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

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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 th[illegible]ederal 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.[37] 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."[38] 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.[39] 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.[40]

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.[41] Although computer security experts have said that such programs are potentially as dangerous as the disease they are designed to cure,[42] 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.[43]

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.[44] 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.[45] 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.[46]

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.[47] 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.[48]

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.").

Computer Fraud

United States District Court
For the
District of Puerto Rico

Hato Rey, Puerto Rico 00918-1766

Chambers of
Gilberto Gierbolini
Chief Judge

March 19, 1993

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

Dear Judge Wilkins:

I was very pleased and honored to have you with us at the seminar sponsored by the Federal Public Defender Service for the District of Puerto Rico on February 25, 1993. Thank you for speaking about the sentencing guidelines at the seminar. Although I was unable to attend the seminar, I am sure that the participants learned a great deal about the guidelines and had an opportunity to express their opinions concerning this hotly debated issue.

I remember that the guidelines were also a topic of discussion at the last chief judges' meeting in Denver, CO. At that meeting, the opposition to the sentencing guidelines was palpable. In fact, the great majority of the chief judges proposed issuing a public statement expressing their opposition to the guidelines. Mr. William W. Schwarzer, Director of the Judicial Center, reminded the conference that only the Judicial Conference could make public statements of the nature contemplated.

As I informed you when you graciously visited my chambers during your visit, a possible response to the opposition to the guidelines might be to allow judges discretion to depart two levels up or down from a given sentence mandated by the guidelines. Allowing these departures would not affect consistency in sentencing. But even if they do, the departures would not result in inconsistencies comparable to those that existed before the guidelines were established. In addition, allowing departures would allay the frustrations and misgivings judges feel under the guidelines concerning the lack of

judicial discretion, the role played by United States Attorneys, and the inability of judges to tailor a sentence to an individual defendant.

I wish to thank you again for coming to Puerto Rico.

Sincerely,

Gilberto Gierbolini

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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

University of Colorado at Boulder

School of Law

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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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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.

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Executive Director and Administrator
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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!

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
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

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

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

OFFICIAL OLYMPIC SPONSOR

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.

Office of the
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF FLORIDA

Reply to: JACKSONVILLE

H. JAY STEVENS
Federal Public Defender

JACKSONVILLE DIVISION	ORLANDO DIVISION	TAMPA DIVISION	FT. MYERS DIVISION
Post Office Box 4998 311 West Monroe St. - Suite 318 Jacksonville, Florida 32201 Telephone 904 232-3039	Federal Building - Suite 417 80 North Hughey Avenue Orlando, Florida 32801-2229 Telephone 407 648-6338	Timberlake Annex, Suite 1000 501 East Polk Street Tampa, Florida 33602-3945 Telephone 813 228-2715	Barnett Centre - Suite 704 2000 Main Street Ft. Myers, Florida 33901 Telephone 813 334-21188

January 2, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Dec. 31, 1992 Proposed Amendment 61

Dear Mr. Courlander:

Our office represents Mr. Terry Lynn Stinson in **Stinson v. United States**, Case No. 91-8685, in which certiorari was granted on November 11, 1991. The **Stinson** case involves the question whether it is a misapplication of the sentencing guidelines for a court to fail to follow the specific direction of current U.S.S.G. §4B1.2, application n.2, that possession of a firearm by a felon is not a "crime of violence." Proposed amendment 61 would reverse the directive which is the subject of **Stinson**.

The brief on the merits in **Stinson** is due January 6, 1993 and oral argument before the Supreme Court is set for March, 1993. The action taken by the Sentencing Commission in announcing this proposed amendment at this time obviously creates uncertainty as to the proper disposition of **Stinson**. We would request that the proposed amendment be withdrawn until the Supreme Court has ruled in **Stinson**.

Barring that, we would ask permission to present testimony at the scheduled hearing on March 22, 1993 in Washington. We will further written comment no later than March 15, 1993, as required by the announcement in the Federal Register.

Sincerely,

WILLIAM M. KENT
Assistant Federal Public Defender

WMK:wmk

Departures

Washington D.C. 20004-2696
Telephone 202-508-5620

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.

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.

FIRST NATIONAL BANK
CAPITAL CITY GROUP

P.O. Box 900 • Tallahassee, Florida 32302-0900
(904) 224-1171

March 10, 1993

Attn: Public Information
U. S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D. C. 20002-8002

Dear Members:

We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

BROWN & MOREHART
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*Also Admitted in Kentucky

March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Mr. Courlander,

This letter is to provide my input on several of the proposed changes and amendments to the sentencing guidelines. I hope that these are of some use to you as these changes are contemplated. I am limiting my comments to three proposals, but on a broader scale would suggest that the Commission give favorable consideration to all changes which result in a more equitable situation.

Prior to expressing my views I wanted to give some background on myself. I am an attorney in Cincinnati, Ohio. The majority of my practice involves federal criminal sentencings and post-conviction motions related to sentencing. I handle cases in federal court across the country. Because of my work I have become familiar with the contents of the guidelines. It is with this understanding that I provide the following comments.

The proposal that would permit a District Court Judge to make a downward departure, without the United States Attorney making the request, if the Judge believes the Defendant has provided substantial assistance is one which should be approved. The current scenario permits the United States Attorney to plea bargain with the Defendant and decide after the Defendant provides information whether to make a request for a downward departure. Absent unconstitutional motivation on the part of the U.S. Attorney, there is nothing a Defendant or Judge can do, if the U.S. Attorney does not request a downward departure. This system smacks of unfairness. The U.S. Attorney, gains the information and then can decide not to give the Defendant any credit for it. The Defendant may have already put himself at grave personal risk and additionally is not able to retrieve what he has provided to the U.S. Attorney. Permitting the Judge to have control on this situation would level the playing field and result in a more just situation.

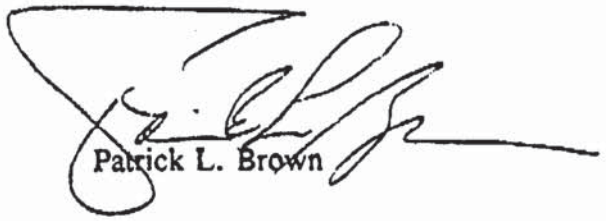
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first time offenders. The comparison is made repeatedly

between violent offenders and drug offenders and the relative disparity is sentences received. The proposed amendment would help alleviate this disparity and more importantly result in sentences, especially for first time drug offenders, which are more in keeping with a system of fairness and justice.

The third proposal I am writing about relates to eliminating the weight of the carrier in LSD cases when calculating the weight of the drugs involved. It is difficult for me to understand the rationale behind adding to the weight of the actual drug the weight of the carrier paper. This would easily result in a situation of a supplier or manufacturer who has not separated the drug into doses and thereby not placed it on carrier paper being treated the same as the street seller because of the added weight of the paper the drug is placed on. Simply, a person should be held accountable for the drugs involved, not the material it is carried on.

I thank you for the opportunity to comment on these specific proposed amendments, and the amendments in general. I hope that the amendments will receive favorable consideration. Additionally, I would welcome the opportunity to provide testimony or additional information at any scheduled hearings on these proposed amendments. If I can be of further assistance please do not hesitate to contact me at (513) 651-9636.

Very Truly Yours,



Patrick L. Brown

PLB\wpf
cc: Congressman David S. Mann

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

March 4, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26
One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

Richard D. Besser
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year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison over-crowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,

/ R.D. Besser

R.D.Besser

cc: Families Against Mandatory Minimums

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TELEPHONE
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615 524-4623

February 25, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

Laurienne Moss
3921 Pemberly Ct.
Ann Arbor Mi. 48103
Phone & Fax #
(313) 668-0716
(call first for fax)

U.S. Sentencing Commission
One Columbus Circle, NE.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners,

I am writing to urge you to please consider the proposed amendments to the sentencing guidelines that would reduce sentences for first-time, non-violent offenders in drug cases. My husband, Robert Moss, is serving a 25-year sentence for conspiracy to import & distribute marijuana. As a first time, non-violent offender, he does not deserve to receive this harsh treatment by our courts. My family, which consists of two girls, ages 1 & 2 and a twelve year old, and myself, desperately need Robert to keep us going - as we have been emotionally and financially devastated by the federal courts decisions. Please give those like my husband

TEL: Mar 12,93 10:26 No.001 P.01

and their families a second chance at becoming productive members of this society which prides itself in giving fair & just treatment to its citizens who break the law.

In addition, I would like to remind you, as distinguished members of the sentencing commission, that the guidelines, which were intended to be used as a tool against drug use and abuse, has had no effect in this area. Abuse of drugs has remained the same or even risen in some cases, in spite of these stiff sentences. This leads me to believe that we should not use our courtrooms to rectify a social problem - rather it is a health problem. The money spent on prisons would be put to more effective use in education and prevention. This opinion is shared by many judges, and others

TEL: Mar 12.'93 10:26 No.001 P.02

throughout this country. Government officials such as yourselves, need to get out of the business of destroying lives like ours by the thousands, and instead restore fair treatment to these offenders, which gives them a second chance in life.

Respectfully Yours,
Laurienne M. Moss


Fraud

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
P.O. DRAWER 2894
LAKE CHARLES, LOUISIANA 70602

AMES T. TRIMBLE, JR.
U.S. DISTRICT JUDGE

TELEPHONE (318) 437-7211
FTS 687-7211

December 17, 1992

U. S. Sentencing Commission
Attn: Public Comment
Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20002

Dear Ladies and Gentlemen of the Commission:

This letter is sent in the hope that it will influence you to substantially raise the offense level of crimes involving theft of property, which in some cases carry a tremendous victim impact, so that we as judges can mete out meaningful punishment to theft offenders. What prompted this letter is the fact that within less than two weeks, I will have sentenced six defendants who entered guilty pleas to car theft and one who entered a plea of guilty to mail fraud.

I simply do not have time to outline all of these cases for you, but will give you illustrative samples. In one case, the defendant, along with his cousin, stole a new GMC Suburban valued at some $24,000. He was assigned one criminal history point for having been found guilty of possession of marijuana in 1988 and in 1985 he was found guilty of unlawful possession of a handgun, for which he was assigned no criminal history points. Under the guidelines, he has an offense level of 12 and a criminal history category of I, for which he can be imprisoned for from 6 to 12 months. In my mind, the idea that someone can get away with stealing $24,000 of another man's property and be exposed to only 12 months incarceration (none of these people are able to pay a fine, costs of incarceration, etc.) totally belies the adage that crime does not pay. Such a lenient sentence, I feel, is a virtual invitation for repetition of what I consider a very serious crime. We have come a long way, perhaps too far, since the days when a man could be hanged for theft of a horse. This defendant's cousin, with two prior DWI convictions, can be sentenced to a maximum of 14 months under the guidelines. The other vehicle thefts were limited to correspondingly insubstantial sentences.

The mail fraud case involved an individual with no prior convictions who, using the mail service, as an employee of an insurance adjusting agency, defrauded an insurer of over $150,000. His offense level of 14 and criminal history category of I provides a guideline range of imprisonment from 15 to 21 months. The fraud that he perpetrated against the insurance company client of the

firm caused the owner of the firm to be personally liable for repayment of the funds stolen by the employee. Twenty-one months, even in state facilities where there are fewer "amenities" than in our federal accommodations, does not begin to be adequate to deter a criminal mind - which we are dealing with in all of these cases - from its nefarious purpose.

I might add that I spoke to an attorney friend of mine who does not work in the criminal law field, but who has a most compassionate disposition, about the first case discussed above. Without revealing the statutory limit of 10 years or the guideline range of 6 to 12 months, I asked him what type of sentence he felt would be appropriate in such a case. His response, after reflecting several minutes, was that he felt that imprisonment for 3 to 5 years would be justified. I fully agree with him.

This letter is, purely and simply, a plea that the Sentencing Commission reconsider the guideline ranges in all offenses involving loss of property by the victim with a view to substantially increasing the ranges.

Thank you very kindly for your consideration.

Sincerely,

JAMES T. TRIMBLE, JR.

JTTjr/rh

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

March 12, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

On behalf of the Food and Drug Administration ("FDA"), I wish to submit the following comments on proposed amendments to the sentencing guidelines for United States courts, published in 57 Fed. Reg. 62832 (1992).

Proposed Amendment Five:

(a) The FDA opposes proposed amendment five, which would eliminate from Sections 2B1.1 (theft) and 2F1.1 (fraud and deceit) "more than minimal planning" as a specific offense characteristic providing for a two-level increase in sentence. The amendment would also eliminate from Section 2F1.1 "a scheme to defraud more than one victim" as a specific offense characteristic requiring a two-level increase in sentence. Instead, the amendment would modify the loss tables in Sections 2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase for losses in excess of $40,000.

The "more than minimal planning" and "scheme to defraud more than one victim" specific offense characteristics have special significance in offenses involving the public health and safety, which often consist of coordinated or carefully planned schemes to defraud that result in substantial non-monetary harm to consumers and to health patients. Indeed, fraud offenses frequently include planned efforts to conceal the wrongful conduct from regulatory agencies and from the public. Therefore, the FDA believes that these characteristics should remain as specific offense characteristics rather than being considered only in terms of economic loss under Sections 2B1.1 and 2F1.1.

(b) Under the heading "Additional Issues for Comment," the Notice also invites comment on various alternatives to proposed amendment five. The FDA opposes eliminating the "more than minimal planning" and "scheme to defraud" specific offense characteristics from Section 2F1.1, or any of the proposals to

otherwise alter the definition of "more than minimal planning" in Section 1B1.1. However, the agency strongly supports increasing the base offense level of Section 2F1.1, and other guidelines that contain an enhancement for "more than minimal planning," in recognition of the pervasiveness and seriousness of fraudulent criminal conduct. The agency also supports setting forth more examples of the application of "more than minimal planning" in fraud and theft cases, specifically including examples of fraud involving the manufacture, distribution, or use of food, drug, device, or cosmetic products.

The FDA believes that the current base offense level six in Section 2F1.1 is disproportionately low in comparison to other guideline offenses. In addition, the agency believes that the guidelines do not sufficiently reflect the serious, non-monetary harm that frequently results from fraud-related offenses within the purview of the Federal Food, Drug, and Cosmetic Act. Accordingly, while the FDA supports the proposal to restructure the loss tables for fraud offenses to provide higher offense levels for losses at the lower end of the loss table, the agency believes that the guidelines' offense levels should be substantially increased for health-related fraud offenses that do not result in substantial economic harm. One way to partially address this concern would be to adopt the proposals set forth in proposed amendment six and issue for comment (no. seven), as set forth below.

Proposed Amendment Six:

The FDA strongly supports proposed amendment six, which would amend Application Note 10 of Section 2F1.1 to (a) provide guidance for an upward departure in cases in which the fraud caused substantial non-monetary harm and to (b) include an example of a fraudulent blood bank operation. Other "guidance" examples of health-related fraud offenses warranting an upward departure would exist in the case of a pharmaceutical manufacturer that conducted or reported fraudulent or false testing to determine the identity, strength, quality, or purity of a drug, or of a person or persons that created, sold or dispensed a counterfeit drug. In each example, the quality or safety of the drug may be seriously deficient based on the improper or inadequate manufacturing operations or processes. Such offenses might result in substantial harm to innocent health victims that is not adequately addressed by considering economic loss alone.

Issue For Comment (No. Seven):

For the reasons set forth in the preceding two paragraphs, the FDA strongly supports amending Sections 2B1.1, 2B1.2, and 2F1.1 to identify specific offense characteristics for circumstances in which the "loss" does not fully capture the harmfulness and seriousness of the conduct, thereby warranting an increased offense level. In particular, the agency suggests establishing respective specific offense characteristics to provide for (a) a two-level increase (or level 13) for circumstances in which some or all of the harm caused by the offense was non-monetary, (b) a four-level increase (or level 24) when the defendant knowingly or recklessly endangered the health or safety of one or more persons, (c) a four-level increase (or level 24) when the offense involved the knowing or reckless risk of serious bodily injury or death to one or more persons, and (d) a six-level increase (or level 26) when the offense results in death. Alternatively, the FDA supports amending the commentary to these sections to include the above examples as circumstances in which an upward departure may be warranted.

Issue For Comment (No. 65):

The FDA supports amending Section 2F1.1 to include the risk of loss as a factor in determining the guideline range for fraud and related offenses when the amount of the risk is greater than the actual or intended loss. The risk of loss should increase the guideline range to the same extent as actual or intended loss, irrespective of whether or not the risk was reasonably foreseeable. Currently, Section 2F1.1 provides that the intended loss shall be used if it is greater than the actual loss. Presumably, this is to hold defendants accountable for the loss intended by their wrongful acts. The agency believes that defendants should likewise be held fully accountable for the risk of loss associated with their intentional wrongful acts.

Additional FDA Comments:

The FDA recommends that the Statutory Index (Appendix A), which specifies the guideline section or sections ordinarily applicable to the statute of conviction, be amended. With respect to the Federal Food, Drug, and Cosmetic Act, the current appendix lists Sections 2F1.1 and 2N2.1 as being applicable to offenses under 21 U.S.C. §333(a)(2), but only Section 2N2.1 as being applicable to 21 U.S.C. §§331, 333(a)(1), and 333(b). The agency believes that Section 2F1.1 is also applicable to offenses under 21 U.S.C. §§331, 333(a)(1), and 333(b) (as amended August 26, 1992), and that this information should be included as a Consolidation and Simplification of Chapter Two Offense Guidelines amendment.

Thank you for this opportunity to comment on the proposed amendments to the sentencing guidelines. If the Sentencing Commission has any questions concerning these comments, please feel free to contact me (301-443-4370) or James S. Cohen, Associate Chief Counsel for Enforcement (301-443-7272).

Sincerely,

Margaret Jane Porter
Chief Counsel
Food and Drug Administration

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD E. ZIEGLER
U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15% This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,

Donald E. Ziegler

Donald E. Ziegler

ef

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

DATE: February 16, 1993

RE: 7. Issue for Comment.

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

TO: U. S. Sentencing Commission
Public Information

The Commission should address the issue of whether 2B1.1, 2B1.2 and 2F1.1 fully capture the harmfulness and seriousness of the offense by commentary suggesting an upward departure if the Court thinks it is merited. If and when the Commission identifies, through its monitoring process, a trend of upward departures for this reason, it can address same through the adoption of a specific offense characteristic. This is consistent with the "heartland" approach adopted by the Commission, an approach that is valid, but has, in practice, diminished because of too many amendments during the first 5 years of implementation.

richard crane
torney at law • corrections & sentencing law
200 hillsboro road • suite 310
nashville, tennessee 37212
(615) 298-3719 • FAX 298-2467

February 18, 1993

U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
Washington, D.C. 20002-8002

Re: Amendments 28(G), 37 and 38
Amendment 25

Gentlemen:

I am writing in support of proposed amendment 28 (G). Some of the problems with the loss definition under § 2B1.1 and § 2F1.1 have been resolved because of the 1992 amendment to the statutory index specifying that either of these guidelines could be appropriate for violation of 18 § 656.

But, the problem persists in other areas. For example, I had a client convicted this past year for conspiring to embezzle from an employee benefit plan. (18 § 371) The offense involved the use of a certificate of deposit from a union pension fund as collateral for a loan. The CD greatly exceeded the amount of the loan, so when the loan was defaulted on, only a portion of the CD was seized to cover the loss. Because the offense involved pension fund money, my client's sentenced was calculated under § 2B1.1 using the full value of the CD , rather than the actual loss. Your proposed amendment 28(G) would, hopefully, resolve this problem.

I also very much favor amendment No. 25 regarding disclosure of information relative to guideline calculations. I practice around the country and there are great differences from one U.S. Attorney's Office to another in providing this information.

Additionally, I think that the amendment should include a requirement

recycled paper

that the government stipulate as often as possible in plea agreements to any facts which impact on guideline calculations. Again, as I practice in various states, some U.S. Attorney's offices are readily agreeable to incorporating stipulations or a separate statement of the offense, while other U.S. Attorney's offices have a "policy" of never stipulating to anything. This only increases the work for the probation officer and for the court, when these matters could easily be resolved during plea negotiations.

Sincerely,

Richard Crane

RC/cm

First Time Offender

WHITE,
KOCH, KELLY
&
McCARTHY
A Professional Association

Attorneys and Counselors at Law

Sumner S. Koch
William Booker Kelly
John F. McCarthy, Jr.
Benjamin Phillips
John N. Patterson
David F. Cunningham
Albert V. Gonzales
Janet Clow
Kevin V. Reilly
Charles W. N. Thompson, Jr.
M. Karen Kilgore
Holly A. Hart
Sandra J. Brinck

Of Counsel
Kenneth Bateman

Special Counsel
Paul L. Bloom

Aaron J. Wolf
Jennifer Lea Wise
Jacquelyn Archuleta-Staehlin
Mark A. Basham

March 12, 1993

***VIA* TELEFAX 202-273-4529**

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear United States Sentencing Commission:

The purpose of this letter is to express my support for Edwards Bill H.R. 957, Sentencing Uniformity Act of 1993. I have practiced criminal law for the past 17 years and was Chief Public Defender for the State of New Mexico from 1983 through 1985. I believe that mandatory minimum sentences have created injustice throughout the federal system and have clearly created a backlog of civil cases in the State of New Mexico.

I thank you for your consideration of Edwards Bill H.R. 957.

Sincerely,

JANET CLOW

JC/cam
cc: Steve Schiff (*via* Telefax)

433 Paseo de Peralta P.O. Box 787, Santa Fe, NM 87504-0787 (505) 982-4374 Fax Nos. (505) 982-0350; 984-8631

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
ROBERT D. RICHMAN

PHONE: (612) 348-1755
(FTS) 777-1755
FAX: (612) 348-1419
(FTS) 777-1419

March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
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

FIRST NATIONAL BANK
CAPITAL CITY GROUP

P.O. Box 900 • Tallahassee, Florida 32302-0900
(904) 224-1171

March 10, 1993

Attn: Public Information
U. S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D. C. 20002-8002

Dear Members:

We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

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NATIONAL OFFICE:
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202-842-1650, ex. 320

CURE-NH
William J. Manseau, D.Min
Chairperson
6 Daniel Webster Highway S
Nashua, NH 03060
Phone: 603-888-3559

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

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

March 10, 1993

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

Attention: Public Information

To Whom It May Concern:

I wish to express my full support for proposed amendment #50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium, e.g. blotter paper, is not to be counted."

I urge you to specify that it be fully retroactive and that you submit it to the Congress on or before May 1, 1993. There are approximately 2,000 individuals incarcerated in the federal system to date, the majority of which are first-time, non-violent offenders, who have already been unjustly sentenced to outrageous amounts of time in LSD offenses for the sheer weight of carrier mediums.

Also, I wish to state my support for the Edwards Bill, The Sentencing Uniformity Act of 1993. Please work to repeal the mandatory minimum sentencing law and restore sentencing justice to all.

Thank you.

Sincerely,

William J. Manseau, D.Min.
Chairperson, CURE-NH

WJM/

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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 hiding 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!

(614)890-6164
OFFICE

(614)258-0105
HOME

DAYTON ELECTRONIC SYSTEMS

Roger A. Logan
1605 Bryden Road
Columbus, OH 43205
March 8, 1993

To Whom It May Concern,

Legislation to abolish all federal mandatory minimum sentences was introduced early in the 103rd Congress, by Rep. Don Edwards. This bill will return justice to the sentencing process.

The news media makes you aware of the injustices in this country, but when you come in direct contact with injustices, your morale as a U.S. citizen is devastated. The bitterness of the 50's & 60's that I had has been rekindled. By being a black American, I must say that the backlash of the past 12 years has definitely set the black man behind on the issues accomplished in the 60's & 70's.

My son, Keith Logan, (a first-time offender) was sentenced to 14 years for conspiracy to distribute 8 kilos of cocaine. The undercover officer expressed to me that he knew that Kith was only responsible for conspiracy of one kilo and that if he would testify against someone else, he would have a reduced sentence.

My son confessed to being a part of the sell of one kilo of cocaine the evening the other young men were arrested and never went to trial. His sentence was based on a report submitted by a (young) probation officer and a (young) prosecutor. The reason I emphasize "young" is because the legislatures have taken away sentencing from judges and given it to young inexperienced "white" adults. The judge at her sentencing stated that she knew it was unfair and that black judges have stepped down because of the mandatory minimum sentencing law.

Mandatory minimum sentencing has not worked in the past, and is not working today. This has perpetuated the National debt. The goal should be to produce productive citizens.

Enclosed are statistics of the negative affects that mandatory minimum sentencing has had on America. I urge you to support Rep. Edward's Uniformity Sentencing Biii.

Please reply.

Sincerely,

Roger A. Logan

FAMM FACTS

PRISON OVERCROWDING

* In 1992, America had 1.2 million people behind bars. The United States imprisons more of its citizens per capita than any other country in the world. Per 100,000 people, the United States imprisons 455, with South Africa in second place with 311. In other words, one in every 300 Americans is in prison--not jail, probation, or parole--but in prison. *(The Sentencing Project, Americans Behind Bars: One Year Later, 1992)*

* From 1980 to January 1993, the federal prison population grew by 57,000 inmates--from 24,000 to 81,000. At the current rate of incarceration, by 1995 the federal prison population will reach 100,470, and by the year 2000 there will be 136,980 people in federal prisons. *(Bureau of Justice Statistics, Sourcebook 1991, p. 679)*

* Convictions for federal drug offenses increased 213 percent between 1980 and 1990. *(Bureau of Justice Statistics, National Update, January 1992, p.6)*

* Drug offenders currently make up 57 percent of the federal inmate population, up from 22 percent in 1980. By 1995, nearly 70 percent of federal inmates will be drug offenders. *(Testimony by former BOP director, J. Michael Quinlan, given on February 26, 1992 to House Appropriations Subcommittee)*

* In 1990, more than half of the federal inmates serving mandatory minimum sentences were first offenders. *(Bureau of Justice Statistics, Sourcebook 1991, p.542)*

* Average federal sentences in 1990 for the following offenses were:
Drugs offenses: 6.5 years. Sex offenses: 5.8 years. Manslaughter: 3.6 years. Assault: 3.2 years. *(Bureau of Justice Statistics, Sourcebook 1991, p.532)*

EXCESSIVE TAXPAYER COSTS

* The average cost of incarcerating a federal prisoner is $20,072 per year, or approximately $55 per day. *(Bureau of Prisons, State of the Bureau 1991, Summer 1992)*

* To house, feed, clothe, and guard the 81,000 federal inmates, taxpayers pay a hefty $4.5 million per day or $1.6 billion per year.

* At the state level, taxpayers cover incarceration costs as high as $6.8 million per day in California where over 100,000 people are behind bars at an average of $25,000 per inmate per year. *(The California Republic, July 1991, p.9)*

* States spend more of their budgets on justice programs (6.4%) than on housing and the environment (3.8%) and nearly as much as they spend on hospitals and health care (8.9%) *(Bureau of Justice Statistics, Justice Expenditures & Employment, 1990, Sept. 1992)*

* The federal drug program budget for FY 1993 was $12 billion. *(Office of National Drug Control Policy)*

* Federal spending for corrections increased 44 percent between 1989 and 1992, from $1.5 billion to 2.2 billion per year. *(U.S. Budget FY 93, Part 1, p.198)*

* The Bureau of Prisons' authorized budgets increased 1,350 percent between 1982 and FY 1993, from $97.9 million to $1.42 billion per year. *(National Drug Control Strategy Budget Summary, 1992, p.212)*

* It costs more to send a person to federal prison for four years than it does to send him to a private university (tuition, fees, room, board, books & supplies) for four years. *(Sources: Federal Bureau of Prisons, The College Board)*

* Figures are not yet available for the tax revenue loss from former tax-paying inmates, or the increased cost of social services needed by inmates' families that were previously supported by the inmate.

PRISON CYCLE

Statistics show that people who have been in prison are more likely to have children who will end up in prison. Long mandatory prison sentences are sowing the seeds for the next generation of inmates.

* More than half of the juveniles in state and local jails have an immediate family member who is a felon.

* More than one-third of the adults in state prisons and local jails have an immediate family member who is a felon.

* Relative to the general population, inmates are more than twice as likely to grow up in a single parent family. Seventy percent of juvenile offenders and 52 percent of adult offenders had one, or no, parent.

(Sources: Bureau of Justice Statistics, Survey of Youth in Custody 1987, Profile of Jail Inmates 1989, Survey of Inmates in State Correctional Facilities 1986)

PUBLIC ATTITUDES

* toward crime: 61% prefer attacking social problems, 32% want more prisons & law enforcement.

* toward purpose of prison: 48% think it should rehabilitate, 38% think it should punish.

* toward spending more money & effort in fight against illegal drugs: 40% prefer teaching the young, 28% work with foreign governments, 19% arrest sellers, 4% help overcome addiction, 4% arrest users.

(Source: Bureau of Justice Statistics Sourcebook 1991, pp.202, 210, 243)

U.S. SENTENCING COMMISSION FINDINGS ON MANDATORY MINIMUMS

* Sentencing power has been transferred from the courts to the prosecutors. The Commission reports that, "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised."

* Mandatory minimum sentences create disparities based on race. Blacks and hispanics are charged with and receive mandatory minimum sentences more often than whites. The Sentencing Commission reports that this racial disparity "reflects the very kind of disparity and discrimination that the Sentencing Reform Act...was designed to reduce."

Blacks, 68 percent of the time.
Hispanics, 57 percent of the time.
Whites, 54 percent of the time.

Sentences for crack cocaine are also 100 times greater than for powder cocaine. Generally, blacks use crack cocaine and whites use powder cocaine.

* Mandatory minimums are counterproductive--low level participants receive mandatory minimums more often than top level kingpins.

Street-level participants, 70 percent of the time.
Mid-level players, 62 percent of the time.
Top-level importers, 60 percent of the time.

* Mandatory minimums create "cliffs" in sentencing based on small differences in weight. Possession of 5.0 grams of cocaine requires a sentence of up to one year, but possession of 5.01 grams of cocaine requires a sentence of atleast five years.

COMPARATIVE OFFENSES

Keep in mind: Federal guidelines equate one marijuana plant to one kilo (2.2 pounds) of marijuana, regardless of the size of the plant at arrest. In LSD cases, the guidelines include the weight of the paper, or the sugarcube, or the orange juice in which the LSD is mixed, to determine the total drug weight on which sentencing is based.

Level 24: 4.3 years to 5.3 years

$80 million worth of larceny, embezzlement, other forms of theft. Kidnapping abduction, unlawful restraint.
176 pounds of marijuana, 800 mg. of LSD, 400 grams (less than 1 lb.) of cocaine powder.

Level 26: 5.3 years to 6.6 years

Robbery with life-threatening injury.
220 pounds of marijuana, 1 gram (half the weight of one dime) of LSD, 500 grams (a little over 1 lb.) of cocaine.

Level 28: 6.6 years to a 8.1 years

Conspiracy or solicitation of murder.
880 pounds of marijuana, 4 grams (almost the weight of 2 dimes) of LSD, 8.7 pounds of cocaine powder.

Level 30: 8.1 years to 10.1 years

Kidnapping, abduction, unlawful restraint with ranson demand.
1540 pounds of marijuana, 7 grams (a little over 3 dimes weight) of LSD, 8.7 pounds of cocaine powder.

Level 38: 19.6 years to 24.4 years

Selling or buying of children for use in the production of pornography.
66,000 pounds of marijuana, 300 grams (approx. 3/4 lb.) of LSD, 330 pounds of cocaine powder.

(Source: U.S. Sentencing Commission Guidelines Manual, November 1, 1992)

SOME ORGANIZATIONS THAT OPPOSE MANDATORY MINIMUM SENTENCES

- **The United States Sentencing Commission.** The Commission found mandatory minimums to be racially discriminative, inefficient, counterproductive, and to have had no effect on the rate of crime in America.
- **The Federal Courts Study Committee**
- **The American Bar Association**
- Each of the 11 **Judicial Conferences of Federal Judges**
- **The National Association of Criminal Defense Lawyers**
- **The American Civil Liberties Union**

Richard D. Besser
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370

FAX (315) 853-4371

March 4, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26
One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

Richard D. Besser
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year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison over-crowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,

R.D.Besser

cc: Families Against Mandatory Minimums

Henry N. Blansfield, M.D.
1 Cedarcrest Drive
Danbury, CT 06811
(203) 744-6222
Fax (203) 744-6336

February 26, 1993

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

Attention: Public information

As a physician currently engaged in providing services to psychoactive drug users in our society and concerned with reducing harm to them, I strongly support amendments to sentencing guidelines that would drastically lessen their length. I am opposed to mandatory lengths of incarceration based upon the type of illicit drug involved in felonious drug selling and its weight. There must be a return to consideration of an arrested individual's prior record and willingness to accept rehabilitation and treatment if a compulsive drug user. Most of all, leniency would seem indicated if the nature of the crime, namely selling, has not directly harmed another. Reforms in the length of sentences need to be retroactive to allow redress for those already imprisoned by previous unfair and inhumane mandatory rules of sentencing.

Working as a clinician in the drug/alcohol field for twenty years has led me to believe that chemical dependence is a disease resulting from alterations in neuron receptor - transmitter mechanisms. Paradoxically society criminalizes the use of certain agents acting on the central nervous system while permitting the legal acquisition and consumption of others that have been repeatedly shown to have morbid deleterious heath effects, i.e. alcohol and tobacco. This, in itself, is the epitome of hypocrisy.

There is increasing awareness of the adverse impact of present drug laws on society, particularly the urban minority young male population. Racism and the drug war have been addressed by Clarence Lusane in his book "Pipe Dream Blues". A study of the impact of current drug policy, from a crime and corrections standpoint, has been carried out by the Monroe County Bar Association (Rochester, New York and environs) and detailed in a report called "Justice in Jeopardy". This report can be obtained from :

James C. Gocker, Esq.
130 East Main St.
Rochester, NY 14604
(716) 232- 4448

I enclose a copy of a New York Times article dealing with alternative sentencing, a policy whose time has come. Such approaches need to be strongly considered not only because they are dictated by the evidence pointing to the failure of present drug policy involving crime and corrections to succeed in alleviating or reducing the problem, but also because alternatives may be much less costly. The crime and corrections industry will, of course, lobby strongly against any change in the 70% dollar allocation they are now receiving.

Sincerely yours,

Henry N. Blansfield, M.D.

NY Times 1/20/93

Dealing With Drug Dealers: Rehabilitation, Not Jail

Hynes Tries Alternative Approach Intended to Stop a Problem by Curing an Addiction

By FRANCIS X. CLINES

In 15 years of selling cocaine and heroin in the doorways and abandoned buildings of Brooklyn's pervasive Borough Park narcotics mart, Guillermo Rios developed an entrepreneurial sense of a good deal, even as he indulged his own deep addiction.

Mr. Rios, who once managed seven tidy street outlets, had to hurriedly put his deal-maker's sense to good use 20 months ago when he was caught, fix in hand, selling drugs to undercover detectives. At the arraignment, District Attorney Charles J. Hynes of Brooklyn offered him a deal he never expected:

Either complete an experimental long-term rehabilitation program and be treated like an addict with all the struggle of self-reform, or face mandatory prison time as just another common criminal with all the attendant lost freedom and wasted life.

Limited Experiment

It was a deal that Mr. Rios and more than 200 other addicted drug dealers in Brooklyn have taken gladly but warily over the last two years in an unusual program that is attracting attention from other law-enforcement officials who are intent not so much on declaring a truce in the war on drugs as in attempting a little creative triage.

The Brooklyn program is a limited experiment, but it is showing enough progress at retaining phlegmatic addicts in long-term treatment in lieu of prison that the state has decided to extend it to the other city prosecutors' offices this

Continued on Page B2

Joyce Dopkeen/The New York Times

"What I am learning is to finally begin valuing my life," said Guillermo Rios, left, who chose an experimental rehabilitation program after being caught selling drugs. He talked with Ed Hill of Daytop Village in Swan Lake, N.Y.

Dealers' Deal: Rehabilitation, Not Jail

Continued From Page B1

year. Mr. Rios, who is finishing his first year in rigorous rehabilitation, said, "I had already been in jail and that just made me a little crazier."

He remains free, as ever, to walk away from the deal. But if he does, a special pursuit team will try to track him down and put him back on the narcotics court treadmill toward the overwhelming likelihood of serving long years in prison, with no second chance at mercy from Mr. Hynes.

The program is intended to deal with the legions of drug dealers who basically underwrite their own addiction with the money they make selling. Second offenders like Mr. Rios face very tough laws providing mandatory prison time and no easy plea bargains. Prison reformers say such second-felony laws are unrealistically harsh, but Mr. Hynes is exploiting the harshness, in effect, in his new carrot-and-stick program.

Half the states have comparable drug crackdown laws mandating prison time for repeat offenders and these have been instrumental in the mushrooming of prison populations and expenses across the nation through a high turnover in drug arrests. This growth has not necessarily focused on the more violent criminals who are at the heart of the public's alarm and the politicians' enactment of harsh remedies.

Up to 2 Years

With prisons becoming glutted, some criminal-justice officials are looking for cheaper, more productive alternatives. Few new programs besides Mr. Hynes's Drug Treatment Alternative to Prison offer such a powerful combination of seduction and penalty to try to change addicts who have been carefully screened and not merely to detain them behind bars until they come out to deal again.

Under the program, arrested dealers who spend up to two years completing private drug-rehabilitation programs like Daytop Village and Samaritan Village are rewarded by having the drug charges for which they were arrested dropped; the arrested dealer is free to pursue a new drug-free life with one less felony blot.

But those who yield to the temptation to walk out on the rehabilitation program's rough self-examination, job training and other responsibilities immediately face the full force of New York State's predicate felony law, which mandates prison time for second-time drug offenders, with little leeway afforded sentencing judges.

For public officials, the cost of treatment versus incarceration of nonviolent drug offenders is increasingly important. The Brooklyn program costs about $17,000 a year for each dealer in treatment, less than half the cost of imprisonment, about $40,000. But the real choice in public policy is not that simple, and alternative approaches to prison can prove risky for responsible officials.

'A Terrifying Experience'

An assistant district attorney, Susan A. Powers, recalled the initial anxiety that the program, rooted in Mr. Hynes's unusual use of his case-disposal powers, might prove to be a gamble that failed, with addicts scandalously fleeing in droves. "It was a terrifying experience," she said. "But the results so far have been rather amazing." Ms. Powers pointed out that 70 percent of the addicts admitted to the program have stayed, versus a rate of about 13 percent nationally in voluntary drug-treatment programs.

"Retention is the key to success, studies show, even if you're forced to enter a program," she said. "They can change you if they can keep you,"

> 'This is the hardest thing an addict's going to do,' a director says.

providing the programs are as long term and experience proven as Daytop and Samaritan.

"This is actually a lot harder for them than jail," said Ed Hill, director of the privately run Daytop Village center in Swan Lake, in the Catskills, where Mr. Rios, ever a manager, has risen in 11 months to be the chief administrator for running the woodshop and its staff.

"This is the hardest thing an addict's going to do because it represents true and total change," Mr. Hill said. "No more the swaggering tough guy with the .45 pistol in his belt or the 9-millimeter in his boot. We're talking complete overhaul."

He stressed that society was right to want its streets cleaned of the plague of addict-dealers like Mr. Rios but that the real issue, finally faced fully by this program, was whether to try to change them or to merely guarantee a deeper problem with prison-toughened criminals.

Mr. Rios, a trim, watchful man with more than half his 29 years of life already invested in drugs, said pragmatism was as effective as idealism in Mr. Hynes's program. He conceded that he had jumped at the program mainly to avoid prison and had thought he could ease through and feign dedication when needed, as with other more casual programs that he had gone through inside prison and out.

Mr. Hill, a Daytop graduate from Brooklyn's street-drug pathology of two decades ago, smiled, noting that avid peer-pressure is only one tool intended to root out routine fakery. Mr. Rios said he eventually found change and growth in himself necessary to stay in the program.

"Here, instead of doing 7 to 15 in prison, I'm not even doing time," he said gratefully. "I'm learning a lot about myself, what a threat I am to me and to others. What I am learning is to finally begin valuing my life."

Of the 30 percent in dropouts from the program, Mr. Hynes's pursuit squad, put together especially for this program, has arrested 95 percent to resume the court process. Of 64 returned to court, 51 received felony prison terms and 11 cases were pending as of the latest tally in November. Only two received misdemeanor treatment — a tribute to the original selection of firm second-felony drug cases by the District Attorney to guarantee the harsh stick needed to complement the program's inviting carrot.

Long-range effects are yet to be measured since only the first 14 graduates have returned to their communities. "I had my hand on the doorknob several times, ready to walk," said Angelo K., a 30-year-old graduate who completed the program's residential and re-entry programs, learning to be a diesel mechanic in the process. Through the program he has obtained a job in his old neighborhood, Sunset Park, still as drug-infested as when he began dealing as a 14-year-old.

'Finally Be an Adult'

"It was like I was frozen in my childhood back then," Angelo said. "The program resumed my life. I feel like I lived the rest of childhood in a year and sped forward to finally be an adult. Basically, they taught me we're not bad people," he said of the Samaritan Village program and his fellow addicts aiming for change.

Despite the program's modest enrollment, its surprising retention rate among the notoriously unreliable addict community is encouraging enough to attract praise from the office of Gov. Mario M. Cuomo and a decision to expand it to the other city prosecutors. A $700,000 state allocation of Federal anti-drug money will help finance 300 new residential treatment slots beyond the 200 in the Brooklyn program.

"The future of this approach is very dependent on the available treatment slots," Ms. Powers stressed. "There are only something like 15,000 full-scale residential slots available nationally — amazingly small — and maybe two-thirds of them are in New York and California. If the Clinton Administration is serious with its talk about changing the 70-30 approach of law-enforcement-to-treatment to something more of a 50-50 breakdown, then this program and others like it have a future."

Mandatory Minimums

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
400 South Phillips Avenue
Sioux Falls, South Dakota 57102

B. JONES
f Judge

December 22, 1992

Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
Federal Judiciary Building
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Post-sentence Supervision Juvenile Offenders

Dear Judge Wilkins:

I have been told the Sentencing Commission will soon be proposing legislation that would provide for post-sentence supervision in juvenile cases. I am writing to express my support for such a proposal. This issue is important to us because we dispose of an inordinate number of juvenile cases resulting from crimes committed in Indian country.

For a lot of the same reasons post-sentence supervision is appropriate for adults, it is equally appropriate for juveniles. Moreover, given the personal and social problems frequently present in many of these cases, the need for post-sentence supervision is often acute. Furthermore, one should not be deceived by the "tender" age of some juvenile offenders; they are frequently impetuous and dangerous and pose a serious threat to the public. Accordingly, post-sentence supervision would not only provide an opportunity for much needed guidance and encouragement, it would also provide a means of removing dangerous juvenile offenders from the community and returning them to residential correctional treatment programs.

Sincerely,

JOHN B. JONES
Chief Judge

cc: Mr. Donald Chamlee, Chief,
Division of Probation, AO

Office of the
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF FLORIDA

H. JAY STEVENS
Federal Public Defender

Reply to: JACKSONVILLE

JACKSONVILLE DIVISION	ORLANDO DIVISION	TAMPA DIVISION	FT. MYERS DIVISION
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January 2, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: **Comment on Dec. 31, 1992 Proposed Amendment 61**

Dear Mr. Courlander:

Our office represents Mr. Terry Lynn Stinson in **Stinson v. United States**, Case No. 91-8685, in which certiorari was granted on November 11, 1991. The **Stinson** case involves the question whether it is a misapplication of the sentencing guidelines for a court to fail to follow the specific direction of current U.S.S.G. §4B1.2, application n.2, that possession of a firearm by a felon is not a "crime of violence." Proposed amendment 61 would reverse the directive which is the subject of **Stinson**.

The brief on the merits in **Stinson** is due January 6, 1993 and oral argument before the Supreme Court is set for March, 1993. The action taken by the Sentencing Commission in announcing this proposed amendment at this time obviously creates uncertainty as to the proper disposition of **Stinson**. We would request that the proposed amendment be withdrawn until the Supreme Court has ruled in **Stinson**.

Barring that, we would ask permission to present testimony at the scheduled hearing on March 22, 1993 in Washington. We will further written comment no later than March 15, 1993, as required by the announcement in the Federal Register.

Sincerely,

WILLIAM M. KENT
Assistant Federal Public Defender

WMK:wmk

United States District Court
Middle District of North Carolina
Post Office Box 3483
Greensboro, North Carolina 27402

Chambers of
William L. Osteen, Sr.
Judge

N. Sec - Career Offender

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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HERMAN AMASA SMITH
OF COUNSEL

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

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

February 10, 1993

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

Dear Judge Wilkins:

I write to express my appreciation of the Proposed Guideline Amendments for Public Comment for the 1993 amendment cycle. This document displays the proposed changes in a format that is easier to follow than the more formal presentation published in the Federal Register. By displaying proposed changes adjacent to sections of text that would be deleted, and including an index containing a brief synopsis of each proposal, you make the lengthy and highly technical document "reader-friendly".

The work of the United States Sentencing Commission is important to the Federal Judiciary. Presentation of the proposed amendments in this manner assists the members of the Judicial Conference Committee on Criminal Law and members of my staff who provide support services to them by making it easier to analyze the impact of the proposals on the work of the courts. Your efforts to streamline the process are appreciated.

Sincerely,

L. Ralph Mecham
Director

cc: Honorable Vincent L. Broderick

UNITED STATES SENTENCING COMMISSION
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Edward F. Reilly, Jr. (ex officio)

February 10, 1993

Honorable Martin L. C. Feldman
United States District Court
500 Camp Street
New Orleans, Louisiana 70130

Dear Judge Feldman:

Thank you for your comments regarding proposed amendment 56 that would permit the courts to apply retroactively the Commission's recent amendment to §3E1.1 (Acceptance of Responsibility).

The Commission published this proposed amendment, along with several others, at the request of the Legislative Subcommittee of the Federal Defenders. In my judgment, the proposed amendment is not likely to gain the necessary four votes to be passed by the Commission. At this time, I do not expect to support the proposed amendment, primarily for the reasons cited in your letter. Moreover, making the three-level reduction under §3E1.1 retroactive for already-sentenced defendants would do nothing to further what I believe was the primary objective of the amendment -- creating an additional incentive for defendants to enter an early guilty plea and/or provide complete information regarding their offense involvement in a timely manner.

I would also like to take this opportunity to commend you for the contributions you periodically have made in guideline training for newly appointed federal judges. Rusty Burress and others speak highly of your work in this area.

Your continuing interest in the work of the Commission is greatly appreciated.

With highest personal regards and best wishes, I am

Sincerely,

Billy Wilkins

William W. Wilkins, Jr.
Chairman

United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans 70130

Chambers of
Martin L. C. Feldman
District Judge

January 28, 1993

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

RE: Proposed Guidelines Amendment
Retroactivity of Amended Guidelines
Range (Proposed Amendment No. 56)

Dear Judge Wilkins:

Thank you for the "Reader Friendly" copy of the proposed guidelines amendments that were submitted for public comment. As usual, the Commission has done an extremely competent job in pursuit of a mammoth mission. I write briefly to oppose proposed amendment number 56, regarding the retroactivity to Section 3E1.1, concerning an additional 1 level reduction for Acceptance of Responsibility.

Although I would not presume to speak for the federal judiciary, I know that I and several members of my Court have previously held that Section 3E1.1 is not retroactive. Our Court was flooded with applications to reduce sentences. I suspect that the view that Section 3E1.1 is not retroactive dominates the current case literature around the country, and that most courts dealt with numerous applications.

I respectfully suggest that to now make Section 3E1.1 retroactive could bring all kinds of unforeseeable chaos in connection with sentence reductions. One can expect hordes of applications coming in involving cases as far back as the imagination can take one. The extent to which applications have been denied is still another consideration, and what one would have to do with them remains uncertain because the extent of retroactivity seems unlimited. Although I do not feel the need to testify, I did want to share these concerns with you.

United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans 70130

Chambers of
Martin L. C. Feldman
District Judge

When you have an opportunity, please give my friend, Rusty Burress, my cheerful good wishes and tell him that I hope to see him at the next video program for newly appointed federal judges.

Sincerely,

MLCF:dcw

Martin L. C. Feldman

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
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
JAMES B. ZAGEL
JUDGE

TELEPHONE
312-435-5713
FTS-387-5713

March 17, 1993

The Honorable Ann C. Williams
United States District Judge
219 South Dearborn, Chambers 1988
Chicago, IL 60604

Dear Ann:

I have comments on three aspects of the proposed amendments. Actually, I have comments on others, but I care particularly about these three.

I. I disagree very strongly with the proposed amendments Nos. 1 and 35. I do not believe that the rule barring evidence of acquitted conduct ought to be adopted. If the standard of proof at sentencing hearings is to remain preponderance of the evidence for all or nearly all purposes, the standard should not be changed for prior acquitted conduct. The proposed amendment can only be founded on the theory that for this one sort of evidence proof beyond a reasonable doubt is required and estoppel occurs because there has been a prior judicial determination that such proof had not been made out. Why is there a different rule for criminal conduct which has not been charged (and for which defendant had no chance to be acquitted)? And what is acquittal? The failure to convict of a particular offense when a jury fails to decide it while convicting or acquitting of related offenses? As a matter of policy I also object and I do so because of cases like those of United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990) and United States v. Masters, 978 F.2d 281 (7th Cir. 1992).

II. I agree with Amendments 23 and 29. The prior rule and its commentary were at war with each other as I noted in United States v. Odoms, 801 F. Supp. 59 (N.D. Ill. 1992). The Commission should propose this amendment, it is a better course of action than the efforts of courts to read into the guideline what is not there.

III. The proposals (24, 31, 47) to allow departure for substantial assistance without government recommendation are ones I would like to support but the administration of such a rule would be difficult. I foresee subpoenas against federal agencies and Assistant U.S. Attorneys in order to secure testimony about how valuable the assistance was. There is a real risk of prolonging hearings of and compromise of confidential information under this new rule. Suppose defendant X says he gave valuable information about dope dealer Y, what happens if the reason this was of no assistance is that Y is an undercover agent still in the field. Y has committed no crime so departure is not justified. Does the government have to reveal this?

Very truly yours,

James B. Zagel
District Judge

JBZ:fo
cc: John Steer, General Counsel
U.S. Sentencing Commission

THE COMMISSIONER OF CUSTOMS

WASHINGTON, D.C.

March 26, 1993

EN-93-0160
CC:MJM

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

Dear Commissioners:

The United States Customs Service has reviewed the proposed amendments to the Federal Sentencing Guidelines as published in the December 31, 1992, issue of the Federal Register (Vol. 57, No. 252, Part IV). Please accept our comments on the following proposals.

With regard to Proposals 6 and 7, Customs agrees that the commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), §2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), and §2F1.1 (Fraud and Deceit) should be amended to identify circumstances in which the loss does not fully capture the harmfulness and seriousness of the conduct. Where some of the harm caused by the offense was nonmonetary, Customs strongly believes that this circumstance should be adopted as a specific offense characteristic providing for a one or two level increase instead of an invited upward departure.

For Proposal 8, our comment is limited to the change with Application Note 7, which addresses "mules". Due to the serious detection problem that contraband carrying "mules" present to Customs, we support Option 3 (the defendant shall not receive a mitigating role adjustment for that quantity of contraband that the defendant transported) for its strong deterrent effect.

Concerning Proposal 9, Customs believes that reducing the upper limit of the Drug Quantity Table from level 42 to level 36 sends the "wrong signal" to those criminal elements involved in narcotics trafficking. Therefore, we strongly oppose this change.

The issue in Proposal 13 invites comment on whether §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt of Conspiracy) should be amended to address the calculation of weight under negotiation in a reverse sting operation. The concern is that when government agents set a price for the controlled substance that is substantially below its market value, the defendant is able to purchase a significantly greater quantity of it than his available resources would have allowed otherwise. With the base level of the offense being tied to the quantity of narcotics purchased, one assumes that the concern is that these defendants are thus "unfairly" treated under the existing guideline. Customs strongly disagrees with this characterization. The purpose behind pegging guidelines to the weight of the narcotics is to create a stronger deterrent for the larger amounts of narcotics involved. An amendment such as this would suggest that a target of a reverse sting operation is somehow less culpable than a defendant who purchased the same amount of narcotics at its market value. Customs does not see the logic in that argument since the criminal intent and act is the same in both situations. This amendment would in effect be giving a "break" to those defendants who happened to be "lucky" enough to be the target of a reverse sting operation.

Proposal 20 revises the guidelines in Chapter Two, Part S (Money Laundering and Monetary Transaction Reporting). A joint working group of the Departments of Justice and Treasury are currently preparing comments on this section and Customs opinion will be included in that report.

As to Proposal 26, due to Customs enforcement responsibilities regarding the exportation of stolen vehicles, we agree that the offense levels in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and §2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) should be raised to reflect the increases in the maximum imposable sentence from five to ten years' imprisonment under section 102 and 103 of Public Law 102-519 (Anti-Car Theft Act of 1992).

Should you have any questions, please contact Matthew McConkey of the Chief Counsel's staff at 927-6900.

Sincerely,

Michael H. Lane
Acting Commissioner

BESKIND, RUDOLF & MAHER, P.A.

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March 19, 1993

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

Dear Chairman Wilkins:

The Criminal Law Section of the North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the December 31, 1992, Federal Register for the 1993 amendment cycle.

Our Section has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Criminal Law Section urges that the Commission adopt the changes proposed in Amendments No. 1, No. 20 and No. 39.

The Criminal Law Section strongly urges that the Commission reject the changes proposed in Amendments No. 5, No. 41 and No. 42.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely,

David S. Rudolf

DSR/cd
NCATL93.C04

NORTH CAROLINA BAR ASSOCIATION

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March 19, 1993

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Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

The Executive Council of the Criminal Justice Section of the North Carolina Bar Association has reviewed the proposed amendments to guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the December 31, 1992, Federal Register for the 1993 amendment cycle.

Our council has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Council fully endorses the responses of the Practitioners Advisory Group to each of the amendments proposed during this cycle. We urge the adoption of Amendments of No. 39, No. 20, and No. 1, and support the options and modifications proposed by the Practitioners Advisory Group.

The Council strongly advocates the rejection of Amendments No. 5, No. 41, and No. 42. The Council thanks the Sentencing Commission for this opportunity to express our views on these matters.

Sincerely

Robert B. Rader, Chair
Criminal Justice Section

cc: J. Donald Cowan, Jr.
Charles E. Burgin
Allan B. Head
Lyle J. Yurko
Jo Hambrick Kittner

PACDL

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March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

Teresa E. Storch
P.O. Box 449
Albuquerque, NM 87103

March 15, 1993

United States Sentencing Commission
Attn.: Public Information
One Columbia Circle, N.E.
Suite 2-500. South Lobby
Washington, DC 20002-8002

Dear Sentencing Commission,

I am writing with the following comments to the proposed amendments to the Sentencing Guidelines. I will refer to the guideline section for which the amendment is being proposed, and I will be following in the order in which the amendments are discussed in the Federal Register, Vol. 57, No. 252.

1. Support the amendment to Sec. 1B1.3 (not using acquitted counts for relevant conduct).

2. No comment on the amendment to Sec. 1B1.11 (use of version of guidelines).

3. Support the policy statement amendment to Sec. 1B1.12 (Juvenile Delinquency Act).

4. No comment on amendment to Sec 2A4.2 (demanding ransom).

5. No comment on amendments to fraud, theft, tax guidelines.

6. Support amendment to Sec. 2D1.1(a)(3), establishing a mitigation ceiling; a mitigation ceiling of level 32 is still too high, however.

7. Support amendment to Sec. 3B1.2, Option 1 (upper limit of drug quantity table at 36).

8. Support amendment to Sec. 2D1.1 concerning "mixture or substance" not including waste.

9. Support amendment to Sec. 2D1.1 (a)(3), Option 1 (offense level limited by amount involved...at any one time).

10. Support future amendment to Sec. 2D1.1 which would take into account "sentencing entrapment" issue in reverse sting operation, and would suggest that amount be based on market rate ant what defendant could reasonably purchase at market rate.

11. No comment to amendment to Sec. 2K1.3 (using Career Offender definition of prior convictions instead of Criminal History definitions).

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12. No comment to amendment to Sec. 2K2.1 (definition of firearms).

13. Oppose amendment to Sec. 2K2.1 (knowledge that firearms stolen).

14. No comment to amendments listed at paras. 17 and 18 of Fed. Reg.

15. Levels 6 and 8 for violations of 18 USC 922 and 930 appropriate.

16. Amendment to Sec. 2S1.1 (a)(1) concerning "if defendant committed the underlying offense" and "level for that offense can be determined" is vague. Otherwise, no comment.

17. No comment on amendments to the tax section.

18. No comment to amendment to Sec. 2X1.1.

19. Support amendment to Sec. 3B1.3.

20. Support an amendment to the guidelines which would allow a judge to depart for substantial assistance without government motion for non-violent first offenders.

21. Support amendment to Sec. 6B1.2 (requiring government to disclose information to guideline application).

22. No comment on car-theft guideline.

23. Support consolidation guidelines as outlined at Para. 27 of Fed. Reg.

24. Support the additional language to Introductory Commentary at Ch. 5, Part H, as proposed by the Judicial Conference.

25. Support the Bar Association amendment to 5K1.1, over the Commission's amendment commented on above at Para. 20; should not be limited to first offenders. Support Option A in providing an additional ground for departure rather that B.

26. Supports expanding Zones A and B in general (Para. 33, Fed. Reg.).

27. Supports restricting sentencing court's consideration of conduct that includes the elements of the offense to which Defendant pleads guilty (Para. 34 Fed. Reg.).

28. Support proposed amendments as outlined by Practitioner's Advisory Group, Paras. 35, 36, 37, 38, 39, 40, Fed. Reg.

29. No comment on amendment proposed by IRS and US Postal Service (Paras. 41-46, Fed. Reg.).

30. Support proposed amendments as outlined by Federal Defenders (Paras. 47-56, Fed. Reg.).

31. Oppose amendments proposed by the Department of Justice (Paras. 57, and 60-66, Fed. Reg.).

32. No comment on amendments proposed by the Department of Justice, Paras. 58 and 59, Fed. Reg.

Sincerely,

Teresa E. Storch

Post-it ™ brand fax transmittal memo 7671	# of pages ▸ 1
To PUBLIC OPINIONS	From V. CONROY
Co. U.S. SENTENCING COMM.	Co.
Dept.	Phone # 314-781-8160
Fax # 202-213-4529	Fax #

March 12, 1992

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Commissioners:

This letter concerns the series of proposed amendments to the sentencing guidelines. I am writing to advocate the passage of proposed Amendment 50, which will eliminate the weight of the carrier in LSD cases, allowing the actual weight of the drug, not the carrier weight, in determining the offenders sentence.

I believe Amendment 50 will correct the current inequity in the sentencing of LSD offenders. I believe that LSD offenders are being and have been sentenced far in excess of what justice requires due to the inclusion of the carrier medium.

✳ I also advocate passage of proposed amendment 56, which would allow for the correction of the previous guidelines, which were enacted with good intent, but in practice have proven to be at at odds with Congress's mandate to the Sentencing Commission to promote uniformity of sentencing.

Thank you for your consideration regarding this matter.

Sincerely,

Virginia L. Conroy
2187 Clifton
St. Louis, MO 63139

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

714 / 836-2055
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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
United States District Judge

Amendment 3

1. Omit proposed § 1B1.12

Unless the function of Policy Statements has been expanded to alert attorneys to a law that they should already know if they handling a juvenile case in federal court or to alert probation officers to the non-applicability of guideline sentencing to juveniles, this addition is an accurate but superfluous statement of prevailing law. § 1B1.12 is unnecessary inasmuch as the Supreme Court decision states the rule.

(I suppose it is ironic that in a recent juvenile homicide on my docket, neither counsel nor the probation officer appeared to know of U.S. v. R.L.C..)

2. Retain the Second Paragraph of § 5H1.1

We know that "Age" is discussed in Chapter 5 and I favor **retention** of § 5H1.1's second paragraph.

It is still accurate; R.L.C. merely put a cap on the sentence. Either the case citation, or one sentence, or both, could be inserted:

> However, the sentence may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult. See United States v. R.L.C., 112 S.Ct.1329 (1992).

3. Fix the Index

No entry appears in the Index for "minors" or for "juveniles." The amendment could be downgraded as suggested above and enlarging the Index would be the simplest place to help practitioners and probation officers note this minor addition.

Amendment 56

As suggested on page 5 concerning "healing" amendments, retroactive applications will hopefully be kept minimal.

It seems that § 3582(c) contemplated primarily Offense Level changes as grounds to modify sentences. This Amendment would be the first, as best as I can tell, to inject Chapter 3 Adjustments into Chapter One's list in § 1B1.10(d)'s retroactive amendments.

It certainly is a policy call, of course, but my fairly recent research on this issue indicated that no Circuit was concluding that the amendment to § 3E1.1 was to be applied retroactively. There will be a great number of motions forthcoming, be assured.

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: **26. Issue for Comment.**

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

TO: U. S. Sentencing Commission
Public Information

✳ The appropriate guideline for carjacking is the robbery guideline found at 2B3.1. It has all the elements needed to calculate the offense level. Carjacking is a violent offense commited against a person and should comprise its own count group for each crime.

THOMAS P. JONES
ATTORNEY AT LAW
EAST CENTER STREET
P. O. DRAWER 0
BEATTYVILLE, KENTUCKY 41311
(606) 464-2648

February 22, 1993

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

To the U.S. Sentencing Commission:

I would like to express my support for the proposed amendments to the Sentencing Guidelines. I would especially like to voice my support for the following four amendments:

Proposal II, option 1: restructures 2D1.1 so that the offense level is based on the largest amount of a controlled substance in a single transaction.

Proposal 39: reduces the offense levels associated with higher drug quantities by two levels.

Proposal 50: bases the offense level in 2D1.1 on the amount of actual L.S.D. involved without including the weight of any carrier medium.

Proposal 56: pertains to 1B1.10, expanding the court's ability to apply changes in the Sentencing Guidelines retroactively.

These proposals would all help to insure fairer judgment in dealing with small-time drug offenders. It is only fair and reasonable to make any changes retroactive, providing convicted offenders the same reduced sentences being granted to new offenders. Thank you for your efforts at making the guidelines more equitable, so that the punishment will truly reflect the crime.

Sincerely,

Thomas P. Jones

Thomas P. Jones
Attorney at Law

TPJ/bm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
U. S. DISTRICT JUDGE
U. S. COURT HOUSE
DES MOINES, IOWA 50309

February 9, 1993

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

Attention: Public Information

This letter sets forth some comments I have concerning proposed guideline amendments. I may supplement these comments with a later letter after I have had an opportunity to examine the proposed guidelines amendments in greater detail.

By and large, the proposed amendments look good to me. I strongly favor proposed amendments 1, 9, 10, 11, 12, 23 and 25.

In respect to 13, issue for comment, I believe that section 2D1.1 should be amended to reduce the amount of drugs for which the defendant should be held responsible to the amount that the negotiated payment would fetch on the actual market.

In respect to 24, issue for comment, I believe that the court should have downward departure power for substantial assistance, without a government motion, when the defendant is a first offender and the offense involves no violence. Indeed, I would prefer an even broader power.

In respect to 40, issue for comment, I believe the Commission should ask Congress to eliminate the 100 to 1 ratio for powder and crack cocaine. The Draconian sentences required for crack offenders are unconscionable.

In respect to 66, issue for comment, I strongly oppose a 4 level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang because I believe that such a guideline would be difficult to apply, would border on guilt by association, and would tend to infringe on constitutional rights of free expression and association. It would work far more mischief than good, I fear.

Sincerely,

Harold D. Vietor

Harold D. Vietor