between one and six months, the Court must substitute community confinement for at least the minimum guideline range as a condition of a sentence of probation.

In both proposed options I am concerned that the underlying offense, the offense of conviction, is not taken into account in determining the appropriate guideline range of imprisonment. Both options seem to rely primarily on violation conduct to set the guideline range for the violation. Although I believe that a person's conduct while under supervision is an important factor in determining the appropriate sentence to impose for a violation of probation, it should not be considered as the sole factor.

Title 18, Section 3565(a)(1) and (2) set forth the choices available to the Court upon a finding there has been a violation of probation. The first choice is to continue the subject on probation by modifying or enlarging the conditions; or revoke the sentence of probation and impose any other sentence that was available under Sub-Chapter A at the time of the initial sentencing. The last phrase of 18 USC 3565(a)(2), "at the time of initial sentencing", presents somewhat of a problem. It could be argued that computing the guideline range of imprisonment based on criminal conduct that occurred subsequent to the initial sentencing violates the statutory meaning of that section. After struggling with the problem I believe there could be a solution.

Since probation is a sentence and if a subject violates the terms of probation and the sentence is revoked, in effect, the Court is re-sentencing the defendant and may impose any <u>other</u> sentence that was available under Title 18, Chapter 227, Sub-Chapter A. Title 18, Section 3551(b)(2) and (3) set forth the available authorized sentences as either a fine or a term of imprisonment authorized by Sub-Chapter D. That same section states that an individual shall be sentenced in accordance with the provisions of Section 3553. In looking at 18 USC 3553(a)(4), the Court is directed to impose the kinds of sentence in the sentencing range established for the applicable category of an offense committed by the applicable category of defendant, as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 USC 994(a), and that are in effect on the date the defendant is sentenced. Therefore, it seems that if a sentence of probation is revoked and the Court is in the process of re-sentencing the individual, the Court must still apply the applicable guidelines. Based on the above factors I

believe that the two options proposed will meet with a considerable amount of resistance from the defense community because they base the guideline range of imprisonment solely on conduct that occurs subsequent to the initial conviction. This is especially true in Option Number Two of the Proposed Amendments to Chapter Seven.

I believe that in probation revocation cases the Sentencing Commission should not overlook the original offense of conviction. In computing the guideline range of imprisonment after a probation revocation, the base offense level of the original offense of conviction should be a starting point. Specific offense characteristics, if any, should be applied to the base offense level in accordance with the present application instructions at 1B1.1. Since the individual has violated the terms of probation in no event should a reduction be allowed for acceptance of responsibility. In the case of new criminal conduct, it should be scored in accordance with Chapter Four of the guidelines but in no event should the criminal history category be less than two. In the case of a violation for new criminal conduct that is similar or more serious than the original offense of conviction, the Court should consider a departure under Section 4A1.3.

I strongly believe that in any guidelines for the revocation of probation, the original offense of conviction should be considered in computing the guideline range after revocation of probation. Otherwise, individuals who were sentenced to probation as a downward departure could receive an additional benefit should they violate probation by receiving a term of imprisonment that could be substantially less than the guideline range for the original offense of conviction. For individuals who commit a technical violation of probation, a sentence of imprisonment within the original guideline term should be sufficient.

The revocation of supervised release presents a different problem. Unlike a sentence of probation, individuals who receive a term of supervised release have already served a term of imprisonment. At the very least, they will have served at least one-half of the minimum guideline range of imprisonment for the original offense of conviction with the other half of imprisonment being satisfied by community confinement or home detention. In most cases, for individuals convicted of Class A, B, and in some cases C, offenses, the individual will have served at least the minimum guideline range of imprisonment for the original offense of conviction. A term of supervised release

is meant to be in addition to the penalty imposed for the offense of conviction. Unlike probation revocation matters, the penalties for revocation of supervised release are fairly specific and spelled out in 18 USC 3583(e)(2) and (3).

After reviewing both options in the Proposed Amendments, I endorse the provisions for revocation of supervised release in Option Number Two at 7A1.3 including the commentary.

I would like to express my appreciation for the opportunity to comment on the Proposed Amendments which will have an impact on the duties of all United States Probation Officers in the system. I have limited my comments to only one of the Amendments due to the severe time restraints which make it difficult to digest and analyze all of the Proposed Amendments. Thank you for your consideration.

Very truly yours,

Frank R Trusso

FRANK R. TRUSSO
SUPERVISING U.S. PROBATION OFFICER

FRT/lmt

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

PROBATION OFFICE

March 29, 1990

DAVID E. JOHNSON
CHIEF U. S. PROBATION OFFICER
ROOM 6-100, U. S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE 21201-2669

BRANCH OFFICE:
PRESIDENTIAL BUILDING
SUITE 500
6525 BELCREST ROAD
HYATTSVILLE 20782

PLEASE REPLY TO:
BALTIMORE OFFICE

FTS: 922-4741

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

Dear Mr. Martin:

I am submitting comments on the Sentencing Guidelines Proposed Amendments which are due to Congress in May, 1990.

Amendment 53 - Obstructing or Impeding Investigation, Prosecution, or Sentencing of the Instant Offense. Points (13) and (14) should be expanded to include failing to cooperate with the probation officer during the preparation of the presentence report. This would include the defendant knowingly failing to provide information to the probation officer or refusing to provide information to the probation officer after it has been requested.

Amendment 58 - Acceptance of Responsibility. We would recommend that every effort be made to simplify this adjustment. Determination of this matter is highly subjective and is frequently a matter of contention. The computation should be deleted from the probation officers report, and the judge should make the adjustment at time of sentencing if it is felt to be appropriate.

Amendment 62 - Vacated, Set Aside, Expunged and Pardon Convictions. Expunged convictions should be treated the same as "Set Asides". Rule 32 of the Federal Rules of Criminal Procedure requires that the probation officer gather the information if it is available. Thus, an expunged conviction should be counted.

Amendment 66 - Fine Provisions. The new fine provisions do not seem to address the issue of mandatory minimum fines.

Amendment 69 - Violations of Probation and Supervised Release. Option number one is preferred, but it would be better to have a mixture of the two options that would keep the process closer to the current practices for probation violation. There is also a question as to whether a period of supervised release should be imposed to follow the term of imprisonment imposed upon revocation of probation or supervised release. Imposing supervised release following a revocation prison term could precipitate a never ending cycle of imprisonment and supervised release. Such a cycle goes far beyond the intent of the sentencing court to punish the defendant for the original offense.

Yours truly,

David E. Johnson, Chief
U.S. Probation Officer

DEJ/ms

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
CHARLES P. KOCORAS
JUDGE

March 30, 1990

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

Dear Chairman Wilkins:

On behalf of the Committee on Criminal Law and Probation Administration of the Judicial Conference and at the request of the Chairman, Judge Edward R. Becker, I write to provide comments regarding the proposed amendments to the sentencing guidelines pertaining to revocation of probation and supervised release. As you know, supervision of offenders is a critical part of the responsibilities of the United States Probation Office and of fundamental importance to the overall success, or failure, of our criminal justice system efforts. Because our committee has responsibility for the supervision process and, in light of the strain on supervision resources because of the effects of the Sentencing Guidelines, we have a deep interest in the formulation of amendments dealing with the subject of revocation of persons on supervised release or probation.

Guidelines for revocation of probation and supervised release will have a substantial effect on the operation of the courts and the Federal Probation System. Effective supervision of offenders in the community is fundamental to the administration of justice. For these reasons, it is imperative that all preliminary steps necessary to the enactment of amendments be completed prior to their enactment. These preliminary steps include appropriate field testing and adequate input from those most informed, and most affected, by the amendments. We do not believe Option I and Option II have been developed in a way to insure that all of the statutory objectives and other relevant considerations have been accommodated. We also do not think

there has been sufficient opportunity for evaluation and comment by those with experience in the field. We do not believe Option I and Option II should be enacted as presently drafted.

It is clear that Option I and Option II were developed based on different philosophical approaches. Because the two options are premised in fundamentally different ways -- Option I treating the new offense essentially as a sanction for failure to abide by the conditions of supervision and not as a sanction for the new criminal conduct (although the sanction partakes, in a general way, of the nature of the violation), while Option II essentially treats the new offense as the basis for, and measure of, the sanction to be imposed -- criticisms of the two options need to be separately addressed. Each of the two options, however, contain a common failing.

Both Options I and II treat probation and supervised release in the same way in revocation matters. Because probation and supervised release are neither synonymous terms nor define identical conditions, it is essential to consider the point at which they are found in the criminal justice system. An offender on supervised release will already have served the period of imprisonment that the court imposed for the original offense. The penalty for a violation of supervised release is not determined by the original imprisonment penalty for the underlying offense, but rather by the statutory classification of the original offense.

In contrast, an offender ordered to be supervised on probation has not been sentenced to the full term of imprisonment for the original offense. If the probation term is revoked, the original statutory penalty is available for the court to impose. In addition, following probation revocation and service of a prison term, the same individual may be subject to a period of supervised release. Revocation guidelines must incorporate these appreciable statutory differences. Neither Option I nor Option II address these differences adequately.

The introductory commentary to Option I states, in part, that "the guidelines envision that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction." Option I, as presently drafted, essentially reflects this belief. In reality, however, in a good many cases the offenders will only face the revocation proceedings and not a separate prosecution for the new offense. There needs to be sufficient flexibility in the choices of the presiding judge to accommodate these possibilities.

Option II, on the other hand, puts the judge in the same straitjacket as when the original sentence was imposed. Recognizing the necessity to treat similarly situated offenders similarly, it is also necessary, however, to afford the judge the ability to give weight to considerations which were not as prominent when the original sentence was imposed or which are not adequately reflected in the guideline calculations. Concerns about reintegration of the offender into the community, the attainment of educational or vocational goals and the pursuit of the most efficacious way of handling drug problems are some, but not all, of the considerations which are common in revocation proceedings. These considerations mandate that a judge should have a full range of options at his command to deal with the variety of situations which will trigger revocation proceedings. Option II does not provide that, and neither does Option I.

We believe guidelines for revocation should address the following matters:

(1) the nature and severity of the misconduct;

(2) that persons on probation supervision did not receive the full imprisonment sanction for the underlying offense whereas offenders under

supervised release supervision have served the period of imprisonment initially imposed;

(3) that reintegration of offenders into the community and risk control while they reside in the community are appropriate correctional goals in revocation proceedings;

(4) consideration of other criminal justice sanctions imposed for the conduct giving rise to the revocation proceeding;

(5) the virtue of not unduly burdening the courts when fairness and consistency do not require it.

While Options I and II of the proposed amendments accomplish some of these goals, neither accomplish all of them. Option I has the desirable quality of being simple to operate; however, to quote Chapter One of the Guidelines Manual, "Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects." Option I does not include considerations of the risk that the offender poses to the community, the harm (or potential harm) caused by the conduct, or the need to incapacitate certain offenders. Although this approach seeks to sanction a breach of the supervision contract, it does not adequately address the complexity and variety of the violations of supervision that the courts process. Using this approach, the courts would thereby treat dissimilar violators similarly.

Option II would entail reapplication of sentencing guidelines for violation matters. In doing so, it would make fine distinctions among violators based upon their criminal history and the conduct constituting the violation. This process would replicate the application procedures of the

sentencing guidelines in the violation guidelines and bring with it its attendant complexity and the substantial lack of judicial discretion necessary to revocation matters.

We are not opposed in principle to complexity when fairness and justice demand it. However, the facts of violation conduct are not consistently available for the detailed analysis required under the sentencing guidelines. This is particularly true of allegations of new criminal behavior without a conviction or new criminal behavior investigated by local jurisdictions. In such cases, the information available to calculate the offense level under the guidelines is often unavailable, or to make it available would require a mini-trial at the violation hearing.

In February 1990, Judge Becker conducted a survey of the probation offices in twenty districts. We learned that implementation of the sentencing guidelines appears to be going reasonably well. However, the districts uniformly reported that one effect of the new system has been to increase the length of time between initial indictment and sentencing with notable increases in the length of sentencing hearings. The structure of the sentencing guidelines requires factfinding by the court for the specific offense characteristics, adjustments, criminal history category, and sometimes even regarding the base offense level when it is predicated on quantities. The initial application by the probation officer regarding all of these guideline components may be subject to dispute by the parties, necessitating hearings. Less time-consuming procedures for violations would be preferable.

Individuals serving a term of supervision will eventually reside in the community without criminal justice controls and, as a consequence, an important goal of supervised release and probation is the reintegration of offenders to the community. This objective must, of course, be balanced by the goal of control of offenders when they pose a danger or risk. The guidelines must be sufficiently flexible to allow the judge to impose an

informed determination. We fear that neither Option I or II meets this standard.

Prior to the enactment of violation guidelines, it would be prudent to address some technical issues. Option II states that if supervised release is revoked and the offender incarcerated, he shall be ordered to recommence supervised release to complete any time remaining on the term of release. Option I is not explicit regarding this issue, but seems to imply that such a procedure is possible. Both options depart on the premise that a second period of supervised release can be imposed after the revocation of the first period of supervised release. We do not find any statutory authority for the imposition of a second term of supervised release after the revocation of the initial period of supervised release imposed at time of sentencing. If this legal issue is not addressed before violation guidelines are promulgated, the courts will face a new problem of disparity in the interpretation of the supervised release statute.

In order to avoid ex post facto issues, it would be prudent to include the effective date of the violation guidelines. Would they pertain to the date of the violation hearing, the violation behavior, the date of sentence, or the date of the original offense?

In summary, we oppose enactment of both Option I and Option II. Because revocation guidelines are analogous to sentencing guidelines in importance, they must only be enacted after studied care. Supervision of offenders is a fundamental part of the criminal justice system and affect greatly the operations of the United States Probation Office. Both Options I and II suffer from inadequate development and analysis and, for the reasons stated above, should not be enacted. While we presently offer no specific alternative proposals, our committee and the probation office stand ready to assist in the rewriting of appropriate amendments. Because of their

importance to us, we would willingly accept an invitation to assist you in your efforts.

The members of the Criminal Law and Probation Committee of the Judicial Conference appreciate the opportunity to comment on the proposed amendments. We thank you for your consideration of our views and, as expressed above, stand ready to help you in any way you may wish.

Charles P. Kocoras

Charles P. Kocoras
United States District Judge
Member, Committee on Criminal
Law and Probation
Administration

cc: Honorable Edward R. Becker

UNITED STATES GOVERNMENT

memorandum

DATE: March 28, 1990

REPLY TO ATTN OF: Aurora C. Miranda
U.S. Probation Officer

SUBJECT:
Sentencing Guidelines Proposed Amendments

TO: Rossie E. Turman, Jr.
Supervising U.S. Probation Officer

SENTENCING GUIDELINES PROPOSED AMENDMENTS

A specific guideline enhancement for prior similar criminal conduct in lieu of the current provisions in Guideline 4A1.3 would be conducive. It would provide a fair assessment of where such defendants would fall.

An insertion in Chapter Five, Part A, of the Sentencing Table of 13 to 15, and other categories saying 16 or more is an excellent idea. There may be an occasion where the defendant would fall into the 13 or more category, although his criminal record would be far worse than the penalty he would get under this category.

Chapter Five, Part E

Providing for restitution by imposing a term of probation or supervised release with a condition that would require restitution is favorable. There have been cases where restitution should be paid, however, was not ordered or recommended since it was not specifically referenced in 18 USC 3663. While the restitution is permitted in such cases, under the new changes, it would be required.

Chapter Five, Part H

Adding the new wording for specific offender characteristics would provide clarity and would be more useful than what is presently used. The relevance of the specific offender characteristics in determining conditions of probation are important. The new provisions would elaborate on what is, and what is not, relevant.

Chapter 5, Park K

Changing the wording from "general provisions" to "other grounds for departure" is simpler and can be better understood.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
☆ U.S. GPO: 1988—201-760/80026

Chapter Seven, Violations of Probation and Supervised Release

The new option of inserting the introductory commentary would prove useful and provides a good introduction for the rest of what follows. Inserting the classes of violations and describing them in Class Three is excellent. Under current provisions, there is not explanation of what the violations may be, therefore, we must resort to other sources for accurate and complete information. All of the new options for Chapter Seven would be extremely helpful and would break down the violations and revocations of probation.

Appendix A

The additional statutory index which would be added would be beneficial as we presently don't have these statutes in our index and have to resort to other sources when one of them applies.

In general, I believe all of the proposed changes would provide clarity and would simplify the much used Sentencing Guideline Manual. The explanations are especially useful since we presently have a minimal explanation of the application of the Guidelines.

ACM/ymc

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 2, 1990

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

Dear Chairman Wilkins:

On behalf of the Committee on Criminal Law and Probation Administration of the Judicial Conference I write to provide comments concerning a number of the proposed amendments to the sentencing guidelines. Please note that under separate cover Judge Charles P. Kocoras (ND/IL), a member of the Committee and of its Subcommittee on Supervision, is writing you to express the Committee's position on the proposed amendment to Chapter Seven (Violations of Probation and Supervised Release).

I. Comments Relative to The Structure of the Sentencing Guidelines

§ 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor

§ 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon

§ 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for

the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

II. Offenses Involving Unlawful Aliens

While we are concerned about the specific offense characteristic in § 2L1.1 regarding prior criminal conduct, we support the other proposed changes on the particular guidelines. As the Committee has pointed out in the past, the districts bordering Mexico process large dockets with numerous cases involving this guideline. There has been a need to distinguish defendants that smuggle large numbers of aliens and those who endanger the lives of the aliens. To date, the courts have had to depart to distinguish the criminal conduct of such offenders. The proposed modifications to § 2L1.1 in specific offense characteristics (b)(1) and (b)(2) as well as the additions to the application notes, by making the offense level dependent on the number of unlawful aliens transported, and by encouraging departure where safety is endangered, correct this deficiency.

III. § 2X5.1, Other Offenses

The proposed amendment adds language to this guideline and adds two application notes. The new text in the guideline and Application Note 1, which explains the new text, add important clarification to the guideline. However, Application Note 2 is problematic.

This guideline gives guidance when the court is sentencing a defendant for an offense for which no guideline has been expressly promulgated by advising that the court should apply the most analogous guideline. Where there is no analogous guideline, the provisions of 18 U.S.C. 3553(b) control. Proposed Application Note 2 introduces a new procedure. It provides that when there is no sufficiently analogous guideline:

> ...the Court may find it helpful to estimate a Chapter Two offense level by comparing the seriousness of the instant offense with the offense levels that are listed. This estimated offense level may be used in conjunction with reference to Chapters Three, Four, and Five to provide guidance for the determination of the appropriate sentence.

This note suggests that the court should select an offense level when no analogous guideline exists. In essence, the court takes the responsibility to set the offense level, a procedure which may cause problems, produce anomalous and inconsistent results, and generate appellate issues. I think that it would be better to rest on § 3553(b) until, aided by the monitoring process, the Commission promulgates a guideline for the fact pattern at issue.

One example comes to mind. In the District of Maryland there are federal highways which generate numerous drunk driving offenses under the provisions of the assimilated crimes act. There are no analogous guidelines for drunk driving. If individual judges "estimated" an offense level, one judge may estimate the offense level at 12 and another estimate the level at 26.

IV. § 3E Acceptance of Responsibility

The Commission has requested comments concerning a number of aspects of this guideline. I have made revision to this guideline an agenda topic for the June 1990 meeting of our Committee, because of the strong and widespread feeling among the district judges all across the nation that there needs to be discretion to reduce the offense level for acceptance of responsibility by more than two levels in order to accommodate a number of rigidities and inequities in the guidelines. Consequently, while we are not prepared to provide comment regarding this provision by the public comment deadline of March 30, 1990, we will be in contact with the Commission after our next meeting with suggestions with respect to acceptance of responsibility and a number of other facets in the guidelines, all with a view to increasing flexibility in their administration.

V. § 4A1.2, Unconstitutional Convictions in the Criminal History Computation

We disagree with the amendment to Application Note 6 and the background statement following this note regarding use of uncounseled misdemeanors for which no term of imprisonment was imposed. Note 6 provides:

"Any other sentence resulting from a valid conviction is to be counted in the criminal history score, including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction."

I observe that a sentence may be constitutionally valid for some purposes and not others, but that distinction is not identified in the note. Moreover, the note, coupled with the new "background statement" (absent the distinction I have just referred to), make it appear that the Commission is making a legal determination that belongs to the courts. The caselaw is badly divided as to the effect of uncounseled and other allegedly valid convictions. Toby Slawsky, Esquire, Assistant General Counsel for the Administrative Office of the United States Courts, is working on a memorandum on this subject and we urge the Commission to withhold action at the present time.

Please note that this subject materially impacts on the work of probation officers. As stated in Appendix F of Presentence Investigation Reports Under the Sentencing Reform Act of 1984 (copy attached), it is our position that whether such an uncounseled misdemeanor can be used to increase the term of imprisonment is a legal issue to be decided by the sentencing judge. Thus, we have instructed probation officers to report such convictions under "Other Criminal Conduct" and indicate how the criminal history score would be changed if such convictions were included in the criminal history score.

VI. **§ 5E1.2, Fines for Individual Defendants**

The statutes authorize fines as an optional penalty but the guidelines make fines presumptive in every case. However, in a large majority of cases defendants do not have the ability to pay a fine. Because fines are presumptive according to the guidelines, the judge is required to make a finding as to ability to pay in every case. In order to more accurately reflect the reality of the defendant population and to remove a time consuming proceeding, the Committee on Criminal Law and Probation Administration endorsed a resolution during the January 1990 meeting to urge the U.S. Sentencing Commission to amend the guidelines to remove the presumptive fine requirement and allow the courts to impose a fine when warranted. This resolution was transmitted to the Commission in my letter to you of February 5, 1990. While the proposed amendments to the application notes in the fine guideline provide more flexibility in the requirements to calculate fines, the Committee stands by the resolution, believing that a better amendment would be for the Commission to authorize fines rather than making them presumptive.

On several occasions in the past, the Committee has urged that the required fine calculation for the costs to the government of imprisonment or supervision (§ 5E1.2) should be amended. Few defendants are able to pay these costs. Moreover, this provision requires a second fine calculation, often to very little end. Not only is this provision unrealistic and burdensome, it is confusing to those who have the statutory authority to collect fines. The confusion results from the mistaken belief that "costs" are a separate financial penalty, distinct from a criminal fine, when in fact, "costs" are merely one of the elements that goes into the determination of the fine calculation. We recommend that this requirement be moved to § 5E1.2(d), the list of considerations in determining the amount of the fine. Since only one total fine can be imposed, this provision is actually another consideration that could be added to the seven factors already included in § 5E1.2.

VII. Concluding Comments

Since the effective date of the sentencing guidelines in November of 1987, the Commission has amended the guidelines on four occasions resulting in the incorporation of 306 amendments. The frequency and number of amendments is burdensome, not only in mastering the changes, sometimes minor and sometimes major, but also in dealing with legal issues that they generate such as the ex post facto considerations. The current notice of proposed amendments entails 70 more. I speak for my colleagues on the Committee and the federal bench as well as the U.S. probation officers that assist us in requesting that the pace of future amendments be slowed.

Beyond this general request for a substantially reduced pace of guideline amendments, I strongly urge that the Commission not promulgate any amendments at this time (this comment pertains to those addressed by Judge Kocoras as well as those addressed herein). That is because the Commission is far below its statutory complement and lacks the statutorily required three judicial members, 28 U.S.C. § 991, so that any guidelines that it promulgates may well be subject to legal challenge. The uncertainty, confusion and extra work that such challenges will create surely makes the game not worth the candle.

Sincerely,

Edward R. Becker, by DLC

Edward R. Becker

ERB:pmk

APPENDIX F

Use of Uncounseled Convictions

Under Gideon v. Wainwright, 372 U.S. 335 (1963, an indigent defendant who is prosecuted for a felony must be offered the assistance of appointed counsel. If counsel is neither provided nor intelligently waived, the conviction is void. Under Argersinger v. Hamlin, 407 U.S. 25 (1972), the same rule applies to a misdemeanor conviction that results in a sentence of imprisonment. Under United States v. Tucker, 404 U.S. 443 (1972), the void conviction may not be considered by a sentencing judge in a subsequent case.

Misdemeanor convictions that do not result in imprisonment are treated differently. The Supreme Court held in Scott v. Illinois, 440 U.S. 367 (1979), that the states are not obliged to furnish appointed counsel to indigent defendants in misdemeanor cases if the conviction does not in fact result in imprisonment. In such a case, the conviction is valid. In essence, a more relaxed standard of procedural fairness is permitted for cases in which the consequence of a misdemeanor conviction is not deprivation of liberty.

The question that arises under Scott is what use can be made of the valid but uncounseled misdemeanor conviction by a judge imposing sentence in a later case. Where state law provided that a first theft offense was a misdemeanor but a second similar offense was a felony, the Supreme Court held that an uncounseled misdemeanor conviction, even though valid, could not be counted as the first offense. Baldasar v. Illinois, 446 U.S. 222 (1980). There is dispute, however, about the scope of the Baldasar holding. Some believe that the uncounseled misdemeanor conviction cannot be considered in any way that would result in a defendant's imprisonment or increase the term of imprisonment. Others have argued that Baldasar should be read more narrowly to prohibit the use of the prior misdemeanor conviction only where such use, as in Baldasar itself, would increase the statutory maximum prison sentence that could be imposed. Cases are collected in Justice White's dissent from the denial of certiorari in Moore v. Georgia, 108 S.Ct. 247 (1987).

In the commentary to Section 4A1.2 of the Guidelines, the Sentencing Commission has stated that a valid but uncounseled misdemeanor conviction shall not be counted in the criminal history score if counting it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." That is of course a legal issue to be decided by the sentencing judge. Accordingly, the probation officer should report such convictions under "Other Criminal Conduct" and indicate how the criminal history score would be changed if they were included in the scoring.

(27)

Erich D. Andersen
8365 Fairlane Dr. #10
Birch Run, MI 48415

September 25, 1990

Dear Communications Director:

Please find enclosed one copy of my article on the "abuse of a postion of trust" enhancement provision in the Sentencing Guidelines. The article is to be published in the Oregon Law Review. I send it in response to the Commission's call for comments on Guideline section 3B1.3.

I hope that my article may be of some use to the Commission. I may be reached at the above address if the Commission should have any questions or comments. Thank you.

Erich D. Andersen

ENHANCEMENT FOR "ABUSE OF A POSITION OF TRUST" UNDER THE FEDERAL SENTENCING GUIDELINES

Erich D. Andersen[1]

Many criminal offenses contain an aspect which the United States Sentencing Commission has called an "abuse of a position of public or private trust."[2] One example is insider trading. This offense characteristically involves the unauthorized use, by some insider, of confidential corporate or market information for personal gain.[3] The insider occupies a position of trust, which he abuses when he takes such information and uses it to obtain money or advancement.[4]

---

[1] Law Clerk to the Honorable James P. Churchill, Senior United States District Judge for the United States District Court for the Eastern District of Michigan; Former Law Clerk to the Honorable Diarmuid F. O'Scannlain, United States Circuit Court Judge for the United States Court of Appeals for the Ninth Circuit; B.A. 1986, J.D. 1989, University of California, Los Angeles. I would like to thank my wife, Anne Read-Andersen, and my friend and former colleague, Joseph D. Kearney, for their valuable criticism and editing suggestions. Rosa Kim and Fred Isaacs also made helpful comments on an early draft of this article. This article is dedicated to my wife, Anne.

[2] See, e.g., United States Sentencing Commission, Guidelines Manual § 3B1.3, at 3.7 (1989) [hereinafter "Guidelines Manual"] (reproduced in the appendix to this article).

[3] See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 883 (2d Cir. 1968), cert. denied, 404 U.S. 1005 (1971).

[4] See Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74. As this article discusses below, the Commission has restricted application of the adjustment in the area of insider trading to those persons who occupy positions of "special trust." Id. The Commentary indicates that such persons include corporate

Where the abuse of a position of trust is an aspect of the offense, there is no need to provide for an additional enhancement for this fact.[5] Where the punishment for the offense itself does not account for the abuse, however, an enhancement is proper because of the additional element of culpable behavior.[6] Accordingly, the Sentencing Commission has provided, in the federal Sentencing Guidelines, for an upward adjustment in a criminal's base offense level when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitates the commission or concealment of the offense."[6]

As recent cases reveal, however, it is sometimes difficult to

---

presidents and attorneys, but not tipees. Id.

[5] In United States v. Reich, 661 F. Supp. 371, 377 (S.D.N.Y. 1987), the district court discussed in hypothetical terms whether the "abuse of a position of trust" adjustment, contained in section 3B1.3 of the Sentencing Guidelines, is built into a notion of insider trading. The court ultimately did not resolve the question because Reich was a pre-Guidelines case.

The Sentencing Guidelines now make it clear that the abuse of a position of trust notion is not built into the offense of insider trading. This is why the Commentary to the guideline section on insider trading authorizes the adjustment for defendants who occupy positions of "special trust." See supra note 4.

[6] In its discussion of section 3B1.3 of the Guidelines, the Commission explains that the adjustment is appropriate because persons who abuse positions of trust "generally are viewed as more culpable." Guidelines Manual § 3B1.3, Commentary, Background, at 3.7. The Commission has been criticized in the past for not sufficiently articulating the underlying purposes of such provisions. See Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1952-53 (1988); Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 99-103 (1988).

[6] Guidelines Manual § 3B1.3, at 3.7 (reproduced in full in the appendix to this article). While section 3B1.3 provides for an adjustment where a defendant uses a "special skill" to commit or conceal a crime, this article will only address the "abuse of a position of trust" enhancement contained in that section.

determine when a person has abused a "position of trust."[7] Courts have not limited their findings of abuse to obvious areas such as insider trading or fraud by elected officials. They have authorized the adjustment for criminal conduct by a janitor,[8] a security guard,[9] a baby sitter,[10] and a bank loan clerk.[11]

While applying the adjustment in this expansive manner, however, almost every federal circuit court addressing the issue at any length has struggled to find limits on application of the adjustment.[12] Perhaps because of the confusion, the Sentencing Commission has asked for "comment . . . as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply."[13]

This article will offer several recommendations for amendment. All of these recommendations arise out of a view, developed by study in this area, that the "abuse of a position of trust" concept has the potential for being interpreted so broadly that it will

---

[7] See infra, at 7-13.

[8] See United States v. Drabeck, No. 89-30237, slip op. 6083, 6090 (9th Cir. June 14, 1990).

[9] See United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990).

[10] See United States v. Zamarripa, No. 89-2145, slip op. 1, 506 (10th Cir. June 11, 1990) (reversing district court's departure from the Guidelines and holding that the conduct was adequately accounted for in section 3B1.3 of the Guidelines).

[11] See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[12] See, e.g., Drabeck, No. 89-30237, slip op. at 6089-90.

[13] 55 Fed. Reg. 5739 (Sent. Comm'n 1990).

apply whenever a defendant commits a crime in, or related to, the workplace. To avoid this result, the Sentencing Commission should more narrowly define a "position of trust" for the purposes of sentence enhancement and impose a tighter causation requirement.

Before turning to specific recommendations, this article will briefly explain how the abuse of a position of trust adjustment fits into the recent history of criminal sentencing and the new Guidelines scheme. Next, it will consider the obstacles that courts have encountered in applying the adjustment. The article will then discuss how the Commission has accounted for the abuse of a position of trust in the base offense levels and specific offense characteristics of certain crimes. Finally, the article will offer and explain a proposal that the Sentencing Commission change the abuse of a position of trust adjustment from one of general application in the Guidelines to one of limited application.

I. THE RETURN OF RETRIBUTIVE SENTENCING

The federal Sentencing Guidelines arose out of a minor revolution in criminal sentencing that occurred in the 1970s and 1980s.[14] This revolution was fought largely over the purposes and goals of criminal sentencing and the role of judges in the process.

---

[14] For a good digested version of the history of criminal sentencing in this country, see United States v. Scroggins, 880 F.2d 1204-08 (11th Cir. 1989). Scroggins suggests that the retribution model of sentencing prevailed in the early part of this country's history and slowly gave way to a "medical model," which emphasized rehabilitation and flourished in the 1960s. By 1984, the rehabilitation goal was on the wane. Congress began to acknowledge that "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated." S. Rep. No. 225, 98th Cong., 2d Sess. 40.

Before the revolution, federal criminal law was strongly influenced by a rehabilitative model of criminal sentencing.[15] The rehabilitative model assumed that it was possible through criminal penalties to change offenders so that they would not commit future crimes. During the 1970s, however, a number of commentators expressed opposition to this theory.[16] They argued that the probation and parole system was a sham and that prisons did not rehabilitate.[17]

The new thinking was, in fact, largely a return to an emphasis on retribution theory with some concrete ideas about

---

[15] See, e.g., Williams v. New York, 337 U.S. 241, 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); Ind. Const. Art. 1 (1978) (the "penal code shall be founded on the principles of reformation and not of vindicative justice); see generally A. Campbell, Law of Sentencing 31-41 (1978) [hereinafter "Law of Sentencing"].

[16] See, e.g., M. Frankel, Criminal Sentences: Law Without Order ch.9 (1973); A. von Hirsch, Doing Justice: The Choice of Punishments ch. 6, 15-17 (1985); P. O'Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform ch. 6-10 (1977); N. Morris, Madness in the Criminal Law 145 (1982) ("Sentencing reform has been influenced intellectually and theoretically by an efffort to minimize sentences and the hypocrisy of adjusting prison terms to supposed indicia of rehabilitation demonstrated in prison, and by a trend toward models of guided discretion in judicial sentencing"); Winick, Legal Limitations on Correctional Therapy and Research, 65 Minn. L. Rev. 331-422 (1981).. See also Scott L. v. State, 760 P.2d 134 (Nev. 1988) (Nevada holds that retribution and "just desserts" remain appropriate sentencing rationales).

[17] Despite this movement towards giving retribution a greater role in criminal sentencing, the rehabilitation model still has persuasive advocates. See, e.g., Law of Sentencing at 26 (Supp. 1989) ("despite popular support for the vindication rationale, such notion is in fact a capitulation to mankind's basest instincts . . . [and] was the primary impetus behind sentences of torture, mutilation, and slow death that characterized the Middle Ages.").

implementation. Two theories which gained early adherents were so-called "flat sentencing" and "presumptive sentencing" systems.[18] "Flat sentencing" involved assessing a set sanction against every person convicted of committing a certain crime. Once a sentencing court determined the sentence for the individual offender, the sentence would become "flat," meaning that the defendant would have to serve the entire, or almost the entire, term. The similar "presumptive sentencing system" dictated that each crime would carry a presumptively correct standard penalty. That penalty, however, could be augmented or reduced by aggravating or mitigating factors.[19]

Elements of this "presumptive sentencing system" found their way into the current federal Sentencing Guidelines. The Guidelines operate on a system that assumes a standard penalty for a given offense, which can be adjusted upwards or downwards depending upon whether the defendant abused a position of public or private trust in such a way as to facilitate the commission or concealment of the offense.

By the time the Guidelines came into being, however, several states had adopted different forms of determinative or presumptive sentencing systems.[20] Most of the states devised some sort of

---

[18] See generally, George, The Comprehensive Crime Control Act of 1984 406-07 (1989) (looseleaf).

[19] Id.

[20] See S. Rep. No. 98-225, 98th Cong., 2d Sess. 61-62, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182 [hereinafter "Crime Control Report"] (discussing state legislation).

guidelines to control the exercise of judicial discretion.[21] State courts accepted the constitutionality of these provisions.[22]

The executive and legislative branches of the federal government soon became interested in the idea of developing a comprehensive federal sentencing system centered on a retributive philosophy.[23] Congress was concerned not only that the sentencing laws did not always reflect the new thinking, but also that a great disparity existed in the penalties for various crimes.[24] Congress acknowledged that some of the blame for such disparity should be placed at its feet. It had selected penalties in a haphazard manner over the decades and had not undertaken to create a Federal

---

[21] See id.

[22] See, e.g., Juneby v. State, 641 P.2d 823 (Alaska App. 1982).

[23] See, e.g., Crime Control Report at 38:

> In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

[24] Id.

Criminal Code to iron out the discrepancies.[25] Congress laid much of the blame for disparate sentences, however, at the door of the federal courts.[26] The new system would take away much of this judicial discretion in sentencing matters to remove the perceived disparities.

The initial answer to the problem of how to focus and revise the federal criminal sentencing laws was the Sentencing Reform Act of 1984.[27] Congress endeavored in this Act to iron out some of the disparities in existing penalty provisions by setting out a system of offense classifications.[28] Congress left the process of working out the details of this system, however, to the United States Sentencing Commission.[29] The Sentencing Commission was charged with the task of devising federal Sentencing Guidelines for Congression approval.[30]

---

[25] See Crime Control Report at 39; see generally George at 409-10.

[26] See, e.g., supra note 23.

[27] See Public Law 98-473, 98 Stat. 1976. See generally diGenova & Belfiore, An Overview of the Comprehensive Crime Control Act of 1984 -- The Prosecutor's Perspective, 22 Am. Crim. L. Rev. 707 (1985); Rezneck, The New Federal Sentencing Provisions, 22 Am. Crim. L. Rev. 785 (1985).

[28] See 28 U.S.C. § 991(b)(1)(B), 3559; see also United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990) ("Uniformity in sentencing was undeniably a primary goal of Congress and the Sentencing Commission in establishing a neotenic sentencing framework").

[29] See 28 U.S.C. §§ 991-98, 3553(b). The Guidelines became effective on November 1, 1987, and survived a constitutional challenge in 1989. See Mistretta v. United States, 109 S. Ct. 647 (1989).

[30] See 28 U.S.C. § 991.

II. THE STRUCTURE OF THE GUIDELINES

The federal Sentencing Guidelines provide a comprehensive scheme for criminal sentencing that is intended to limit the role and discretion of judges.[31] In a typical one-offense sentencing under the Guidelines, the district court will consult a mandatory presentence report prepared by a probation officer[32] and take the following steps to ensure that the report leads to the proper sentence: (1) look up the statute of conviction in the statutory index; (2) find the "base offense level" for that crime; (3) consider certain "specific offense characteristics," such as the possession of a gun during the commission of the offense; (4) determine if any "adjustments" from chapter three of the Guidelines apply (these adjustments account for, among other things, the defendant's role in the offense and the status of the victim); (5) calculate a "criminal history score" on the basis of the defendant's past criminal record; (6) determine the defendant's guideline range based upon the sum of the above factors by looking at a sentencing table contained in the Guidelines; (7) determine the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; and (8) refer to "specific offender characteristics" for additional adjustments.[33] After considering these factors, the sentencing

---

[31] See Weigel, supra note 6, at 89.

[32] See Fed. R. Crim. P. 32(c)(1).

[33] See Guidelines Manual § 1B1.1, at 1.13 (application instructions); Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 6-7 (1988) (article by United States Sentencing Commissioner and United States Circuit Judge Stephen Breyer); Wilkins & Steer, Relevant

judge may "depart" from the range indicated by the Guidelines if there are unusual factors, not taken into account by the Guidelines, which warrant such a departure.[34]

Under the Guidelines, an "abuse of a position of trust" may factor into the defendant's sentence as an adjustment,[35] a built-in aspect of an offense,[36] or a specific offense characteristic.[37] Section 3B1.3 of the Guidelines provides for a general upward adjustment when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."[38] There should be no adjustment, however, "if an abuse of trust . . . is included in the

---

Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) (article by United States Sentencing Commissioner and General Counsel of the United States Sentencing Commission).

[34] Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Guidelines Manual § 5K2.0, at 5.42. The Supreme Court recently took certiorari of a case addressing the issue of whether the defendant should have an opportunity to comment before a district court imposes a sentence based upon a departure under the Guidelines. See United States v. Burns, appeal taken from D.C. Cir., cert. granted, No. 89-7260 (July 31, 1990).

[35] See Guidelines Manual § 3B1.3, at 3.7.

[36] See, e.g., id. § 2C1.3, at 2.36 (stating that adjustment provided for in section 3B1.3 should not be applied).

[37] See, e.g., id. § 2C1.2, at 2.35 (adjustment provided for in section 3B1.3 should not be applied, but only because specific offense characteristic provides for eight-point enhancement where elected official offers, gives, solicits, or receives a gratuity on account of an official act -- that is, where he abuses a position of trust).

[38] Id. § 3B1.3, at 3.7.

base offense level or specific offense characteristic" of the crime for which the defendant has been convicted.[39] In such circumstances, the "abuse of a position of trust" adjustment would result in unfair double-punishment.

III. THE GENERAL ADJUSTMENT OF SECTION 3B1.3

The general sentencing adjustment provided for in section 3B1.3 has two "prongs." The first prong requires the sentencing court to ask whether the defendant has "abused a position of public or private trust."[40] The second prong requires that the court determine whether such abuse has "significantly facilitated the commission or concealment of the offense."[41]

For discussion purposes, it is useful to consider these two prongs independently. Each prong presents its own analytical problems, and the courts have begun to look at section 3B1.3 as requiring a two-step analysis.[42]

A. The "Abuse of a Position of Trust" Prong

The courts have had tremendous difficulty in determining what it means to "abuse a position of public or private trust." The word "trust" has a broad meaning that can encompass all kinds of relationships. Viewed broadly, "trust" is an "assured reliance on

---

[39] Id.

[40] Guidelines Manual § 3B1.3, at 3.7.

[41] Id.

[42] See, e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6197-6201 (9th Cir. June 19, 1990).

some person or thing: a confident dependence on the character, ability, strength, or truth of someone or something."[43] Viewed narrowly, "trust" can imply only a fiduciary relationship created by law. Thus far, the courts have indicated only that a "position of trust" under the Sentencing Guidelines involves certain characteristic features.

In United States v. Drabeck, the United States Court of Appeals for the Ninth Circuit focused on the lack of supervision accorded a criminal defendant in upholding application of the adjustment.[44] Defendant Drabeck worked for a janitorial service, which had a cleaning contract with a certain bank. As an incident of his job, Drabeck had keys to the bank and often worked unsupervised after the bank was closed. One evening when no bank employees were present, he removed $6,300 in traveler's checks from the bank's coin vault, located in an area where the general public was not allowed to enter. To get into the vault, Drabeck had to turn the handle of the vault door, which was either unlocked or defective.

Drabeck pleaded guilty to one count of bank larceny. In sentencing him, the district court applied an upward adjustment for

---

[43] Webster's Third New International Dictionary 2456 (1986). Note that courts often turn to the dictionary when terms used in the Guidelines are ambiguous. See, e.g., Foreman, slip op. at 6189 (construing term "facilitate" in Guideline § 3B1.3 by reference to dictionary definition); cf. United States v. Brannan, No. 89-50016, slip op. 2647, 2653 (9th Cir. Mar. 12, 1990) (relying in part on dictionary definition of "counterfeit" in affirming conviction of defendant for use of a "counterfeit access device" in violation of 18 U.S.C. § 1029(a)(1)).

[44] See United States v. Drabeck, No. 89-30237, slip op. 6083, 6086-90 (9th Cir. June 14, 1990).

an abuse of a position of trust. Drabeck appealed, arguing that "Guideline § 3B1.3 was not meant to apply to any person lower on . . . the 'hierarchy of fiduciary responsibility' than an ordinary bank teller."[45] A janitor, Drabeck argued, is lower on this hierarchy and therefore he should not have received the adjustment for stealing the traveler's checks.[46]

The Ninth Circuit disagreed. It first observed that the Commentary to section 3B1.3 does indeed identify the "ordinary bank teller" as a person who does not "abuse a position of trust" when he/she embezzles from a bank.[47] The court reasoned, however, that the "lack of supervision over the defendant distinguishes him sufficiently from an ordinary bank teller such that the exception from the enhancement that the Commentary affords the [bank] teller is inapplicable to [Drabeck]."[48]

At first glance, the court's point about a lack of supervision makes sense. A janitor often works when the bank is closed and there are no other employees around to watch him. Because of this lack of supervision, the bank management is less aware of the janitor's possible mischief and must place more trust in him than the "ordinary bank teller," who is closely supervised all day.

A second look, however, reveals that a lack of supervision does not necessarily suggest a position of trust. The janitor is

---

[45] Id. at 6089.

[46] Id.

[47] See id. at 6087-88 (discussing Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7).

[48] Id. at 6088.

not as closely supervised as the bank teller precisely because he has fewer opportunities to engage in criminal mischief that will be costly to the bank. The janitor does not have ready access to money and receipts, as does the "ordinary bank teller." Such realities suggest that a lack of supervision may not be so much an indication that the janitor occupies a position of trust, as an indication that the janitor's job is less likely to afford him an opportunity for perpetrating a crime that will be very costly to the bank. In short, it does not necessarily follow that the janitor is in a greater position of trust than the ordinary bank teller simply because the janitor is less supervised.[49]

Other cases focus less on the lack of supervision factor and more on the defendant's authority and control over the crime scene or victim. In United States v. Ehrlich, the defendant was a bank loan clerk responsible for "loan balancing." This job entailed verifying that the bank's general ledger account totals matched those of the bank's data processing company. Ehrlich would file debit and credit slips to correct the balances of the affected accounts caused by clerical, data entry, or computer error in the

---

[49] It is possible that the Commission intended the cryptic "ordinary bank teller" example to provided guidance not so much for the "position of trust" prong as the facilitation prong. The idea would be that the bank teller's job does not facilitate the commission of the offense of embezzlement because the bank teller is in no better position to embezzle than any number of people who work in financial institutions. The Commission, however, simply does not tell us what the ordinary bank teller example is supposed to illustrate. Thus, the courts tend to look to the example as a paradigm for application of the adjustment in all its facets. The bold courts threaten to disregard the counter-intuitive example altogether, see Drabeck, slip op. at __, but most simply sail through the fog without a sextant, not minding that they cannot see the coastline.

computer balancing process. Ehrlich manipulated this loan balancing process in such a way as to embezzle money from the accounts. A jury found her guilty of embezzlement and the district court imposed sentence, including a two-point upward adjustment for abuse of a position of trust under section 3B1.3 of the Guidelines. Ehrlich appealed, alleging among other things that the trial court erred in applying the adjustment. In particular, Ehrlich argued that her job was like that of an ordinary bank teller.[50]

The Fifth Circuit rejected the argument, emphasizing that Ehrlich was in a position of greater trust than the ordinary bank teller because she had extraordinary authority over the bank's accounts. "Ehrlich's position gave her the authority to routinely initiate loan balancing transactions."[51] "Ehrlich was given the authority to balance the loan suspense account, which she debited to effect three of the six embezzlements."[52] "This account is large and important, and . . . the bank assigns control of the loan suspense account only to employees deemed trustworthy and highly responsible."[53]

The Tenth Circuit also focused on authority and control in applying the abuse of a position of trust adjustment to a baby

---

[50] See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[51] Id. at 331 (emphasis added).

[52] Id. (emphasis added).

[53] Id. (emphasis added).

sitter who sexually abused the child he was hired to watch.[54] In United States v. Zamarripa, the district court had departed from the sentencing range indicated by the Guidelines to take into account the special circumstances surrounding the defendant's crime. The Tenth Circuit vacated and remanded for resentencing, however. It concluded that the district court erred in departing because section 3B1.3 provided an upward adjustment for the special circumstances cited by the district court. Section 3B1.3 provided for an adjustment because "[a] babysitter is in a position of trust, and this position certainly enables him to commit a sexual crime more easily than a man on the street."[55]

While courts have looked to supervision, authority, and control to define the "position of trust," however, they have not yet acknowledged that crime within the scope of employment is the most common feature in the cases upholding application of the upward adjustment.[56] United States v. Parker is a good example of

---

[54] See United States v. Zamarripa, No. 89-2145, slip op. at 2 (10th Cir. June 11, 1990).

[55] See Zamarripa, No. 89-2145, slip op. at 5-6.

[56] See Drabeck, slip op. at 6087-90 (adjustment where janitor committed bank larceny while on duty); Foreman, slip op. at 6200-01 (police officer attempted to use badge associated with law-enforcement position to escape search at airport); Ehrlich, 902 f.2d at 330-31 (bank loan clerk embezzled during course of employment); Zamarripa, slip op. at 5-6 (babysitter abused child while on duty); United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990) (security guard provided information about cash delivery while on duty at check-cashing firm); United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990) (bank officers misapplied bank funds).

United States v. Berkowitz, 712 F. Supp. 707 (N.D. Ill. 1989) is consistent with this interpretation. In Berkowitz, the court refused to apply the adjustment where the defendant stole documents from a United States Attorney's office while he was there to review

this phenomenon. Defendant Parker had a job as an armed security guard at a check-cashing firm in Elizabeth, New Jersey. This firm delivered large amounts of cash to corporate clients in New York City.[57] Parker conspired to rob a vehicle of the check-cashing firm as it made a delivery to a building in New York. On the day of the robbery, Parker learned of the delivery schedule of the vehicle and passed the information on to his co-conspirators. Parker also provided a description of the vehicle. Parker's co-defendants ambushed the vehicle as it arrived to make a cash delivery, shooting two payroll guards in the process.

Parker appealed from his sentence under the Guidelines, arguing, among other things, that he should not have received a two-point upward adjustment for abuse of a position of trust under section 3B1.3.[58] The Second Circuit dismissed the argument, reasoning that "Parker was the only defendant who [on the day of the robbery] was a Payroll employee."[59] A co-defendant "had not worked there in two months, and it could only facilitate his planning and the execution of the crime to have confirmation from an insider as to the description of the Payroll car and the time it was likely to arrive."[60] Parker had to concede that "because of

---

documents as a part of discovery in a criminal case in which he had been indicted. See id. at 709. The district court, in a one-sentence analysis of the issue observed that the defendant "simply took [illegal] advantage of an opportunity." Id. Berkowitz did not commit his offense within the scope of employment.

[57] See Parker, slip op. at 3494-95.

[58] See id. at 3516.

[59] Id.

[60] Id.

his position he 'could have confirmed the details of car, personnel and route that were already known by [the co-defendant], and upon which he had planned this robbery.'"[61]

The courts' apparent equation of employment with "position of trust" is inconsistent with the Commission's view of the adjustment. The Commentary to section 3B1.3 explains that the "ordinary bank teller" who embezzles at work should not receive the adjustment.[62] Because the Commission excludes the bank teller from the universe of defendants who could receive the adjustment, it must have meant that "position of trust" is not synonymous with scope of employment. Yet every court to publish a decision on the subject has upheld application of the adjustment where the defendant has committed the offense within the scope of employment.[63]

The federal appellate courts can hardly be blamed for their expansive reading of section 3B1.3, however. Such a result is almost predetermined when the courts of appeal use a deferential standard of review. While most federal circuit courts of appeal have not determined the standard of review to be employed in reviewing adjustments for abuse of a position of trust under section 3B1.3, two such courts have taken the lead and announced

---

[61] Id.

[62] See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

[63] See supra Note 39.

that they will review for clear error only.[64] This deferential standard of review insulates district court decisions, but has the undesirable effect of insulating district court decisions from closer scrutiny. Borderline applications of the adjustment are less likely to be overturned at the appellate level under such a standard.

B. THE "FACILITATION" PRONG

The second prong of section 3B1.3 requires sentencing courts to determine whether the abuse of a position of trust has "significantly facilitated the commission or concealment of the crime."[65] This is a causation requirement to ensure that there is a nexus between the abuse of a position of trust and the criminal offense.

Thus far, the courts have not used the facilitation prong to limit application of the adjustment. Without much critical analysis, the courts have merely emphasized the importance of a defendant's special knowledge of the crime scene or victim in

---

[64] See Drabeck, slip op. at 6089 (district court's factual finding that defendant abused a position of trust reviewed for clear error); Ehrlich, 902 F.2d at 330 ("A district court's application of § 3B1.3 is a sophisticated factual determination that will be affirmed unless clearly erroneous."); see also Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 520 (1990) ("the burden of persuasion as to specific offense characteristics and other offense level adjustments properly should rest with the party asserting their application"). But see Foreman, slip op. at 6197 (issue "whether an upward adjustment under § 3B1.3 is proper" is a legal issue and reviewed de novo, but "factual issue" of whether defendant's "conduct significantly facilitated the concealment of her crime" is reviewed for clear error only).

[65] Guidelines Manual § 3B1.3, at 3.7.

discussing the facilitation requirement. For instance, in Parker, the defendant-security guard argued that his job at a check-cashing firm could not have facilitated the commission of the robbery of a payroll car connected to the firm.[66] The Second Circuit disagreed, reasoning that "it could only facilitate [the] planning and execution of the crime to have confirmation from an insider as to the description of the payroll car and the time it was likely to arrive."[67]

Similarly, in Ehrlich, defendant argued that her job as a bank loan clerk merely afforded her an opportunity to embezzle "'that could have as easily been afforded to other persons.'"[68] Thus, she argued, the adjustment under section 3B1.3 was improper. The Fifth Circuit conceded that "[p]erhaps any number of . . . employees could have obtained and executed the same instruments, debit and credit slips, and then routed them" to the data processing center.[69] However, defendant's "position of trust gave her specialized knowledge of the [data processing] system, as well as information about non-reconciled MedCentre accounts, that few other employees shared. More importantly, Ehrlich's position gave her the

---

[66] See Parker, slip op. at 3516.

[67] Id.

[68] Ehrlich, 902 F.2d at 331 (quoting Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7). Ehrlich's argument is not surprising given the language in the application note (viz., "an opportunity that could have as easily been afforded to other persons"). This language could be read to suggest that a position of trust does not contribute "in some substantial way" to the facilitation of the crime unless only one person enjoys the privileges of that "position of trust."

[69] Id.

authority to routinely initiate loan balancing transactions, which facilitated embezzlements."[70]

One court could have put some teeth into the facilitation requirement, but it left the requirement toothless. In United States v. Foreman, a Missouri police officer arrived at Los Angeles International Airport, and was detained for questioning by Drug Enforcement Agency officers who observed her engaging in suspicious activity.[71] When the agents identified themselves, Foreman showed the agents her police badge and stated that she was an active police officer. Her efforts did not avail. The agents eventually arrested her for possession of a controlled substance.

In determining Foreman's sentence under the Guidelines, the district court included a two-point upward adjustment, concluding that Foreman had "use[d] her employment as a police officer to attempt to deflect the investigation of her, and thus to attempt to escape responsibility for her criminal activity."[72] Foreman appealed from her sentence, arguing, among other things, that "the use of her police identification did not abuse her position of trust 'in a manner that significantly facilitated' her crime."[73] "[Any] efforts on her part to use her position as a police officer to avoid investigation were unsuccessful and thus could not have

---

[70] Id.

[71] See Foreman, slip op. at 6194.

[72] Id. at 6201 (quoting district court's findings and conclusions) (emphasis added).

[73] Id. at 6197.

'significantly facilitated' her crime."[74]

A divided panel of the Ninth Circuit disagreed with this argument, holding that section 3B1.3 "may be read to provide an adjustment for abuse of a position of trust that significantly facilitated the attempted concealment of the offense."[75] Without first determining whether the language of section 3B1.3 is ambiguous, the court inferred an attempt provision by engaging in a linguistic analysis of the word "facilitate" and a far-flung examination of sentencing for attempts in other areas of the Guidelines.[76] The court determined that "the guideline's use of the word 'facilitated' implies that the drafters of this section intended it to apply to any abuse of a position of trust which significantly made it easier to commit or conceal a crime, regardless of the success of that abuse."[77] The court recognized that the Sentencing Commission specifically provided for attempts in other sections of the Guidelines and did not do so in section 3B1.3, but determined that this fact was not controlling, given its understanding of what it called the "Commission's overall Guidelines policy on attempts."[77]

The dissent appears to be correct, however, when it describes the majority opinion as "enlarg[ing] the language of section 3B1.3 far beyond anything the language of that provision can reasonably

---

[74]Id.

[75]Id. at 6200 (emphasis added).

[76]See id. at 6197-98.

[77]Id. at 6189.

[77]See id. at 6200.

bear."[78] The majority "looks past the unambiguous language of the statute in order to justify its rather odd 'implication' that an unsuccessful effort to facilitate is the same as having 'significantly facilitated.'"[79] The majority's disregard of the official Commentary, which requires a finding that the abuse of trust "contributed in some substantial way" to facilitating the commission or concealment of the crime, compounds the majority's misreading of the Guideline's language.[80] An attempted abuse of a position of trust cannot have a "substantial" effect on facilitating the concealment of an offense because an attempt, by definition, means a lack of ultimate success. Moreover, the dissent properly questions the wisdom of inferring some overall Guidelines policy on attempts from a general section which refers only to base offense levels and not adjustments.[81]

Another point bears mentioning here. The Foreman court failed to consider whether the defendant's sentence could have been enhanced under a different guideline section. This appears to have been a mistake because section 3C1.1 provides for an upward adjustment in the defendant's base level where the defendant "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense."[82] The Commentary to this

---

[78]Id. at 6202 (Reinhardt, J., dissenting).

[79]Id. at 6205 (Reinhardt, J., dissenting).

[80]See id. at 6205-06 (Reinhardt, J., dissenting).

[81]See id. at 6207 (Reinhardt, J., dissenting).

[82]Guidelines Manual § 3C1.1, at 3.9 (see the Appendix to this

enhancement section explains that it reaches defendants who "conceal[] material evidence, or attempt[] to do so."[83] This language appears to apply to Foreman, who attempted to impede or obstruct the administration of justice by flashing her police badge in hope of avoiding a search.

IV. THE BUILT-IN ADJUSTMENT

A. The Overbreadth Problem

Section 3B1.3 states that it may not "be employed if an abuse of trust ...is included in the base offense level" of the crime for which the defendant has been convicted.[84] The Commission sometimes indicates where the adjustment has already been accounted for in the base offense level for the offense by noting this fact in the Commentary to the relevant guideline.[85] Where the Commentary states that the adjustment is not applicable, we may assume that it has been built into the base offense level for the crime. On the other hand, where the Commentary states that the adjustment is applicable, we may assume that the base offense level does not already take into account the abuse of a position of trust factor.

For instance, the adjustment of section 3B1.3 does not apply

---

article).

[83] Id. § 3C1.1, at 3.9, Commentary, Application Note 1(a).

[84] Id. § 3B1.3, at 3.7.

[85] Cf. United States v. Fuente-Kolbenschlag, 878 F.2d 1377, 1380 (11th Cir. 1989) ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.").

where the defendant is a present or former federal officer who has engaged in conduct involving a financial or non-financial conflict of interest.[86] The logic here must be that the conduct of such a federal official is, by definition, an abuse of a position of public trust; therefore, imposing a sentence enhancement for the abuse would be redundant.[87] The base offense level for the crime accounts for the abuse of a position of trust element.

On the other hand, the adjustment does apply "[i]n the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a)."[88] Likewise, a fiduciary of an ERISA or welfare benefit plan is, by definition, in a position of trust and therefore should receive an

---

[86] See Guidelines Manual § 2C1.3, at 2.36.

[87] Defendants made this argument to no avail in United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990). Defendants, officers in Vermont banks, were convicted of several offenses, including conspiracy to misapply bank funds. They argued that they should not have received an upward adjustment for abuse of a position of trust because an adjustment for that factor was already included in the base level for the offense. The Second Circuit disagreed. The court noted that the offense encompasses criminal conduct by any person who is "an officer, director, agent or employee of, or connected in any capacity with" a federally insured bank. Id. Since not all of these positions are necessarily positions of trust, abuse of trust is not necessarily part of the offense. This was an aspect not accounted for in the base level of the offense.

McElroy suggests that the abuse of a position of trust adjustment may become commonplace in the Savings and Loan fraud cases now working their way into the courts.

[88] See id. § 2E5.4, at 2.69. Section 501(a) acknowledges that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. § 501(a)(1988).

automatic adjustment when he steals or embezzles from the plan.[89] In these cases, we can assume that the base offense levels do not already contain a built-in adjustment for the abuse of a position of trust because the Commentary indicates that the adjustment should be made. The Commission has mandated application of the enhancement only for a class of defendants who fit squarely within the parameters of the "abuse of a position of trust" notion.

Where the Commission makes it clear that the "abuse" notion is or is not built into the offense, there is little difficulty in deciding whether the adjustment should be applied. It is not always clear, however, whether certain types of defendants should receive the adjustment.

For example, sometimes the Commission relies upon a hazy distinction to indicate which types of defendants should receive the adjustment. The Commentary to the base offense level guideline for insider trading states that "[s]ection 3B1.3 ... should be applied only if the defendant occupied and abused a position of special trust."[90] Examples of persons in positions of "special trust," we are told, "might include a corporate president or an attorney who misused information regarding a planned but

---

[89]See Guidelines Manual § 2E5.2, Commentary, Application Note 2, at 2.68 (stating that a "'[f]iduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan").

[90]Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74 (emphasis added).

unannounced takeover attempt. It typically would not apply to an ordinary 'tippee.'"[91] The distinction between "special" and "ordinary" trust is not fully developed here; the Commentary barely sketches out a concept that is supposed to guide courts on difficult decisions.

At other points, the Guidelines treat an offense as if it invariably includes an "abuse" factor, even if it may not. For instance, in Guidelines section 2C1.6 the Commentary proscribes application of the section 3B1.3 adjustment in sentencing for several crimes, including the offering of loans or gratuities to bank examiners or the offering of anything of value for procuring a loan or discount on commercial paper from a Federal Reserve bank.[92] By proscribing application of the adjustment for these crimes, the Commission suggests that the base offense level already takes into account the "abuse of a position of trust" factor. Yet, some defendants who are sentenced under section 2C1.6 may not, in fact, abuse a position of trust. Defendants who offer or give gratuities, for instance, would not appear necessarily to abuse

---

[91] Id., Commentary, application note 1. The academic literature is full of useful discussions about the many ways in which corporate and market insiders occupy and can abuse their positions of trust. See, e.g., Andre, A Preliminary Inquiry Into the Utility of Vote Buying in the Market for Corporate Control, 63 S. Cal. L. Rev. 533, 636 (1990) ("managers who have unlimited access to the corporate coffers are clearly in a position to abuse their trust"); Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, 301 (1990) ("The state may justifiably concern itself with . . . personalized encounters [between a professional investment advisor and client] not because the communications lack first amendment protection, but because they present opportunities for abuse of the professional's position of trust, overreaching, and fraud.").

[92] See Guidelines Manual § 2C1.6, Commentary, Application Note 1, at 2.38.

positions of trust. A defendant who is convicted of offering a bribe to secure a loan from a Federal Reserve bank would be sentenced under section 2C1.6.[93] Such a person, however, may not abuse a position of trust in the same way that a Federal Reserve bank officer would by accepting the bribe. Nevertheless, section 2C1.6 is said to have a built-in adjustment for the abuse of a position of trust aspect, even though there is a potential class of defendants who may not be guilty of such conduct.

B. The Underinclusiveness Problem

While the Guidelines sometimes indicate that certain offenses include built-in adjustments for abuse of a position of trust, they inexplicably fail to state whether other offenses already contain the built-in adjustment. The Ninth Circuit noted this peculiarity in Drabeck.[94] There, the court found itself unable to understand why the "ordinary bank teller" does not, as a matter of law, abuse a position of trust when he/she embezzles from the bank.[95] The court speculated that perhaps the abuse of trust adjustment is already built into the base offense level for the crime of embezzlement.[96] The court noted several cases "suggesting" this

---

[93] See Guidelines Manual § 2C1.6, at 2.37.

[94] See United States v. Drabeck, No. 89-30237, slip op. at 6083, 6087-90 (9th Cir. June 14, 1990).

[95] Cf. United States v. Fousek, No. 89-5358, slip op. (8th Cir. Aug. 29, 1990) (bankruptcy trustee, convicted of embezzling funds from Chapter 13 debtors, does not challenge upward adjustment under Guidelines section 3B1.3 for abuse of a position of trust).

[96] But see id. (defendant does not appeal issue of upward adjustment for abuse of a position of trust for embezzlement).

fact, but wondered why the Commission had not made this explicit.[97]

The confusion in Drabeck is not surprising. Embezzlement would appear to be one of those crimes where most, if not all, defendants would abuse positions of trust. Yet the embezzlement section in the Guidelines says nothing about whether this fact has been accounted for in either the base offense level for the offense or the specific offense characteristic.[98] In its one example defining the limits of section 3B1.3, the Commission instructs that a bank teller who embezzles does not abuse a position of trust.[99] Yet at other points in the Guidelines the Commission explicitly provides for the adjustment in the case of embezzlement by other similarly situated individuals.[100] What separates the embezzling "ordinary bank teller" from other types of embezzlers who should receive the adjustment is not clear.

---

[97]See id. at 6089. The Ninth Circuit in Drabeck cited United States v. Jimenez, 897 F.2d 286, 297 (7th Cir. 1990) (stating in dicta that enhancement of sentence for abuse of trust is not applicable to embezzlement); United States v. Herrera, 878 F.2d 997, 1001 n. 3 (7th Cir. 1989) (section 3B1.3 designed to prevent double-counting, thus it may not be employed if an abuse of trust is included in the base offense level); United States v. Reich, 661 F.Supp. 371, 373 (S.D.N.Y. 1987) (to sentence a lawyer under Guidelines, district court must determine whether breach of trust is built into notion of insider trading before deciding whether to adjust under section 3B1.3. But c.f. Fuente-Kolbenschlag, 878 F.2d at 1380 ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.").

[98]See Guidelines Manual § 2B1.1, at 2.17.

[99]See id. 3B1.3, Commentary, Application Note 1, at 3.7.

[100]See, e.g., id. § 2E5.4, Commentary, Application Note 1, at 2.69 (embezzlement by union officer); id. § 2E5.2, Application Note 1, at 2.68 (embezzlement by ERISA or welfare plan fiduciary).