The court would also have available a 2 level upward adjustment because the offense described in the amendment commentary would involve obviously vulnerable victims (§ 3A1.1).

6. Proposed Amendment number 7 - Fraud & Theft - The Commission invites comment on whether certain guidelines (§§ 2B1.1, 2B1.2 and 2F1.1) should be amended to identify circumstances where upward departure may be appropriate to take into account circumstances where loss does not fully capture the seriousness of the offense. Proposed Amendment number 7 is related to number 6 and suffers from similar defects.

a. Cumulativeness

Most of the examples given in this proposed amendment often are covered by existing provisions. For example:

A fraud offense which "caused particularly significant emotional trauma to ...one or more victims" will, at least in some cases, be covered by the vulnerable victim adjustment (§3A1.1), which specifically refers to "mental condition", and victims who were "particularly susceptible to the criminal conduct".

An offense in which the defendant "consciously or recklessly endangered the solvency of...one or more victims" most often will be covered by § 2F1.1(b)(6) where the victim is a financial institution.

A fraud offense in which the defendant risked the health, bodily safety or life of one or more victims is covered by § 2F1.1(b)(2)(B) (2 level increase where more than 1 victim involved) and § 2F1.1(b)(4)(2 level increase, to a minimum of 13, if the offense involved conscious or reckless risk of serious bodily injury).

b. Mens Rea

As discussed above in connection with Proposed Amendment number 6, the examples given would authorize the court inappropriately to depart upward based on wholly unintended, and possibly unforeseeable, consequences.

c. Preference for Authorizing Departures

This proposed amendment poses the question whether the Commission should continue to add specific offense characteristics with 1 or 2 level increases, or simply authorize upward departure when unexpected situations arise. The latter approach is preferable. The government often advocates application of specific offense characteristics whenever there is any supporting evidence, however slight. The courts have developed an unsettling tendency of accepting the government's arguments uncritically. On the other hand, the courts seems more reluctant to depart without ample supporting evidence. Thus, by authorizing departure in unexpected situations, the courts would be given needed flexibility without inviting unwarranted increases in offense levels.

7. Request for Comment number 13 - Calculation of weight under negotiation in reverse sting cases - Should there be an amendment addressed to the offense level determination in such cases? Yes. Why? Because government agents should not be able to control, and increase, a defendant's potential punishment based on the agents' ability to set artificial market conditions. A defendant should not be punished for what he or she would like to be able to do, but rather on the basis of what he or she can do.

To determine an appropriate amendment to address the issue raised by the Commission, it is necessary to realize that the problem is actually broader than stated by the Commission. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power.

Two recent cases of which the PAG is aware help illustrate the scope of the problem. In one case, undercover government agents offered to sell the defendant 300 kilograms of cocaine. The defendant agreed to do so. The only problem was that he had no money (none). The agents, however, suggested that the defendant issue a quit claim deed to his house to the agents to serve as collateral for the cocaine purchase, which the defendant than did. (As a result, the house has been forfeited.) It turns out that the mortgage on the house exceeded the current appraised market value of the property--i.e., the house had negative equity. The government's position is that the defendant should be punished for a 300 kilogram offense.

In the second case, the defendant wanted to purchase 5 kilograms of cocaine and had the money to do so. The undercover FBI agents said they did not deal in such small quantities and that they would only sell the defendant 55

kilograms. Since the defendant did not have money for 55 kilograms, the agents told him the payment and delivery of the five kilograms would be the first installment on a 55 kilogram deal. If government agents were not the supposed sellers, there either would have been no deal (if the sellers were insistent upon only selling in quantities greater than 50 kilograms) or there would have been an agreed upon sale of 5 kilograms. Nevertheless, under the conditions set by the agents, the overall 55 kilogram deal proceeded and the defendant was arrested when he showed up with money for five kilograms. At sentencing, the government argued that the offense level should be based on 55 kilograms, because the defendant had agreed to purchase that amount. The district judge saw this as a transparent attempt by the agents to manipulate the guidelines and refused to sentence on the 55 kilogram amount. The judge ruled that the defendant had the ability to purchase five kilograms and that the offense level should be based on that amount.

It seems to the PAG that the judge in the second case adopted a reasonable method for resolving the artificial market problem. (While the judge's ruling in the second case might be seen as suggesting that an amendment is not necessary at all, we doubt that all or even most judges would feel free to adopt such an approach without an amendment providing authority to do so.) The guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court shall determine the defendant's offense level on the basis of the amount of drugs that he or she could have purchased based on the agreement.

The amendment should provide that this method is mandatory (i.e., "shall determine") whenever artificial market conditions have been set or agreed upon for several reasons. First, no defendant should be sentenced on the basis of artificial market conditions. Second, if the amendment is not mandatory, disparity will result among similarly situated offenders. Third, the passage of such an amendment will probably reduce the frequency of such cases but it is less likely to have such a salutary effect unless it is mandatory (i.e., if agents know that it is still possible to increase a defendant's punishment by artificial market conditions).

There still remains the question of what constitutes artificial market conditions. That is not a difficult as it might seem. The DEA keeps statistics on the "going price" for different controlled substances according to geographic area and time period. The question of what constitutes artificial market terms for a sale could be established by expert testimony or common established practices familiar to the court or the parties. Perhaps the defendant should have the initial

burden of making a prima facie showing (by proffer or otherwise) that the price and/or terms were artificial and the government would have an opportunity to rebut the showing by a preponderance of the evidence standard. Alternatively, the defendant could have the burden of establishing, by a preponderance of the evidence standard, that there were artificial market conditions set or agreed to by the government agents which increased his or her purchasing ability.

One final note. The request for comment number 13 does not completely address the problem of "sentencing entrapment." There are cases where defendants are encouraged to purchase, or sell amounts that they had not intended to, but agreed to buy or sell at the encouragement of government agents. Even where the defendant has the ability to purchase or sell the increased quantity (which means they would be unaffected by the proposed amendment), it seems to me that a convincing case can be made for not sentencing the defendant on the amount which is the product of government inducement.

8. Proposed Amendment number 20 - Money Laundering - The PAG strongly supports the proposed amendments to §§ 2S1.1 through 1.4, pertaining to money laundering offenses and reporting violations. As noted by the Money laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Group recognizes, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense." Id.

Although we largely support the proposed amendment, we are concerned about two issues. First, the amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of

funds involved in a money laundering transaction. Second, the pervasive use of government stings in money laundering cases, in which the government largely controls the value of funds involved in the offense, provides continued opportunities for sentence manipulation and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. Accordingly, the PAG recommends that the amendment be adopted with certain revisions: 1) that the incorporation of the fraud table be deleted with the existing money laundering table remaining in its place; and 2) that a lower base offense level be employed for violations of 18 U.S.C. § 1956(a)(3).

While we understand the Working Group's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving forcer behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).[13]

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a five million dollar insurance policy.

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendments

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[13]Indeed, although fraud is far closer in nature to theft than to money laundering in that both involve a discrete victim who has lost something of economic value, the Third Circuit recently held that for sentencing purposes the differences between the nature of a theft and the nature of a fraud rendered the equation of these two crimes "flawed." United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991).

proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate a revised, money laundering specific table should be employed.

The proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

In such cases there will never be commission of the underlying offense by the defendant, since it is the government agents who are representing that they, or their confederates, committed that offense. Accordingly, while a defendant who commits an underlying offense and launders the funds will be sentenced under the guideline for the underlying offense, under proposed § 2S1.1(a)(1) in a sting operation the defendant will receive a potentially higher sentence for only engaging in the laundering offense.

For example, if a defendant engages in mail fraud with a loss of $1,600 then launders the proceeds, his offense level would be 6 under the proposed amendments to §§ 2F1.1 and 2S1.1. If agents merely represented that the funds were derived from mail fraud and the defendant believed them and engaged in a financial transaction designed to avoid a CTR requirement, his offense level would be 10 (assuming a (b)(1)(A) enhancement, 8 if no enhancement). It makes little sense to punish a defendant more severely for engaging in a sting than for actually committing of the underlying offense.

9. Proposed Amendment number 23 - Abuse of Position of Trust - This proposed Commission amendment would significantly narrow the existing 2 level "abuse of position of trust" adjustment, so that it applies only to abuse of "special trust." "Special trust" would be defined as referring to "a position of trust characterized

by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."

The PAG favors adoption of this amendment, because the current "abuse of position of trust" guideline is extremely broad and susceptible of varying and unfair interpretations, particularly in fraud and embezzlement cases where some form of breach of trust almost always exists. The fraud guidelines themselves already contain a number of add-on provisions, such as the 2 level increase for "more than minimal planning" or a scheme to defraud more than one victim, and the 2 level increase for misrepresentation that the defendant was acting on behalf of charitable, educational, religious or political organizations. § § 2F1.1(2), 2F1.1(3)(A). The embezzlement guidelines likewise contain a 2 level increase for more than minimal planning. § § 2B1.2. The proposed amendment makes it far more likely that the 2 level enhancement for abuse of trust appropriately would be limited to professionals, high ranking managers and others in a special position of trust, and would not be added to the typical fraud or embezzlement defendant's sentence.

The Commission has also invited comment on whether, as an alternative to modifying § 3B1.3, the Commission should amend § 2B1.1 and § 2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in § 3B1.3 would not apply if the proposed specific offense characteristic was applied. The PAG recommends against such an amendment, as that would not cure the overbreadth problem inherent in the current language of § 3B1.3, and would compound the problem by adding a vague offense characteristic to the guidelines.

10. Proposed Amendment number 24 - Substantial Assistance - Call for Comment- The PAG is in favor of amending section 5K 1.1 by providing that a sentencing court can, sua sponte, depart downward from the guidelines in those cases involving first offenders where no violence was associated with the criminal offense. This would apply in those cases where the government does not present a section 5K1.1 Motion For Substantial Assistance but where the court nonetheless finds from the evidence that such a motion would have been appropriate had it been filed by the government.

11. Proposed Amendments number 25 and 36 - Standards for Acceptance of Plea Agreements - The PAG strongly urges the commission to adopt its proposed amendment number 25 (PAG #36) by adding commentary which would recommend that the government disclose to the defendant information relevant to the application of the sentencing guidelines prior to entry of a guilty plea. This

commentary would create no new right for a defendant, but would add to "truth in sentencing" and improve the practice of federal criminal law around the country under the Sentencing Guidelines.

12. Proposed Amendment number 27 - Guideline Consolidation - The PAG favors this amendment as it would simplify the Guidelines by deleting 27 Chapter Two guidelines through consolidation with other guidelines that cover similar offense conduct.

13. Proposed Amendment number 28 - Miscellaneous Substantive, Clarifying, and Conforming Amendments Affecting White Collar Offenses - The PAG makes the following recommendations on some of the miscellaneous amendments proposed by the Commission:

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft

The PAG recommends adoption of these changes, which conform the embezzlement Commentary on loss computation with the Commentary for fraud and deceit at § 2F1.1.

§ 2F1.1 Fraud and Deceit

The PAG agrees that the specific offense characteristic for violation of an order should apply only when not otherwise addressed in the guidelines. The PAG agrees that the Commentary for fraudulent loan applications and contract procurement cases should be changed to make clear that where the loss significantly overstates or understates the seriousness of the conduct, an upward or downward departure may be warranted. Similarly, we agree that the Commentary on loss determination should be amended to make clear that when loss overstates the seriousness of the offense, a downward departure may be warranted.

§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

§ 2C1.6 Loan or Gratuity to Bank Examiner for Adjustment of Farm Indebtedness, or Procuring Bank Loan or Discount of Commercial Paper

§ 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

§ 2E5.1 Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

§ 2E5.6 Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives or Labor Organizations

The PAG recommends adoption of the proposed amendments for determining the fines for organizations. These amendments would provide that consequential damages could be used in lieu of pecuniary loss only when "reasonably foreseeable." Without such a limitation, consequential damages are likely to distort the appropriate fine level by taking into account a myriad of unforeseen circumstances.

14. Proposed Amendment number 37 - Theft and Fraud - Although styled as an issue for comment, the PAG supports an amendment to the commentary about loss in the theft guideline which would conform the commentary in the theft guideline with the commentary on loss in the fraud guideline.

15. Proposed Amendment number 38 - Theft - Although listed as an issue for comment, the PAG would support an Amendment under section 2B .1 which would provide that the sentencing court has the discretion to make a downward adjustment in those cases where defendants do not personally profit from the offense.

16. Proposed Amendment number 40 - Cocaine and Cocaine Base - The PAG strongly supports this issue for comment which would provide that the Commission would ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At a minimum, we would urge the Commission to do a study on this whole area as to whether or not the ratio of 100 to 1 accurately reflects current scientific research and whether, in fact, the ratio should be reduced.

17. Proposed Amendment number 44 - Theft - This amendment increases the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen, and provides a minimum offense level of 14 if the offense involved an "organized scheme" to steal mail. Without knowing the Postal Service's experience with theft of mail, it is difficult to comment on the advisability of increasing the offense level. Further, we recognize that the Postal Service's minimal level 14 approach has already been adopted by the Commission for "an organized scheme to steal vehicles or vehicle parts," because it often is difficult to fix a loss figure on stolen vehicles and parts. § 2B1.1(b)(6); comment. (backg'd.). However, the PAG recommends that the Commission not adopt at this time any additional guideline that utilizes the "organized scheme" language, as that term is vague and seems duplicative of the specific offense characteristic for "more than

minimal planning." Virtually any scheme involving more than one person is an "organized scheme," and the Commission should study whether that term can be modified to more precisely cover the activity which concerns the Postal Service.

18. Proposed Amendment number 45 - Multiple Victims - This broad proposal by the Postal Service would create a new victim-related adjustment of 2 levels if more than one victim is affected, and if the offense affected 100 victims or more, the offense level would be increased by 2 levels for every 250 victims, up to a total of 8 levels. The PAG recommends against this proposal, as the 2 level increase would apply in a large number of typical fraud and theft cases, where dollar value already acts as a proxy for impact on multiple victims. Also, the proposed step increase for every 250 victims is arbitrary, and there does not appear to be a need for such an adjustment, especially given the loss tables, and the likelihood that the 2 level increase for "more than minimal planning" would apply to any scheme involving a large number of victims.

19. Proposed Amendment number 46 - Abuse of Position of Trust - The Postal Service proposes to add to the Commentary for 3B1.1 an application note that would specify that the enhancement for abuse of a position of trust applies to all postal employees for theft or obstruction of the mails, embezzlement of Postal Service funds, and theft of Postal Service property. As noted above, the PAG supports the Commission proposal to amend § 3B1.3 so that it applies to abuse of position of special trust. The PAG agrees that Postal Service employees to hold such a position of special trust with regard to theft or obstruction of the mails, because they have special access to the mails and the public depends so heavily on their honesty. Therefore, the Commentary to the proposed Commission amendment could include a reference to such Postal Service employees. However, with regard to embezzlement of Postal Service funds and theft of Postal Service property, the employees do not enjoy a special position of thrust, and should not be subject to an enhancement for such offenses.

20. Proposed Amendment number 59 - This proposed amendment would create a new guideline, § 2F1.2, applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030). As stated in the "Synopsis of Amendment", and as is apparent throughout the commentary, its emphasis is on dealing with non-monetary harm. This proposed guideline is overbroad and cumulative of existing provisions.

a. Overbreadth

The proposed guideline is drafted so that the base offense is largely meaningless in that one or more specific offense characteristics will apply to virtually every covered offense. Offense level increases are provided for virtually all computer crimes including, for example, the mere examination of business information "not meant for public distribution" (see proposed § 2F1.2(b)(2) and Application Notes 4 and 7).

Furthermore, inclusion of "consequential losses from trafficking in passwords" in the calculation of economic loss invites a host of problems. 18 U.S.C. § 1030(a)(6) makes it a separate crime to traffick in passwords only where there is also intent to defraud. There is, however, no such limitation in proposed § 2F1.2(b)(4)(B). "Trafficking" is defined broadly to include the mere "transfer" of a password (see 18 U.S.C. § 1030(a)(6) and 1029(e)(5)). Thus, less pernicious forms of trafficking in passwords may be included as relevant conduct under Guideline § 1B1.3(a)(2). This could include, for example, one "hacker" merely revealing a password to another without hope or expectation of economic gain. Inclusion of such consequential losses creates a real possibility that defendants will inappropriately be punished for acts by others that were not intended or reasonably foreseeable.

b. Cumulativeness

Violations of 18 U.S.C. § 1030 are presently subject to the fraud guideline, § 2F1.1, for which Application Note 10 authorizes upward departure where the primary objective of the fraud was non-monetary. In addition, Proposed Amendment number 6 would authorize upward departure where "the fraud caused substantial non-monetary harm", and Proposed Amendment number 7 addresses a similar issue. Thus, there is no need for a specific computer fraud guideline to deal with the sort of non-monetary injury discussed in connection with this proposed amendment.

In addition, particular parts of this proposed amendment are cumulative of existing provisions. For example:

> Proposed § 2F1.2(b) deals with offenses where the defendant obtained and/or altered protected information, which includes (under Application Notes 4 and 6) information "relat[ing] to military operations or readiness, foreign relations or intelligence, or law enforcement investigations or operations." This sort of harm is adequately covered by §2F1.1,

Application Note 10(d), which authorizes upward departure where "the offense endangered national security or military readiness."

Proposed § 2F1.2(b)(3)(A) deals with offenses which caused or were likely to cause "interference with the administration of justice." Such offenses often will constitute obstruction of justice, and be separately prosecutable, and punishable, under Title 18, Chapter 73 ("Obstruction of Justice"). In some circumstances (such as where a defendant enters false information in a law enforcement or court database), this sort of harm might also be covered by §2F1.1, Application Note 10(b), which authorizes upward departure where "false statements were made for the purpose of facilitating some other crime."

Proposed §2F1.2(b)(3)(A) also deals with offenses which caused or were likely to cause "harm to any person's health or safety." This sort of harm is adequately covered by § 2F1.1, Application Note 10(c), which authorizes upward departure where "the offense caused physical or psychological harm."

21. Proposed Amendment number 62 - Bank Fraud - Here, the Commission solicits comment on whether the guidelines principally applicable to bank fraud (§§ 2B1.1, 2B4.1 and 2F1.1) should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution. This proposal invites problems of both overbreadth and redundancy.

First, if the word "affects" is defined broadly, virtually all offenses involving financial institutions would be deemed to affect such institutions. Such a result cannot be justified by the potential consequence to the victim. There is no reason to believe that a garden variety bank fraud will cause greater damage than a comparable fraud on another kind of business. Furthermore, there is no philosophical reason why the former should be punished more harshly than the latter.

If, on the other hand, "affects" is limited to those frauds which have an impact on solvency, then the proposed amendments would be largely cumulative of existing offense characteristics. Sections 2B1.1, 2B1.4 and 2F1.1 already include as specific offense characteristics that the offense "substantially jeopardized the safety and soundness of a financial institution" (§§ 2B1.1(b)(7)(A), 2B4.1(b)(2)(A) and 2F1.1(b)(6)(A)); and that the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense" (§§ 2 B1.1(b)(7)(B), 2B4.1(b)(2)(B) and

2F1.1(b)(6)(B)). In either of those events, the offense level is increased by 4, to a minimum of 24. Thus, the Guidelines already make ample provision for those frauds which significantly affect financial institutions.

22. Proposed Amendment number 65 - The Commission requests comment on whether §2F1.1 should be amended to include "risk of loss" in determining the applicable guideline range for fraud when the amount at risk is greater than the actual or intended loss. As with Proposed Amendment number 6, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm. Also as with Proposed Amendment number 6, this sort of provision might be incorporated into an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.

The PAG also supports amendments numbered 29 and 30 proposed by the Criminal Law Committee of the Judicial Conference of the United States. We especially support proposed amendment number 29 which would add a paragraph to permit a downward departure when offender characteristics are present to an unusual degree and combined in ways important to the purposes of sentencing.

The PAG also supports, in substance, Amendments numbered 31-34 which are being proposed by the American Bar Association Sentencing Guidelines Committee.

Finally, the PAG supports Amendments numbered 47 and 52-56 of the proposals submitted by the Legislative Subcommittee of the Federal Defenders. As to proposed Amendments numbered 48-51 proposed by the Legislative Subcommittee of the Federal Defenders we prefer our amendment #39 in the Drug trafficking area, but we do support proposed amendment number 50 which would separate the weight of the carrier from the actual weight of LSD to determine the offense level in LSD cases. In the same regard, we also support the concept proposed in amendment number 49 sponsored by the Legislative Subcommittee of the Federal Defenders which would clarify that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the drug is bonded.

I have confirmed with your Staff Director, Ms. Phyllis J. Newton, that the Sentencing Commission will allow representatives of the PAG to address the Commissioners at your Tuesday, March 23, 1993 meeting at 10:00 A.M. As in the past, the PAG will <u>not</u> be presenting oral comments at the March 22, 1993, public hearing being held at the Ceremonial Courtroom of the United States District Court of the District of Columbia.

I look forward to working with you during this amendment cycle.

Sincerely,

Fred Warren Bennett, Chairman
Practitioner's Advisory Group

cc: Commissioners Nagel, Gelacak,
Carnes and Mazzone

REVISED PROPOSED AMENDMENT #39

Submitted by

PRACTITIONERS' ADVISORY GROUP

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the CURRENT GUIDELINES)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 38 (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancement for weapon usage; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities; and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and --

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
(c) Cocaine Base;
(d) PCP;
(e) LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
(f) Fentanyl; or
(g) Fentanyl Analogue.
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24.".

Section 2D1.1(b) is amended as follows (redline indicates additions, strikeout indicates deletions):

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually used by the defendant, or the defendant induced or directed another participant to use a dangerous weapon, increase by 4 levels.

(3) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.".

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting subdivisions 1-10:

"(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
~~(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.~~	~~Level 42~~
~~(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine~~	~~Level 40~~

~~(actual), or at least 10 KG but less than 30 KG of "Ice";~~
~~At least 1 KG but less than 3 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 40 KG but less than 120 KG of Fentanyl;~~
~~At least 10 KG but less than 30 KG of a Fentanyl Analogue;~~
~~At least 100,000 KG but less than 300,000 KG of Marihuana;~~
~~At least 20,000 KG but less than 60,000 KG of Hashish;~~
~~At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~

(1) ~~At least 30 KG but less than~~ 100 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ~~At least 150 KG but less than~~ 500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ~~At least 1.5 KG but less than~~ 5 KG or more of Cocaine Base; ~~At least 30 KG but less than~~ 100 KG or more of PCP, or ~~at least 3 KG but less than~~ 10 KG or more of PCP (actual); ~~At least 30 KG but less than~~ 100 KG or more of Methamphetamine, or ~~at least 3 KG but less than~~ 10 KG or more of Methamphetamine (actual), or ~~at least 3 KG but less than~~ 10 KG or more of "Ice"; ~~At least 300 G but less than~~ 1 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ~~At least 12 KG but less than~~ 40 KG or more of Fentanyl; ~~At least 3 KG but less than~~ 10 KG or more of a Fentanyl Analogue; ~~At least 30,000 KG but less than~~ 100,000 KG or more of Marihuana; ~~At least 6,000 KG but less than~~ 20,000 KG or more of Hashish; ~~At least 600 KG but less than~~ 2,000 KG or more of Hashish Oil. — Level 38

(2) At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least ~~50~~ 150 KG but less than ~~150~~ 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least ~~500 G~~ 1.5 KG but less than ~~1.5~~ 5 KG of Cocaine Base; At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of PCP, or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of PCP (actual); At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of Methamphetamine, or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Methamphetamine (actual), or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of "Ice"; At least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 4 12 KG but less than ~~12~~ 40 KG of Fentanyl; At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of a Fentanyl Analogue; At least ~~10,000~~ 30,000 KG but less than ~~30,000~~ 100,000 KG of Marihuana; At least ~~2,000~~ 6,000 KG but less than ~~6,000~~ 20,000 KG of Hashish; At least ~~200~~ 600 KG but less than ~~600~~ 2,000 KG of Hashish Oil. — Level 36

(3) At least ~~3~~ 10 KG but less than ~~10~~ 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least ~~15~~ 50 KG but less than ~~50~~ 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least ~~150~~ 500 G but less than ~~500 G~~ 1.5 KG of Cocaine Base; At least ~~3~~ 10 KG but less than ~~10~~ 30 KG of PCP, or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG of PCP (actual); At least ~~3~~ 10 KG but less than ~~10~~ 30 KG of Methamphetamine, or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of Methamphetamine (actual), or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of "Ice"; At least ~~30~~ 100 G but less than ~~100~~ 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least ~~1.2~~ 4 KG but less than 4 12 KG or more of Fentanyl; At least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of a Fentanyl Analogue; At least ~~3,000~~ 10,000 KG but less than ~~10,000~~ 30,000 KG or more of Marihuana; At least ~~600~~ 2,000 KG but less than ~~2,000~~ 6,000 KG or more of Hashish; At least ~~60~~ 200 KG but less than ~~200~~ 600 KG or more of Hashish Oil. — Level 34

(4) At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least ~~5~~ 15 KG but less than ~~15~~ 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least ~~50~~ 150 G but less than ~~150~~ 500 G of Cocaine Base; At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of PCP, or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of PCP (actual); At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Methamphetamine, or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of Methamphetamine (actual), or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of "Ice"; At least ~~10~~ 30 G but less than ~~30~~ 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least ~~400 G~~ 1.2 KG but less than ~~1.2~~ 4 KG of Fentanyl; At least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of Fentanyl Analogue; At least ~~1,000~~ 3,000 KG but less than ~~3,000~~ 10,000 KG of Marihuana; At least ~~200~~ 600 KG but less than ~~600~~ 2,000 KG of Hashish; At least ~~20~~ 60 KG but less than ~~60~~ 200 KG of Hashish Oil. — Level 32

(5) At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least ~~3.5~~ 5 KG but less than ~~5~~ 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least ~~35~~ 50 G but less than ~~50~~ 150 G of Cocaine Base; At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of PCP, or at least ~~70~~ 100 G but less than ~~100~~ 300 G of PCP (actual); At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of Methamphetamine, or — Level 30

at least ~~70~~ 100 G but less than ~~100~~ 300 G of Methamphetamine (actual), or at least ~~70~~ 100 G but less than ~~100~~ 300 G of "Ice";
At least ~~7~~ 10 G but less than ~~10~~ 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~280~~ 400 G but less than ~~400 G~~ 1.2 KG of Fentanyl;
At least ~~70~~ 100 G but less than ~~100~~ 300 G of a Fentanyl Analogue;
At least ~~700 G~~ 1,000 KG but less than ~~1,000~~ 3,000 KG of Marihuana;
At least ~~140~~ 200 KG but less than ~~200~~ 600 KG of Hashish;
At least ~~14~~ 20 KG but less than ~~20~~ 60 KG of Hashish Oil.

(6) At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28
At least ~~2~~ 3.5 KG but less than ~~3.5~~ 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~20~~ 35 G but less than ~~35~~ 50 G of Cocaine Base;
At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of PCP, or at least ~~40~~ 70 G but less than ~~70~~ 100 G of PCP (actual);
At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of Methamphetamine, or at least ~~40~~ 70 G but less than ~~70~~ 100 G of Methamphetamine (actual), or at least ~~40~~ 70 G but less than ~~70~~ 100 G of "Ice";
At least 4 7 G but less than ~~7~~ 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~160~~ 280 G but less than ~~280~~ 400 G of Fentanyl;
At least ~~40~~ 70 G but less than ~~70~~ 100 G of Fentanyl Analogue;
At least ~~400~~ 700 KG but less than ~~700~~ 1,000 KG of Marihuana;
At least ~~80~~ 140 KG but less than ~~140~~ 200 KG of Hashish;
At least 8 14 KG but less than ~~14~~ 20 KG of Hashish Oil.

(7) At least ~~100~~ 400 G but less than ~~400~~ 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26
At least ~~500 G~~ 2 KG but less than ~~2~~ 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~5~~ 20 G but less than ~~20~~ 35 G of Cocaine Base;
At least ~~100~~ 400 G but less than ~~400~~ 700 G of PCP, or at least ~~10~~ 40 G but less than ~~40~~ 70 G of PCP (actual);
At least ~~100~~ 400 G but less than ~~400~~ 700 G of Methamphetamine, or at least ~~10~~ 40 G but less than ~~40~~ 70 G of Methamphetamine (actual), or at least ~~10~~ 40 G but less than ~~40~~ 70 G of "Ice";
At least ~~1~~ 4 G but less than 4 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~40~~ 160 G but less than ~~160~~ 280 G of Fentanyl;
At least ~~10~~ 40 G but less than ~~40~~ 70 G of a Fentanyl Analogue;
At least ~~100~~ 400 KG but less than ~~400~~ 700 KG of Marihuana;
At least ~~20~~ 80 KG but less than ~~80~~ 140 KG of Hashish;
At least ~~2~~ 8 KG but less than 8 14 KG of Hashish Oil.

(8) At least ~~80~~ 100 G but less than ~~100~~ 400 G of Level 24

Heroin (or the equivalent amount of other Schedule I or II Opiates);
At least ~~400~~ 500 G but less than ~~500 G~~ 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 4 ~~5~~ G but less than ~~5~~ 20 G of Cocaine Base;
At least ~~80~~ 100 G but less than ~~100~~ 400 G of PCP, or at least 8 10 G but less than ~~10~~ 40 G of PCP (actual);
At least ~~80~~ 100 G but less than ~~100~~ 400 G of Methamphetamine, or at least 8 10 G but less than ~~10~~ 40 G of Methamphetamine (actual), or at least 8 10 G but less than ~~10~~ 40 G of "Ice";
At least ~~800 MG~~ 1 G but less than ~~1~~ 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~32~~ 40 G but less than ~~40~~ 160 G of Fentanyl;
At least 8 10 G but less than ~~10~~ 40 G of a Fentanyl Analogue;
At least ~~80~~ 100 KG but less than ~~100~~ 400 KG of Marihuana;
At least ~~16~~ 20 KG but less than ~~20~~ 80 KG of Hashish;
At least ~~1.6~~ 2 KG but less than ~~2~~ 8 KG of Hashish Oil.

(9) At least ~~60~~ 70 G but less than ~~80~~ 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 22
At least ~~300~~ 350 but less than ~~400~~ 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~3~~ 3.5 G but less than 4 ~~5~~ G of Cocaine Base;
At least ~~60~~ 70 G but less than ~~80~~ 100 G of PCP, or at least 6 7 G but less than 8 10 G of PCP (actual);
At least ~~60~~ 70 G but less than ~~80~~ 100 G of Methamphetamine, or at least 6 7 G but less than 8 10 G of Methamphetamine (actual), or at least 6 7 G but less than 8 10 G of "Ice";
At least ~~600~~ 700 MG but less than ~~800~~ 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~24~~ 28 G but less than ~~32~~ 40 G of Fentanyl;
At least 6 7 G but less than 8 10 G of a Fentanyl Analogue;
At least ~~60~~ 70 KG but less than ~~80~~ 100 KG of Marihuana;
At least ~~12~~ 14 KG but less than ~~16~~ 20 KG of Hashish;
At least ~~1.2~~ 1.4 KG but less than ~~1.6~~ 2 KG of Hashish Oil.

(10) At least 40 G but less than ~~60~~ 70 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 20
At least 200 but less than ~~300~~ 350 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 2 G but less than ~~3~~ 3.5 G of Cocaine Base;
At least 40 G but less than ~~60~~ 70 G of PCP, or at least 4 G but less than 6 7 G of PCP (actual);
At least 40 G but less than ~~60~~ 70 G of Methamphetamine, or at least 4 G but less than 6 7 G of Methamphetamine (actual), or at least 4 G but less than 6 7 G of "Ice";
At least 400 MG but less than ~~600~~ 700 MG of LSD

(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than ~~24~~ 28 G of Fentanyl;
At least 4 G but less than 6 ~~7~~ G of a Fentanyl Analogue;
At least 40 KG but less than ~~60~~ 70 KG of Marihuana;
At least 8 KG but less than ~~12~~ 14 KG of Hashish;
At least 800 G but less than ~~1.2~~ 1.4 KG of Hashish Oil.".

Section 3B1.2 is amended by deleting the Commentary and inserting new Commentary as detailed below:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided.

2. One factor that determines whether a defendant warrants a mitigating role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant must be one of the least culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (minimal, or minor) role listed in Note 6.

4. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

5. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and
(d) the defendant did not exercise any supervision over other participant(s).

6. With regard to offenses involving contraband (including controlled substances), a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband as a courier

shall not receive a mitigating (minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal, nor a minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

7. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (minimal, or minor) role adjustment. In determining whether a mitigating (minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the version of amendment #39 published in the Federal Register at the request of the Practitioners Advisory Group)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 38~~36~~ (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancement~~s~~ for weapon usage~~, principal organizers of large scale organizations, and obtaining substantial resources from engaging in the criminal activity by a defendant with an aggravating role~~; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities ~~by 2 levels~~; ~~provides a greater reduction for a significantly minimal participant;~~ and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and -- ~~the offense involves any of the controlled substances listed below, the base offense level shall not exceed level 32:~~

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
(c) Cocaine Base;
(d) ~~Phencyclidine (PCP);~~
(e) ~~Lysergic Acid Diethylamide (LSD)~~ (or the equivalent amount of other Schedule I or II Hallucinogens);
~~(f) N phenyl N [1 (2 phenylethyl) 4 piperidinyl] propanamide;~~
(f) ~~Marihuana;~~ Fentanyl; or
(g) Fentanyl Analogue.
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

~~*Provided*, that if the offense involves any controlled substance other than those listed in subparagraphs (a) through~~

~~(g) above, and the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 24. If an offense involves both the above listed controlled substances and other controlled substances, apply the offense level specified in the Drug Quantity Table set forth in subsection (c) below, but the base offense level shall not exceed 32 if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role).".~~

Section 2D1.1(b) is deleted and the following inserted in lieu thereof:

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was ~~actually~~ possessed ~~by the defendant~~, ~~or the defendant induced or directed another participant to actually possess a dangerous weapon,~~ increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually ~~brandished or displayed or fired~~ used by the defendant, or the defendant induced or directed another participant to ~~brandish, display, or fire~~ use a dangerous weapon, increase by 4 levels.

~~(3) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to use a dangerous weapon and someone other than that participant received serious bodily injury, or if the defendant created a substantial risk of death or serious bodily injury, or induced or directed another participant to participate in activity that created a substantial risk of death or serious bodily injury, increase by 6 levels.~~

(3) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

~~(5) If the defendant was the principal organizer or leader of criminal activity that involved 15 or more participants, increase by 2 levels.~~

~~(6) If the defendant engaged in criminal activity from which he obtained substantial income or resources, and the defendant qualifies for an aggravating role adjustment pursuant to §3B1.1 (Aggravating Role), increase by 2 levels.".~~

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the following as subdivisions 1-8:

(1) 100 KG or more of Heroin Level 38
(or the equivalent amount of other Schedule I or II Opiates);
500 KG or more of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
5 KG or more of Cocaine Base;
100 KG or more of PCP, or 10 KG or more of PCP (actual);
100 KG or more of Methamphetamine, or 10 KG or more of Methamphetamine (actual), or 10 KG or more of "Ice";
1 KG or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
40 KG or more of Fentanyl;
10 KG or more of a Fentanyl Analogue;
100,000 KG or more of Marihuana;
20,000 KG or more of Hashish;
2,000 KG or more of Hashish Oil.

"(2) At least 30 KG but less than 100KG of Heroin Level 36
(or the equivalent amount of other Schedule I or II Opiates);
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1.5 KG but less than 5 KG of Cocaine Base;
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at
least 3 KG but less than 10 KG of "Ice";
At least 300 G but less than 1 KG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 12 KG but less than 40 KG of Fentanyl;

At least 3 KG but less than 10 KG of a Fentanyl Analogue;
At least 30,000 KG but less than 100,000 KG of Marihuana;
At least 6,000 KG but less than 20,000 KG of Hashish
At least 600 KG but less than 2,000 KG of Hashish Oil.

(3) At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 34
At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 500 G but less than 1.5 KG of Cocaine Base;
At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG or more of Methamphetamine (actual), or at least 1 KG but less than 3 KG or more of "Ice";
At least 100 G but less than 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 KG but less than 12 KG or more of Fentanyl;
At least 1 KG but less than 3 KG or more of a Fentanyl Analogue;
At least 10,000 KG but less than 30,000 KG or more of Marihuana;
At least 2,000 KG but less than 6,000 KG or more of Hashish;
At least 200 KG but less than 600 KG or more of Hashish Oil.

(3) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 32
At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 150 G but less than 500 G of Cocaine Base;
At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

(4) At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 30
At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 50 G but less than 150 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.

(5) At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28
At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 35 G but less than 50 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";
At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 140 KG but less than 200 KG of Hashish;
At least 14 KG but less than 20 KG of Hashish Oil.

(6) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26
At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;
At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";
At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 160 G but less than 280 G of Fentanyl;
At least 40 G but less than 70 G of a Fentanyl Analogue;
At least 400 KG but less than 700 KG of Marihuana;
At least 80 KG but less than 140 KG of Hashish;
At least 8 KG but less than 14 KG of Hashish Oil.

(7) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 24
At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 5 G but less than 20 G of Cocaine Base;
At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";
At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 G but less than 160 G of Fentanyl;
At least 10 G but less than 40 G of a Fentanyl Analogue;
At least 100 KG but less than 400 KG of Marihuana;
At least 20 KG but less than 80 KG of Hashish;
At least 2 KG but less than 8 KG of Hashish Oil.

(8) At least 70 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 22
At least 350 but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 3.5 G but less than 5 G of Cocaine Base;
At least 70 G but less than 100 G of PCP, or at least 7 G but less than 10 G of PCP (actual);
At least 70 G but less than 100 G of Methamphetamine, or at least 7 G but less than 10 G of Methamphetamine (actual), or at least 7 G but less than 10 G of "Ice";
At least 700 MG but less than 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 28 G but less than 40 G of Fentanyl;

At least 7 G but less than 10 G of a Fentanyl Analogue;
At least 70 KG but less than 100 KG of Marihuana;
At least 14 KG but less than 20 KG of Hashish;
At least 1.4 KG but less than 2 KG of Hashish Oil.".

(9) At least 40 G but less than 70 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 20
At least 200 but less than 350 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 2 G but less than 3.5 G of Cocaine Base;
At least 40 G but less than 70 G of PCP, or at least 4 G but less than 7 G of PCP (actual);
At least 40 G but less than 70 G of Methamphetamine, or at least 4 G but less than 7 G of Methamphetamine (actual), or at least 4 G but less than 7 G of "Ice";
At least 400 MG but less than 700 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than 28 G of Fentanyl;
At least 4 G but less than 7 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 14 KG of Hashish;
At least 800 G but less than 1.4 KG of Hashish Oil.".

~~The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:~~

~~"16. In defining substantial income or resources the Court should refer to the body of definitional law that has developed in interpreting Title 21 U.S.C. § 848(c)(2)(B).".~~

Section 3B1.2 is deleted in its entirety and the following inserted in lieu thereof:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

~~(a) If the defendant was a significantly minimal participant in any criminal activity, decrease by 6 levels.~~

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in

any criminal activity, decrease by 2 levels.

~~In cases falling between (a) and (b), decrease by 5 levels.~~

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a ~~significantly minimal role (6 level reduction), a~~ minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), ~~a 5 level reduction is provided, and in cases falling between (b) and (c),~~ a 3-level reduction is provided.

2. ~~To determine whether a defendant warrants a mitigating (significantly minimal, minimal, or minor) role adjustment requires an assessment of~~ One factor that determines whether a defendant warrants a mitigating role ~~is~~ the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (~~significantly minimal,~~ minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. ~~Subsection (a) (6 level reduction) applies to a defendant who plays a significantly minimal role in concerted activity. To qualify for significantly minimal role under subsection (a), the defendant must be the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Note 6 and must be the least culpable. If more than one defendant equally qualifies as the least culpable, both defendants qualify for this reduction.~~

34. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant ~~plainly~~ must be one of the least

culpable, but not the least culpable, of the participants in ~~the~~ criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (~~significantly minimal,~~ minimal, or minor) role listed in Note 6.

~~4~~5. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

~~5~~6. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (~~significantly minimal,~~ minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) total compensation to the defendant was small in amount, generally in the form of a flat fee ~~must be small in relation to the compensation or gain realized by those persons who do not have a mitigating role in the offense and should ordinarily not exceed $5,000 and generally should be paid as a flat fee~~; and
(d) the defendant did not exercise any supervision over other participant(s).

~~6~~7. With regard to offenses involving contraband (including controlled substances, a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband as a courier

shall not receive a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a ~~significantly minimal,~~ minimal, or minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (~~significantly~~

~~minimal,~~ minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

~~7~~8. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment. In determining whether a mitigating (~~significantly minimal,~~ minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the version of amendment #39 published in the Federal Register at the request of the Practitioners Advisory Group)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 38~~36~~ (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancements for weapon usage~~, principal organizers of large scale organizations, and obtaining substantial resources from engaging in the criminal activity by a defendant with an aggravating role~~; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities ~~by 2 levels~~; ~~provides a greater reduction for a significantly minimal participant;~~ and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and -- ~~the offense involves any of the controlled substances listed below, the base offense level shall not exceed level 32:~~

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
(c) Cocaine Base;
(d) ~~Phencyclidine (PCP);~~
(e) ~~Lysergic Acid Diethylamide (LSD)~~ (or the equivalent amount of other Schedule I or II Hallucinogens);
~~(f) N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;~~
(f) ~~Marihuana;~~ Fentanyl; or
(g) Fentanyl Analogue.
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

~~*Provided*, that if the offense involves any controlled substance other than those listed in subparagraphs (a) through~~

~~(g) above, and the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 24. If an offense involves both the above listed controlled substances and other controlled substances, apply the offense level specified in the Drug Quantity Table set forth in subsection (c) below, but the base offense level shall not exceed 32 if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role).".~~

Section 2D1.1(b) is deleted and the following inserted in lieu thereof:

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was ~~actually~~ possessed ~~by the defendant~~, ~~or the defendant induced or directed another participant to actually possess a dangerous weapon,~~ increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually ~~brandished or displayed or fired~~ used by the defendant, or the defendant induced or directed another participant to ~~brandish, display, or fire~~ use a dangerous weapon, increase by 4 levels.

~~(3) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to use a dangerous weapon and someone other than that participant received serious bodily injury, or if the defendant created a substantial risk of death or serious bodily injury, or induced or directed another participant to participate in activity that created a substantial risk of death or serious bodily injury, increase by 6 levels.~~

(3) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

~~(5) If the defendant was the principal organizer or leader of criminal activity that involved 15 or more participants, increase by 2 levels.~~

~~(6) If the defendant engaged in criminal activity from which he obtained substantial income or resources, and the defendant qualifies for an aggravating role adjustment pursuant to §3B1.1 (Aggravating Role), increase by 2 levels.".~~

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the following as subdivisions 1-8:

(1) 100 KG or more of Heroin Level 38
(or the equivalent amount of other Schedule I
or II Opiates);
500 KG or more of Cocaine
(or the equivalent amount of other Schedule I
or II Stimulants);
5 KG or more of Cocaine Base;
100 KG or more of PCP, or 10 KG or more of
PCP (actual);
100 KG or more of Methamphetamine, or 10 KG
or more of Methamphetamine (actual), or 10 KG
or more of "Ice";
1 KG or more of LSD
(or the equivalent amount of other Schedule
I or II Hallucinogens);
40 KG or more of Fentanyl;
10 KG or more of a Fentanyl Analogue;
100,000 KG or more of Marihuana;
20,000 KG or more of Hashish;
2,000 KG or more of Hashish Oil.

"(2) At least 30 KG but less than 100KG of Heroin Level 36
(or the equivalent amount of other Schedule I or II Opiates);
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1.5 KG but less than 5 KG of Cocaine Base;
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at
least 3 KG but less than 10 KG of "Ice";
At least 300 G but less than 1 KG of LSD
(or the equivalent amount of other Schedule I
or II Hallucinogens);
At least 12 KG but less than 40 KG of Fentanyl;

At least 3 KG but less than 10 KG of a Fentanyl Analogue;
At least 30,000 KG but less than 100,000 KG of Marihuana;
At least 6,000 KG but less than 20,000 KG of Hashish
At least 600 KG but less than 2,000 KG of Hashish Oil.

(3) At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 34
At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 500 G but less than 1.5 KG of Cocaine Base;
At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG or more of Methamphetamine (actual), or at least 1 KG but less than 3 KG or more of "Ice";
At least 100 G but less than 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 KG but less than 12 KG or more of Fentanyl;
At least 1 KG but less than 3 KG or more of a Fentanyl Analogue;
At least 10,000 KG but less than 30,000 KG or more of Marihuana;
At least 2,000 KG but less than 6,000 KG or more of Hashish;
At least 200 KG but less than 600 KG or more of Hashish Oil.

(3) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 32
At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 150 G but less than 500 G of Cocaine Base;
At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

(4) At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 30
At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 50 G but less than 150 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.

(5) At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28
At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 35 G but less than 50 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";
At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 140 KG but less than 200 KG of Hashish;
At least 14 KG but less than 20 KG of Hashish Oil.

(6) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26
At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;
At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";
At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 160 G but less than 280 G of Fentanyl;
At least 40 G but less than 70 G of a Fentanyl Analogue;
At least 400 KG but less than 700 KG of Marihuana;
At least 80 KG but less than 140 KG of Hashish;
At least 8 KG but less than 14 KG of Hashish Oil.

(7) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 24
At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 5 G but less than 20 G of Cocaine Base;
At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";
At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 G but less than 160 G of Fentanyl;
At least 10 G but less than 40 G of a Fentanyl Analogue;
At least 100 KG but less than 400 KG of Marihuana;
At least 20 KG but less than 80 KG of Hashish;
At least 2 KG but less than 8 KG of Hashish Oil.

(8) At least 70 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 22
At least 350 but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 3.5 G but less than 5 G of Cocaine Base;
At least 70 G but less than 100 G of PCP, or at least 7 G but less than 10 G of PCP (actual);
At least 70 G but less than 100 G of Methamphetamine, or at least 7 G but less than 10 G of Methamphetamine (actual), or at least 7 G but less than 10 G of "Ice";
At least 700 MG but less than 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 28 G but less than 40 G of Fentanyl;

At least 7 G but less than 10 G of a Fentanyl Analogue;
At least 70 KG but less than 100 KG of Marihuana;
At least 14 KG but less than 20 KG of Hashish;
At least 1.4 KG but less than 2 KG of Hashish Oil.".

(9) At least 40 G but less than 70 G of Heroin Level 20
(or the equivalent amount of other Schedule I or II Opiates);
At least 200 but less than 350 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 2 G but less than 3.5 G of Cocaine Base;
At least 40 G but less than 70 G of PCP, or at least 4 G but less than 7 G of PCP (actual);
At least 40 G but less than 70 G of Methamphetamine, or at least 4 G but less than 7 G of Methamphetamine (actual), or at least 4 G but less than 7 G of "Ice";
At least 400 MG but less than 700 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than 28 G of Fentanyl;
At least 4 G but less than 7 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 14 KG of Hashish;
At least 800 G but less than 1.4 KG of Hashish Oil.".

~~The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:~~

~~"16. In defining substantial income or resources the Court should refer to the body of definitional law that has developed in interpreting Title 21 U.S.C. § 848(e)(2)(B).".~~

Section 3B1.2 is deleted in its entirety and the following inserted in lieu thereof:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

~~(a) If the defendant was a significantly minimal participant in any criminal activity, decrease by 6 levels.~~

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in

any criminal activity, decrease by 2 levels.

~~In cases falling between (a) and (b), decrease by 5 levels.~~

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a ~~significantly minimal role (6 level reduction), a~~ minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), ~~a 5 level reduction is provided, and in cases falling between (b) and (c),~~ a 3-level reduction is provided.

2. ~~To determine whether a defendant warrants a mitigating (significantly minimal, minimal, or minor) role adjustment requires an assessment of~~ One factor that determines whether a defendant warrants a mitigating role ~~is~~ the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (~~significantly minimal,~~ minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. ~~Subsection (a) (6 level reduction) applies to a defendant who plays a significantly minimal role in concerted activity. To qualify for significantly minimal role under subsection (a), the defendant must be the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Note 6 and must be the least culpable. If more than one defendant equally qualifies as the least culpable, both defendants qualify for this reduction.~~

34. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant ~~plainly~~ must be one of the least

culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (~~significantly minimal,~~ minimal, or minor) role listed in Note 6.

~~4~~5. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

~~5~~6. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (~~significantly minimal,~~ minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) total compensation to the defendant was small in amount, generally in the form of a flat fee ~~must be small in relation to the compensation or gain realized by those persons who do not have a mitigating role in the offense and should ordinarily not exceed $5,000 and generally should be paid as a flat fee~~; and
(d) the defendant did not exercise any supervision over other participant(s).

~~6~~7. With regard to offenses involving contraband (including controlled substances, a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband as a courier

shall not receive a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a ~~significantly minimal,~~ minimal, or minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (~~significantly~~

~~minimal,~~ minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

78. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment. In determining whether a mitigating (~~significantly minimal,~~ minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

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CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

separateness and that the concept of "closely related" offenses should not apply. The commentary of the proposed guideline also draws a distinction which is not supported by the legislative intent or statutory definitions of "actual money laundering" as compared to "other money laundering." Simply stated, we believe if the government proves the elements of the statute, the defendant should be sentenced accordingly, without a further analysis of the criminal intent by the sentencing court. In view of our concerns with these proposed amendments, we support the existing guidelines which provide for a separate and higher offense level for money laundering not tied to the offense level of the specified unlawful activity. For the above reasons, the Postal Service endorses the position of the Department of Justice to maintain higher levels for money laundering offenses.

* **Proposed Amendment 23, § 3B1.3.** We disagree with this proposed amendment's application to employees of the Postal Service, and submit in the alternative a revision to the commentary portion of this section which would make the public trust guideline specifically applicable to postal employees **(Amendment 46)**. Historically, postal employees have held a special fiduciary relationship with the American public because their personal correspondence is entrusted to the care and custody of the agency. This special trust is corroborated in the oath of employment and the long-standing federal criminal statutes which relate to the theft or obstruction of mail and embezzlement which apply exclusively to postal employees. In addition, these types of crimes significantly impair the Postal Service function and negatively impact on the public's trust in the institution.

Our proposed revision to the commentary would make the public trust guideline apply to employees of the Postal Service sentenced for theft or obstruction of United States Mail, (18 U.S.C. §§1703, 1709); embezzlement of Postal Service funds (18 U.S.C. §1711); and

theft of Postal Service property (18 U.S.C. §§1707, 641). To make this amendment comport to guideline commentary format, the statute citations are deleted. Application Note 1 is amended by inserting the following paragraph at the end:

> "This adjustment, for example, will apply to postal employees who abuse their position to steal or obstruct U.S. Mail, embezzle Postal Service funds, or steal Postal Service property."

It is our opinion the enhancement is justified because these crimes disrupt an important governmental function--the nation's postal system--as prescribed in § 5K2.7. Moreover, without the offense enhancement provided by § 3B1.3, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused by the offense under similar rationale discussed in § 2B1.3, comment (n.4). For example, the theft or destruction of mail by employees of the Postal Service necessarily impacts numerous victims, while the total dollar loss may be minimal.

Our proposal clarifies that the special trust relationship a postal employee has with the public and its written correspondence is significantly different from that of the employment relationship of the ordinary bank teller as cited by example in §3B1.3, comment (n.1), of the current guideline. Adoption of our proposed amendment would also provide for consistency in the application of this guideline in light of several court decisions, United States v. Milligan, 958 F.2d 345 (11th Cir. 1992) (court held that a postal clerk who embezzled funds had occupied a position of trust); United States v. Lange, 918 F.2d 707 (8th Cir. 1990) (postal employee who had access to certified and Express Mail was in a position of trust); United States v. Arrington, 765 F. Supp. 945 (N.D.Ill 1991)(a casual mail handler

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

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EDISON ELECTRIC INSTITUTE

PETER B. KELSEY
Vice President,
Law and Corporate Secretary

March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.[1] EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).[2] The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

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[1] Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

[2] Amendment No. 23, Notice at 62,842.

EEI believes that the proposed application note focuses too narrowly on a person's status in the employment context. In relevant part, the proposed note provides that:

> "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature.

EEI recommends that the reference to "professional or managerial discretion" be eliminated from the proposed amendment. This reference is likely to confuse a sentencing court because it focuses on employment-related abuses of trust and does not mention non-employment abuses of trust. There are numerous situations where a personal "special trust" is violated (for example, sexual abuse of a child by a relative or clergyperson). But such situations are not reflected in the proposed amendment.

Furthermore, the proposed amendment suggests that persons in professional or managerial positions in companies generally are in positions of trust that would warrant a sentence enhancement, provided that their positions "contributed in some significant way to facilitating the commission or concealment of the offense." This seems too casual a linkage between a person's status in a company and enhancement of that person's sentence. At a minimum, there should be some intent by an individual to use a position of special trust to further commission or concealment of an offense before this forms the basis for enhancing their sentence.

The proposed application note also should be clarified to ensure that the provision does not automatically imbue corporate managers with an aura of "special trust." For example, a corporate manager who is responsible for compliance with a particular area of the law should not be in a position of special trust with respect to violations of other areas of the law. The proposed amendment should require that the individual be in a position of special trust directly relevant to the underlying offense before this sentence enhancement is applicable.

Also, the trust should be one owed to the victim of the offense for which a sentence is being imposed, and should be reasonably relied on by the victim in the context of the offense. Corporate managers should not be liable for a perceived

special duty owed to the general public by them or their corporation. The special trust should arise directly between the individual and the victim of the crime before it can lead to sentence enhancement.

For all of these reasons, EEI would recommend the following as an alternative to Amendment No. 23:

> "Special trust" refers to violation of a duty of trust between the defendant and the victim or victims of an offense for which a sentence is being imposed. The duty of trust may arise from a fiduciary relationship or a position of substantial discretionary judgment that is legitimately given considerable deference by the victim. (In an employment context, such positions ordinarily are subject to significantly less supervision than those held by employees whose responsibilities are primarily ministerial in nature.) For this enhancement to apply, the violation of the duty of trust must have contributed in some significant way to facilitating the commission or concealment of the offense and not merely provided an opportunity that could have been afforded to other persons. Also, the defendant must have intended or known that the victim would rely on the duty of trust, and the victim must in fact have reasonably relied on that duty, in a way that contributed to the commission or concealment of the offense.

II. Issue For Comment No. 24 and Amendments Nos. 31 and 47, Substantial Assistance to Authorities

The Notice also contains an issue for comment and two proposed amendments regarding the elimination from § 5K1.1 of the requirement that the government make a motion requesting a departure from the guidelines before allowing a court to reduce a sentence as a result of substantial assistance by the defendant in the investigation or prosecution of another person.[3] EEI answers the question for comment in the affirmative and supports Amendments Nos. 31 and 47, which would allow the court to consider a departure from the guidelines for substantial assistance provided by a defendant at its own discretion, and urges the

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[3] Issue For Comment No. 24 and Amendments Nos. 31 and 47, Notice at 62,842, 62,848, and 62,853, respectively.

Commission to adopt the same amendment to § 8C4.1 of the Guidelines, which is the same provision as it applies to organizations.

There is a significant potential for unfairness when the prosecutor is given complete control over substantial assistance departures. Furthermore, the substantial assistance departure is currently the only ground for departure from the guidelines that requires a government motion before the court may consider it. Even if the amendment is adopted and a court is allowed to consider the issue at its own discretion, the government will still be the principal source of evidence regarding whether "substantial assistance" was in fact provided by the defendant. But prosecutors should not have sole discretion whether to raise the issue of substantial assistance for a court's attention, especially given that a prosecutor's exercise of this discretion generally is unreviewable. In order for this section to achieve its goal of encouraging defendants to aid law enforcement authorities in the prosecution of offenses, defendants must perceive that the section will be fairly applied. This requires courts to be able to consider the issue of substantial assistance of their own accord and in response to motions by defendants as well as in response to motions by prosecutors.

On a related subject, the limitations suggested by Issue for Comment No. 24 (i.e., must be a first offender and no violence must be associated with the offense) are unnecessary. Courts should be allowed to consider substantial assistance by defendants in all cases where such assistance has been rendered. First offender status and non-violent nature of the crime should be left as facts to be taken into account at the discretion of the court. They should not be used as a basis for universally limiting consideration of substantial assistance.

As noted above, § 8C4.1 of the Guidelines contains language that applies to the sentencing of organizations analogous to that contained in § 5K1.1, and it contains the identical governmental motion requirement. The purpose of the sections is the same. Therefore, an amendment to one should prompt an amendment to the other, as there is no policy justification for doing otherwise. Thus, EEI urges the Commission to strike the government motion requirement from both § 5K1.1 and § 8C4.1 of the guidelines.

III. Issue For Comment No. 30, Departures

Amendment No. 30 requests comment as to whether the language in Chapter One, Part A4(b) may be read to be overly restrictive of a court's ability to depart

from the guidelines.[4] EEI supports the suggestion made by the Committee on Criminal Law of the Judicial Conference of the United States that the language contained in Part A4(b) should be changed to the extent that it discourages departures by encouraging courts of appeals to find that sentences that depart from the guidelines are "unreasonable."[5]

While the language of Part A4(b) concedes that the initial guidelines will be the subject of refinement over time, and that the departure policy was adopted because "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision[,]" the language that follows nevertheless suggests that departures from the guidelines are improper.[6] The courts must be allowed to exercise reasonable judgment with respect to application of the guidelines, and must not be required to adhere inflexibly to specified types of departures and departure levels. At a minimum, EEI recommends that Part A4(b) be amended to strike the last sentence of the fourth paragraph and the last sentence of the fifth paragraph.

IV. Issue For Comment No. 32, First Time Offenders

The Commission has requested comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense.[7] EEI believes that there should be a specific provision for departures in the sentencing of first offenders of non-violent offenses. Judges need this departure to prevent the possibility of offenders receiving punishment that does not fit the crime. This departure should be accomplished through providing an additional ground for departure in Chapter Five, Part K.

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[4] Issue For Comment No. 30, Notice at 62,848.

[5] Letter of Vincent L. Broderick, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable William W. Wilkins, Jr., dated November 30, 1992.

[6] Federal Sentencing Guidelines Manual (1992 Ed.) at 6.

[7] Issue For Comment No. 32, Notice at 62,848.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.
>
> | No. of victims | Increase in offense level |
> |---|---|
> | 2 - 99 | 2 |
> | 100-349 | 4 |
> | 350-649 | 6 |
> | more than 650 | 8 |

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

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March 10, 1993

United States Sentencing Commission
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Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

National Association
of Manufacturers

James P. Carty
Vice President, Government Regulation,
Competition & Small Manufacturing

March 4, 1993

The Honorable William Wilkins
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On behalf of the more than 12,000 members of the National Association of Manufacturers (NAM), we are submitting this comment letter in response to a request for comments that appeared in the December 31, 1992, *Federal Register*. We have confined our comments to Amendments # 23, 24, 31, 45 and 47.

Amendment # 23 -- Abuse of Position of Trust

It appears the intent of the amendment is to clarify that the Abuse of Position of Trust (Sec. 3B1.3) adjustment should be used only in certain narrow circumstances. As drafted, it is not clear the amendment achieves that goal. We believe the amendment wrongly focuses on the employment sphere to define the process of determining special trust cases. Although there are cases involving defendants who have abused their managerial or professional discretion, there are any number of cases outside the employment realm involving abuse of special trust. For example, sexual abuse of a minor by a "big brother" or "big sister" would clearly violate a special trust as would similar abuse of a parishioner by a clergyman, or a boy scout by his troop leader. None of these examples falls directly within the workplace, yet each plainly implicates relationships of special trust. To use the employment situation as a global explanation of abuse of special trust is, therefore, potentially confusing and could be misleading to a court. As an alternative, we recommend the following.

> " 'Special trust' refers to a position of public or private trust characterized by substantial discretionary judgment that is ordinarily given considerable deference. Positions of special trust are often within an employment context involving professional or managerial discretion, but may frequently fall outside the employment context. For this section to apply, the position of special trust must have contributed in some substantial way to facilitating the commission or concealment of the offense. This section will apply to a narrow class of

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where the trust relationship is special and where breach of that trust is ordinarily met with heightened societal opprobrium."

Amendments # 24, 31 and 47 -- Substantial Assistance to Authorities

Each of these amendments raises the legitimate issue of whether the government should be interposed as a "gatekeeper" between the defendant and the court on questions of fact bearing on sentence administration. At present, the question of whether the defendant has rendered substantial assistance to authorities can be placed before the court if and only if the government so moves. This ground for departure stands alone in requiring a government motion to put the issue before the court.

The NAM believes there is no compelling reason to treat this basis for departure different from all others. Although we are unaware of any empirical evidence suggesting that wrongdoing is occurring to an appreciable degree, the current system holds the potential for abuse. The prosecutor can act arbitrarily and capriciously toward the defendant, and can erect unreasonably high hurdles for agreeing to move for a reduction of sentence. It strikes us that the possibility for abuse is sufficiently great so as not to outweigh any countervailing need to retain the government in the role of "gatekeeper."

It is not sufficient to argue, furthermore, that the exclusive government motion is necessary because the government's testimony is crucial in arriving at a factual determination that the defendant has rendered substantial assistance. Current guidelines provide that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance." Sec. 5K1.1, comment (n.3). There is thus an existing mechanism that assures that departures will occur only in cases where there is sufficient evidence that the defendant has in fact rendered substantial assistance.

To preclude abuse and assure fairness, the court should be permitted in all cases to consider a motion to depart by the defense as well as the government. We therefore believe that either amendment # 31 or 47 will accomplish the goal but that amendment # 24 is overly narrow in its application and would exclude such motions in far too many deserving cases.

Amendment # 45 Multiple Victims

Amendment # 45 would establish a new adjustment based upon the number of persons "affected" by the offense. We oppose its adoption. The language of the amendment is exceedingly and dangerously vague and the amendment introduces a novel concept into sentencing policy that is of questionable wisdom. Is an "affected" party a victim? Can one be "affected" and not be a victim? What is the definition of "affected." Can it entail emotional effects?

Focusing on the consequences of an offense is problematic. Punishment based on unforeseeable outcomes wrongly interjects chance into the criminal justice system and, as a result, undermines the purpose of sentencing guidelines. Cases involving multiple victims are currently, and should continue to be, dealt with by increasing the number of counts leveled against the defendant. See, e.g., Sec. 2N1.1(d)(1)(Tampering With Consumer Products).

We appreciate having the opportunity to comment. If we can be of any assistance in the future, please do not hesitate to call on us.

Sincerely,

James P. Carty
Vice President
Government Regulation
Competition and Small Manufacturing

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

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March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendment 27

This is a vote for the **Synopsis.** I have not the time, patience, or skill to spin out each proposed change; but I like what the Synopsis says it will do.

These giant "healing" amendments are going to be scarce, I hope. Now that the Section 3582(c) "Motions for Modification" are upon us (primarily on account of the additional level for early acceptance of responsibility -- which motions, of course, do not beget sentence modification), the prospect of tinkerings with numerous substantive offense levels makes me nervous.

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March 10, 1993

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Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

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January 26, 1993

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

Dear Judge Wilkins:

Bill Osteen, Jr., has discussed with me his letter to you regarding the Section 4B1.1 career offender enhancement. I would like to second his proposal that the Government give notice that such an enhancement may be applied.

This would facilitate frank discussion between attorneys and their clients and between attorneys and U.S. Attorneys seeking to resolve cases.

As Bill notes, the Government has better and easier access to a defendant's record and this disclosure would not be an undue burden.

Sentences fashioned under the Guidelines are sufficiently stunning without the surprise application of this enhancement. Anything the Commission might do to alleviate this situation would be helpful to all parties concerned.

Very truly yours,

HARRISON, NORTH, COOKE & LANDRETH

A. Wayland Cooke

AWC:cak

United States District Court
Middle District of North Carolina
Post Office Box 3485
Greensboro, North Carolina 27402

Chambers of
William L. Osteen, Sr.
Judge

January 15, 1993

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

Dear Judge Wilkins:

Not too long ago while I was still engaged in defense practice I realized that the "career offender guideline" posed a real difficulty in dealing with my clients. I should have mentioned it to the Sentencing Commission at the time, but for some reason failed to do so.

It was interesting recently to find that my son, Bill, has run into the same difficulty. I asked him to write for your consideration. He has done so and after reading his letter, I have no additional comments except that I concur completely with his analysis of the problem and suggested solution. This should not impose an additional effort upon the U. S. Attorney, but even if it does, when compared to the tremendous adverse effect on the defendant under the system, it seems that such effort could be justified.

Please give the enclosed letter the consideration which it richly deserves.

Thanks for all the good efforts your Commission brings to the sentencing process.

Sincerely,

William L. Osteen

William L. Osteen, Sr.

WLO,sr:ajv

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January 13, 1993

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

Dear Judge Wilkins:

I am writing to request that the Sentencing Commission consider amending the guidelines to correct what I believe is a difficult, if not unfair, situation under the career offender guideline.

Section 4B1.1 of the guidelines deals with the career offender. The penalties pursuant to that section result in greatly increased guideline ranges for certain defendants. It is my belief that a defendant should be given notice by the government prior to entry of plea or trial if such penalties may be imposed. This could be done pursuant to a framework similar to that required under 21 U.S.C. §841 and §851 for enhanced penalties.

I bring this to the Commission because of a recent difficulty encountered in one of my own cases. My client was charged with bank robbery. My preliminary calculations led me to believe a sentencing range of six to eight years was possible, unless the career offender enhancement applied. If applicable, my defendant's sentence could be in the 17 to 20 year range, close to the maximum possible. I was unable to advise my client effectively with respect to his alternatives.

Knowledge of a defendant's prior criminal record is a matter almost exclusively within the government's control prior to trial or plea. Neither a criminal defendant nor his counsel have access to resources such as the NCIC or other records of criminal convictions. Most defendants, as a practical matter, do not have a clear recollection of prior convictions. There is not sufficient time, prior to trial or plea, for a defense attorney to accurately investigate prior records particularly if a defendant has lived in another jurisdiction.

I recognize that the guidelines treat a defendant that accepts responsibility favorably. Nevertheless, acceptance is a factor determined following entry of a plea; a defendant is not assured of that reduction. Realistically, most defendants want to understand their maximum exposure in making a decision as to whether to plead or go to trial. Defense counsel wants to inform the defendant of his alternatives to the fullest extent possible.

Although the enhanced penalties pursuant to 21 U.S.C. §841 increase the minimum and maximum sentences applicable, I believe the notice theory contained therein should apply to §4B1.1 as well. There is no practical distinction between §841 and §4B1.1.

One of the problems defense attorneys run into if they recognize that the career offender provisions apply is that often a defendant cannot believe or accept their applicability after being so advised. Notice by the government prior to entry of a plea would alleviate that problem, at least in part.

Second, when a defendant is caught by surprise at the career offender adjustment in the presentence report, he is often antagonistic to both his lawyer and the system, and will subsequently seek appellate or other relief. I believe a notice requirement would alleviate this problem by giving a defendant advance notice of the stricter penalty.

Rather than cause more cases to go to trial, I believe prior notice of a career offender enhancement will induce more defendants to cooperate. It would give a defendant a tangible reason to believe he will receive such a sentence.

Even in cases in which the government failed to notify a defendant, criminal history points would be assessed to take into account the convictions; a trial court could depart upward if the career offender guideline was not noticed based on the trial court's discretion. I believe the trial court should have some discretion in dealing with these sentences.

It is my belief that such a provision of notification would promote more fairness in the criminal process, and lead to more informed pleas.

I further believe that such notice could be given with relatively little 'extra work' by the United States. Usually government agents will make some effort to ascertain a defendant's

record during the investigation. Following indictment, the probation office investigates a defendant's record for purposes of pretrial release. These probation records may or may not be disclosed to the defendant; if disclosed, they have to be returned to that office immediately following the detention hearing. The United States Attorney can order an NCIC check; any information contained therein which is unclear can be checked out quickly through law enforcement resources.

I realize courts have generally held that application of the career offender guidelines is not a basis for the defendant to withdraw his plea. I do not believe that such a holding means the current system cannot be changed to promote additional fairness.

My bank robbery case is awaiting resolution. I am still uncertain as to whether the career offender adjustment will apply. Before entry of the plea, the government ordered an NCIC check, but would not voice an opinion on the applicability of the career offender adjustment. One conviction noted a burglary arrest but said "adj. wth." I contacted an attorney in Florida; their investigator could only find four adult convictions which did <u>not</u> give rise to the career offender adjustment. My client assures me he only has one adult felony conviction for a crime of violence or drug offense. I remain uncertain. We will wait and see.

Thank you for your time and consideration.

Sincerely,

William L. Osteen, Jr.

William L. Osteen, Jr.

WLO:cam

Before the
UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E., Suite 2-500
Washington DC 20002-8002
Attention: Public Information

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In the Matter of

Proposed Amendment of the Sentencing Guidelines for the United States, Section 2F2.1, Applicable to Violations of the Computer Fraud and Abuse Act

----------X

TO: The Commission

COMMENTS OF THE SOCIETY FOR ELECTRONIC ACCESS

The Society for Electronic Access ("SEA") submits these comments in the above-captioned proceeding, which concerns the proposed amendments to the United States Sentencing Guidelines ("U.S.S.G.") concerning Computer Fraud and Abuse [57 Fed. Reg. 62832 (1992) (to be codified at U.S.S.G sec. 2F2.1) (proposed Dec. 31, 1992)]. We strongly urge you not to adopt these amendments because the penalties specified therein are unduly harsh, overly broad, and vague.

These amendments violate due process by providing harsher penalties for activities more properly related to computing than to crime. For example, proposed U.S.S.G. sec. 2F2.1.b.1 states:

"If the defendant altered information, increase by 2 levels"

where alteration is defined in Commentary #9 as including:

> "...all changes to data, whether the defendant added, deleted, amended or destroyed any or all of it."

It is almost impossible to use a computer without performing one or more of these functions. Merely logging on to another

computer fits this definition of alteration because this changes the information kept in its system logs, even if the user never requested that a specific file or record be accessed. Furthermore, the effect of these data alterations may not be directly related to severity of a crime: if a voyeur looks at protected files and leaves a note telling that he or she was there, that is very different from a vandal's deletion of a credit file. Yet, under these amendments both situations are treated as activities of equal seriousness. It is absurd to think that the alteration itself, absent other factors, requires an increase in the severity of the minimum sentence, or that all alterations affect criminality equally.

These amendments violate due process by including overly broad standards for determining the severity of a crime. For example, proposed U.S.S.G. sec. 2F2.1.b.5 states:

> "If an offense was committed for the purpose of malicious destruction or damage, increase by 4 levels."

where malicious destruction or damage, as defined in Commentary #11:

> ". . . includes injury to business and personal reputations."

The effect of so broad a category of activity being contained in a single sentencing adjustment would be to group the trivial with the heinous, and punish them equally. Breaking into a person's computer account and publicly posting information which disrupts his or her ability to conduct business is very different matter

from copying and publicly posting materials from that person's account that simply make the person look foolish, yet the amendment groups these actions together as offenses of equal seriousness.

Furthermore, this language allows for the punishment of speech without requiring a determination that the speech does not enjoy the protection of the First Amendment. The Supreme Court has always erected extremely stringent standards for the kinds of speech that can be found unprotected by the First Amendment, and these amendments to the Sentencing Guidelines err by allowing speech to be punished if it is found to damage someone's "personal reputation" under less stringent standards of proof, which would be introduced at the sentencing, rather than at the trial itself.

These amendments violate due process by mandating overly harsh punishments. To use an example derived from the recent past (see Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987)), if a defendant (willfully and for the purposes of commercial advantage or private financial gain) wrote something for publication which included sections of J.D. Salinger's private correspondence, the defendant could be convicted of criminal copyright infringement, and fined. See 17 U.S.C. sec. 506 and 18 U.S.C. sec. 2319. It stretches the imagination, however, to suggest that if the defendant had either obtained or distributed these materials electronically, no matter how limited the scope of the distribution, this copyright

infringement would be transformed into a crime so severe that the defendant would, as a first time offender, face a sentence of fifteen to twenty-one (15-21) months in prison.

Proposed U.S.S.G. sec. 2F2.1.b.2 states:

> "...if the defendant disclosed protected information to the public by means of a general distribution system, increase by six levels."

where the definition of "general distribution system" as defined in Commentary #10 includes:

> "...electronic bulletin board and voice mail systems, newsletters and other publications, and any other form of group dissemination, by any means."

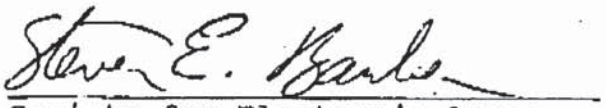
These amendments suggest that crimes for which the trial judge has heretofore had the latitude to impose probationary sentences or fines or both must now receive minimum sentences harsher than those mandated by the Federal Sentencing Guidelines for assault where the use of a dangerous weapon was threatened [U.S.S.G. sec. 2A2.3.a.1], sexual abuse of a ward [U.S.S.G. sec. 2A3.3.9.a] or trespassing on government property with a firearm [U.S.S.G. sec. 2B2.3.B.1 - .2]. Of all the potential violations of due process contained in these amendments, this potential for mandating unduly harsh sentences is the most shocking and the most clear.

In President Clinton's statement, "Technology for America's Economic Growth: A New Direction to Build Economic Strength" he says "Government telecommunication and information policy has not kept pace with new developments in telecommunications and computer technology. As a result, government regulations have

tended to inhibit competition and delay deployment of new technology." These amendments are part of that problem.

By simultaneously rendering the Guidelines both harsher and more vague, these amendments would create a chilling effect on perfectly legal uses of computers by private citizens, by creating an environment in which the potential criminality of an action would be impossible to ascertain in advance. Therefore, the SEA strongly urges you not to adopt the amendments to United States Sentencing Guidelines proposed at 57 Fed. Reg. 62832.

Respectfully submitted,



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Date: March 15, 1993

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March 15, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-9002
Attention: Public Information

Re: Proposed Amendent #59 to the Sentencing Guidelines for United States Courts, which creates a new guideline applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030)

Dear Commissioners:

The Electronic Frontier Foundation (EFF) writes to state our opposition to the new proposed sentencing guideline applicable to violations of the Computer Fraud and Abuse Act of 1988, 18 U.S.C. 1030 (CFAA). We believe that, while the proposed guideline promotes the Justice Department's interest in punishing those who engage in computer fraud and abuse, the guideline is much too harsh for first time offenders and those who perpetrate offenses under the statute without malice aforethought. In addition, promulgation of a sentencing guideline at the present time is premature, as there have been very few published opinions where judges have issued sentences for violations of the CFAA. Finally, in this developing area of the law, judges should be permitted to craft sentences that are just in relation to the facts of the specific cases before them.

The Proposed Guideline Is Too Harsh.

The proposed CFAA sentencing guideline, with a base offense level of six and innumerable enhancements, would impose strict felony liability for harms that computer users cause through sheer inadvertence. This guideline would require imprisonment for first time offenders who caused no real harm and meant none. EFF is opposed to computer trespass and theft, and we do not condone any unauthorized tampering with computers -- indeed, EFF's unequivocal belief is that the security of private computer systems and networks is both desirable and necessary to the maintenance of a free society. However, it is entirely contrary to our notions of justice to brand a computer user who did not intend to do harm as a felon. Under the proposed guideline, even a user who painstakingly attempts to avoid causing harm, but who causes harm nonetheless, will almost assuredly be required to serve some time in prison.

The proposed guideline, where the sentencing judge is given no discretion for crafting a just sentence based on the facts of the case, is too harsh on less culpable defendants, particularly first time offenders. As the Supreme Court has stated, the notion that a culpable mind is a necessary component of criminal guilt is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). In the words of another court, "[u]sually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong." *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983).

There Is Not Yet Enough Caselaw to Warrant a Guideline.

The Sentencing Commission itself has recognized the importance of drafting guidelines based on a large number of reported decisions. In the introduction to the Sentencing Commission's *Guidelines Manual*, the Commission states:

> The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a

> significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions, and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented pre-sentence reports, the parole guidelines, and policy judgments.

United States Sentencing Commission, *Guidelines Manual*, Chap. 1, Part A (1991).

At the present time, there are only five reported decisions that mention the court's sentencing for violations of the Computer Fraud and Abuse Act. *See*, *United States v. Lewis*, 872 F.2d 1030 (6th Cir. 1989); *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 72 (1991); *United States v. Carron*, 1991 U.S. App. LEXIS 4838 (9th Cir. 1991); *United States v. Rice*, 1992 U.S. App. LEXIS 9562 (1992); and *United States v. DeMonte*, 1992 U.S. App. LEXIS 11392 (6th Cir. 1992). New communications technologies, in their earliest infancy, are becoming the subject of precedent-setting litigation. Overly strict sentences imposed for computer-related fraud and abuse may have the effect of chilling these technologies even as they develop. Five decisions are not enough on which to base a guideline to be used in such an important and growing area of the law.

The Commission itself has recognized that certain areas of federal criminal law and procedure are so new that policy statements, rather than inflexible guidelines, are preferable. *See, e.g.,* United States Sentencing Commission, *Guidelines Manual*, Chap. 7, Part A (1990) (stating the Commission's choice to promulgate policy statements, rather than guidelines, for revocation of probation and supervised release "until federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment. . . ."). A flexible policy statement, rather than a specific sentencing guideline, is a more appropriate way to handle sentencing under the Computer Fraud and Abuse Act until there has been enough litigation on which to base a guideline.

Judges Must Be Permitted to Craft Their Own Sentences for Cases Involving Special Circumstances.

Individual sentencing decisions are best left to the discretion of the sentencing judge, who presumably is most familiar with the facts unique to each case. To promulgate an inflexible sentencing guideline, which would cover all crimes that could conceivably be prosecuted under the Computer Fraud and Abuse Act, is premature at this time.

As discussed above, there have only been five reported decisions where the Computer Fraud and Abuse Act has been applied. In three of these reported CFAA cases, the judges involved used their discretion and fashioned unique sentences for the defendants based on the special facts of the case. *See, Morris,* 928 F.2d at 506 (where the judge placed Defendant Morris on probation for three years to perform 400 hours of community service, ordered him to pay fines of $10,050, and ordered him to pay for the cost of his supervision at a rate of $91 a month); *Carron* at 3 (where the judge found that Defendant Carron's criminal history justified a sentence of 12 months incarceration followed by 12 months of supervised release and restitution to the two injured credit card companies); and *DeMonte* at 4 (where the trial court judge held that Defendant DeMonte's "extraordinary and unusual level of cooperation" warranted a sentence of three years probation with no incarceration). Judges must be permitted to continue fashioning sentencing that are just, based on the facts of a specific case.

Computer communications are still in their infancy. Legal precedents, particularly the application of a sentencing guideline to violations of the Computer Fraud and Abuse Act, can radically affect the course of the computer technology's future, and with it the fate of an important tool for the exchange of ideas in a democratic society. When the law limits or inhibits the use of new technologies, a grave injustice is being perpetrated. The Electronic Frontier Foundation respectfully asks the Commission to hold off promulgating a sentencing guideline for the Computer Fraud and Abuse Act until there are enough prosecutions on which to base a guideline.

Thank you in advance for your thoughtful consideration of our concerns. We would be pleased to provide the Commission with any further information that may be needed.

Sincerely yours,

Shari Steele

Shari Steele
Staff Attorney

The Electronic Frontier Foundation is a privately funded, tax-exempt, nonprofit organization concerned with the civil liberties, technical and social problems posed by the applications of new computing and telecommunications technology. Its founders include Mitchell Kapor, a leading pioneer in computer software development who founded the Lotus Development Corporation and developed the Lotus 1-2-3 Spreadsheet software.

CPSR

March 15, 1993

Chairman William W. Wilkins, Jr.
US Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Chairman:

We are writing to you regarding the proposed amendments to sentencing guidelines, policy statements, and commentary announced in the Federal Register, December 31, 1992 (57 FR 63832). We are specifically interested in addressing proposed item 59, regarding the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030).

CPSR is national membership organization of professionals in the computing field. We have a particular interest in information technology, including the protection of civil liberties and privacy. We have sponsored a number of public conferences to explore the issues involving computers, freedom, and privacy.[1]

We have also testified before the House of Representatives and the Senate regarding the federal computer crime law.[2] It is our position that the government must be careful not to extend broad criminal sanctions to areas where technology is

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1 See, e.g., The First Conference on Computers, Freedom & Privacy (IEEE Computer Society Press 1991), The Second Conference on Computer, Freedom & Privacy (Association for Computing Machinery 1992). A third report will soon be out on the third Conference on Computers, Freedom & Privacy. All three volumes contain "reports from the field" that may be helpful in understanding more fully the issues related to the protection of computer systems, the conduct of computer crime investigations, and the appropriate penalties for computer crime.

2 Computer Virus Legislation, Hearing before the Subcomm. on Criminal Justice, Comm. on the Judiciary, U.S. House of Rep., 101st Cong., 1st Sess. 62 (1989), The Computer Abuse Amendments Act of 1990, Hearing before the Subcomm. on Technology and the Law of the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. 62 (1990).

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rapidly evolving and terms are not well defined.[3] We believe that such efforts, if not carefully considered, may ultimately jeopardize the use of new information technology to promote education, innovation, commerce, and public life.

We also remain concerned that criminal sanctions involving the use of information technologies may unnecessarily threaten important personal freedoms, such as speech, assembly, and privacy. It is the experience of the computing profession that misguided criminal investigation and the failure of law enforcement to fully understand the use of computer technology will have a detrimental impact on the entire community of computer users.

For example, you may wish to review the recent decision of Steve Jackson Games v. Secret Service,[4] involving a challenge to the government's conduct of a particular computer crime investigation. The court found that the Secret Service's conduct "resulted in the seizure of property, products, business records, business documents, and electronic communications equipment of a corporation and four individuals that the statutes were intended to protect."[5] The court, clearly concerned about the government's conduct, recommended "better education, investigation, and strict compliance with the statutes as written."

Clearly, the decisions made by the Sentencing Commission regarding those factors that may increase or decrease a criminal sentence will have an important impact on how computer crime is understood and how the government conducts investigations. We therefore appreciate the opportunity to express our views on the propose changes to the guidelines for 18 U.S.C. 1030.

For the reasons stated below, it our belief that the proposed guidelines regarding the Computer Fraud and Abuse Act now under consideration by the Sentencing Commission place emphasis upon the wrong factors, and may discourage the use of computer technology for such purposes as publication, communication, and access to government information. For these reasons, CPSR hopes that the current proposal will not be adopted.

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3 S. Rep. 544, 101st Cong., 2d Sess. 4 (1990).

4 No. A-91-CA-346-SS (W.D. Tex. Mar. 12 1993).

5 Id. at 26-27.

The Proposed Guidelines Will have a Chilling Effect on Constitutionally Protected Activities

The proposed amendment would treat as an aggravating factor the alteration, obtaining, or disclosure of "Protected information." This term is defined in the proposed guidelines as "private information, non-public government information, or proprietary commercial information." The term is nowhere mentioned in the statute passed Congress.

We oppose this addition. It has been the experience of the computer profession that efforts to create new categories of information restriction invariably have a chilling impact on the open exchange of computerized data. For example, National Security Decision Directive 145, which gave the government authority to peruse computer databases for so-called "sensitive but unclassified information," was widely opposed by the computing community, as well as many organizations including the Information Industry Association and the American Library Association. The reason was that the new designation allowed the government to extend classification authority and to restrict the free flow of information and ideas.[6]

Clearly, this proposal to increase the sentence for a violation of a particular federal statute is not as sweeping as a Presidential order. Nonetheless, we believe that the problems posed by efforts to create new categories of computer-based information for the purpose of criminal sentencing will raise similar concerns as did NSDD-145. It is not in the interest of those who rely on information systems for the purpose of public dissemination to encourage the development of such classifications.

The proposed guidelines would also treat as an aggravating factor the alteration of public record information. This proposal may go directly against efforts to promote public access to electronic information and to encourage the use of computer networks for the conduct of government activities. For example, computer bulletin boards have been established by agencies, such as the Department of Commerce and Environmental Protection Agency, precisely for the purpose of encouraging public use of on-line services and to facilitate the administration of agency business.

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6 See Military and Civilian Control of Computer Security, Hearing before the Legislation and National Security Subcomm. of the Comm. on Government Operations, House of Rep., 101st Cong., 1st Sess. (1989).

Much of the problem may well be with the use of the term "alter" without any further discussion of the nature of the alteration. Computer systems are by nature interactive. Any user of a computer system "alters" the data on the system. System operators may control the status of a particular file by designating it as a "read only" file or a "read-write" file. When a file is "read only," a user may access the file but is technically unable to alter the files contents. However a file that is "read-write" may allow users to both review files and to alter them.

Certainly, there are many other factors that relate to computer system security, but this particular example demonstrates that in many instances altering a public file may in fact be the intended outcome of a system operator. Failing to distinguish between permissible and impermissible alterations of a computer file in the sentencing guidelines misses entirely the operation of many computer systems.

The proposed amendment would also discourage the publication of information in electronic environments. The amendment recommends that the sentence be increased by 4 levels where "the defendant disclosed protected information to any person" and by six levels where "the defendant disclosed protected information to the public by means of a general distribution system."

Both of these proposals would punish the act of publication where there is no economic advantage to the defendant nor any specific harm indicated. Such provisions could be used to discourage whistle-blowing in the first instance, and subsequent dissemination of computer messages by system operators in the second.[7]

For this reason, we strongly oppose the inclusion of comment 10 which states that a "general distribution system" includes electronic bulletin boards and voice mail systems. This particular comment could clearly have a chilling effect on operators of electronic bulletin boards who may become reluctant to disseminate information where such dissemination could be considered an aggravating factor for the purpose of the federal computer crime law.

Current guidelines

It is our view that the current guidelines are a reasonably fair articulation of the specific harms that might warrant additional stringency, at least in the area of computer crime. We believe that it is appropriate to impose additional sanction where there is "more than minimal

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7 See Steve Jackson v. Secret Service, supra.

planning" or "scheme to defraud more than one victim," as currently stated in the Guidelines. One of our concerns with the application of 18 U.S.C. 1030 after the decision in U.S. v. Morris, 928 F.2d 504 (2d Cir. 1991) is that the provision does not adequately distinguish between those acts where harm is intended and those where it is not. For this reason, provisions in the sentencing guidelines which help to identify specific harms, and not simply the disclosure of computerized information, may indeed be helpful to prosecutors who are pursuing computer fraud cases and to operators of electronic distribution systems.

For similar reasons, we support the current §2F1.1(4) which allows an upward departure where the offense involves the "conscious or reckless risk of serious bodily injury." Again, it is appropriate to impose a greater penalty where there is risk of physical harm

The Commission may wish to consider at some future date a provision which would allow an upward departure for the disclosure of personally identifiable data that is otherwise protected by federal or state statute. We believe that privacy violations remain an important non-economic harm that the Commission could address. For instance, the disclosure of credit reports, medical records, and criminal history records, by means of an unauthorized computer use (or where use exceeds authorization) may be an appropriate basis for the imposition of additional sanctions.

We suggest that the Commission also consider whether a downward departure may be appropriate for those defendants who provide technical information about computer security that may diminish the risk of subsequent violations of the computer fraud statute. Such a provision may lead to improvements in computer security and the reduced likelihood of computer-related crime.

We recognize that the Commission is currently considering factors that should be considered in the imposition of federal sentencing, and that this process should not be equated with the creation of new criminal acts. Nonetheless, the decisions of the Commission in this area may well influence subsequent legislation, and the ability of computer users to make use of information systems, to access government information, and to disseminate electronic records and files. It is for these reasons that we hope the Sentencing Commission will give careful consideration as to potential impact on the user community of these proposed changes to the federal sentencing guidelines.

We appreciate the opportunity to provide these comments to the Commission and would be pleased to answer any questions you might have. Please contact me directly at 202/544-9240.

Sincerely yours,

Marc Rotenberg, director
CPSR Washington office

Enclosure

S. HRG. 101-1276

THE COMPUTER ABUSE AMENDMENTS ACT OF 1990

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 2476

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO CLARIFY AND EXPAND LEGAL PROHIBITIONS AGAINST COMPUTER ABUSE

JULY 31, 1990

Serial No. J-101-91

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

44-473 WASHINGTON : 1991

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Senator LEAHY. Thank you, Mr. Jerger.
Go ahead, Mr. Rotenberg.

STATEMENT OF MARC ROTENBERG, COMPUTING AND CIVIL LIBERTIES PROJECT, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, WASHINGTON, DC

Mr. ROTENBERG. Mr. Chairman, Senator Humphrey, thank you for the opportunity to testify today.

My name is Marc Rotenberg. I am director of the Washington office of Computer Professionals for Social Responsibility. I will speak briefly on three issues regarding S. 2476.

The first point I would like to make is that CPSR supports the proposed adoption of the recklessness provision in the computer crime law. We believe that this is a sensible way to send a message to the computing community that those acts which even though may not be malicious, which nonetheless result in harm because of someone's disregard for the needs of other users should be punished. For this reason, we would support the recklessness provision and the expansion of the scope of the computer crime law to cover those types——

Senator LEAHY. Expansion of——

Mr. ROTENBERG. Expand the scope of the law to cover those acts that involve clear recklessness.

Having said that, I should point out that while this provision is based in part on the experience with the *Morris* case, it is worth noting that the current law did cover the *Morris* case quite well. Robert Morris was convicted of a felony act, and under the Federal sentencing guidelines would have received a sentence of almost 2 years. So at least to those who say that the law is not adequate for the Morris situation, I think the facts suggest otherwise.

My second point is regarding the civil liberties implications of computer crime investigations. And, as you indicated earlier, Senator, the recent experience with Steve Jackson Games in Texas and with the Craig Neidorf prosecution in Chicago, suggests that at least in some instances Federal prosecutors have reached too far in the conduct of computer crime investigations. And I believe part of the reason for this may be a matter of terminology. We have become so accustomed to the thought that computer hacking is necessarily malicious or necessarily criminal that when the word "hacking" comes up, prosecutors appear to leap and look for an opportunity to conduct an investigation.

The point I would like to make is that there is nothing in title 18 that criminalizes computer hacking. Title 18 criminalizes unauthorized access to computer systems, and that is an important distinction that must be made so that prosecutors stay focused on the target and that people who have not committed an unlawful activity do not get swept up within the investigative net.

And my final point is simply this: There is clearly a problem of computer crime in this country. Estimates losses run between $3 billion and $5 billion a year, but losses of those amounts are tied to acts of individuals who for malicious purposes or purposes of self-gain take from others what is not rightfully theirs. Those are the acts the Federal prosecutors should be focusing on. Those are the

acts which cause the greatest harm to our economy. And we hope that in the ongoing work of the law enforcement agencies they will make sure that their priorities are in accord with that need.

Thank you, Mr. Chairman.

[The prepared statements of Mr. Rotenberg follow:]

Prepared Testimony
and
Statement for the Record

of

Marc Rotenberg
Director, Washington Office

Computer Professionals for
Social Responsibility (CPSR)

on

S. 2476
The Computer Abuse
Amendments Act of 1990

before

The Subcommittee on Technology and Law,
Committee on the Judiciary,
United States Senate

July 31, 1990

Mr. Chairman, members of the Committee, thank you for the opportunity to testify today on the Computer Abuse Amendment Acts of 1990. My name is Marc Rotenberg and I am the director of the Washington Office of Computer Professionals for Social Responsibility.

CPSR is a national organization of computer scientists and other specialists that seek to inform the public about the social impact of computer systems. Our membership includes a Nobel Laureate and four winners of the Turing Award, the highest honor in computer science.

I also want to thank you, Senator Leahy and the other members of the Committee, for taking the lead on the computer virus issue. Your hearing last March with Cliff Stoll and FBI Director William Sessions has helped the public understand the complex issues of computer crime and has laid the foundation for appropriate Congressional action.

I have a lengthy statement that I ask be entered into the hearing record. This afternoon I would like to focus on three points regarding the proposed legislation and computer crime.

First, CPSR supports the proposed addition of a recklessness provision in the criminal code. This change should help deter those computer acts, which though not malicious, are outside the bounds of responsible computing and place other computer users at risk. CPSR believes that this provision will heighten the sense of ethical accountability within the computer user community. At the same time, we have some questions about other provisions in the bill that would expand the scope of law enforcement authority, define the term "access," and create an action for civil damages.

Second, the conduct of computer crime investigations will necessarily raise civil liberties concerns. There is already evidence that the Secret Service conducted a poorly conceived search of a small business in Austin, Texas. And there are unanswered questions about the impact of the recent Secret Services raids on the operation of computer bulletin boards and freedom of speech. We need to be sure

that there are adequate procedural safeguards to ensure that important civil liberties interests – freedom of speech, privacy of communication, and due process protections – are not diminished in the efforts to respond to computer crime.

Third, even as the public continues to worry about highly publicized incidents of computer "hacking," it is important to restate that the majority of computer crime is committed by authorized users who embezzle company funds, steal proprietary information, and destroy corporate records. These crimes, though they rarely receive the attention of the national papers, should remain the primary concern of the law enforcement agencies.

PROPOSED CHANGES TO SECTION 1030

Creation of Recklessness Provision

CPSR supports the creation of the recklessness misdemeanor provision contained in S. 2476. We believe that such a provision is necessary to discourage acts with computer systems which, though not intended to cause harm, demonstrate such an extraordinary disregard for the sensible use of a computer system and that such harm in fact results.

Computer users today are increasingly operating in an interconnected world. Individual terminals are linked together through local networks and national networks. These networks facilitate the exchange of information and increase the utility of computer systems for all users. Most systems are designed to encourage open access and to promote the rapid exchange of data. The potential risk with this arrangement is that it leaves users vulnerable to viruses, worms, and similar programs that could cause harm to individual user's systems.

The Cornell Worm demonstrated the risk of a rogue program on a computer network. Individual users were required to disconnect from the network. During the period of time that the network was down, users could not exchange electronic mail, could not transfer files, and could not access information in other systems that might be necessary for their work.

The law should make clear to computer users that potentially dangerous experiments cannot be conducted in an environment that places other users at risk. The computing community is based on trust. When a user acts with disregard for the needs of others, he or she has destroyed that trust. For this reason, we will support legislation that expands the scope of computer crime law to cover acts of clear recklessness.

Let me note, however, that while this provision is clearly based on the Cornell Worm incident, it is intended to provide prosecutors with an alternative method of prosecuting cases; it is not intended to "fill a gap" in the law. In the Cornell case, Mr. Robert Morris, Jr. was convicted of a felony act, and, under the federal sentencing guidelines. would have received a sentence of about two years. Current law covered the Morris case. The reason for the recklessness provision is to make clear to computer users that they should not engage in experiments that place other users at risk.

Change in Scope of Computer Crime Law

CPSR would oppose the extension of computer crime law to computers "used in interstate commerce or communication." We believe that the scope of the current law which is based on a "federal interest computer system" is adequate and that the Justice Department has failed to show that it is necessary at this time to expand the scope of computer crime law.

Very few cases have been brought under the section of the criminal code that would be amended by the Act now under consideration by this Committee. In fact, the Morris case was the first jury trial for a section 1030 indictment. Before expanding the scope of this provision, it is critical to show that the current law is not adequate and that reasonable law enforcement goals cannot be addressed adequately in the current framework.

It is also clear, as the indictments following the Secret Service raid demonstrated, that there are a variety of ways to prosecute computer crime. Section 1030 is simply one tool available to law enforcement officials. We need more case law to determine whether the many prosecutorial theories outlined in the Justice

Department manual on computer crime are adequate before expanding the scope of section 1030.

There is a further problem with the proposed change and that is that computers are so ubiquitous that criminalizing unauthorized access to computer systems could apply to virtually any act in today's world. This provision would go much further than the federal wiretap law. Without clear contours and bright lines, such a law may fail to serve any useful purpose.

We would say that unless the Justice Department can demonstrate the need for this change, based on a clear and compelling need, the Congress should await the development of further case law under the current statute. But if the Department of Justice is granted additional authority then we would strongly urge the Committee to consider the creation of additional procedural safeguards to ensure that civil liberties and due process interests are not undermined in the course of the investigation of computer-related crime.

Creation of Access Definition

We support the effort to define the term "access" in section 1030. At the same time, we must caution against vague and ambiguous phrases that provide little guidance to computers users or system operators. Under the proposed definition, a user who simply glances at a computer screen has effectively gained access to that system, yet may have no ability to alter the contents of the system or to otherwise affect its operation. Such a definition is clearly too broad for any reasonable purpose.

One of the points that should be stressed here is that the definition of access will vary widely depending on the environment in which the system exists. Access restrictions for system maintained by an intelligence agency will be far more extensive than for a university which is still more restricted than a computer in one's home. The law needs to take account of these varying standards to ensure that the expectations for the system user and the system operator in a particular environment correspond with the legal requirements. There must almost be clear notice of access restrictions for computer users so that anyone who might be charged under this provision understands the law and is able to comply with it.

We would be happy to work with the Committee to see if it might be possible to draft a definition that is clearer in its purpose and more limited in its scope.

Creation of Civil Liability Provision

CPSR takes no position on the proposed creation of a civil action for acts under section 1030. If this change will encourage institutions to improve security practices, then it is worthwhile and should be adopted. At the same time, we do not want the fear of civil liability to curtail the use of computers and the exchange of information.

We do need to find incentives to improve computer security and user accountability. Criminal sanctions alone are probably too harsh a penalty and unlikely to lead to the institutional changes that are necessary if computer security is to be improved. For this reason, civil liability may be a reasonable alternative.

CIVIL LIBERTIES CONCERNS RAISED BY COMPUTER CRIME INVESTIGATIONS

Operation Sun Devil

Mr. Chairman, I would like to turn the recent series of searches conducted by the Secret Service. Although it has been just a few months since this raid was undertaken – and much of the relevant information has not yet been disclosed – it raises a number of significant civil liberties questions we hope the Committee will bear in mind as it considers whether to expand the scope of the Computer Fraud and Abuse Act.

During the last two year, the Secret Service undertook an extensive investigation of computer "hackers," culminating in a nationwide raid on May 7 that involved 150 Secret Service agents in 24 cities. So far, these searches have led to only six arrests. In Atlanta, three men pled guilty last month to gaining illegal entry to BellSouth Computers. But at least two cases have raised troubling questions about the scope and conduct of Operation Sun Devil.

In March of this year, the Secret Service raided the offices of Steve Jackson, a small businessman in Austin, Texas, who produces fantasy role-playing games,

similar to Dungeons and Dragons. The Secret Service seized three of Mr. Jackson's computers as well as the materials for his new game, GURPS CYBERPUNK. As a result of the raid, Mr. Jackson, was forced to lay-off half of his staff and to incur substantial business losses.

In a second case, in Chicago, Illinois, Craig Neidorf, a twenty-year-old college student and the publisher of an electronic newsletter was charged by the government with distributing an administrative document obtained from BellSouth. Although the federal government initially alleged an extraordinary conspiracy involving unauthorized computer access and the national phone network, last Friday federal prosecutors in Chicago decided to drop the case against Mr. Neidorf.

Both the Jackson and Neidorf cases raised significant civil liberties and First Amendment issues. For if the First Amendment extends to electronic speech, then it would be impermissible for the government to attempt a prior restraint on publication. We know from the Pentagon Papers case that the government could not reach into the printing room of the newspaper and attempt to turn off the presses. Yet, in these more recent cases involving computer-based publishing, the government actually confiscated the "presses" in an effort to suppress dissemination of information that would be widely available, if printed in paper form .

Mitchell Kapor, one of the pioneers of the personal computer industry, and John Perry Barlow established an organization, the Electronic Frontier Foundation, Inc., in part to examine some of the civil liberties issues that might be raised by Operation Sun Devil and related investigations. The Jackson and Neidorf cases demonstrate the importance of this effort and the need for adequate Congressional oversight to ensure that overly zealous law enforcement officials do not take advantage of the current climate of public concern to undertake investigations that are unsound or misguided.

Although we will have a great many more cases before the application of the First Amendment to digital media is determined, this recent introduction suggests the importance of watching these developments closely.

Implications of Computer Crime Investigations for Privacy

A related problem is tc ensure that there are adequate safeguards in place so that computer crime investigations are properly tailored to a specific, well-defined purpose. On the one hand, evidence of computer crime may be more easily concealed than other types of crime. Data is easily encrypted. Files can be readily copied and just as easily destroyed. There are various techniques to remove data from disks before a new user is able to gain access. For these reasons, law enforcement officials argue that changes in the law may be necessary to conduct investigations of computer crime.

At the same time, searches of computer systems are almost necessarily broader than searches of physical spaces. Much of the information that can be easily obtained is unrelated to the investigation. Where the computer operates as a bulletin board or messaging gateway, electronic mail of hundreds or thousands of users could be accessible. Also, the ease of copying data may encourage law enforcement agents to make a copy of all the electronic media taken in a search to see if there is evidence of other types of crime, unrelated to the initial investigation for which a warrant was obtained.

Most significant is that computer communications are particular vulnerable to surveillance and monitoring. Computer mail unrelated to a particular investigation could be swept up in the government's investigation if the law is not carefully tailored. Back-up tapes may contain copies of thousands of electronic messages and files.

This is not a matter of speculation. Based on a letter from the Secret Service to Members of the House Judiciary Committee, we know that the Secret Services has developed a Computer Diagnostics Center to scan the contents of electronic media seized in computer crime investigations. We would like to know if there are any restrictions on the use of the CDC, and whether, for example, the CDC is used to scan the contents of public bulletin boards in those cases where no warrant has been obtained.

Congress recognized the potential problem of searches of electronic media when it first considered the proper scope of electronic surveillance. That is the reason for the extensive system of procedural safeguards and the fundamental goal

of minimizing the scope of searches that is mandated by section 2518 of the criminal code. These principles were carried forward and updated in the revisions that you, Mr. Chairman, helped enact with the Electronic Communication Privacy Act. ECPA drew a reasonable balance between the needs of law enforcement investigators and the rights of all computer users.

We would oppose any efforts at this time to modify the restrictions in ECPA, absent a showing that the law enforcement needs cannot be accommodated in some other fashion that does not undermine the privacy and security of computer systems.

We hope, at some point, that the Committee will conduct an oversight hearing on the ECPA and determine whether law enforcement officials are following the standards established in the 1986 law.

COMPUTER CRIME PROBLEM IS WIDELY MISUNDERSTOOD

My last point, Mr. Chairman, is to urge the Committee and the law enforcement community to direct its energies to those forms of computer-related crime that cause the greatest harm and that are based on malicious intent. These are the crimes of fraud, embezzlement, and theft that make up an estimated loss of $3 to $5 billion annually in this country.

It is a popular misconception that computer crime is caused primarily by young kids, technically skilled. One state assistant attorney general has actually stated that there is little difference between a teenager with a computer modem and a criminal with a handgun. And the FBI is now encouraging parents to help identify the early warning signs of "computer hacking."

The Secret Service has painted its case in broad strokes. "Computer hacking" is not a crime. Gaining unauthorized access to a federal interest computer system under section 1030 is. It is critical that this distinction not be lost. Once we lose our focus on prosecutable crime, the image blurs, and anyone may become the target of a law enforcement investigation.

Those people who have violated the law should be held accountable. But so too should law enforcement officials who are bound by oath of office. It is a core principle of our constitutional form of government that the investigation of unlawful activity must be conducted by lawful means.

Thank you, Mr. Chairman, for the opportunity to testify today. I would be pleased to answer your questions.

Prepared Testimony and Statement for the Record on Computer Virus Legislation*

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Mr. Chairman, members of the Committee, thank you for the opportunity to testify on legislation regarding computer viruses. My name is Marc Rotenberg and I am the director of the Washington Office of Computer Professionals for Social Responsibility (CPSR).

CPSR is a national membership organization of computer scientists and other specialists that seek to inform the public about the social impact of computer systems. Our membership includes a Nobel Laureate and five Turing Award winners, the highest honor in computer science. CPSR members have examined several national computing issues and prepared reports on funding priorities in computer science, the Strategic Defense Initiative, computer risk and reliability, and the proposed expansion of the FBI's records system.[1]

You have asked me to examine legislation that has been introduced in the House of Representatives related to computer viruses. I appreciate this opportunity and am glad that you have taken an interest in this subject.

It was just a year ago last week that the Cornell "virus" swept through the Internet.[2] For many people in this country it was the first that they had heard of computer viruses and similar programs that could bring a nation-wide computer system to a halt. Even as system managers were clearing the code out of their computers, discussions about the vulnerabilities of computer systems and the rights and responsibilities of computer users were taking place all across the country.

CPSR Members Address the Computer Virus

In Palo Alto, California CPSR members met shortly after the Internet virus to discuss the significance of the event. Over the course of several days our members discussed the wide-ranging issues raised by the incident.[3] The discussion revealed many concerns about network security, ethical accountability, and computer reliability. It also revealed a division within our organization about the moral responsibility of the virus author. Some of our members believed that the person responsible for the virus had performed a great service for the computer community by drawing attention to the security flaws in the Internet, particularly the UNIX operating system. Others felt strongly that this person had violated a fundamental understanding within the computer community not to exploit known security flaws and had caused great damage to users of the Internet. The division within our organization reflected a division within the computer science community.[4]

In the end we issued a statement on the computer virus that has been widely circulated in the computer community and republished in computer journals.[5] I have attached the CPSR statement to my testimony and ask that it been entered into the hearing record.

On the issue of the culpability of the person responsible for the virus we said clearly that the act was irresponsible and should not be condoned. The author of the virus had treated the Internet as a laboratory for an untested experiment in computer security. We felt this was very risky, regardless of whether data was altered or destroyed.

But we did not view our task primarily as sitting in judgement over the author of the Internet virus. There had been other viruses in the past, and there would be more in the future. More important, we believed, was to set out the various concerns of our organization for the public, policy makers, and others within the profession who were examining the significance of the computer virus and considering various responses. We reached the following conclusions:

First, we emphasized individual accountability as the cornerstone of computer ethics. We said that the openness of computer networks depends on the good will and good sense of computer users. Criminal penalties may be appropriate for the most pernicious acts of computer users. But for the vast majority of cases, far more would be accomplished by encouraging appropriate ethical guidelines.

Second, we said that the incident underscored our society's growing dependence on complex computer networks. Although the press and the public tended to focus on the moral culpability of the virus writer, we believed that the incident also raised significant policy questions about our reliance on computer systems. Since its inception, CPSR has been particularly concerned about the development of complex computer systems, especially in the military, that are difficult to test and may produce misplaced trust. There is little that tougher criminal penalties can do to correct the problems of computer risk and reliability.

Third, we opposed efforts to restrict the exchange of information about the computer virus. Shortly after the virus incident, officials at the National Security Agency (NSA) attempted to limit the spread of information about the computer virus and urged Purdue University to destroy copies of the virus code.[6] We thought this was short-sighted. Since that time, several technical reports and the widespread exchange of information through the Internet have helped users in the computer community more fully understand how the virus operated and provided the necessary data to correct security flaws.[7] We continue to believe that the needs of network users will be better served through the open and unrestricted exchange of technical information.

* Before the Subcommittee on Criminal Justice, Committee on the Judiciary, US House of Representatives.

The importance of open computer networks was also demonstrated recently during the earthquake in the San Francisco Bay area. Before the national networks were able to report on the unfolding events, computer users were dialing up networks to search for friends and to reassure relatives. According to one account, a user of the Prodigy service in the Bay Area sent a message out through the network to subscribers in central Kansas, asking that someone pass the word on to his son, a soldier based at Fort Riley, that everybody back home was ok. The soldier, who had been unable to reach home, received the message from a complete stranger.[8]

Fourth, we encouraged a public discussion about the vulnerabilities of computer networks and the various technical, ethical, and legal questions raised by the incident. Since the meeting, CPSR members, along with others in the computer community, have been involved in a variety of activities, hosting panel discussions on the virus incident, drafting papers, and encouraging an examination of ethical standards. We believe that these efforts will help develop a broader understanding of the rights and responsibilities of network users.

Complexity of the Virus Problem

I will this morning describe some of the concerns of the computer community and make several recommendations about what Congress might do to respond to the problem of computer viruses. I will also address some of the potential problems posed by proposed federal legislation. At the outset, I should make one fundamental point: The problems raised by computer viruses are far-reaching and complex. There is no simple technical or legal solution. In many ways, we are confronting a whole new series of policy questions that raise fundamental issues about privacy and access, communications and accountability. Public policy must be brought up to date with new technologies, but in the effort to ensure that our laws are adequate Congress should not reach too far or go off in directions that are mistaken or may ultimately undermine the interests we seek to protect.

There are several issues that should be considered in the efforts to develop appropriate legislation to respond to malicious code. First is the increased interdependence of computer systems. The technological developments that makes possible the spread of computer viruses also makes possible the transfer of vast amounts of computer information. Through computer networks, we are now able to send electronic mail, research findings, and tips on security fixes far more rapidly than ever before. Efforts to restrict the exchange of computer viruses run the risk of limiting the flow of this valuable information.

Throughout the computer community, there is a deep concern that solutions to computer security problems not destroy the trust between computer users. Ken King, the President of EDUCOM has warned against short-sighted solutions.[9] Cliff Stoll, the Berkeley astronomer turned computer security expert, speaks of the need to preserve honesty and trust within the computer community and warned against measures that could restrict exchange of computer communications.[10]

As computer networks have developed, so has our concern about the reliability of computer systems. We must reexamine our growing dependence on complex computer networks, particularly in the military. Simply put there are too many computer systems in use today that are dangerously unstable.[11] A report produced recently by the staff of the Subcommittee on

Investigations and Oversights of the House Science Committee highlights the enormous risk of the current software development process.[12] We are automating too many complex problems with the expectation that computer systems can solve problems that we ourselves don't fully understand. In areas that involve life critical functions, the consequences of computer error could be great.[13]

I raise these issues because there is a need to be wary of quick legal or technical fixes that do little to address the underlying problems we must confront. There is a widely shared belief among computer security experts that there is no "silver bullet" that will solve the problem of computer viruses.[14] Though there is much that can be done to improve computer security and operations, it should be understood that no system will ever be one hundred percent secure.

Need for Teaching Computer Ethics

A large part of the task that lies ahead is to develop a system of ethics that teaches computer users about the appropriate uses of computer systems. We need to discourage computer users from making use of shared resources in ways that make systems less useful to others. To suggest an approach to computer ethics that avoids some of the shortcomings of legislation based on rapidly changing technical terms or ambiguous legal phrases I would like to set out an elaborate analogy. The more I have tried to understand this issue, the more I have been struck by the similarity between our evolving computer networks and interconnected databases, and our public libraries.

A library provides a great wealth of information for its users, but not all information is equally accessible. In many libraries, I can freely roam the stacks and pull out what I need. But other libraries might require that I put my request on paper before the materials are delivered. Certain materials at a reference desk are only accessible after I have spoken with the appropriate person and obtained permission.

A computer system operates in much the same way. On many systems, I am allowed to look through large reams of data without harm to anyone. But for certain information, I need permission. If I were to reach over the reference librarian's desk to take an article I wanted or to look at circulation records, I would be violating a library rule. So too, does the computer user violate a computer rule when he or she enters a system's operating system, knowing that only system managers and other privileged users are authorized. We need to remind system users about the difference between space that is public and that which is private.[15]

There are also other users in the library. In some libraries, users might be asked to leave books in study carrels so that others can find them. But my right to look at a book in another person's carrel would not extend to a right to go through the person's book bag. Similarly, it may be perfectly appropriate to look at another person's computer files it if is clear that they are publicly accessible, as long as I do not go through the person's private files.

A library also relies on the trust and good will of its users. A person who steals a book, or tears a page out of a magazine has not just caused harm to the library, but has deprived other users of the library of a valuable resource. Computer users, like users of a library, must increasingly understand the consequences of their actions in terms of the needs and activities of others.

Of course it is worth noting that there are laws against theft of library materials and destruction of library resources. But neither these laws nor the threat of prosecution have much effect on the habits of library users, since the likelihood of prosecution is so remote. When sanctions are imposed, it is by the library and not the federal government.

Partial Solutions

The complexity of the computer virus problem requires a multi-part approach. Computer users, system managers, vendors, professional organizations, educators, and the government all have a role to play.

In the federal government much is happening, though more could be done.[16] The National Institute of Standards and Technology (NIST) recently prepared a special publication on computer viruses intended for managers of federal computer systems that is useful and easy to read.[17] It should be made widely available for all of the federal agencies.

Another step that has been taken is the development of the Computer Emergency Response Team (CERT). The proposal was developed last December at a closed-door session with UNIX users and vendors at the National Computer Security Center.[18] While it is good to see the cooperative undertaking between the federal government and the user community, it is not an ideal arrangement. CERT operates through the National Security Agency and the Department of Defense. Military control of computer security is precisely what Congress tried to avoid with the passage of the Computer Security Act.[19] As CPSR has noted in the past, broad claims of national security should not provide carte blanche for the Department of Defense and intelligence agencies to extend their authority over computer security.[20]

Moreover, it is not even clear that CERT's advice is error-free. A recent posting to the "Risks" computer bulletin board on the Internet noted that CERT had mistakenly sent out an advisory to network users recommending the use of potentially infected system utilities to correct known security flaws. As one computer user noted, this was not good advice.[21]

The General Accounting Office (GAO) produced a useful overview of virus issues in a report released in June.[22] The GAO recommended that the White House Science Adviser assume responsibility for improving computer security. Although the GAO's concerns about lax security practices is well taken, I suspect that many users in the computer science community would object to centralizing authority for computer security for several reasons. Based on the experience with the Internet, it seems that the university and research community, Berkeley and MIT in particular, were more effective in responding to the virus than the federal agencies.[23]

One of the lessons of the Internet virus is that responses should be developed at the host level and not the network level. As Jeff Schiller, the manager of the MIT Network and Project Athena Operations Manager, has said "anybody can drive up to your house and probably break into your home, but that does not mean we should close down the road or put armed guards on exit ramps."[24]

The great value of the Internet for the user community is its decentralized structure. Like the phone network, it provides rapid access for users across the country. System security requirements will vary from site to site, depending

on whether the user is located at a university, in private industry, or a military agency. If the GAO recommendations are followed, it should only be to strengthen the flow of information about network security. Any steps to create a coercive authority in the White House for computer security on the Internet, such as the creation of a computer security czar, would be a serious mistake.

Universities and research institutions can also take steps to ensure that adequate policies are established to minimize the risk of computer viruses. Universities that fail to take reasonable steps to ensure that their systems are not used for the perpetration of a virus may find themselves civilly liable under tort law.[25] Many universities have already established policies that outline the responsibilities of users of computer facilities, which can serve as models for other schools.[26]

Research in computer ethics will also help reduce the likelihood of computer misuse. The National Science Foundation is planning a major conference to bring together leaders in the computer science community and philosophers to discuss how more might be done to incorporate ethics into computer education. This is a sensible undertaking and should build upon the work that has already been done to improve computer ethics.[27] At the same time, it is important to note that much of the discussion about computers and ethics focuses on the responsibilities of individual users of computer systems and not on the large organizations or institutions that maintain and operate these systems. A coherent system of ethics that binds a community of users, like a system of democratic government, must be based on an implied contract between the individual and the institution. The individual will uphold his or her responsibility if the institution does as well. Concerns about privacy, security, data quality and accountability should also be addressed as institutions move foreward with their recommendation for computer ethics.

Review of Legislation

The last five years has been a period of rapid development in computer security legislation. Congress has three times passed laws designed to extend criminal statutes to computer technology.[28] Virtually all of the states have adopted new statutes, and many are looking at possible changes and additions.[29] There are available to prosecutors today a wide range of theories to base criminal charges for computer related crime.[30]

Based on the views of CPSR members, the experience of the Internet virus, and our general concern about protecting open computer networks, I will describe the potential problems with the proposed federal legislation.

It is important to remember that a computer virus may also be a form of speech, as was the Aldus Peace Virus, and that to criminalize such activities may run afoul of First Amendment safeguards. Restrictions on speech should be carefully examined to ensure that free expression is not suppressed. Computer networks are giving rise to new forms of communication. The public debates in the town square of the eighteenth century are now occurring on the computer networks that will take us into the twenty-first century. These are fragile networks, and the customs and rules are still evolving. The heavy hand of the government could weaken the electronic democracy that is now emerging.[31]

Our legal system protects the fundamental right of free speech in a democratic society and gives special attention to laws that may unduly restrict

the exchange of information. It would be wrong to criminalize a computer communication if the communication caused no damage, even if the communication did not follow traditional pathways. It is often those individuals and organizations without great resources who turn to these alternative methods of communication to convey a message.

I wonder also if in casting such a broad net, these statutes might not meet constitutional challenge on overbreadth grounds.[33] A criminal law should clearly distinguish between prohibited and permissible conduct. If it fails to do this, it grants too much discretion to law enforcement officials to choose which cases to prosecute. Where speech is involved, such a law might unnecessary chill protected speech.

Some of the state statutes are poorly conceived. Those with the software trade association who have been pushing to extend the reach of computer security statutes might consider whether the products of their own members violate restrictions on "alteration of data" or "unauthorized use of resources."[34] To some extent, every computer program takes control of the user's systems. If the program acts as intended, then there are no problems. But if the program misfires, as it sometime does, software developers may be criminally liable.

A further problem lies in the attempt to define the criminal act in terms of a technical phrase such as a "virus." A virus is not necessarily malicious. Some viruses may only display a Christmas greeting and then disappear without a trace.[35] Other viruses might alter or destroy data on a disk. To treat the two acts as similar because an identical technique is involved would be similar to punishing all users of cars because some cars might cause the death of a person. It is the "state of mind" of the actor and the harm that results which should be the two guiding principles for establishing criminal culpability.[35]

More interesting from a technical viewpoint is that computer viruses may be used both to enhance computer security and to facilitate the exchange of computer information.[36] Although computer security experts have said that such programs are potentially as dangerous as the disease they are designed to cure,[37] it is not clear the disseminating a benign virus should necessarily be a criminal act. Hebrew University used a computer virus to identify and delete a malicious virus that would have destroyed data files across Israel if it had remained undetected.[38]

I would recommend that the Congress wait until there is more case law under the 1986 Act and until more of the state statutes have been tested, before enacting new computer security legislation. Congress should also obtain information from the Justice Department about the effectiveness of the current laws, and see whether state courts can develop common law analogies to prosecute the computer equivalents of trespassing, breaking and entering, and stealing.[39] This is a process that happens gradually over time. The extension of common law crimes to their computer equivalents may provide a more durable and lasting structure than federal statutes that must be updated every couple of years.

Funding

It is difficult to talk about the role of Congress in improving computer security without noting the importance of funding to implement the Computer Security Act, the law passed by Congress designed to address the computer security needs of the federal agencies. I was very disturbed to learn two weeks ago that the conference committee cut the proposed appropriation for NIST from $6 million to $2.5 million, even after OMB had approved the funding for NIST and encouraged NIST's new role as the lead agency for civilian computer security.[40] According to one news account, the cut came at the urging of a Member who had tried unsuccessfully to redirect part of NIST's 1989 appropriation to a special research testing facility in his home state. If this news account is accurate, then that Member's shortsighted and parochial concerns may cost the federal agencies dearly in needed assistance with computer security.

Conclusion

I believe that Peter Neumann, a computer Security experience at SRI and a member of CPSR, described the problem best when he said:

> Better laws that circumscribe malevolent hacking and that protect civil and constitutional rights would be of some help, but they cannot compensate for poor systems and poor management. Above all, we must have a computer-literate populace — better educated, better motivated and more socially conscious.[41]

Tougher criminal penalties may help discourage malicious computer activities that threaten the security of computer networks, but they might also discourage creative computer use that our country needs for technological growth.[42] Though we have a great deal of criminal law that could potentially apply to the acts of computer users, it is still very early in the evolution of computer networks. In the rush to criminalize the malicious acts of the few we may discourage the beneficial acts of the many and saddle the new technology with more restrictions than it can withstand.[43]

Footnotes

[1] More information about CPSR is available from the CPSR National Office (P.O. Box 717, Palo Alto, CA 94302, (415) 322-3778) and the CPSR Washington Office (1025 Connecticut Ave., NW, Suite 1015, Washington, DC 20036, (202) 775-1588).

[2] It should be noted that there is a debate within the computer community about the correct term to apply to the program that travelled across the Internet. Purists, following the established taxonomy of computer security, prefer the term "worm" because the Internet program did not attach itself to another program, as viruses technically do, but rather was a free-standing program that infiltrated the network. However, the broad scope and rapid rate of the program's impact suggested to many that the term "virus" was more descriptive than "worm." The press and many within the computer community followed this usage.

[3] John Schmeridewaind, "The Virus Perpetrator: Criminal or Hero?" *The San Francisco Chronicle*, November 23, 1988, at C1.

[4] Compare Aaron Haber, "Give No Quarter to Creator of Computer Virus," *PC Week*, December 5, 1988, editorial, "Faint Praise," *Computerworld*, November 14, 1988, at 24, Edwards A. Parrish, "Breaking Into Computers Is A Crime - Pure and Simple", *Los Angeles Times*, December 4, 1988 (Dr. Parrish is dean of the Vanderbilt University School of Engineering and President of the IEEE Computer Society), Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 689, 697 (June 1989).

[5] "CPSR Statement on the Computer Virus," 7 *The CPSR Newsletter* 2-3 (Winter 1989), reprinted in 32 *Communications of the ACM* 699 (June 1989). The virus incident caused several other organizations to examine the need for ethical standards. See, e.g., "NSF Poses [sic] Code of Networking Ethics," 32 *Communications of the ACM* 688 (June 1989) (National Science Foundation code), "Teaching Students About Responsible Use of Computers," 32 *Communications of the ACM* 704 (June 1989) (describing the statement of ethics for MIT's Project Athena), "Ethics and the Internet," 32 *Communications of the ACM* 710 (June 1989) (Internet Activities Board code).

Several national data processing, computer, and engineering organizations had well established codes prior to the virus incident. See "DPMA Code of Ethics, Standards of Conduct and Enforcement Procedures," (Data Processing Management Association), "ACM Code of Professional Conduct: Procedures for the Enforcement of the ACM Code of Professional Conduct," (Association for Computing Machinery), "IEEE Code of Ethics," (Institute of Electrical and Electronics Engineers), reprinted in part in *Proceedings of the 12th National Computer Security Conference* 547-52 (1989).

[6] John Markoff, "U.S. Moving to Restrict Access to Facts About Computer Virus," *The New York Times*, November 11, 1988.

[7] See, e.g., Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 689 (June 1989), Don Seeley, "A Tour of the Worm" (November 1988) (Department of Computer Science, University of Utah), Eugene H. Spafford, *The Internet Worm Program: An Analysis, Purdue Technical Report* CSD-TR-823 (Nov. 28, 1988), reprinted in 19 *Computer Communications Review* 1 (January 1989). See also Spafford, "Crisis and Aftermath," 32 *Communications of the ACM* 678 (June 1989), John Markoff, "The Computer Jam: How It Came About," *The New York Times*, November 9, 1988, at D10. See generally, *Proceedings: 1988 IEEE Symposium on Security and Privacy*, *Proceedings: 1989 IEEE Symposium on Security and Privacy*.

Two computer conferences on the Internet have been a valuable source of information about computer security. Conference subscribers send information to the conference moderator, who then compiles the messages and sends postings to all subscribers. The "Virus-L" conference, moderated by Ken van Wyk at Lehigh University, contains information about specific viruses. The internet address for the conference is VIRUS-L@IBM1.CC.LEHIGH.EDU and administrative questions should be sent to krvw@SEI.CMU.EDU. The "Risks" conference ("Forum on Risks to Public in Computers and Related Systems") provides more general information about computer risk and reliability. The moderator is Peter Neumann at SRI. The internet address is RISKS@CSL.SRI.COM.

[8] T.R. Reid, "Bulletin Board Systems: Gateway to Citizenship in the Network Nation," *The Washington Post*, November 6, 1989, at 27 (Washington Business section).

[9] King, K.M. "Overreaction to External Attacks on Computer Systems could be More Harmful than the Viruses Themselves," *Chronicle of Higher Education*, November 23, 1988, at A36.

[10] Cliff Stoll, *The Cuckoo's Egg* 302-03, 311 (1989). See also, Cliff Stoll, Testimony on Computer Viruses, The Subcommittee on Technology and the Law, Committee on the Judiciary, United States Senate, May 15, 1989.

[11] See, e.g., "Proposed NORAD Computer System Called Flawed," *The Washington Post*, December 16, 1988, at A22.

[12] "Bugs in the Program: Problems in Federal Government Computer Software Development and Regulation," Staff study by the Subcommittee on Investigations and Oversight, Committee on Science, Space, and Technology, U.S. House of Representatives, August 3, 1989. See also Evelyn Richards, "Study: Software Bugs Costing U.S. Billions: Document is Critical of Government's Role," *The Washington Post*, October 17, 1989, at D1.

CPSR has been engaged in an ongoing review of the problems of computer risk and reliability, particularly in defense-related systems. See, e.g., *Computers in Battle: Will They Work?* (1987) (edited by Gary Chapman and David Bellin), *Risk and Reliability: Computers and Nuclear War* (1986) (videotape available from CPSR), and *Losing Control?* (1989) (videotape available for CPSR).

[13] Peter G. Neumann, "A Glitch in Our Computer Thinking: We Create Powerful Systems With Pervasive Vulnerabilities," *The Los Angeles Times*, August 2, 1988, part II, at 7. See also Ken Thompson, "Reflections on Trusting Trust," 27 *Communications of the ACM* 761 (August 1984) (1983 ACM Turing Award Lecture).

[14] John Markoff, "Virus Outbreaks Thwart Computer Experts," *The New York Times*, May 30, 1989, at C1.

[15] Computer security experts take a slightly different approach to this problem. They speak of "least privilege" which means allowing users to have access to only those files of the system for which they are authorized. Following this approach, it is possible to develop elaborate security schemes, based on a hierarchy of privileges, that clearly describe the privileges of each user. This model is appropriate for many large systems, but may be too formal for other computer systems, such as community bulletin boards, where there is little difference in the status of various system users.

[16] Even as new programs are being developed to respond to computer viruses, it is disappointing to see that some system managers have failed to correct known security flaws that were exposed by the Internet virus last year. A rogue program recently attacked the same security holes at NASA that had been exploited last fall. John Markoff, "Computer Network at NASA Attacked by Rogue Program," *The New York Times*, October 7, 1989.

[17] John P. Wack and Lisa J. Carnahan, *Computer Viruses and Related Threats: A Management Guide* (August 1989) (NIST Special Publication 500-166). The report can be ordered from NIST at (202) 783-3228 or through the Superintenent of Documents, Washington, DC 20402-9325 (stock number 003-003-02955-6). See also Stanley A. Kurzban, "Viruses and Worms — What Can you Do?" 7 *ACMSIG Security Audit and Control Review* 16 (Spring 1989). For more general information about computer security policy, see Charles K. Wilk, *Defending Secrets Sharing Data: New Locks and Keys for Electronic Information* (October 1987) (Office of Technology Assessment), Louise G. Becker, Computer Security: An Overview of National Concerns (February 1983) (Congressional Research Service).

[18] Martin Marshall, "Virus Control Center

Proposed," *Infoworld*, December 12, 1989, at 8. See also General Accounting Office, *Computer Security: Virus Highlights Need for Improved Internet Management* 24-25 (June 1989) (GAO/IMTEC-89-57).

[19] See Computer Security Act of 1987: Hearings on H.R. 145 Before a Subcommittee of the Committee on Government Operations, House of Representatives, 100th Cong., 1st Sess. 525-26, 456, 23 (statements of Congressman Brooks, Congressman Glickman, and Congressman English).

Prior to passage of the Computer Security Act, President Reagan attempted to establish primary computer security authority at the National Security Agency and to expand government classification authority under NSDD-145. Agents visited private information vendors and public libraries, and the free flow of information diminished. See Bob Davis, "Federal Agencies Press Data-Base Firms to Curb Access to 'Sensitive' Information," *The Wall Street Journal*, January 28, 1987, Judith Axler Turner, "Pentagon Planning to Restrict Access to Public Data Bases," *The Chronicle of Higher Education*, January 21, 1987; Connie Oswald Stofko, "Inquiry by FBI Causes Libraries to Assess Records, *SUNY Reporter*, February 12, 1987; Jerry J. Berman, "National Security vs. Access to Computer Databases: A new Threat to Freedom of Information," 2 *Software Law Journal* 1 (1987). The NSA also approached election officials and investigated computerized vote-counting software. Burnham, "US Examines if Computer Used in '84 Elections is Open to Fraud," *The New York Times*, September 24, 1985, at A17.

Library associations, public interest organizations, and experts on information policy described the risks of reduced access to information under NSDD-145. See American Library Association, *Less Access to Less Information by and about the U.S. Government* (1988); Steven L. Katz, "National Security Controls, Information, and Communications in the United States," 4 *Government Information Quarterly* 63 (1987); People For the American Way, *Government Secrecy: Decisions without Democracy* (1987); John Shattuck & Muriel Morisey Spence, *Government Information Controls: Implications for Scholarship, Science and Technology*, excerpted in "When Government Controls Information," 91 *Technology Review* 62 (April 1988).

The Computer Security Act followed widespread public opposition to NSDD-145. See House Committee on Science, Space, and Technology, H.R. Rep. No. 153, pt. 1, 100th Cong., 1st Sess. 18, 19, 19 (1987), reprinted in 1988, U.S. Code Congressional and Administrative News 3133, 3134, 3133 (Statement of Jack W. Simpson, President, Mead Data Central; statement of John M. Richardson, Chairman, Committee on Communications and Information Policy, Institute of Electrical and Electronic Engineering; statement of Cheryl W. Helsing, American Bankers Association). See generally Marc Rotenberg, Testimony on the Computer Security Act, Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives 2-5, May 4, 1989.

[20] See Mary Karen Dahl, "'Sensitive, Not 'Secret': A Case Study," 5 *CPSR Newsletter* 1 (Fall 1987), Marc Rotenberg, Testimony on the Computer Security Act, Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives, May 4, 1989, Letter to Representative Dan Glickman from Marc Rotenberg regarding NSA efforts to suppress dissemination of encryption technology, August 18, 1989. See also "Computer Security Questioned," *The Baltimore Sun*, April 10, 1989, at A7.

[21] Anonymous, "Warning About CERT Warnings," 9 *Forum on Risks to the Public in Computers and Related Systems* 36 (October 27, 1989) (Internet computer conference) (moderated by Peter Neumann).

[22] General Accounting Office, *Computer Security: Virus Highlights Need for Improved Internet Management* (June 1989) (GAO/IMTEC-89-57). See also statement of Jack L. Brooks, Director, Government Information and Fiscal Management Issues, Information Management and Technology Division, Hearing Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, July 20, 1989.

[23] Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 687, 697 (June 1989).

[24] Ibid.

[25] See American Council on Education and United Educators Insurance, *A White Paper on Computer Viruses* (May 1989) (prepared by David R. Johnson, Thomas P. Olson, and David G. Post). See also "The Computer Worm: A Report to the Provost of Cornell University on an Investigation Conducted by the Commission of Preliminary Enquiry" (February 1989) (Cornell University).

[26] See, e.g., *Handbook for Students, Harvard College 1987-1988* 85 ("Misuse of Computer Systems").

[27] See, e.g., Donn B. Parker and Bruce N. Baker, "Ethical Conflicts in Information and Computer Science, Technology and Business" (August 1988), Deborah Johnson and John W. Snapper, *Ethical Issues In the Use of Computers* (1985), Glenda Eoyang, "Acquisition and Maintenance of Ethical Codes," and John Ladd, "Ethics and the Computer Revolution," *DIAC-88: Directions and Implications of Advanced Computing* 102, 108 (Computer Professionals for Social Responsibility 1988) (edited by Nancy Leveson and Douglas Schuler).

[28] In October 1984, the Computer Fraud and Abuse Act was signed into law. P.L. 99-473 and 99-474 codified at 18 U.S.C. 1030. In 1986 the law was amended and expanded to include "federal interest computers." A companion statute addresses fraud and related activity in connection with an access devices. 18 U.S.C. 1029. See also Electronic Communications Privacy Act of 1986, particularly 18 U.S.C. 2510 ("Wire and electronic communications and interception oral communications") and 18 U.S.C. 2701 ("Unlawful access to stored communication").

[29] See Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection or Prosection?* 20-28, 33-42 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research). Another useful source is the Congressional Research Service report by Robert Helfant and Glenn J. McLoughlin, "Computer Viruses: Technical Overview and Policy Considerations" (August 15, 1988) (88-556 SPR).

[30] See Branscomb at 28-31. See also Department of Justice, *Computer Crime: Legislative Resource Manual* (Bureau of Justice Statistics).

[31] A compelling argument for the need to avoid restrictions on electronic communication can be found in Ithiel de Sola Pool, *Technologies of Freedom* (1983).

[32] See Lawrence Tribe, *American Constitutional Law* 1022-39 (2nd ed. 1988).

[33] The president of an organization of programmers called the Software Development Council has stated, "release a virus, go to jail." "Invasion of the Data Snatchers!" *Time*, September 26, 1989, at 67.

[34] The so-called Aldus Peace Virus is an example of a benign virus. See Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection of Prosecution?* 5-6 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research).

[35] See Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* 5-6 (1972).

[36] Indeed, someday a computer virus might be needed to free society from tyrannical rule. John Brunner, *The Shockwave Rider* (1975).

[37] John Markoff, "Computer Virus Cure May Be Worse Than Disease," *The New York Times*, October 7, 1989, at A1.

[38] Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection or Prosecution?* 41 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research).

[39] See Statement of Senator Patrick Leahy, Hearing on Computer Viruses, Senate Subcommittee on Technology and the Law, Committee on the Judiciary, United States Senate, May 15, 1989.

[40] Vanessa Jo Grimm, "Hill Halves NIST Budget For Security," *Government Computer News*, October 30, 1989, at 1.

[41] Peter G. Neumann, "A Glitch in Our Computer Thinking: We Create Powerful Systems with Pervasive Vulnerabilities," *The Los Angeles Times*, August 2, 1988, part II, at 7. A similar view was expressed by Professor Pamela Samuelson:

> Probably more important than new laws or criminal prosecutions in deterring hackers from virus-related conduct would be a stronger and more effective ethical code among computer professionals and better internal policies at private firms, universities, and government institutions to regulate usage of computing resources. If hackers cannot win the admiration of their colleagues when they succeed at their clever stunts, they may be less likely to do them in the first place. And if owners of computer facilities make clear (and vigorously enforce) rules about what is acceptable and unacceptable conduct when using the system, this too may cut down on the incidence of virus experiments.

"Can Hackers Be Sued for Damages Caused by Computer Viruses?" 32 *Communications of the ACM* 666, 668-69 (June 1989).

[42] The heads of many top U.S. computer companies could probably have been classified as "hackers" in their younger days. See generally Steven Levy, *Hackers* (1984). In fact, the chief scientist at the National Security Agency was

one of the early pioneers of Core Wars, the precursor to today's computer "virus." There has already been discussion within the computer community about how to redirect the energies of hackers toward socially beneficial goals. See, e.g., John A.N. Lee, Gerald Segal, Rosalie Steier, "Positive Alternatives: A Report on an ACM Panel on Hacking," 29 *Communications of the ACM* 297 (April 1986).

[43] Other countries are also confronting the question of whether to develop new laws for computer crime. In Great Britain at least one journal has questioned the wisdom of rushing foreward with new legislation. "Halting Hackers," *The Economist*, October 28, 1989, at 18 ("Laws that try to make untenable distinctions between computer crime and ordinary crime are neither fair nor comprehensible.").

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EDISON ELECTRIC INSTITUTE

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March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.[1] EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).[2] The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

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[1] Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

[2] Amendment No. 23, Notice at 62,842.

EEI believes that the proposed application note focuses too narrowly on a person's status in the employment context. In relevant part, the proposed note provides that:

> "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature.

EEI recommends that the reference to "professional or managerial discretion" be eliminated from the proposed amendment. This reference is likely to confuse a sentencing court because it focuses on employment-related abuses of trust and does not mention non-employment abuses of trust. There are numerous situations where a personal "special trust" is violated (for example, sexual abuse of a child by a relative or clergyperson). But such situations are not reflected in the proposed amendment.

Furthermore, the proposed amendment suggests that persons in professional or managerial positions in companies generally are in positions of trust that would warrant a sentence enhancement, provided that their positions "contributed in some significant way to facilitating the commission or concealment of the offense." This seems too casual a linkage between a person's status in a company and enhancement of that person's sentence. At a minimum, there should be some intent by an individual to use a position of special trust to further commission or concealment of an offense before this forms the basis for enhancing their sentence.

The proposed application note also should be clarified to ensure that the provision does not automatically imbue corporate managers with an aura of "special trust." For example, a corporate manager who is responsible for compliance with a particular area of the law should not be in a position of special trust with respect to violations of other areas of the law. The proposed amendment should require that the individual be in a position of special trust directly relevant to the underlying offense before this sentence enhancement is applicable.

Also, the trust should be one owed to the victim of the offense for which a sentence is being imposed, and should be reasonably relied on by the victim in the context of the offense. Corporate managers should not be liable for a perceived

special duty owed to the general public by them or their corporation. The special trust should arise directly between the individual and the victim of the crime before it can lead to sentence enhancement.

For all of these reasons, EEI would recommend the following as an alternative to Amendment No. 23:

> "Special trust" refers to violation of a duty of trust between the defendant and the victim or victims of an offense for which a sentence is being imposed. The duty of trust may arise from a fiduciary relationship or a position of substantial discretionary judgment that is legitimately given considerable deference by the victim. (In an employment context, such positions ordinarily are subject to significantly less supervision than those held by employees whose responsibilities are primarily ministerial in nature.) For this enhancement to apply, the violation of the duty of trust must have contributed in some significant way to facilitating the commission or concealment of the offense and not merely provided an opportunity that could have been afforded to other persons. Also, the defendant must have intended or known that the victim would rely on the duty of trust, and the victim must in fact have reasonably relied on that duty, in a way that contributed to the commission or concealment of the offense.

II. Issue For Comment No. 24 and Amendments Nos. 31 and 47, Substantial Assistance to Authorities

The Notice also contains an issue for comment and two proposed amendments regarding the elimination from § 5K1.1 of the requirement that the government make a motion requesting a departure from the guidelines before allowing a court to reduce a sentence as a result of substantial assistance by the defendant in the investigation or prosecution of another person.[3] EEI answers the question for comment in the affirmative and supports Amendments Nos. 31 and 47, which would allow the court to consider a departure from the guidelines for substantial assistance provided by a defendant at its own discretion, and urges the

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[3] Issue For Comment No. 24 and Amendments Nos. 31 and 47, Notice at 62,842, 62,848, and 62,853, respectively.

Commission to adopt the same amendment to § 8C4.1 of the Guidelines, which is the same provision as it applies to organizations.

There is a significant potential for unfairness when the prosecutor is given complete control over substantial assistance departures. Furthermore, the substantial assistance departure is currently the only ground for departure from the guidelines that requires a government motion before the court may consider it. Even if the amendment is adopted and a court is allowed to consider the issue at its own discretion, the government will still be the principal source of evidence regarding whether "substantial assistance" was in fact provided by the defendant. But prosecutors should not have sole discretion whether to raise the issue of substantial assistance for a court's attention, especially given that a prosecutor's exercise of this discretion generally is unreviewable. In order for this section to achieve its goal of encouraging defendants to aid law enforcement authorities in the prosecution of offenses, defendants must perceive that the section will be fairly applied. This requires courts to be able to consider the issue of substantial assistance of their own accord and in response to motions by defendants as well as in response to motions by prosecutors.

On a related subject, the limitations suggested by Issue for Comment No. 24 (i.e., must be a first offender and no violence must be associated with the offense) are unnecessary. Courts should be allowed to consider substantial assistance by defendants in all cases where such assistance has been rendered. First offender status and non-violent nature of the crime should be left as facts to be taken into account at the discretion of the court. They should not be used as a basis for universally limiting consideration of substantial assistance.

As noted above, § 8C4.1 of the Guidelines contains language that applies to the sentencing of organizations analogous to that contained in § 5K1.1, and it contains the identical governmental motion requirement. The purpose of the sections is the same. Therefore, an amendment to one should prompt an amendment to the other, as there is no policy justification for doing otherwise. Thus, EEI urges the Commission to strike the government motion requirement from both § 5K1.1 and § 8C4.1 of the guidelines.

III. Issue For Comment No. 30, Departures

Amendment No. 30 requests comment as to whether the language in Chapter One, Part A4(b) may be read to be overly restrictive of a court's ability to depart

from the guidelines.[4] EEI supports the suggestion made by the Committee on Criminal Law of the Judicial Conference of the United States that the language contained in Part A4(b) should be changed to the extent that it discourages departures by encouraging courts of appeals to find that sentences that depart from the guidelines are "unreasonable."[5]

While the language of Part A4(b) concedes that the initial guidelines will be the subject of refinement over time, and that the departure policy was adopted because "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision[,]" the language that follows nevertheless suggests that departures from the guidelines are improper.[6] The courts must be allowed to exercise reasonable judgment with respect to application of the guidelines, and must not be required to adhere inflexibly to specified types of departures and departure levels. At a minimum, EEI recommends that Part A4(b) be amended to strike the last sentence of the fourth paragraph and the last sentence of the fifth paragraph.

IV. Issue For Comment No. 32, First Time Offenders

The Commission has requested comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense.[7] EEI believes that there should be a specific provision for departures in the sentencing of first offenders of non-violent offenses. Judges need this departure to prevent the possibility of offenders receiving punishment that does not fit the crime. This departure should be accomplished through providing an additional ground for departure in Chapter Five, Part K.

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[4] Issue For Comment No. 30, Notice at 62,848.

[5] Letter of Vincent L. Broderick, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable William W. Wilkins, Jr., dated November 30, 1992.

[6] Federal Sentencing Guidelines Manual (1992 Ed.) at 6.

[7] Issue For Comment No. 32, Notice at 62,848.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.
>
> | No. of victims | Increase in offense level |
> |---|---|
> | 2 - 99 | 2 |
> | 100-349 | 4 |
> | 350-649 | 6 |
> | more than 650 | 8 |

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

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March 12, 1993

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Re: Proposed Amendments 1 and 34

Dear Mr. Courlander:

I thank the Sentencing Commission for the opportunity to offer written comments on the Proposed Amendments to the Federal Sentencing Guidelines, dated January 12, 1993. My comments are directed exclusively to Proposed Amendments 1 and 34, both of which concern the "relevant conduct" provision of U.S.S.G. § 1B1.3.

For the past two years I have made a close study of the policy issues surrounding various practices of real-offense sentencing, not only within the federal system, but in states across the country. The results of that work have recently been published as *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523-73 (February 1993). (A reprint is enclosed.) Because the analysis of *Sentencing Facts* is pertinent to your present deliberations, I wanted to make it available to you.[1]

Proposed Amendment 1. I applaud the Commission's proposed amendment to § 1B1.3(c) that **"Conduct of which the defendant has been acquitted after trial shall not be considered under this section."** A number of states bar the use of acquittal conduct at sentencing, even while retaining a real-offense orientation to sentencing in other respects. *See State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). Still other states forbid the consideration of acquittal conduct as part of their general approach of conviction-offense sentencing. *See Sentencing Facts*, 45 Stan. L. Rev. at 535-41 (surveying the experience of three state guidelines systems). *See also id.* at 552 ("Among the recommendations in this article, the foremost is the restoration of the legal force of acquittals at sentencing through a prohibition of the consideration of facts embraced in charges for which the defendant has been acquitted").

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[1] Also, since 1989 I have served with my father as Co-Reporter to the American Bar Association's effort to promulgate a third edition of its *Criminal Justice Standards for Sentencing Alternatives and Procedures*, which were adopted formally by the ABA on February 9, 1993. This letter, however, represents my own views and not necessarily those of the ABA.

In conjunction with the proposed amendment to § 1B1.3(c), I suggest a parallel amendment within Part K ("Departures") -- perhaps in the policy statement of § 5K2.0, perhaps in a new policy statement -- providing that **"Conduct of which the defendant has been acquitted after trial shall not be considered as grounds for departure from the guidelines."** I recognize that this suggestion conflicts with Proposed Amendment 1 insofar as the Commission would amend § 1B1.3, comment (n. 11) to provide that acquittal conduct *may* provide basis for departure in an exceptional case. The Commission proposal, to this extent, would permit the result in *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam), and similar cases. As outlined in *Sentencing Facts*, 45 Stan. L. Rev. at 531-33, 550-52, the policies supporting a bar on acquittal conduct at sentencing extend equally to departure and to guideline sentences. On this ground, I would delete the second sentence of proposed § 1B1.3 comment (n. 11).

Proposed Amendment 34. The Commission has invited comment on a further amendment to § 1B1.3 as submitted by the American Bar Association's Sentencing Guidelines Committee (the "SGC amendment"). The SGC amendment would **"restrict the court's consideration of conduct that is relevant to determining the applicable guideline range to (A) conduct that is admitted by the defendant in connection with a plea of guilty or nolo contendere and/or (B) conduct that constitutes the elements of the offense of which the defendant was convicted."** I wish to comment in favor of the SGC amendment, which should be adopted in addition to Proposed Amendment 1.

First, the SGC amendment would alter the basic operation of § 1B1.3, changing it from a modified "real-offense" provision into a modified "conviction-offense" provision. The policy choices relevant to such a decision are complex. In *Sentencing Facts*, 45 Stan. L. Rev. at 547-65, I have argued that the conviction-offense program is far preferable to the real-offense alternative. I do not reproduce that argument here. I will note, however, that state guidelines jurisdictions have been uniform in their endorsement of conviction-offense sentencing. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rptr. 355, 356-57 (June 1992) (recommending that the federal commission adopt a conviction-offense scheme); *Sentencing Facts*, 45 Stan. L. Rev. at 535-41.

Finally, the SGC amendment is consistent with the newly adopted ABA Criminal Justice Standards, *Sentencing Alternatives and Procedures* (3d ed., approved February 9, 1993). The applicable Standard, § 18-3.6, provides as follows:

Standard 18-3.6. Offense of conviction as basis for sentence.

The legislature and the agency performing the intermediate function [e.g., the sentencing commission] should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

* *

In conclusion, Proposed Amendment 1 represents a significant improvement upon existing law, although its reach should be extended to departure sentences. Proposed Amendment 34 is also an important advance, and should be adopted in addition to Proposed Amendment 1.

Sincerely,

Kevin R. Reitz
Associate Professor of Law

VIA FEDERAL EXPRESS

cc: Members of the United States Sentencing Commission

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

February 23, 1993

U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

Thank you for the opportunity to comment on the proposed amendments.

Sincerely

David E. Miller

David E. Miller, Deputy Chief
U. S. Probation Officer

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

*****MEMORANDUM*****

DATE: 2/23/93

RE: **29 and 30. Issues for Comment.**

FROM: David E. Miller, Deputy Chief
U. S. Probation Officer

TO: U. S. Sentencing Commission
Public Information

In its effort to learn and correctly apply the guidelines the probation system generally has been reluctant to attempt to find, justify and recommend departures. We were driven by a mentality of "doing it right", meaning technically correct guideline application. This attitude has become practice to the extent the Courts follow the lead of probation officers.

The system does need to loosen up and recognize the importance of the use of sound, reasoned and rational departures. The Commisson should look carefully at all of its departure language and determine if adjustments can be made to permit a more liberal reading which might enable Courts greater freedom to depart.

The original plan of the Commission to observe common practices of the Courts over time; to monitor departures, and to propose amendments consistent with those findings is still good logic. I am not sure the vast number of guideline amendments have met that standard heretofore.

Executive Director and Administrator
Charles and Pauline Sullivan

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202-842-1650, ex. 320

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

PUBLIC COMMENT OF CHARLES SULLIVAN TO THE
UNITED STATES SENTENCING COMMISSION

CURE very strongly opposes "in an exceptional case, however, such conduct may provide a basis for an upward departure" (amendment to Commentary to 1B1.3).

CURE is dedicated to reducing crime through rehabilitation. One of the first steps in this process is the perception by the person convicted that "the system" is fair.

When the potential is there in the Guidelines to use acquitted conduct to enhance a sentence, then I believe the system will be perceived as "rigged".

In fact, in my opinion, this proposed amendment goes against the very spirit of the confirmation hearings of the first commissioners that were conducted in 1985 by Sen. Charles Mathias, the Republican from Maryland.

I shall never forget Sen. Mathias asking the commission-appointees "to raise their hands" if they had ever spent time in jail. For those who had not, he encouraged them to visit the jails and prisons.

By this exercise, Sen. Mathias was encouraging a word that is almost non-existent today, "mercy". Sen. Mathias was indirectly telling the Commission that their attitude should be one of coming down of the side of reducing (not enhancing) the sentence whenever appropriate!

In the same way, I encourage you to support the 33 proposed amendments that would reduce drug sentences especially the one that would eliminate the weight of the carrier in LSD cases.

In this regard, I have attached a copy of a recent letter that we have received. I have removed the name since we are not certain if he wants his name to be known.

Dear CHARLES+PAULINE..... .....Monday March 1st 1993

Greetings from F.C.I. Danbury. I am currently serving a 128 month sentence without parole, for conspiracy to distribute LSD. I have no history of violence what so ever, nor any prior felony convictions. I have taken responsibility for my crime. I continue to demonstrate, diligently, my whole-hearted conviction to reform my life. I am biding my time wisely, attending Marist College (I made high honors last semester,..intend to do so again), and the Comprehensive Chemical Abuse Program, among other programs. In 21 months, I've done *all* this--128 months are entirely unnecessary and unfathomable. I *am* an asset to our society, and to the world.

An interesting turn of events has unfolded, and it warrants your *immediate attention!* I have enclosed information that documents and explains the "quirk in the law" that justifies these absurd sentences for LSD offenses, by including the irrelevant weight of carrier mediums. You will also find an excerpt, from the Federal Register, containing 1993 amendments to the Federal Sentencing Guidelines, as proposed by the U.S. Sentencing Commission. See amendment #50--*synopsis of proposed amendment and proposed amendment*--which reads: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted." This amendment seeks to rectify a truly gross misappropriation of justice.

This means that prison stays (which are costly to the American taxpayers and public at large, as well as the individuals and their families, in both tangible and intangible ways) could be dutifully shortened, for myself and 2000 other human beings serving 10, 15, and 20 year sentences (with out parole), for the sheer weight of *irrelevant* carrier mediums....This would not be mocking the fact that LSD is illegal, it would simply serve to produce *just sentences*, in which the "time would fit the crime".

I earnestly request that you write the U.S. Sentencing Commission, and voice your support for crucial amendment #50! IT IS ESPECIALLY IMPORTANT FOR YOU TO URGE THAT IT BE RETROACTIVE!! This needs to be done by March 15th, since public hearings are scheduled in Washington D.C., on March 22nd. (See Federal Registar excerpt).

I hope and pray that you will find the time and understanding to act on this issue,..it's not only for my benefit, but thousands just like me, encompassing all our families and loved ones, as well as all those that will continue to be federally prosecuted for LSD offenses. Please, justice and equity *must* transcend rhetoric!