attempting to read too much into the guidelines and a fair, common sense reading of the current guideline is all that is required. This is one example where I think where it's not broke and we don't need a fix.

Concerning the Chapter 3, Part D, multiple count comments, I have already commented on my concern over failure to separate out for other purposes robbery and other unique harms against individuals. I see no particular problem with the proposed amendments in this section.

Acceptance of responsibility § 3E1.1 causes me both joy and concern. I agree that the acceptance of responsibility and the plea should be in a timely manner. I am somewhat concerned, however, that the proposed phrase "ordinarily is a significant factor" may be a little too strong. I would prefer something like "is ordinarily an indicator" rather than "a significant indicator." With that exception, however, I think the proposed amendments would help clarify this section. Obviously, we cannot punish a defendant for exercising his constitutional right to go to trial. However, there are a number of cases reported by U.S. Attorneys where judges are giving acceptance of responsibility where the defendant has gone to trial and even testified in a manner which clearly was contrary to the facts. Under these circumstances, the guidelines should certainly attempt to preclude any reduction for acceptance of responsibility.

The comments on s 4B1.1 career offender are alright as far as they go. However, I will refer you back to my opening paragraphs. I think the definitions of prior felony convictions under 4B1.2(3) are totally inconsistent with logic and reason and also with the congressional intent to punish more severely career offenders. I cannot too strongly recommend that this be changed in that defendants who are convicted of separate violent crimes, even though their convictions may be consolidated for trial or sentencing, be treated as such. To my knowledge, Congress has not imposed any such definition that the Commission uses. In fact, it uses a much broader definition when it defines violent felonies in § 924(e)(2)(B).

I have substantial objections to the recommended changes to § 5K1.1. Although I am missing Page 86 and 88 of the comments, I am concerned with the proposed changes. I

generally believe that the existing guideline is adequate until proven deficient. One suggestion contained on Page 87 would be to substitute "provided" for "made a good faith effort to provide." In many cases, a defendant may in fact make a good faith effort to provide and the government may be satisfied that he has done so, but the information does not in fact finally help the government. I would think that the government should be able to make a motion under these provisions, and not require that the defendant actually provide substantial assistance. In my experience and judgment, if the defendant does make a good faith effort to provide and the government is satisfied that that is so, he should get some consideration even though the information does not, in the final result, turn out as favorably as hoped. My objections in this regard are not particularly strong. However, I think the suggested change on Page 90, which would substitute the words "a finding" for "motion of the government" would be an open invitation for judges to make wholesale departures from the guideline and for every defense attorney to make a claim that his client has made a good faith effort to provide substantial assistance to the government or has in fact provided it and the government is simply being unreasonable by not making a motion. The present guideline gives the government a very powerful incentive to encourage a defendant's genuine cooperation. To allow this to be shifted to the court whenever the court makes a finding that the defendant has made a good faith effort to provide substantial assistance would as I have stated be an unmitigated disaster.

Concerning the amendments required by the Major Fraud Act of 1988, I agree it is clear that Congress intends for substantial punishments to be imposed for individuals involved in insider trading and major stock frauds. I would generally agree that these need to be increased and that fraud involving the procurement by the United States of goods or services should be protected by enhancing present punishments.

Concerning the recommendations on dosage units, I do not have the technical knowledge to evaluate the amendments and therefore have no specific comment. If the DEA liaison has no objections, I would certainly defer to their judgment.

ORGANIZATIONAL SANCTIONS

Concerning the February 6 organizational sanctions, I think it is clear that we are moving in the right direction in that the proposed draft is a manifest improvement over the original degree of difficulty proposals. I obviously concur with the recommendations of the Department and their proposed organizational guidelines. I would also defer to the comments which the Commissioners receive from the larger offices who deal more extensively with organizational guidelines than my district. I would say that on Pages 17 and 18 I have some conceptual difficulty understanding the proposed § 8D1.2. The proposed guideline indicates that if at least one individual associated with the organization is sentenced that the fine upon the organization should be set equal to the total presumptive fine of the individuals actually sentenced for commission of the crime.

Subparagraph (b) provides that if no individual associated with the organization is sentenced that the magnitude of the fine shall be twice the presumptive fine of an individual who has committed the same crime. This seems to give a substantial break to the organization if an individual member is convicted. I can see examples where an individual owner-manager is convicted but his fine would certainly be less than that of the total corporate responsibility. As I read the proposed guideline, the organizational fine under these circumstances would be limited to the presumptive fine for the person actually sentenced. It would appear to me that this limitation should not be incorporated into the guideline and that the presumptive fine should the same whether individuals in the organization are convicted or not.

SENTENCING PROCEDURE GUIDELINES FOR CHAPTER SIX

Concerning the memorandum dated February 1, 1989, I will address the various comments which are enclosed in the 71 pages in this package of material I have received.

I agree that the sentencing procedures should not be burdensome and the Court should have flexibility in setting up the appropriate procedure in each district for insuring that the defendant and the government have appropriate time to examine the presentence report, etc. The procedures needed in larger districts obviously would not be the same procedures as would necessarily be needed in smaller

districts. Certainly, there should be no requirement and in fact there is none that there be a number of separate hearings.

Concerning the proposed new Guideline 2K2.5, on possession of firearms and dangerous weapons in a federal facility, I would like to see the base level set at 8 rather than 6. The possession of a weapon on a federal facility can constitute a serious danger to employees. Obviously, where the weapon is used, more serious guidelines do apply. However, I think that in an effort to deter this type of conduct, a level of 8 would be more appropriate than that of a 6.

Concerning the insider trading and security fraud memorandum at Page 14, I think that these comments are generally appropriate and, as I have stated my comments above concerning earlier proposals, I believe this is a good, specific proposal and does enhance the punishment and seriousness of these violations.

Likewise, the comments on Page 20 and 21 dealing with civil rights are certainly appropriate since protection of civil rights needs to be zealously done.

Concerning unlawful entering Guideline 2L1.2, as noted in my letter above and by comments from other U.S. Attorneys, they feel that this needs to be substantially increased. In fact, one of the more serious problems is the revolving defendant who reenters the country as soon as he is deported. It would appear to me that a reentry following expulsion either under administrative or judicial orders should result in at least a 3-level increase. I see no reason for excluding the 3-level enhancement for violations of the immigration laws as is presently done. In fact, I would think that repeated violations of the same statute should warrant substantially greater punishment since it involves a blatant disregard of judicial and administrative orders.

Generally, the comments concerning the narcotics violations, PCP, etc. seem to be well taken and I would again defer to the expertise of DEA on the techical portion of it. However, it appears to me that the recommendations do clear up some ambiguities concerning both weight, purity and other matters.

Concerning home detention, it does appear that Congress in its infinite wisdom has again created a problem. I would hope that the Commission could resolve this by not requiring departures. Any time the Commission guidelines require a departure to comply with a statute, it appears to me that we are opening up additional appeals which we do not need. I would hope that the guideline could accommodate the Congressional direction without requiring a departure, although in this case I will admit it seems somewhat difficult to do since it is clear that for all other purposes, home confinement is not a substitute for incarceration. It may well be that the Commission needs to rethink this matter, although the practical problems of enforcing home confinement, to me, mitigate against allowing that substitution until such time as the home confinement can be adequately monitored. Also, home confinement could be conceived as a punishment available to the relatively more wealthy individuals who can easily accomplish this whereas it is not available to the poor who may not have a permanent place of residence.

Concerning fines and the discussion of fines at Pages 47, consideration and additional guidance needs to be given in these matters. I am particularly pleased to see it. At Page 63 in the recommended notes, courts are encouraged to set fines realisticly thereby increasing the probability that they will be collected and serve as an effective deterrent. The fines which are set without regard to the ability of the government to collect can cause serious problems for the Department of Justice. We are responsible for collecting fines. At the present time, our inventory of uncollected fines is growing astronomically. It does no good to impose fines which the Department of Justice cannot collect. This tends to make fines to be somewhat of a joke in that everyone involved realizes the fine cannot be collected. The Department then has to expend coniderable effort in attempting to do the impossible and get blood out of a turnip. This detracts from our ability to go after the really collectable fines. Additionally, it causes someone looking at the Department's statistics to think that we are doing a bad job since we have all of this uncollected money. Unfortunately, the fact is that most of it is uncollectable and should be written off. We do have new legislation which will permit us to do that but again, it is somewhat cumber-

some. In general, I believe that the fine comments are appropriate and would be an improvement over the existing fine guidelines.

I appreciate the Commission give the Sentencing Guidelines Subcommittee an opportunity to comment. We have appreciated very much your attendance and input at our meetings. I know that all of us are working with a common goal to make the guidelines effective and workable. We are all looking forward to our continued close cooperation.

JOHN STEER

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

March 15, 1989

MEMORANDUM

TO: All Commissioners
Sid Moore
John Steer
David Lombardero
Peter Hoffman

FROM: Brenda

The attached letter from J. Michael Quinlan, dated March 14, 1989, is for your information.

Attachment

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, D.C. 20534

March 14, 1989

Mr. William Wilkins
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue N.W.
Washington, D.C. 20004

Dear Chairman Wilkins:

I am writing in response to the changes proposed to the Sentencing Guidelines relating to the conviction of current or former law enforcement officials for introducing contraband into correctional institutions.

We support sentencing enhancements for either currently employed or former law enforcement officers who are convicted of introduction of contraband into correctional institutions or attempting to introduce contraband into correctional institutions. Any enhancements of this nature should include either currently employed or former federal, state, or local law enforcement officers, including correctional officers or employees of the Department of Justice. These individuals, by virtue of their current or previous employment, have access to otherwise confidential security procedures at correctional facilities, and are thus in a position to use that knowledge to more effectively circumvent institution security operations. Further, as current or former law enforcement officers, these individuals have been placed in positions of public trust, and misuse of these positions or the information gained from occupying these positions represents a serious violation of that trust. Such actions, in addition to their direct implications, erode public confidence in law enforcement agencies and their efforts. Finally, current or former law enforcement officers, more than offenders from other fields of work, are in a position to more fully appreciate the impact on the safety of both staff and inmates of introduction of contraband into a correctional facility.

Based on the above, we endorse a two level increase in the Sentencing Guidelines for current or former federal, state, or local law enforcement officers, including correctional officers, other correctional employees, and other employees of the Department of Justice.

I appreciate the opportunity to comment on the proposed revisions. If you need additional information, please let me know.

Sincerely,

J. Michael Quinlan
Director

[redacted] CAREER OFFENDER

FEDERAL DEFENDER OFFICE
DISTRICT OF MASSACHUSETTS
195 STATE STREET, 4th Floor
BOSTON, MASSACHUSETTS 02109

(COMM) 617-565-8335
(FTS) 617-835-8335

April 17, 1989

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

Dear Paul,

On behalf of the Federal Public Defenders, I enclose our statement concerning legal questions relating to the proposed changes in the career offender guideline. Could you kindly distribute the memorandum to members of the Commission as appropriate. (I have already given a copy to Judge Breyer directly.)

Sincerely,

Owen S. Walker

OSW:eka

Enclosure

STATEMENT OF FEDERAL PUBLIC DEFENDERS CONCERNING
LEGAL QUESTIONS RELATING TO PROPOSED CHANGES IN THE CAREER
OFFENDER PROVISION OF THE UNITED STATES SENTENCING GUIDELINES

April 14, 1989

Introduction

The package of proposed amendments issued by the United States Sentencing Commission includes three alternate suggested proposals for changes in the career offender provision. Two of the alternatives, i.e., Option 1 and Option 2, provide for reductions in the guidelines for career offenders, although the sentences under both options would generally still be substantially higher than for other persons who do not meet the definitions of career offender.

At the hearing before the Commission on April 7, 1989, the question was raised as to whether Options 1 and 2, because they lower the sentences for those meeting the career offender guidelines, would violate 28 U.S.C. §994(h), the statutory provision which underlies the career offender guideline. This statement is submitted in support of the view that a reduction in the career offender provision would in no way violate §994(h) or Congress's intent in enacting it.

The alternative suggested sentence reductions in the Career Offender Guidelines are legally authorized.

As stated above, the career offender guideline is based on 28 U.S.C. §994(h). That section states:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--
>
> (1) has been convicted of a felony that is--
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Import and Export Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and
>
> (2) has previously been convicted of two or more prior felonies, each of which is--
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> (A) a crime of violence; or
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> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

To understand §994(h), it is essential that one keep in mind the following statement from the legislative history of the Sentencing Reform Act:

> Subsection (h) was added to the bill in the 89th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

Senate Report No. 98-225 (Judiciary Committee), 98th Cong. 1st Sess., p. 175 (1983). Two things are immediately clear from the statement. First, §994(h) is a hold-over from earlier legislation proposed by Senator Kennedy which would have required sentences for repeat violent or drug offenders at or near the statutory maximum as it then was. Statutory maximum sentences under pre-existing law, however, were as a practical matter much lower than they now are, because of the substantial reduction in good time under the Sentencing Reform Act of 1984. For example, under the old law, a person who was given a twenty-year sentence received ten days a month good time from the beginning of the sentence (old 18 U.S.C. §4161) and could earn 3 days a month "industrial" good time during the first year of the sentence and 5 days a month thereafter (old 18 U.S.C. §4162); thus in most such cases the actual time served was slightly over one-half the ostensible statutory maximum. Because §994(h) arose from proposed legislation drafted in the context of the liberal good time provisions of then existing law, it was not the intent of Congress to require repeat violent or drug offenders to serve sentences at or near the effective maximum sentences under the new law, which, because of the substantive reduction in good time, are much higher than before. (Under new 18 U.S.C. §3624(b) a prisoner can earn good time of fifty-four days a year, starting after the first year, while serving the sentence.) Therefore, in

fact, the current career offender provisions of the guidelines may exceed what was in fact intended by Congress since the stipulated guideline levels are keyed to current effective maximum sentences rather than pre-existing ones.

Second, the above statement of the Judiciary Committee makes clear that Congress intended to give the Commission discretion to implement the Congressional intent to impose severe punishment on repeat violent and drug offenders in a "consistent and rational" manner. The primary problem with the current career offender provision--a problem recognized by many judges, probation officers, prosecutors, and defense lawyers who have dealt with it--is that in a large number of cases the current sentences for career offenders have not been consistent with other sentences required by the guidelines. As item 243 of the proposed amendments notes, the career offender provision has been criticized on the following grounds, among others:

> (1) sentences based only on the statutory maximum ignore significant variations in the seriousness of the actual offense conduct and therefore (a) are unjust and (b) provide no marginal deterrence; (2) the sentence is frequently excessive in relation to the seriousness of the actual offense conduct; (3) the sentence is too heavily dependent on the charge of conviction for the instant offense and prior offenses (e.g., a prior robbery offense resulting in a state robbery conviction pursuant to a plea agreement for a sentence of probation counts as a prior conviction of a crime of violence, but a prior robbery offense resulting in negotiated plea to a grand larceny charge and imposition of a ten year prison term does not count as a prior conviction of a crime of violence. Thus, differences in plea negotiation practices among

> state courts can affect whether the career offender provision applies and result in a very large difference in the guideline range); (4) the distinction between the criminal records of offenders with a criminal history Category VI and those who are career offenders is insufficient to warrant such large differences in the resulting sentence.

Furthermore, because of the broad definition of crimes of violence, the career offender provision includes people whose prior crimes of violence may include barroom brawls and other fighting behavior which, although serious, in no way means that the person has made a career or habit of crime. Thus, experience has shown that the criminal background of certain career offenders is in fact far less serious than that of certain other defendants who do not meet the career offender definition. Moreover, it may not be "rational", at a time when prison space is at such a premium, to uniformly give disproportionately long sentences to career offenders. As the Commission has noted, many career offenders will be older defendants who are unlikely to be nearly as dangerous to the public as many younger defendants. From the point of view of penology, it does not seem sensible to require Draconian sentences for older defendants, whose careers of serious criminality may be winding down, when society's primary problem is with violent or drug-dealing younger offenders. The Judiciary Committee's statement certainly suggests that the Commission, in dealing with repeat violent and drug offenders, was intentionally given meaningful discretion to

make sensible judgments about the allocation of scarce penological resources.

In addition to the illumination provided by the Committee report, it is apparent from the language of §994(h) that Congress intended a significant measure of interpretation and implementation by the Commission. Indeed, the Commission has done so. Congress did not exclude convictions remote in time from the application of that provision, yet the Commission did so. Guideline §4B1.2, Commentary, Application Note 4. The Congress did not exclude foreign convictions, but the Commission did so. Id. That the Congress permitted that implementation of §994(h) to take effect is persuasive argument that the intent was for the Commission to develop a functional maximum term for those offenders. The substitution of the present language for the earlier version which referred specifically to the statutory maximum underscores this.

If the Congress had intended a purely mechanical guideline referenced to the statutory maximum, it would have been far simpler and more direct for Congress to achieve that effect by statute, rather than by the existing directive to the Commission. It is instructive to compare to the Anti-Drug Abuse Act of 1988, P.L. 100-690 §6452 (Nov. 18, 1988) (mandatory life term for certain drug offenders with two prior drug felonies), which resembled in method and effect the current career offender

guideline and the Commission's proposed Option 3. Where Congress intends such results, it may say so itself.

Conclusion

For the reasons stated, the Federal Public Defenders believe the Commission has discretion to change the career offender guideline in conformity with either Option 1 or Option 2. We continue to recommend Option 1.

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

April 17, 1989

MEMORANDUM

TO: Commissioners
USSC Staff

FROM: Sid Moore

SUBJECT: Federal Public Defender Statement on Legal Issues Raised by Proposals to Change the Career Offender Guideline

We received the attached memo today from the Federal Public Defenders. I circulate it for your information.

Attachment

STATEMENT OF FEDERAL PUBLIC DEFENDERS CONCERNING
LEGAL QUESTIONS RELATING TO PROPOSED CHANGES IN THE CAREER
OFFENDER PROVISION OF THE UNITED STATES SENTENCING GUIDELINES

April 14, 1989

Introduction

The package of proposed amendments issued by the United States Sentencing Commission includes three alternate suggested proposals for changes in the career offender provision. Two of the alternatives, i.e., Option 1 and Option 2, provide for reductions in the guidelines for career offenders, although the sentences under both options would generally still be substantially higher than for other persons who do not meet the definitions of career offender.

At the hearing before the Commission on April 7, 1989, the question was raised as to whether Options 1 and 2, because they lower the sentences for those meeting the career offender guidelines, would violate 28 U.S.C. §994(h), the statutory provision which underlies the career offender guideline. This statement is submitted in support of the view that a reduction in the career offender provision would in no way violate §994(h) or Congress's intent in enacting it.

The alternative suggested sentence reductions in the Career Offender Guidelines are legally authorized.

As stated above, the career offender guideline is based on 28 U.S.C. §994(h). That section states:

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> (1) has been convicted of a felony that is--
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To understand §994(h), it is essential that one keep in mind the following statement from the legislative history of the Sentencing Reform Act:

> Subsection (h) was added to the bill in the 89th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

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fact, the current career offender provisions of the guidelines may exceed what was in fact intended by Congress since the stipulated guideline levels are keyed to current effective maximum sentences rather than pre-existing ones.

Second, the above statement of the Judiciary Committee makes clear that Congress intended to give the Commission discretion to implement the Congressional intent to impose severe punishment on repeat violent and drug offenders in a "consistent and rational" manner. The primary problem with the current career offender provision--a problem recognized by many judges, probation officers, prosecutors, and defense lawyers who have dealt with it--is that in a large number of cases the current sentences for career offenders have not been consistent with other sentences required by the guidelines. As item 243 of the proposed amendments notes, the career offender provision has been criticized on the following grounds, among others:

> (1) sentences based only on the statutory maximum ignore significant variations in the seriousness of the actual offense conduct and therefore (a) are unjust and (b) provide no marginal deterrence; (2) the sentence is frequently excessive in relation to the seriousness of the actual offense conduct; (3) the sentence is too heavily dependent on the charge of conviction for the instant offense and prior offenses (e.g., a prior robbery offense resulting in a state robbery conviction pursuant to a plea agreement for a sentence of probation counts as a prior conviction of a crime of violence, but a prior robbery offense resulting in negotiated plea to a grand larceny charge and imposition of a ten year prison term does not count as a prior conviction of a crime of violence. Thus, differences in plea negotiation practices among

> state courts can affect whether the career offender provision applies and result in a very large difference in the guideline range); (4) the distinction between the criminal records of offenders with a criminal history Category VI and those who are career offenders is insufficient to warrant such large differences in the resulting sentence.

Furthermore, because of the broad definition of crimes of violence, the career offender provision includes people whose prior crimes of violence may include barroom brawls and other fighting behavior which, although serious, in no way means that the person has made a career or habit of crime. Thus, experience has shown that the criminal background of certain career offenders is in fact far less serious than that of certain other defendants who do not meet the career offender definition. Moreover, it may not be "rational", at a time when prison space is at such a premium, to uniformly give disproportionately long sentences to career offenders. As the Commission has noted, many career offenders will be older defendants who are unlikely to be nearly as dangerous to the public as many younger defendants. From the point of view of penology, it does not seem sensible to require Draconian sentences for older defendants, whose careers of serious criminality may be winding down, when society's primary problem is with violent or drug-dealing younger offenders. The Judiciary Committee's statement certainly suggests that the Commission, in dealing with repeat violent and drug offenders, was intentionally given meaningful discretion to

make sensible judgments about the allocation of scarce penological resources.

In addition to the illumination provided by the Committee report, it is apparent from the language of §994(h) that Congress intended a significant measure of interpretation and implementation by the Commission. Indeed, the Commission has done so. Congress did not exclude convictions remote in time from the application of that provision, yet the Commission did so. Guideline §4B1.2, Commentary, Application Note 4. The Congress did not exclude foreign convictions, but the Commission did so. Id. That the Congress permitted that implementation of §994(h) to take effect is persuasive argument that the intent was for the Commission to develop a functional maximum term for those offenders. The substitution of the present language for the earlier version which referred specifically to the statutory maximum underscores this.

If the Congress had intended a purely mechanical guideline referenced to the statutory maximum, it would have been far simpler and more direct for Congress to achieve that effect by statute, rather than by the existing directive to the Commission. It is instructive to compare to the Anti-Drug Abuse Act of 1988, P.L. 100-690 §6452 (Nov. 18, 1988) (mandatory life term for certain drug offenders with two prior drug felonies), which resembled in method and effect the current career offender

guideline and the Commission's proposed Option 3. Where Congress intends such results, it may say so itself.

Conclusion

For the reasons stated, the Federal Public Defenders believe the Commission has discretion to change the career offender guideline in conformity with either Option 1 or Option 2. We continue to recommend Option 1.

COMPREHENSIVE
RESPONSE — 89 AMEND.

FEDERAL PROBATION OFFICERS ASSOCIATION

PREPARED STATEMENT OF THE

FEDERAL PROBATION OFFICERS ASSOCIATION
(FPOA)

FOR THE

UNITED STATES SENTENCING COMMISSION

7 APRIL 1989

HEARING ON PROPOSED AMENDMENTS AND ADDITIONS

TO THE SENTENCING GUIDELINES

CEREMONIAL COURTROOM

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

DELIVERED BY:

TOMMASO D. RENDINO
PRESIDENT - FPOA

Mr. Chairman and Commissioners, I am Tommaso D. Rendino, President of the Federal Probation Officers Association and currently serving as Senior United States Probation Officer in the District of Vermont, stationed at Burlington, with an office also at the Palais de Justice, Montreal, in connection with my duties as liaison officer with local, provincial and federal agencies in the Province of Quebec, Canada.

The FPOA appreciates this opportunity to offer its observations on some of the proposed amendments and also as to other guideline matters.

First of all, in re paragraph 50, "The Offense Level for Robbery", page 30, the FPOA has received reports that sentences for bank robbery are too low under the guidelines and no reports to the contrary. Therefore, we believe that a raising of the base level from 18 to 24 may be appropriate. We suggest that (see page 32 of the proposed amendments) the current armed robbery ranges be applied to a new unarmed range and that the armed robbery range which would result from an increase of 6 in the current base level be adopted. This would result in the following new ranges:

	I	II	III	IV	V	VI
Unarmed	41-51	46- 57	51- 63	63- 78	77- 96	84-105
Armed	78-97	87-108	97-121	110-137	130-162	140-175

Proposed option 2, page 33, seems reasonable to us.

The difference between bank robberies and other robberies, as reflected in longer prison terms, should remain. Bank robberies are more public acts and generally place more people at risk.

Concerning paragraph 96, "Continuing Criminal Enterprise", page 55, we believe that guideline ranges which address statutes calling for mandatory minimum penalties should have the lower end of the range reflect the minimum set by Congress. To have part of a guideline range fall below a Congressionally mandated mandatory minimum penalty would have no real value except, perhaps, to suggest that Congress erred in setting the minimum too high.

Moving to paragraph 119, "Issues Related to Specific Forms of Fraud", page 69, we support a two-level increase in cases where there is a risk of serious personal injury. We also believe that this should be a specific characteristic in all fraud cases and not be limited to just a particular type of fraud.

We feel that sentences should be higher for insider trading, procurement frauds and frauds against financial institutions as this type of criminal behavior undermines public confidence to a greater degree than do other frauds, and they have a more serious financial impact on the larger community.

In order to appropriately account for larger frauds, upward departure is seen as the preferred procedure rather than adding new categories. This method already seems to work well with drug offenses and it also provides the Court with greater discretion.

As to paragraph 243, "The Career Offender Guideline", page 135, we view current career offender guideline ranges as very high. Option 1, page 136, reflects a reasonable approach. It would place these particular offenders in a range of imprisonment higher than the current Category VI, but not at an extraordinarily high level. We see defendants with Criminal History Category VI as probably having criminal records quite similar to career offenders. A merging of Category VI and proposed Category VII would appear to be more realistic than what already exists and should be tried out.

Concerning paragraph 247, "Sentencing Table", page 142, the 0 to 6 month range which is proposed is more reasonable than the current subdivisions. This inclusive range would eliminate the lesser ranges which now exist and which are not 1) required by statute, or 2) necessary to structure judicial discretion.

Regarding paragraph 260, "Home Detention", page 147, the FPOA supports home detention, accompanied by electronic monitoring where appropriate, not only as an alternative to incarceration as required by Section 7305 of

the Omnibus Anti-Drug Abuse Act of 1988 but also, in and of itself, as an additional gradation in the range of sanctions available to the sentencing Court. There are plans currently afoot to vastly increase "home detention", using electronic monitoring, on the "back end" of sentences. We feel that it is also desirable as an option on the "front end" of sentences. The concern that home detention is not punitive in the public eye is only one of perception. It is already reported that inmates prefer the greater freedom which exists in half-way houses over the restrictions of remaining at home daily on a monitored basis.

While the Federal Probation Service is not currently staffed to handle any additional supervision duties such as would necessarily arise with home detention, the option remains desirable. Supervision in home detention cases would be intensive in order to be effective. We estimate that, given current knowledge of home detention cases with electronic monitoring, an experienced probation officer could handle probably no more than 20 to 25 cases, to the exclusion of other duties.

It must be emphasized that, whereas home detention can be a valuable addition to the panoply of sanctions, it can only be accomplished via additional staff and resources such as electronic equipment. Were it to be appropriately implemented some of the collateral benefits to be realized

would be 1) alleviation of prison overcrowding and 2) probable savings of public funds.

Next, the FPOA wishes to urge the Commission to move as speedily as possible to electronic retrieval of the data which the Commission requires from the field. The necessity of having field staff manually pull together the required papers and send them via surface mail is a burden we would appreciate having leave us, soon. The technology and the equipment is in place, for the most part.

The FPOA asks that the Commission consider amending Guideline 1B1.9 by changing the period at the end of this one sentence guideline to a comma and adding the following language, "or any Class A misdemeanor violation involving theft, in which the value of the property taken does not exceed $100." Several districts which have military bases and other large federal installations located within their boundaries handle numerous Title 18 U.S.C. Section 641 shoplifting cases which are Class A misdemeanors and which needlessly tie up probation officers and needlessly delay what are almost inevitably sentences to pay a fine only.

Penultimately, FPOA requests that the Commission review our Salary/Benefit Comparability Study ("Study") dated October 5, 1988 and consider supporting FPOA's goals as enumerated therein. We certainly do

not, in the least, ascribe to the Commission responsibility for the problems which the Study details. On the other hand, guideline sentencing plays a very prominent part in a probation officer's professional life and the Commission could be in a position to offer support which could be most beneficial to the field.

Finally, we once again congratulate the Commission for its overall excellent work, particularly your very diligent efforts at seeking commentary from all interested parties and giving due deliberation to all positions.

STEER

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Federal Public Defender

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KK720K0000.pdf

August 9, 1989

The Honorable Willia hairman
The United States Se
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RE: Revision Of Guidelines Concerning Offenses Against The Person

Dear Judge Wilkins:

I am writing regarding the Commission's planned revision of the guidelines concerning offenses against the person. In particular, I am writing to draw the Commission's attention to circumstances of violent crimes on the Indian reservations.

In many states, most notably Arizona and New Mexico, state governments have no criminal jurisdiction over Indians on Indian land. In such states, an Indian charged with a violent crime, is prosecuted in federal court under the Major Crimes Act, 18 U.S.C. §1153. As a result of this, a disproportionate number of federal violent crimes involve Indians. For example, close to 50% of all the first degree murder cases brought in federal court arise on Indian reservations. The same holds true for many other violent crimes, such as assaults.

The violent crimes we see on the reservation differ, we believe, from the usual federal violent crimes. These crimes are not the product of racketeering or drug conspiracies. Rather, they are the result of anger, passion or intoxication. They are the domestic tragedies that are rarely seen in most other federal courts.

The Commission, in revising the guidelines, should be sensitive to the unique problems on the reservations. Unfortunately, here in the Southwest, the perception among many in the criminal justice system is that the Commission formulated the violent crimes guidelines without adequate attention to the problems of Indians and the circumstances of the crimes. To remedy this situation, and to provide the Commission with a thorough understanding of the situations and circumstances of crimes on

the reservations, it is strongly urged that the Commission take testimony from the parties familiar with Indian crimes. In this case, the Commission should consider holding hearings in Phoenix, Arizona, or at other Southwestern sites. Such hearings will allow testimony from the tribes, the U.S. Attorney, the Federal Public Defender, and the Probation Office on this matter. The Commission could only benefit from such input. Such a course is strongly recommended.

Thank you for your consideration. I would be happy to help in any way I can.

Sincerely,

FREDRIC F. KAY

FFK:jfp

L41204.JMS

cc: Chief Judge Richard M. Bilby
District of Arizona

COMP. RESO E
90 AMENDMENTS

[redacted] Chptr 1 [redacted]

UNITED STATES GOVERNMENT

memorandum

DATE: April 14, 1989

REPLY TO ATTN OF: Magdeline E. Jensen
Probation Division

SUBJECT: Judge Becker's Letter Regarding the Amendments

TO: Honorable William W. Wilkins, Jr., Chairman
U.S. Sentencing Commission

FAX MESSAGE: I am sending a copy of a letter from Judge Becker regarding the proposed amendments to the guidelines. The original letter is in the mail and should arrive at the Commission on Monday.

Pages to follow: 6

Telephone # 633-6226

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
★ U.S. GPO 1988—201-249/60042

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
19613 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-9642 (FTS)
215-597-9642 (COMM.)

April 13, 1989

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

Dear Chairman Wilkins:

I appreciate your invitation to comment on the proposed amendments to the sentencing guidelines which were published as Part II of the March 3, 1989, edition of the Federal Register. As Chairman of the Committee on Criminal Law and Probation Administration of the Judicial Conference, I prefer not to make comments on normative questions such as whether a given guideline should be higher or lower. I do feel at liberty, however, to comment on proposed amendments which may implicate additional (and perhaps unnecessary) work for U.S. Probation Officers and/or Judges and those which may create confusion or create inconsistencies in treatment within the guidelines. With that disclaimer, I comment on the following proposed amendments:

Amendment #10: Section 1B1.2(a)

The amendment adds subsections (c) and (d). Subsection (d) provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Although the drafted language of the amendment to the guideline appears tenable, I have two comments about the commentary to this proposal.

In determining the sentence for a conspiracy, proposed Note 5 advises, "Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy." The commentary indicates that the guidelines should be applied only to the object offense(s) alleged in the conspiracy for which the court "were it sitting as a trier of fact" would convict the defendant. The commentary concludes with, "Note, however, if the object offenses specified in the conspiracy count would be grouped together under 3D1.2(d)...", it is not necessary to engage in the foregoing analysis because 1B1.3(a)(2) governs consideration of the defendant's conduct.

The instruction that the court sit as a trier of fact to determine for which object offenses the defendant could be convicted suggests that a reasonable doubt standard of proof is applicable; the "Additional Explanatory Statement" on page 9 of the amendments actually states that "it appears that this decision should be governed by a reasonable doubt standard." Since this explanation is not part of the commentary and would not appear in the guidelines, the reasonable doubt standard is only inferred by the amendment.

The same commentary note instructs that if the object offenses could be grouped under 3D1.2(d), the foregoing analysis does not apply. Rather, relevant conduct at "1B1.3(a)(2) governs consideration of the defendant's conduct." The evidentiary standard for such consideration is "reliable information," generally interpreted as preponderance of evidence. Thus, the commentary to this amendment establishes a dichotomy in which there is a mixing of the standards of proof when applying the guidelines to conspiracies. For certain conspiracies, such as a robbery conspiracy, the evidentiary standard is beyond a reasonable doubt, while the standard for other crimes, such as a drug distribution conspiracy, is a preponderance of the evidence. The rationale for this dichotomy is unstated. I am concerned that dual standards of proof in this guideline commentary will establish an inconsistency in the treatment of conspiracies and will generate litigation.

My second comment pertains to my anticipation that the procedural solutions proposed by the commentary and explanatory statement will be burdensome to the courts. The explanatory statement suggests that the courts may choose to employ a special verdict procedure or judicial fact finding to ascertain the basis for the conspiracy conviction. However, the special verdict procedure is disfavored in many circuits. Seg. United States v. Desmond, 670 F2d 414, 418 (3d Cir. 1982). Moreover, imposing a fact finding burden on the judge in so many jury trials may itself be burdensome. Since the

majority of cases reach disposition through the guilty plea process, it might be necessary to initiate similar fact finding procedures in a formal proceeding for conspiracy cases arising from guilty pleas, a formidable prospect for the courts.

Amendment #50: Robbery Guideline

My comment regarding the robbery amendment is restricted to the proposal that the Commission amend the guideline "to explicitly take into account other robberies of which the defendant has not been convicted." Two amendments are presented as options, both of which would create a specific offense characteristic that could increase the offense level based upon unconvicted robberies. I point out that to adopt any amendment in which behavior on unconvicted robberies is factored into the guideline would be inconsistent with the provisions of relevant conduct [1B1.3(a)(1)] as it is currently written. Incorporation of such an amendment would result in confusion unless the relevant conduct guideline were also amended to allow consideration of conduct stemming from unadjudicated robberies or similar offenses covered by 1B1.3(a)(1).

While, as noted at the outset, I take no position on normative matters, it strikes me that the Commission may be well advised to obtain more experience with the guidelines, and receive views from District Courts which have only recently begun to impose guideline sentences, before deciding, on the basis of observations from a few sources, substantially to increase or decrease guideline ranges because they seem too high or too low.

Amendment #82: The Weight of LSD

In this amendment, the Commission seeks comment as to whether the guidelines or commentary should exclude the weight of the LSD carrier (sugar, paper, etc.) for guideline purposes. The provisions of the Anti-Drug Abuse Act of 1986 provide that if a mixture of a compound contains any detectable amount of a controlled substance, the entire mixture is considered in measuring the quantity. The pertinent question appears to be whether the "carrier" of LSD constitutes a mixture. It would appear that the carrier for LSD is tantamount to packaging rather than a mixture or compound which affects purity. As a consequence, we endorse the exclusion of the weight of the carrier. This change would clarify problems in determining the proper weight or measure of LSD while maintaining consistency with the provisions of the Anti-Drug Abuse Act pertaining to quantity and purity. Consistency with other provisions of the Act strikes me as most desirable.

Amendment #159: Smuggling, Transporting, or Harboring an Unlawful Alien

This comment is informed by observations from numerous U.S. Probation Officers, particularly in the southwestern region of the country. While the proposed amendment has merit, according to these officers there is a deficiency in specific offense characteristics for smuggling or transporting unlawful aliens. When unlawful aliens are smuggled via vehicle, a high speed chase with border patrol officials is not infrequent, a phenomenon that endangers not only the unlawful aliens but also the general public traveling on highways and roads. There are also instances in which unlawful aliens are concealed in circumstances particularly dangerous to human life. One notable case entailed numerous unlawful aliens who died in a locked boxcar in Texas that had been abandoned by the smugglers. Another consideration is whether large scale smuggling activities should be a consideration. Should a defendant transporting three unlawful aliens in the trunk of his car receive the same offense level as a defendant transporting forty in a truck?

In the past, the elements of high speed chases, endangerment, and large scale smuggling rings often resulted in higher sentences. Under the current guideline, the court must depart to achieve the desired punishment in these instances.

Since the guidelines were initially published, many officers working in the southwest have been puzzled by the absence of important specific offense characteristics in this guideline. While the Commission is considering an amendment to guideline section 2L1.1, we ask that the Commission look at the common elements of these offenses and develop additional specific offense characteristics so they may be formally incorporated into the guideline.

Amendment #243: Career Offender

The Commission reports that the career offender guideline has been criticized on a number of grounds and the criticisms are listed as encompassing seven general issues as follows: (1) Sentences based only on the statutory maximum ignore significant variations in the seriousness of the actual offense conduct and therefore (a) are unjust and (b) provide no marginal deterrence; (2) the sentence is frequently excessive in relation to the seriousness of the actual offense conduct; (3) the sentence is too heavily dependent on the charge of conviction for the instant offense and prior offenses...; (4) the distinction between the criminal records of offenders with a criminal history category VI and those who are career offenders is insufficient to warrant such large differences in the resulting

sentence; (5) the sentences are longer than are needed for incapacitation, and therefore waste prison space, which is in short supply and could be better used for other offenders; (6) prisons are not equipped to house the aged offenders who will be incarcerated as a result of this guideline; and (7) acceptance of responsibility has no impact on the guideline range, thus discouraging guilty pleas. Three proposed options to amend the career offender guideline are presented. Without commenting on the relative merits of the three options, I point out that none of these proposed options address the seven general issues raised by the critics.

Amendment #246: Criminal Livelihood

As the Commission is aware, this guideline has been troublesome in that as it is presently constructed, the guideline would likely be applied to defendants at the lower end of the economic scale with greater frequency than others since "a substantial portion of his income" is attained more rapidly. The proposed amendment is an attempt to ameliorate this problem; however, the proposal may not have completely addressed the problems with this provision.

The new provision would read, "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13..." The phrase "engaged as a livelihood" is defined as (1) income from criminal conduct within 12 months that exceeded 2,000 times the minimum wage (currently $6,700) and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that 12 month period."

In evaluating the merits of this amendment, it would have been helpful if the Commission had provided the reason or rationale for the selection of 2,000 times the minimum wage as the standard.

Any defendant who is gainfully employed can argue that his employment is his "primary occupation," irrespective of the amount of the ill-gotten gains. However, an unemployed defendant cannot, to his prejudice. One example would be the welfare mother convicted of food stamp fraud. The Commission may want to consider how to clarify "primary occupation."

Finally, I observe that the construction of the guideline reflects a narrow interpretation of the statute as it captures only the "small fry" defendant. Large scale drug dealers or those individuals involved in organized crime are untouched by this provision as their offense levels frequently exceed level 13. The

Commission might consider redrafting this provision in a more expansive fashion to allow for enhancement of a sentence for those deriving their livelihood from crime at all levels of the guidelines.

Amendment #258: The Cost of Imprisonment

As you will recall, I testified before the U.S. Sentencing Commission on March 22, 1988, and addressed the cost of imprisonment and supervision. It was my contention that current law on fine penalties would appear sufficient to enable the court to levy substantial fines in all cases where there is an ability to pay. Requiring essentially two fine calculations, one for the guideline fine and on for the costs of incarceration/supervision, seemed superfluous. My position on this subject remains unchanged.

I offer the following proposal to streamline the fine determination process:

1. Delete 5E4.2(i) in its entirety and move it to:

2. Section 5E4.2(d) amended as follows:

   (d) In determining the amount of the fine, the Court shall consider:

      7) The costs to the government of any imprisonment, probation, or supervised release ordered.

      8) Any other pertinent equitable considerations (formerly as (d)(7)).

This amendment would provide for one calculation of the fine encompassing all of the considerations required by the Commission.

Sincerely,

Edward R. Becker

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

April 14, 1989

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

Dear ~~Judge Wilkins:~~ Billy,

I have gleaned from various publications that the Commission is most interested in receiving comments from trial judges on changes that need to be made in the Sentencing Guidelines.

I have given considerable thought to this as I have accumulated experience in sentencing under the Guidelines. In particular, I have noted some recurring, troublesome areas that cause consternation in assembling the pre-sentence report and in the Court's calculation of the sentence. These areas are nettlesome and invariably invite consummate pettifogging. They are:

1. Sentencing of Drug Conspirators under § 2D1.4. The problem comes from Application Notes 1 and 2, calling on the judge to engage in hocus-pocus to determine the kind of conduct on the part of the defendant or his fellows "in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable." I submit that no rational person acting in good faith can make that kind of determination on the record of most criminal trials and guilty pleas. This needs to be addressed at once.

2. Role in the Offense Under §§ 3B1.1 and 3B1.2. In practically every case, the Government argues for an increase and the defendant for a decrease under these Guidelines. This gets the Court into ethereal questions of ranking defendants, and it has no place in the Guidelines' calculus. Rather, role in the offense should be a matter for discretionary departure upward or downward by the sentencing judge.

3. Calculation for Multiple Counts, Chapter 3 Part D. Not only is this calculus complex in the extreme, but it gives the prosecution no incentive to try all charges against the defendant in a unitary proceeding. Thus, it undercuts considerations of judicial economy that have

consistently been recognized in case law by the Fourth and other circuits. The worst offender is Section 3B1.4. In a recent case, a bank robber who robbed two banks could receive up to 96 months for the first robbery, but only 19 more months for the second. Had he been tried separately for each bank robbery, he would have gotten 96 months on each, consecutive. Now that the United States Attorney has figured this out, we can expect to have even more trials.

I could go on at quite some length, but I believe that the problems enumerated above are among the ones crying out most urgently for correction. Based on their comments, I believe that many of my colleagues share these views.

I look forward to seeing you in Annapolis the end of this month. Until then I am, with best personal regards,

Sincerely yours,

Frederic N. Smalkin
United States District Judge

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DIRECT DIAL NUMBER:

April 13, 1989

Honorable William Wilkins, Jr.
Chairman of the United States
Sentencing Commission
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Re: Criminal Tax Offense Guidelines

Dear Judge Wilkins:

Members of the Civil and Criminal Tax Penalties Committee of the Tax Section of the American Bar Association have reviewed the proposed amendments with respect to the tax guidelines as well as the Department of Justice comments with respect to these proposals. Based upon our discussions with the Committee, we believe the views expressed herein fairly reflect the individual views of Committee Members. Due to time constraints, this letter has not been reviewed by the full Committee and, therefore, should not be considered an official statement of the Committee, the Tax Section or of the American Bar Association.

We have commented on what we believe to be certain significant tax guideline amendments as follows:

1. **Amendment 188** - This amendment proposes changes in certain "Application Notes" with respect to the tax evasion guideline. It inserts commentary to §2T1.1 as follows:

> "Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor...,"
>
> and
>
> "(i)n determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or

plan unless the evidence demonstrates that the conduct is clearly unrelated."

The Commission has proposed this language to "clarify" the determination of tax loss and to make the instructions consistent with §2T1.1 - 2T1.3 and related amendments 196 and 199.

The Department of Justice has commented that this proposed amendment is "vague and not particularly helpful insofar as tax offenses are concerned." The Department of Justice, however, has proposed its own amendment to the "Application Notes" suggesting that "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan." It is their position that all tax offenses "regardless of the individuals, entities, statutory violations or years involved can be classified as part of the same course of conduct."

We join the Justice Department in its view that this proposed guideline amendment is not helpful. We do not believe it serves to clarify or assist in determining the total amount for purpose of the tax evasion guideline.

The tax evasion guideline increases the sentence based upon the amount of "tax loss" as defined in §2T1.1. Even though the note, as presently drafted, refers to "criminal deficiency", we believe the "Application Note" will permit the use of civil tax figures which may accompany the special agent's report in a criminal prosecution for purposes of sentencing. To our knowledge, and based upon our experience, these civil figures can be double or even triple the "criminal deficiency" tax figures. We believe that the guidelines should explicitly bar the use of civil adjustments while technically correct, serve to increase a sentence in a criminal case. We suggest that the Application Notes be rephrased to permit only the consideration of "all criminal conduct violating the tax laws" and that the commentary state that purely civil adjustments are not to be considered.

Moreover, we continue to be troubled by the course of conduct concept as applied to non-indictment years and acquitted counts in a tax setting. The Justice Department has taken the view that even years barred by the statute of limitations may be used for purposes of sentencing. Pre-guideline case law permitted the use of conduct for which the defendant was acquitted in determining sentence. At least one post guideline case has adopted this view. See United States v. Ryan, 866 F.2d 604 (3d Cir. 1988). We believe this Application Note and all Application Notes should be rewritten to limit course of conduct increases. We suggest that the applicable offense level should exclude tax

years for which the statute barred prosecution or for which the taxpayer was acquitted. Instead, the Court would be permitted to apply these time barred or acquitted years only for purposes of determining a sentence within an otherwise applicable guideline range. We, therefore, suggest that the Justice Department proposal permitting unlimited accumulation of tax loss from non-indictment years by and between various entities is unfair and inappropriate and should not be adopted.

2. Proposed Amendment 189 - The Commission has proposed deleting in §2T1.1(a) the language "plus interest to the date of the filing of an indictment or information." The Commission has determined that the inclusion of pre-indictment interest was not appropriate as a basis for sentencing individuals convicted of tax evasion.

The Department of Justice does not oppose this position. Instead, they propose an increase of one guideline level to compensate for what they perceive to be a reduction in sentence severity as a result of the deletion of the pre-indictment interest computation.

Our Committee agrees with and applauds the decision to delete pre-indictment interest. It had been our Committee's view since the initial Guidelines were proposed in 1987 that pre-indictment interest was an inappropriate factor to be included as a basis upon which to sentence an individual convicted of tax evasion. We oppose, however, the Justice Department proposal that the Guidelines should be increased an additional level for tax evasion offenses.

We take particular issue with the Department's statistics for GEP (General Enforcement Program) cases purporting to show less than $70,000.00 of allegedly evaded tax was involved in 75% of the cases for fiscal year 1987.

First, on the last occasion when statistics were circulated by the Tax Division, these statistics contained serious errors. For example, these statistics may include only the tax evaded in the year of conviction or plea for a three year case. Second, the Justice Department has failed to release statistics in Special Enforcement Program (SEP) cases which, to our knowledge, constitute the majority of tax cases currently brought. Third, the Guidelines permit sentencing based on a percentage of gross income understated, without offset for deductions. The 1987 figures would certainly be higher if computed on this basis. Finally, under the current Guidelines, years other than those indicted or years in which acquittals were obtained, can be used

as a basis for sentencing and the total amount of tax evaded for non-indictment years almost certainly was not included in the statistics relied upon by the Department of Justice.

The initial tax Guidelines already significantly increased tax sentencing from traditional levels. We believe the Justice Department must make a stronger showing, beyond that based on a "general deterrence" rationale, before these Guidelines should be increased again. It is important to note that these Guidelines have not yet gone into effect since the first tax year involved will be calendar year 1987. We believe the Commission should obtain empirical data resulting from the implementation of the present Guidelines before enhancing them further.

3. Amendment 190 - The Commission proposes to amend §2T1.1(b)(1) to provide as follows:

> "If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity," increase by two levels."

The Justice Department fully supports this amendment.

Our Committee still has grave concerns with respect to this enhancement. The definition of "criminal activity" includes "racketeering activity" as defined in 18 U.S.C. §1961. We continue to believe that this criminal activity definition is overly broad and can lead to significant, unintended and overly harsh results. It appears that the guideline applies whether or not RICO predicates are charged in an indictment. Since mailing a tax return occurs in most tax cases, it may be asserted that the two level enhancement based upon a mail fraud violation, will almost always apply. An additional troublesome example is based upon the inclusion as a RICO predicate of a money laundering offense under §1956(a)(1)(A)(ii). This section prescribes money laundering for purposes of evading taxes. The Guidelines now permit an increase for a tax evasion sentence of two levels if more than $10,000 in income is derived from an illegal activity and, money laundering crime, an illegal activity, is defined as receiving money from an illegal source for purposes of evading taxes. The undifferentiated incorporation of RICO predicates as a definition of criminal activity may well lead to enhancements in a tremendous number of tax evasion cases. We believe this is unwarranted and if the Commission believes an enhancement based on "criminal activity" is appropriate, a specified limited list of offenses should be incorporated rather than simply the incorporation of all RICO predicates.

4. **Amendment 191** - The Commission proposes in this amendment to change the "Application Notes" relating to sophisticated means as a factor enhancing a guideline level under the tax evasion and related guidelines. The related amendments for §2T1.2 - §1.4 are 195, 198 and 201. The proposed amendment would change the language to define sophisticated means as "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case."

The Justice Department has commented that "[w]e are not sure that this language does much to clarify the meaning of the term." They state, however, that this sort of concept cannot be defined "carefully" and, therefore, they do not oppose the proposed amendment.

The Committee agrees with the Justice Department that the sophisticated means concept can only be determined on a case by case basis. We believe it is unduly vague and will be the subject of litigation to determine what is a "routine tax evasion case" and whether therefore there was "greater intricacy or planning" than a "routine" case. This type of concept is ill-suited to and does not further the purpose of streamlining the sentencing process. We believe that this enhancement should be deleted in its entirety or reformulated in some more manageable and objectively ascertainable format. We suggest that the Commission might employ some of the indicia of fraud listed in Spies v. United States, 317 U.S. 492 (1943), in defining what constitutes sophisticated means.

5. **Amendment 210** - This proposed amendment increases the offense levels for tax offenses with larger tax loss values to better reflect the seriousness of the conduct. Members of this Committee have previously expressed concern that the guidelines for tax offenses were being dramatically increased over historical levels without any empirical evidence that such an increase was necessary or appropriate. We did note that the guidelines at the higher levels did not seem to increase at a rate commensurate to reflect the seriousness of the greater amounts of tax evaded. To our knowledge, no one has been sentenced under these tax guidelines. We, therefore, believe that without any empirical evidence to justify the increase in the guideline levels, it is inappropriate to increase the guideline levels again before the guidelines have been monitored in tax cases during a suitable trial period.

6. **Amendment 205** - The Commission has asked for comment with respect to the proposal for deleting interest from the

computation of §2T1.1. Specifically, the Commission has sought comment on whether the tax loss should be standardized by and between the various tax sections and, if so, how this might be accomplished and clarified. The Commission has further sought comment on whether the base offense level for failure to file should be more similar to, or the same as, §2T1.1.

The Justice Department comments with respect to this proposal assert that the two-part definition of tax loss currently contained in the guidelines should be eliminated. The definition currently provides an alternative basis for computing a guideline range based either upon the amount of tax evaded or the amount of the gross income or taxable income which was not reported multiplied by a specified tax rate for individuals and corporations, whichever is greater. The Justice Department believes that since the computation based on the gross income understated will almost always produce a higher guideline range, that the tax evaded alternative should be eliminated. The Justice Department further proposes an increase in the guideline levels for tax evasion based upon their new definition of "criminal tax deficiency". The Justice Department notes that the tax loss may be based on years not subject to plea or even indictment but states that no "additional investigation" will be required simply to determine tax loss in a criminal tax case beyond that contained in a Special Agent's investigative report.

We agree with the concept of streamlining and standardizing the concept of tax loss. At this point, however, we differ with the course proposed by the Department of Justice. We think the elimination of the "tax evasion" portion of the tax loss definition will increase, in dramatic fashion, the guideline levels for tax offenses. In many tax evasion cases, there are off-setting deductions which serve in some fashion to reduce the gross income unreported. The crime of tax evasion is based on the amount of tax which was <u>evaded</u> not the amount of gross income <u>which was understated</u>. The transfer of the Sentencing Guidelines to a gross income understatement concept will improperly distort the concept of tax evasion and base a sentence on a gross income understatement which may have little relevance to the actual loss to the government. For example, it would not be unusual in a tax evasion case for an individual to have unreported gross income of $100,000.00, but to have off-setting deductions for $75,000.00 of the $100,000.00 per year in a three year tax case. The sentencing guideline differential between computing the tax on $25,000.00 of unreported income per year which may be approximately $8,000.00 to $10,000.00 per year and computing a guideline range based on 28% of the $100,000.00 per year is dramatic and will provide an unwarranted disparity and divergence from the appropriate

sentencing concepts in tax evasion. We believe the correct formulation would be to define "tax loss" for tax evasion as the amount the taxpayer evaded or attempted to evade.

Where a failure to file or a false statement is charged, if there is an evasion amount which can be computed this is the amount which should be the basis for a guideline sentence. Only under circumstances where an evasion amount cannot be computed should an alternative formulation based upon a percentage of gross income or taxable income be employed. Sentences should not be increased based upon deductions allowed or allowable in the criminal case as presented by the government but excluded from the computation for purposes of sentencing.

We also strongly differ with the Justice Department view that guideline levels for tax evasion need to be increased yet again even though these guidelines have not yet taken effect.

With respect to the interrelation of the guidelines for tax evasion (2T1.1), failure to file (2T1.2) and false statement offenses (2T1.3 and 2T1.4), we agree with the general concept that the guideline levels should be adjusted to reflect the relative seriousness of these offenses. The tax perjury offense, under 26 U.S.C. §7206, generally has been considered to be less serious than the crime of tax evasion. We have previously suggested to the Commission that the government will undoubtedly attempt to argue in many cases that the tax perjury offense was committed "in order to facilitate evasion of a tax" even though evasion may not have been charged. This would, we believe, unfairly create a tax evasion guideline application in many false statement cases. We believe that the guideline levels should indicate and reflect a difference in the seriousness of the offense by treating tax perjury as a less serious offense, which it is, than tax evasion.

The failure to file guideline (2T1.2) also continues to be troublesome. By incorporating the concept of tax loss at one level less than the table, we believe the guideline dramatically increases sentences in failure to file offenses. We believe that this offense, a misdemeanor, has always been treated less seriously by the Internal Revenue Service than either tax evasion or tax perjury. Indeed, it is our belief that AUSA's are encouraged to review failure to file cases and to charge tax evasion if affirmative acts of evasion have occurred. Therefore, under circumstances where only the failure to file offense is charged, we believe that the guidelines should reflect the less serious nature of this misdemeanor. The guidelines level for this offense, with only one level discount from the tax table, does not presently do so in sufficient fashion.

We are prepared to discuss our suggestions further in more detail.

Sincerely,

IAN M. COMISKY
LAWRENCE S. FELD

dz/IMC
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April 14, 1989

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

Attention: Paul Martin

RE: **Comments on Proposed Amendments, 54 Fed. Reg. 9121 (March 3, 1989)**

Dear Mr. Chairman:

I am writing to express the concerns of the Washington Legal Foundation with regard to options one and two for amending the Career Offender provisions of the Federal Sentencing Guidelines (Sec. 4B1.1 of the Guidelines Manual, 42 Fed. Reg. 9160). We believe that these proposals fly in the face of the Commission's statutory duty under 28 U.S.C. Sec. 994(h). Furthermore, if adopted, either amendment would reduce both general and specific deterrence and result in disproportionately low sentences for repeat violent criminals and drug felons at a time when the nation can least afford it.

It is our understanding that under both proposals, terms of imprisonment for career criminals who commit drug felones or crimes of violence would be drastically reduced. For example, according to the Commission, the proposals could result in as much as a 15 year reduction in the available sentence for a career pusher convicted of selling 10 grams of heroin. We believe that it would be highly inappropriate for the Commission to adopt such penalty reductions at a time when the nation is experiencing an epidemic of drug related violent crimes. Indeed, the Commission is deliberating on this matter in the city which Drug Czar William Bennett has targeted for "drug crime emergency assistance." so far this year, there have been more than 130 murders in the District of Columbia -- most of which were drug related. Indeed, Bennett has described the level of drug violence in the District as "out of control." Of course, the District of Columbia is not alone. New York, Los Angeles, and Miami, to name just a few cities, have also witnessed their streets and neighborhoods occupied as territory for rival gangs and drug lords. In our view, the massive

penalty reductions being advocated by some members of the Commission for career violent and drug felons simply sends the wrong message to the community. It will only result in reducing the specific and general deterrent effects of the law while providing disproportionately low sentences for many of the most egregious offenders.

Even if the policy considerations were not so overwhelmingly against adopting either of the proposals, the Commission could not adopt them without ignoring its statutory mandate. Section 994(h) of Title 28 requires that the "Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for offenders who are adults and who have been convicted for the third time of a crime of violence or a drug felony. Clearly, the statute intends that career offenders receive sentences at or near the statutory maximum for the instant offense of conviction.

Quite rightly and reasonably, the Commission itself has understood Sec. 994(h) as referring to the statutory maximum term of imprisonment. United States Sentencing Commission, Guidelines Manual, Sec. 4B1.1, Commentary (Background). So too, those courts which have construed Sec. 994(h) have similarly understood it to refer to the statutory maximum term of imprisonment. In United States v. Belgard, 694 F. Supp. 1488, 1500 (D. Ore. 1988), the court, in rejecting a claim that Sec. 994(h) created a "status offense," stated that "Congress rationally has concluded that certain individuals that have demonstrated a past pattern of dangerous criminal conduct should be sentenced at or slightly below the statutory maximum sentence for their present crime" (emphasis added). The Court also rejected a claim that the current guideline exceeded the Congressional mandate of Sec. 994(h):

> [I]t is clear that Sec 994(h) contemplated severe sentencing treatment for the category of recidivist offenders who fall within the guidelines definition of "Career Offender" because they repeatedly commit certain violent and/or drug related crimes. It is difficult to envision a sentencing scheme that would more aptly effectuate the directive of Sec. 994(h) than does Sec. 4B1.1.

Id., at 1499 (emphasis added).

Similarly, in his opinion in Mistretta v. United States, Nos. 87-1904 and 87-7028, slip op. at 15 (Jan. 18, 1989), Justice

Blackmun characterized Sec 994(h) as "direct[ing] that [the] guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses ..." (emphasis added). So too, in its amicus curiae brief to the Supreme Court in Mistretta, the United States Senate characterized Sec. 994(h) as requiring sentences "at or near the statutory maximum." Brief of the United States Senate as Amicus Curiae at 22-23, Mistretta v. United States, Nos. 87-1904 and 87-7028 (Jan. 18, 1989).

The Courts, the United States Senate, and the Commission itself have understood "maximum term authorized" to mean "statutory maximum term authorized" because any other meaning would be nonsensical. Certainly, authorized maximum term does not refer to the term available for a particular offense under the appropriate guideline sentencing range. If that were true, Sec. 994(h) would be meaningless; a simple reformulation of the commands of Secs. 994(a),(b) and (d) to ensure that offenders are sentenced for terms "at or near" the guideline maximum (i.e., within the guideline sentencing range). Such an interpretation of Sec. 994(h) would violate the fundamental principle of statutory construction that no statute should be interpreted to render any part inoperative. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 105 S. Ct. 2587 (1985). Moreover, it would make little sense for Congress to direct the Commission to assure that career offenders serve sentences at or near the guideline maximum (which, unless a statutory mandatory minimum is present, the Commission is free to set where it likes) while also requiring under Sec. 994(i) that the Commission "assure that the guidelines specify a sentence to a substantial term of imprisonment" for apparently less egregious offenders.

Career offender language was included in a number of the earlier bills Congress considered before passing the Sentencing Reform Act of 1984 (one title of the larger Comprehensive Crime Control Act of 1984). Arguably, "maximum term authorized" originally could have referred to legislative language which was ultimately deleted from the 1984 Act. The fact that the legislative language to which Sec. 994(h) arguably refers was not enacted should resolve any question concerning its current vitality. Moreover, resort to the legislative history is unnecessary unless the intent of the statute cannot be determined solely by reference to the statute, Transportation Union v. Lewis, 711 F.2d 233 (D.C. Cir. 1983), or unless the statute is unclear. Blum v. Stenson, 465 U.S. 886 (1984).