance the penalties for the use of force or threat of force, deny benefits, rights, as proposed in § 2H1.3.

Concerning firearms under § 2K2, I agree that we need to consolidate and beef up these sections. One of the reoccurring complaints from the U.S. Attorneys has been that the offenses involving firearms are substantially lower than they need to be. Very often, a convicted felon will be caught with a firearm and the use of the firearm statute to prosecute him is the most effective way of incapacitating him The raise in the base level to 12 is certainly a step in this direction. Although I believe that the possession of a machine gun or a silencer should be treated more severely. At the present time, under the recommended amendment, possession of a machine gun by an individual who is not a convicted felon, would carry only a level 6 offense. Certainly, given the fact that there is no particular legitimate purpose for the possession of a machine gun and given the enforcement results which have been published most recently from the use of assault weapons, I believe that a minimum of level 16 should be used for machine guns. I agree that the number of firearms involved in transactions or possessions should be considered. However, I think the increase for the number of firearms is somewhat low and I would start by adding two levels for 3-5 firearms, three levels for 6-11, etc., and would likewise increase the offense by four levels if the firearm was an automatic weapon. I see no reason why a silencer should increase by four levels while a machine gun, itself, would not be increased by four levels.

Concerning § 2L1.1, as you know, a number of U.S. Attorneys have indicated that they felt that substantial additional enhancements for punishment was needed in this area. I would recommend, however, increasing the punishment one level at the 3-5, two at the 6-10, etc. so there would be a greater increase than presently recommended in the draft amendment. I would also apply the same adjustments to the sets of documents or number of passports involved as well.

I would also consider adding a specific offender characteristic to provide a enhancement if the conditions of the smuggling created a risk of harm to the alien smuggled. In the southern area we, of course, have seen a number of cases where aliens smuggled in in trucks have been seriously injured or even killed during the efforts. I would think that this would be an appropriate specific characteristic which should carry substantial enhancements where there is either a risk of or actual injury to the smuggled aliens.

Guideline § 2L1.2, unlawfully entering or remaining in the United States, has been touched upon by several of the U.S. Attorneys who are faced with problems of aliens repeatedly reentering the United States. They feel rather strongly that the current base level is somewhat low and that there should be specific enhancements if the individuals commit this offense after having been deported once. It would certainly appear to me to be appropriate to add in a specific enhancement of something in the order of 2-4 levels for individuals who returned to the United States having been previously ordered deported. Likewise, convictions for reentering the United States should be used to enhance their criminal history.

The sections dealing with mishandling hazardous toxic substance under § 2Q certainly need to be addressed and I believe that the proposed guidelines do make a good effort to address this very serious problem. It does appear to me that under § 2Q1.2(b)(1) that where cleanup costs exceed one million dollars we only increase by one level is far too low. It appears to me to be that the enhancement levels should be more in keeping with those of larcenies and other matters. I don't think the public would be particularly enthusiastic about a one level increase for a million dollar damage to the economy or a three level increase for ten million. I think they would feel that a polluter was getting a bargain at those rates. In general, I feel the specific offender characteristic enhancements are substantially too low for almost all of Subsection B.

The obstruction Guideline § 3C1.1 does not appear to me to be that much of a problem. I am not sure that the proposed amendment would help any. The hotline items appear to me to be examples of where probation officers are

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