conviction, as opposed to the limiting view toward relevant conduct taken by the Sixth Circuit in United States v. Wright, 12 F.3d 70 (6th Cir. 1994).

We believe that Wright clearly demonstrates a situation where a victim can be a victim of an offense without being a direct victim of the offense of conviction. In this case, the defendant used the economic vulnerability of several people to induce them to participate in his scheme to defraud the government through the filing of false tax refund claims. In Echevarria, the defendant held himself out as a physician to defraud health insurance providers. The patients were victims of the offense because they believed they were receiving effective medical attention; however, they were not victims of the offense of conviction. In both of these cases, the defendant "used" individuals for their particular criminal scheme based on those peoples' vulnerability and, as such, we believe that this conduct deserves to be dealt with severely through the use of a two level enhancement. One way to resolve this conflict is making it clear in the guideline commentary that the enhancement is meant to encompass such conduct.

Proposed Amendment 28(14) - Issue for Comment

This issue for comment concerns the circuit conflict of whether the collateral consequences of a defendant's conviction can be the basis of a downward departure. We believe that granting a downward departure on the basis of collateral consequences undermines the Congress' goal of achieving uniformity in sentencing. Prosecution of white collar crimes often involve professionals and business persons who, as a result of their convictions and/or sentences, encounter loss of licenses and closure of businesses. To allow these defendants to take advantage of this additional potential windfall which is unavailable to nonprofessional and employee defendants, promotes the unequal treatment of the defendants that the guidelines sought to eliminate.

In addition to the cases cited in Proposed Amendment 28(14), a recent tax case, United States v. Olbres, 99 F.3d 28 (1st Cir. 1996), involved a husband and wife defendants who appealed the denial of a downward departure based on the fact that their business would fail and their 12 employees would lose their jobs if the defendants were imprisoned. The District Court denied the departure because it did not believe that business failure and third party job loss could legally serve as the basis for a downward departure. The first Circuit applying Koon v. United States, 116 S.Ct. 2035 (1996) remanded the case and noted that only a "rare case" falls outside the heartland that "the mere fact that innocent others will themselves be disadvantaged by the defendants' imprisonment is not alone enough to take a case out of the heartland."

Consequently, we believe that collateral consequences should not be the basis for a downward departure.

Proposed Amendments 37(S) and (T) - Consolidation of §§2T1.1 and 2T1.6;

Consolidation of §§2E4.1, 2T2.1 and 2T2.2

Proposed Amendment 37(S) consolidates §§2T1.1 and 2T1.6. Section 2T1.6 applies to 26 U.S.C. § 7202 (Failing to Collect or Truthfully Account for and Pay Over Tax). The consolidation of these guidelines is logical and, therefore, we have no objection to this proposed amendment.

Proposed Amendment 37(T) consolidates §2E4.1 (contraband cigarettes) with §2T2.1 (nonpayment of alcohol and tobacco taxes) and with §2T2.2 (regulatory offenses). All of these are infrequently applied guidelines and we have no objection to this proposed amendment.

MFKlotz/pt 3/12/97
MFKlotz x15 SEN-AMND.98

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
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March 25, 1997

MEMORANDUM:

TO: Chairman Conaboy
Commissioners
John Kramer
Paul Martin
John Steer
Jonathan Wroblewski
Judy Sheon
Jeanne Gravois

FROM: Mike Courlander

SUBJECT: Public Comment

Attached is recently-received public comment from the Practitioners' Advisory Group which includes their views on proposed amendment #10, Part II, and crack cocaine.

CUA

THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington, D.C. 20064
202-319-5140

March 24, 1997

The Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Guideline Amendments
& Issues for Comment, 1997 Cycle--Part II

Dear Chairman Conaboy:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the Proposed Amendment #10 (dealing with increasing the penalties for Methamphetamine) for Part II of the 1997 proposed guidelines and issues for comment. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comment. Depending on time constraints I may send you an additional letter on other proposed amendments that are included in Part II, but I wanted to make sure that the Commission received our views on Amendment #10.

Proposed Amendment #10--Part II
(increasing penalties for Methamphetamine)

The PAG believes the Commission would be well advised to conduct a study on problems associated with the manufacturing and distribution of Methamphetamine and postpone dealing with this proposed amendment (Parts A.-D.) and the issue for comment (Part E.) during this amendment cycle. We believe the Commission needs more time on this issue in light of the uncertainty of near term Commission and Congressional action on crack cocaine--we strongly feel it would be wrong to propose increased penalties for this drug without "fixing" the drug guidelines and statutes dealing with crack cocaine.

Nevertheless, if the Commission feels that it **must** act at this time I am enclosing herewith the PAG proposal dealing with proposed amendment #10, along with a corresponding drug quantity table

showing how our proposal would work.

[END OF COMMENTS ON PROPOSED AMENDMENT #10--PART II]

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Crack Cocaine

After the Public Hearing held on Tuesday, March 18, 1997, PAG members Lyle Yurko, Esq., Carmen Hernandez, Esq., and I met with Commissioner Budd in regards to crack cocaine proposals. Mr Yurko delivered to Commissioner Budd what was at that time a "working draft" document prepared by PAG member Yurko outlining a crack cocaine proposal. As both Mr. Yurko and I mentioned to Commissioner Budd, this "working draft" document had **not** been approved or agreed upon by the PAG; in fact, a significant number of members of the PAG are not in accord with any proposal to increase at this time the penalties for powder cocaine--at any level--in light of the uncertainty in the Commission and in Congress with how to "fix" the problems with the penalties for crack cocaine. Commissioner Budd did note at the Commission meeting held on Wednesday, March 19, 1997, that this document had not been approved by the members of PAG.

To the extent any copies of the "working draft" document has been circulated by Commissioner Budd to other Commissioners or staff members, I wish to strongly reiterate that this "working draft" document is just that--a proposal drafted by Mr. Yurko which has not yet been finalized or approved by members of the PAG.

****

On behalf of the Practitioners' Advisory Group, we thank you for allowing us to comment further on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett

Fred Warren Bennett
Chairman
Practitioners' Advisory Group

METHAMPHETAMINE AMENDMENT

PART A

The Practitioner's Advisory Group has proposed changes in the drug table which call for an increase in penalty for offenders at quantity levels above Level 26. Those who deal in quantities of 400 grams of mixtures and 40 grams of pure methamphetamine and lower should not have their sentence increased. When concepts of relevant conduct are factored into the proposal, these offenders generally are distributing very small amounts of these drugs over time. Dealers who distribute a few grams of substances per week are currently punished adequately (100 grams equals 5 years). However, for the dealer who possesses more than one pound of a mixture of methamphetamine over time or on one occasion, the Practitioner's Advisory Group has proposed an increase which is 50 percent of the Commission Proposal. This proposal should satisfy the Congressional mandate which we frankly believe was purely politically motivated. If any increase in methamphetamine punishment is justified at all, we believe our proposal, which increases penalties for larger dealers but which does not change sanctions for the already harsh punishment for street dealers, represents a sane response to the Congressional mandate.

PART B

Many controlled substances consumed in the United States are imported from other countries. Until now, no increase for

importation has been thought necessary to adequately punish controlled substance offenders. The Practitioner's Advisory Group believes that treating importation of methamphetamine offenses differently from all other offenses would disproportionately penalize those who possess and sell this substance. We would favor only an import enhancement which applied equally to all substances if there were evidence that clearly established that such drug crimes were being currently inadequately sanctioned. But no evidence has been shown to justify such an increase, rather for at least five years, the Commission has been presented with a barrage of overwhelming evidence which justifies lowering penalties for those who commit drug crimes, and especially for offenders corresponding to Level 26 and lower. The Practitioner's Advisory Group believes that Congress currently lacks the political courage to accept lower drug penalties. Therefore, we believe that the Commission should not submit decreases in drug penalties at this time because while such an act would evidence the Commission's political fortitude, it would not maintain the credibility of the Commission with Congress. However, the Practitioner's Advisory Group strongly urges the Commission not to contribute to the atmosphere of hysteria by increasing penalties whenever Congress suggests higher punishment. No importation increase is necessary to adequately sanction the distribution of controlled substances above the harsh levels which are currently prescribed by the Guidelines and, therefore, no increase should be proposed by the Commission.

PART C

Likewise, little evidence has been presented warranting any sanction increase for environmental damage caused by methamphetamine production. Unless convincing evidence is presented, no Guidelines changes should be established.

PART D

The current special skills sanction embodied in §3B1.3 has functioned adequately for ten years. No special methamphetamine section needs to be created, rather, in the spirit of "simplification," methamphetamine cases should simply continue to be subjected to §3B1.3, unless evidence is presented which overwhelmingly demands special treatment.

PART E

No aggravating factors are warranted and therefore no proposals to modify need be made.

CONCLUSION

The Practitioner's Advisory Group understands that the issues embodied in the methamphetamine proposal go beyond simply prescribing sanctions for methamphetamine offenders. The broader

question of who should control punishment, Congress by mandatory minimums or the Commission by more proportional guidelines is at issue. However, by increasing methamphetamine penalties only at the high levels and only one-half as heavily as Congress was contemplating, the Commission can respond to what has become an increasingly demagogic anti-drug atmosphere in Washington and elsewhere with a degree of sanity. Commissioner Gelacak has proposed defiance of Congress's methamphetamine mandate in the face of evidence that drug penalties are already too harsh. The Practitioner's Advisory Group proposal dilutes the Congressional increases, saving for another day the fight for a complete return to sane drug policies.

Proposed Amendment ___: Part A (The Drug Quantity Table)

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
(1) · 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); · 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); · 1.5 KG or more of Cocaine Base; · 30 KG or more of PCP, or 3 KG or more of PCP (actual) · ~~30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice"~~; 22.5 KG or more of Methamphetamine, or 2.25 KG or more of Methamphetamine (actual), or 2.25 KG or more of "Ice" · 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); · 12 KG or more of Fentanyl; · 3 KG of more of a Fentanyl Analogue; · 30,000 KG or more of Marihuana; · 6,000 KG or more of Hashish; · 600 KG or more of Hashish Oil.	**Level 38**
(2) · At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); · At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); · At least 500 G but less than 1.5 KG of Cocaine Base; · At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); · ~~At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice";~~ · At least 7.5 KG but less than 22.5 KG of Methamphetamine, or at least .750 KG but less than 2.25 KG of Methamphetamine (actual), or at least .750 KG but less than 2.25 KG of "Ice" · At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); · At least 4 KG but less than 12 KG of Fentanyl; · At least 1 KG but less than 3 KG of a Fentanyl Analogue; · At least 10,000 KG but less than 30,000 KG of Marihuana; · At least 2,000 KG but less than 6,000 KG of Hashish; · At least 200 KG but less than 600 KG of Hashish Oil.	**Level 36**
(3) · At least 3 KG but less than 10 KG of Heroin	**Level 34**

(or the equivalent amount of other Schedule I or II Opiates);
· At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 150 G but less than 500 G of Cocaine Base;
· At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
· ~~At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";~~
· At least 2.25 KG but less than 7.5 KG of Methamphetamine, or at least 225 G but less than 750 G of Methamphetamine (actual), or at least 225 G but less than 750 G of "Ice"
· At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 1.2 KG but less than 4 KG of Fentanyl;
· At least 300 G but less than 1 KG of a Fentanyl Analogue;
· At least 3,000 KG but less than 10,000 KG of Marihuana;
· At least 600 KG but less than 2,000 KG of Hashish;
· At least 60 KG but less than 200 KG of Hashish Oil.

(4) · At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 32**
· At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 50 G but less than 150 G of Cocaine Base;
· At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
· ~~At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 KG of Methamphetamine (actual), or at least 100 G but less than 300 KG of "Ice";~~
· At least 750 G but less than 2.25 KG of Methamphetamine, or at least 75 G but less than 225 G of Methamphetamine (actual), or at least 75 G but less than 225 G of "Ice"
· At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 400 G but less than 1.2 KG of Fentanyl;
· At least 100 G but less than 300 G of a Fentanyl Analogue;
· At least 1,000 KG but less than 3,000 KG of Marihuana;
· At least 200 KG but less than 600 KG of Hashish;
· At least 20 KG but less than 60 KG of Hashish Oil.

(5) · At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 30**

· At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 35 G but less than 50 G of Cocaine Base;
· At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
· ~~At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";~~
· At least 225 G but less than 750 G of Methamphetamine, or at least 22.5 G but less than 75 G of Methamphetamine (actual), or at least 22.5 G but less than 75 G of "Ice"
· At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 280 G but less than 400 G of Fentanyl;
· At least 70 G but less than 100 G of a Fentanyl Analogue;
· At least 700 KG but less than 1,000 KG of Marihuana;
· At least 140 KG but less than 200 KG of Hashish;
· At least 14 KG but less than 20 KG of Hashish Oil.

(6) · At least 400 G but less than 700 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 28**
· At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 20 G but less than 35 G of Cocaine Base;
· At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
· ~~At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";~~
· At least 125 G but less than 225 G of Methamphetamine, or at least 12.5 G but less than 22.5 G of Methamphetamine (actual), or at least 12.5 G but less than 22.5 G of "Ice"
· At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 160 G but less than 280 G of Fentanyl;
· At least 40 G but less than 70 G of a Fentanyl Analogue;
· At least 400 KG but less than 700 KG of Marihuana;
· At least 80 KG but less than 140 KG of Hashish;
· At least 8 KG but less than 14 KG of Hashish Oil.

(7) · At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 26**
· At least 500 G but less than 2 KG of Cocaine

(or the equivalent amount of other Schedule I or II Stimulants);
· At least 5 G but less than 20 G of Cocaine Base;
· At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
· ~~At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";~~
· At least 100 G but less than 125 G of Methamphetamine, or at least 10 G but less than 12.5 G of Methamphetamine (actual), or at least 10 G but less than 12.5 G of "Ice"
· At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 40 G but less than 160 G of Fentanyl;
· At least 10 G but less than 40 G of a Fentanyl Analogue;
· At least 100 KG but less than 400 KG of Marihuana;
· At least 20 KG but less than 80 KG of Hashish;
· At least 2 KG but less than 8 KG of Hashish Oil.

(8) · At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 24**
· At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
· At least 4 G but less than 5 G of Cocaine Base;
· At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
· At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Methamphetamine (actual), or at least 8 G but less than 10 G of "Ice";
· At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
· At least 32 G but less than 40 G of Fentanyl;
· At least 8 G but less than 10 G of a Fentanyl Analogue;
· At least 80 KG but less than 100 KG of Marihuana;
· At least 16 KG but less than 20 KG of Hashish;
· At least 1.6 KG but less than 2 KG of Hashish Oil.

UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF COUNSEL

March 14, 1997

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

Attention: Michael Courlander
Public Information Officer

Dear Mr. Courlander:

The United States Postal Inspection Service respectfully submits it comments to the proposed amendments published by the Commission in the January 2, 1997, Federal Register.

Generally, we support the Commission's efforts to consolidate and simplify the guidelines, especially in the area of loss determination for theft and fraud offenses. Over the last four years, we have proposed amendments for calculating the economic loss for theft of mail generally and the theft of mail containing credit cards. In our submission this year, we again recommended changes to address these problems. In particular, we proposed alternative means to determine the economic loss for stolen credit cards and large volume mail thefts based on the principles of intended loss and risk of loss. Specific provisions that authorize an upward departure for these offenses would address the shortcomings of the current guidelines. Furthermore, there are inconsistent interpretations among the circuits in the application of the theft guidelines for stolen, but unused, credit cards that we believe the Commission should address.

Although our proposed amendments were not published, the reasons we gave in their support are similar to those cited by the Commission in its proposed amendments for 1997.

We are in favor of increasing the base offense level for theft and fraud offenses as proposed in Amendment 18. However, we have a concern with the deletion of §2B1.1(b)(3), the specific offense characteristic that provides for a two-level increase for the theft of undelivered United States mail. We do not support the elimination of this guideline and disagree with the narrative accompanying its proposed deletion: "[b]ecause the floor of 6 for offenses involving the theft of mail is unnecessary given the proposal to increase the base offense level for offenses from 4 to 6."

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The federal statutes governing the theft and obstruction of mail differentiate United States mail from other stolen or destroyed property. We believe this distinction was the basis for §2B1.1(b)(3) when it was promulgated and feel strongly that it should be maintained in any general offense level increase proposed for the theft guidelines. The current guideline considers the inherent value of mail that cannot always be measured in dollars, the government's fiduciary role in this public communications service, and the mail as an integral part of our nation's commerce. Moreover, the commentary to the mail theft guideline states: "[t]hat the theft of undelivered mail interferes with a government function and the scope of the theft may be difficult to ascertain." For these reasons, we request the Commission maintain a two-level increase for theft or destruction of United States mail above any new base offense level established for theft offenses.

As a final matter, we agree with Amendment 37 that would consolidate the mail theft and obstruction guidelines and the corresponding change to the commentary.

If you have any questions, or need additional information, please feel free to contact me at (202) 268-4415.

Sincerely,

H. J. Bauman
Counsel
Office of Chief Inspector

March 13, 1997

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

Dear Mr. Courlander:

Enclosed, pleased find our comments with regard to the amendments proposed by the United States Sentencing Commission.

Sincerely,

Mary Lou Soller
Miller & Chevalier
655 Fifteenth Street, N.W.
Suite 900
Washington, DC 20005

Alan J. Chaset
Law Offices of Alan J. Chaset
908 King Street
Suite 200
Alexandria, VA 22314

Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Sections's Committee on the United States Sentencing Guidelines. The members of that committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists. We are corresponding today, however, in our individual capacities as private defense attorneys and not as representatives of either the committee, the section or the association.

On January 2, 1997, the Commission published notice of proposed temporary emergency guideline amendments. Additionally, that notice contained several "non-emergency" proposals to amend and consolidate various other sections of the guidelines. Subsequently, on February 25, 1997, the Commission published another notice containing proposals for other emergency and non-emergency amendments to the guidelines and including some conforming changes to the previously published proposals. While we have already forwarded a brief response to the initial set of emergency proposals in our representative capacity, we are using this occasion to address some of the issues raised within the remainder of those notices and ask that you accept these comments on our own behalf.

As a starting point, we wish to commend the Commission (and more specifically its staff) for the significant amount of effort obviously reflected by the broad range of issues implicated by the various and numerous proposals. To the agency's credit, it was able to craft potential changes to advance its commitment to simplify and consolidate the guidelines while, at the same time, drafting responses to the many legislative directives requiring some more immediate action. And it was also able to deal with other aspects of the guidelines that needed adjustment, able to address several disparate decisions between the circuit courts, and able to attempt to placate the various constituent groups, entities and organizations that seek amendments to the Manual.

Because we are cognizant of the quantum of effort required just to produce the several hundred pages of proposals and because we understand the work that would now be required to polish and refine these matters to permit their adoption and to facilitate their implementation, we appreciate all the more the signal apparently being provided by the Commission as to what can and probably will be handled during this amendment cycle and what needs to be deferred for the present. Rather than being critical of the Commission for raising false hopes, we fully understand that message in general and recognize the impact of the two current commissioner vacancies in particular. Furthermore, considering previously stated remarks in regard to the Commission's Rules of Practice and Procedure, we believe that such deferral would be consistent with the suggestion of a more deliberate system of proposal, comment, review and more focused reproposal.

Having said the above, we believe that the Commission must in turn appreciate that, as a consequence, it has been somewhat more difficult to enlist volunteer members of our and other such committees to spend the time necessary to fully and properly consider and then formally address each of the proposals on the long amendment agenda. For instance, while some of our

volunteers were ready to volunteer their individual opinions on single issues, there was insufficient comment and discussion provided as to most others. As a result, no clear consensus position could be achieved for each of the items on the lists and thus no fairly representative statement could be crafted. We will, however, be providing herein some brief comments of our own on several of the proposals and we do offer our commitment to continue to work with the Commission and its staff on the remainder.

With that as background and even though we are speaking as individual practitioners, please understand that our principal policy directive on sentencing guideline matters is still to be found in the ABA Standards for Criminal Justice, Chapter on "Sentencing," third edition. More specifically, Standard 18 - 2.4 instructs that: "Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized." And Standard 18 - 4.3(c) instructs that: "Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding with experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments."

I. January 2, 1997 - Non-Emergency Amendments

A. Amendment 5: While cognizant of the fact that the proposal here effectively amounts to making permanent a previously promulgated emergency amendment, we remain uncomfortable with U.S.S.G.§3A1.4 in its current and amended forms because we see it as violative of the basic structure of the guidelines. We believe that the existing provisions in Chapter Two and Chapter Four, coupled with the ability to depart for relevant offense and offender characteristics, should be sufficient to address these clearly more serious crimes of terrorism. Further, in the absence of data and/or other evidence speaking to the inadequacy of the current provisions and mechanisms, we cannot support the establishment of a mandatory minimum of 210 months for all such crimes committed by all offenders (including those with no criminal history points).

B. Amendment 6: We too are troubled by the confusion surrounding the definition of "instant offense" and its relation to relevant conduct and we also believe that explanatory language is needed. Unfortunately, the current proposal does not fully address and solve that confusion and that need. While we believe that more work is needed on this otherwise worthwhile proposal, we are also troubled by what is labeled as a conforming change to U.S.S.G. §3C1.1. Despite the label, we view the amendment as applied here as more a broadening of the coverage of this obstruction provision as opposed to an explanatory definition.

C. Amendment 8: We support incorporating the holding in United States v. Hill into U.S.S.G. §1B1.3.

D. Amendment 9: While we have previously and consistently stated our opposition to having acquitted conduct being considered for sentencing purposes and while we favor Option

1B among the proposals now being provided, we are cognizant of the fact that the Commission may not presently be in a position to consider all the implications of United States v. Watts and all the issues surrounding the use of acquitted conduct in the guideline equation.

E. Amendment 10: While we are supportive of that part of this proposal that simplifies the operation of Chapter Two cross references by limiting the what goes into/ what is to be considered in the determination of "greater offense level," we believe that more research needs to be undertaken and presented demonstrating the need to amend U.S.S.G. §2X1.1 as proposed.

F. Amendment 11: We are opposed to the proposed amendment to U.S.S.G. §1B1.10 limiting the impact of retroactive guideline changes to only reductions in the term of imprisonment. For many judges, the sentencing decision is a gestalt reflecting the use of the various sanctioning alternatives available under the statutes and the guidelines. Often, the appropriate sentence for the unique combination of offense and offender characteristics is a similarly unique combination of a particular point on the otherwise applicable range of months, a certain fine including the costs of imprisonment and/or supervision, a period of supervision to follow with particularized conditions of supervision, etc. When one of those factors is changed or eliminated in some way, the entire package has thus been changed. The only way to then achieve the desired balance is to similarly adjust each of the other pieces of the sentencing puzzle.

G. Amendments 12 & 18: The need to address the multiple problems associated with fraud and theft and tax guidelines in general and the interrelated loss issue in particular is most apparent as is the appropriateness of taking those matters off the table for this amendment cycle. While we have not as yet developed a specific position on the changes as currently proposed, we are encouraged by the lead taken in this area by the Practitioner's Advisory Group and are impressed with the drafts already authored by James Felman, Barry Boss and John Cline. As the effort on this front moves forward, we anticipate making substantial use of the product being prepared by these individuals and expect to recommend substantial parts of same for your consideration.

H. Amendment 14: Since we believe that the decisions from the 6th and 11th circuits represent the more appropriate response to the application of the "express threat of death" enhancement in U.S.S.G. §2B3,1, we oppose the proposed changes within the guideline and the application note.

I. Amendment 15: While we remain uncomfortable with language that equates injury as conduct and while there might be a better way to frame the point the Commission is trying to make, we prefer Option 1 as the identified narrower approach to the matter.

J. Amendment 16: While having no difficulty with the first and third parts of this proposal, we are opposed to the functional increase in the offense level for the covered bearer instrument offenses that will occur by moving the offenses from U.S.S.G. §2F1.1 to §2B5.1.

There has been no showing/demonstration that the current arrangement is not adequate to address the crime.

K. Amendment 17: We support the clarification of the meaning of "underlying offense" being proposed here.

L. Amendments 21 & 22: We share the belief that the current guidelines relating to role in the offense merit further study and refinement and we have long felt that these provisions could be integrated in some way with the drug guidelines to lessen the impact of drug quantity on the overall guideline assessment. While we see the need for change, we have some difficulties with each of the options being proposed for dealing with aggravating role and mitigating role adjustments. Because these sections are so significant, we trust that the Commission will place the issue high on the priority list for the next amendment cycle and we pledge to work with staff to share our specific thoughts and suggestions.

M. Amendment 23: While we prefer the clear and convincing standard adopted in the District of Columbia circuit, we believe that the decision in United States v. Dunnigan provides all the guidance necessary here. Further, we oppose the last of the four changes being proposed for the application note to U.S.S.G. §3C1.1; there has been no demonstrated need or other data provided justifying the expansion to a broader set of cases.

N. Amendments 24, 25 & 26: Of the three proposals addressing various aspects of the Acceptance of Responsibility concept in U.S.S.G. §3E1.1, we note our support of only those revisions that remove the restriction that currently prohibits the application of the additional one level decrease for offense level 15 or lower.

O. Amendment 28: As a general proposition, we believe that the Commission should not necessarily dictate a determination/resolution each time a disagreement between the circuit courts is identified as regards the implementation or application of a guideline provision. However, we appreciate the difficulties and unfairness that arise because of disparate interpretations and we are cognizant of the twenty-plus-page document prepared by the Commission's General Counsel listing such conflicts already addressed by Commission amendment.

If, however, the Commission decides to address any of the fifteen conflict issues listed within this proposed amendment during this cycle, please permit us to offer our position on several of those items. As to 4), we believe that a federal prison camp is clearly a non-secure facility and thus is functionally similar to the other listed facilities in U.S.S.G. §2P1.1(b)(3). As to 5), we believe that the two level enhancement at U.S.S.G. §2F1.1(b)(3)(A) requires that the defendant affirmatively misrepresent his/her authority to act on behalf of a charitable or governmental organization. As to 12), we believe that the use of the career offender provisions should be restricted to only those who otherwise statutorily qualify and thus cannot be used for departure purposes. As to 13), we believe that it may be reasonable in some circumstances for multiple criminal incidents occurring over a period of time to constitute a single act of aberrant

behavior thus warranting departure. And as to 14), we believe that it may be reasonable in some circumstances for the collateral consequences of defendant's conviction to serve as the basis of a downward departure.

P. Amendments 33, 34 & 35: We appreciate the desire of the Commission to recognize and implement the holding in Koon v. United States. While we support some of the more technical changes in amendment 34, we believe that amendments 33 and 35 are an inappropriate and unnecessary response to that decision and we see no need to merely repeat the language from the introduction in U.S.S.G. §5K2.0. If the Commission does intend to recraft the entire introduction in an upcoming amendment cycle, that would be the time to handle this matter.

Q. Amendment 37: As to the numerous consolidations and refinements proposed within this item, we have reviewed the detailed comments in this regard prepared by the Federal Public Defenders. While not necessarily adopting the position stated therein on each of the proposed consolidations, we find the effort thorough and complete and commend the discussion to the Commission.

II. February 25, 1997- Emergency/Non-Emergency Amendments

Aside from amendments 2, 12 and 13 that are necessarily implicated by either our previous comments our remarks contained above, we have not had an opportunity to review and discuss these proposals. Any comments in that regard from either us individually or more formally from the committee that we chair will be provided by the March 28, 1997 response date.

Finally, attached hereto are some additional comments prepared by one of the members of the committee. While this document was originated as a response to our request for reactions to the amendments being proposed during this cycle, its content is more general in nature and speaks to the structure of the present system and the author's perceived need for dramatic change. Since we are providing the above discussion in our individual capacities, we thought it appropriate to similarly forward this thoughtful piece from Professor Russell Coombs.

Thank you for this opportunity to provide our input.

COMMITTEE ON CRIMINAL LAW
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March 6, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment for the 1997 amendment cycle. Our comments are brief, in recognition of the fact that the Commission has decided to not enact substantive amendments beyond some circuit splits or conforming amendments, due to the number of amendments necessary to implement new legislative provisions at this time. The Commission has, nevertheless, indicated its desire to receive comment on pending issues, and it is primarily to that end that we direct most of the following comments. All of the proposed amendments we discuss are, in our view, worthy of continued serious efforts toward passage next year. We also urge the Commission to do whatever might be possible this year, beyond implementing legislation and some circuit splits, to improve the system where it is clear that it should be done.

A. Circuit Conflicts

The Sentencing Commission has a responsibility to resolve conflicts among the circuits, in order to maximize uniformity of guideline application and to minimize disparity and unnecessary litigation. These reasons, in themselves, are sufficient justification for the Commission to resolve circuit conflicts on an ongoing basis, to do what it can to ensure the smooth and uniform application of the guidelines with the least litigation possible.

We ask the Commission to resolve those circuit splits we cited in our February 21, 1997 letter, and to also adopt any other conforming or clarifying amendments it deems useful for the operation of the guidelines, in compliance with its statutory task of monitoring the application of the guidelines and clarifying those conflicts and confusions that arise, where possible. We list below those published circuit conflicts that we ask the Commission to prioritize for resolution this year:

1. Amendment # 11: **Application of retroactive amendments.**
2. Amendment # 14: **Express threat of death.**
3. Amendment # 17: **Underlying offense.**
4. Amendment #27: **Controlled substance offense/career offender.**
5. Amendment #23: **Obstructive conduct.**
6 Item 4 of Amendment 28: **Definition of facility "similar facility" to a halfway house**
7. Item 8 of Amendment 28: **A sentence to a community confinement center as prison**
8 Item 10 of Amendment 28: **The fine for costs of supervision or imprisonment**
9 Item 6 of Amendment 28: **"Victim of the offense" under §3A1.1**
10 Item 15 of Amendment 28: **Definition of "non-violent offense" in §5K2.13**

B. Acceptance of Responsibility

We have urged, and continue to urge, the Commission to reform the acceptance of responsibility guideline by "de-linking" the third point from the first two points, to bring a greater degree of certainty to the first two points when the defendant enters a plea, and to allow the court to exercise its discretion, based on a totality of the circumstances, to award the third point reduction to those defendants who not only enter a plea, but do something in addition, i.e., the "plea-plus" situation.

The published amendment was a step in that direction, but we have come to realize that a simpler version would better serve the system. We have discussed among ourselves and with others, including the judicial advisory group and members of the Commission, to more clearly focus on what should be changed, and to change only that, and no more, of the current guideline. We are very close to completing a proposal that we believe would be well received, but some minor fine-tuning still needs to be done. In light of the shortness of time remaining in this cycle, and in light of the low probability that the Commission will be receptive to this amendment this

year, we have decided not to urge adoption of any amendment at this time. However, we urge the Commission to keep acceptance of responsibility high on the agenda for the next amendment cycle.

C. Fraud Table and Loss Issues

We appreciate the Commission's publication of our proposed fraud table and the commitment of your staff to work with us and others in an effort to reach consensus on a new proposed fraud table. The Department of Justice has joined the Committee in calling for increased fraud levels, and the recent FJC judicial survey indicated this was one area in which the judiciary wants change. We asked the Commission to minimize unnecessary litigation by converting the one-level categories to two-level categories and by eliminating the more than minimal planning adjustment. We also asked, as has the Department, that fraud offenses levels be significantly raised.

We realize that the Commission has said it will not be enacting any amendments this year beyond some conforming ones and some circuit splits. However, because it appears that we are very close to achieving a consensus draft proposal, and because of the importance of this issue to the judiciary, we plan to continue working on the fraud proposal. We hope to be able to submit a revised fraud table with accompanying adjustments very soon, which will address the concerns of both the Committee and the Department. If we are able to do so, we hope that the Commission will give it serious consideration this amendment cycle.

We also believe that the loss issues published for comment merit serious consideration, and we have spent considerable time reviewing them. We regret that the Commission chose not to seriously pursue these issues this year. Several of them merit clarification by the Commission, in order to avoid needless litigation and to enhance uniformity of guideline application. We hope the Commission will solicit comment on these issues again next year, and that it will commit staff resources early to help response groups such as ours work through possible options, to ensure that meaningful options are submitted to the Commission for serious consideration next year.

D. Mitigating Role

We still believe that both aggravating and mitigating role adjustments should be reformed, along the lines of the published mitigating role proposal. We were actively working to fine-tune that proposal, and were close to a significant proposal when we were told the Commission was not prepared to go forward with it this year. A proposal similar to that published on mitigating role has been pending for Commission consideration since the 1995 amendment cycle. Role is a crucially important aspect of every federal sentencing, and one in which maximum flexibility is appropriate and needed for the sentencing court. We ask the Commission to also keep role on the table for serious reform next year.

E. Conforming Amendments

We ask the Commission to adopt the following amendments, which simply conform the guidelines to recent changes in law. These amendments can only bring benefit to the system, and avoid ambiguity:

Amendment #34 on §5K2.0.
Amendment #29 on Probation and Supervised Release
Amendment #30 on Supervised Release
Amendment #31 on Restitution
Amendment #36 on the Presentence Report.

Thank you, as always, for your consideration of our recommendations.

Sincerely,

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
John Kramer, Staff Director
John Steer, General Counsel
Members of the Committee on Criminal Law
Eunice Holt-Jones, Chief, Federal Corrections and Supervision Division, AO

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February 27, 1997

Alan Chaset, Chair
Committee on Federal Sentencing Guidelines
Criminal Justice Section
American Bar Association
740 15th Street, N.W.
Washington, D.C. 20005-1009

Dear Alan:

The following are my comments on the current Proposed Guideline Amendments for Public Comment -- Part I. My comments are similar to a September 26, 1996 submission to the Commission, made in my individual capacity.

I shall begin by stating my views as to the principles that should govern two of the most important subjects addressed in the proposed amendments, (1) the topic of departures (amendment number 34), especially departures based on offender characteristics, and (2) the topic of so-called "relevant conduct," along with the subtopic of acquitted conduct (amendment number 9). I consider the need for simplification of the

Guidelines to be closely related to these two topics, and I understand the Commission is considering that problem, so I shall state my views concerning it as well.

I. Departures and offender characteristics

In the long run, the Guidelines should be radically revised to permit or require judges (1) to base sentences on offender characteristics that they now are forbidden to consider or strongly discouraged from considering, and (2) to give greater weight than now to many offender characteristics judges currently are allowed to consider.

I say this should be done "in the long run," because probably it would not be practical to adopt such a radical change comprehensively within the next year or two. On the other hand, it would not be wise to delay the change entirely for a period longer than that. The best course would be to try this change for a few selected categories of offenses and offenders, evaluate the results, and then make additional trials.

My principal concern is that the current Guidelines unduly forbid or minimize judges' reliance on offender characteristics that would justify greater severity of sentences, especially longer terms of imprisonment designed to incapacitate and to deter specifically and generally. However, my reasons for suggesting this change apply also to many offender characteristics that would justify more lenient sentences in some cases. Thus my concern does extend also to the unwisdom of forbidding or minimizing reliance on mitigating facts about

offenders.

The most basic reason for this recommendation is that the predominant purpose of criminal punishment should be to protect society from future crimes, through incapacitation, deterrence, and rehabilitation. The concept of "just deserts" should serve only to place a ceiling on the penalties used to serve the purpose of public protection.

Many of the facts that are most instructive, when a judge is selecting a sentence designed to protect the public, are facts about the offender (other than facts about the crime or crimes for which he is now being sentenced). Such facts about the offender include other crimes or non-criminal, anti-social acts he has committed (whether he was convicted for them or not); his current motivations and skills; his past personal and economic experiences; and many other facts shedding light on his current and likely future character and personality, and thus on his future behavior.

Many federal judges have understood these things. Before 1987 many of them deemed crime prevention the main purpose of their sentences. They relied heavily in selecting sentences on information about crimes of which an offender had not been convicted, on various kinds of information tending to show that another offender was unlikely to offend again, and on many other types of offender characteristics that the current Guidelines place off-limits or give only slight weight. The Guidelines should be revised to permit, and in many kinds of cases to

require, that judges give great weight to many offender characteristics of various kinds.

It would be a red herring to respond that such a change would cause disparity in sentences. The word "disparity," when used to disparage differences in sentences, is always understood to mean unjustified differences. Furthermore, members of Congress and the Commission have often acknowledged that unjustified parity not only is as bad as unjustified disparity, but really is just a different manifestation of the same problems.

The most basic command Congress gave the Commission was to devise Guidelines such that every sentence would be based on all the important facts about each offense and offender, in such a way that the sentence would serve the purposes of crime prevention and just punishment as well as possible in view of economic limitations. Under revised Guidelines such as I recommend, when important differences between two offenders cause them to receive different sentences for the same type of offense, there is no unjustified disparity.

Conversely, under the current Guidelines, when important differences between two offenders are ignored or given trivial weight, and consequently the two receive about the same sentences even though one poses a greater threat of future crime, there is unjustified parity. More importantly, one of the similar sentences fails adequately to prevent crimes.

Research the Commission did before promulgating the initial

Guidelines, and its later research, have obscured the true incidence of both unjustified disparity and unjustified parity among sentences.

Before the first Guidelines, the Commission chose to focus its data collection and analysis only on hard sentencing variables, those that could be defined precisely and objectively, and measured quantitatively. Soft variables were largely ignored, despite their great importance in explaining sentences actually imposed before the Guidelines. As a result, although the initial Guidelines purported to track past practices in most respects, in fact they treated similarly cases that judges wisely had been treating very differently.

After promulgation of the first set of Guidelines, the Commission has persisted in this error. Its data-gathering and analysis have focused almost exclusively on the few, artificially defined offense characteristics to which the Commission had unwisely confined the attention of sentencing judges. Since judges' discretion to depart from the Guidelines is limited and many of them seem timid about departing (especially upward), the data gathered have necessarily given the false impression that the Guidelines have caused almost universal sentencing parity.

The result is that the Commission has overstated the incidence of unjustified disparity that occurred before the Guidelines, and has both understated the incidence of unjustified parity and overstated that of justified parity after the Guidelines took effect. If all the variables that judges

formerly deemed important in sentencing were studied, both for the period before 1987 and for later cases, one would find that the Commission has brought about a very drastic change in the criteria on which federal sentences are based, and in the average time served for some kinds of offenders (and even for some kinds of crimes). This revolution was neither commanded by Congress, nor necessary to the reduction of unjustified disparity. On the contrary, the Commission's relentless course of demanding similar sentences for dissimilar cases has impaired the effectiveness of sentencing to prevent crime, without producing a substantial net improvement in real parity of sentences.

Without doubt, there were plenty of both unjustified disparity and unjustified parity among federal sentences before 1987, for several reasons. There were no substantive standards for sentencing, not even general ones. There were almost no specified procedures. Judges did not have to give reasons for sentences. There was virtually no appellate review of sentences.

The drastic deficiency of that system and of the results it produced was not a good reason, though, for the Commission to build unjustified parity into the Guidelines by ascribing little or no significance to offender characteristics that shed light on the likelihood of future crimes. The Commission should begin expanding the power and duty of judges to rely on such facts.

The issue of offender characteristics is functionally related to that of judicial departures from the specific dictates of the Guidelines. In theory the two issues have no peculiar,

intrinsic interrelationship. However, the current Guidelines' banishing or downplaying of many offender characteristics has created a practical interrelationship between these two issues, in the sense that departures are an escape valve by which a judge can in some circumstances try to ameliorate the Guidelines' deficient treatment of offender characteristics. If the Commission were to conclude, as it should, that the current Guidelines unduly bar or restrict reliance on some important offender characteristics, the most cautious way to experiment with allowing wider and heavier reliance on them would be for the Commission expressly to invite or even encourage specified kinds of departures in this area.

Even if the Commission does so, it would be advisable also to select some kinds of offenses and some kinds of offenders as to which the Guidelines themselves would provide for weighty reliance on certain offender characteristics that the current Guidelines give little or no significance. More would be learned from an experiment with both techniques than with only the former, especially since many judges seem loath to depart, especially upward.

Proposed amendment number 34 seems to permit departures a bit more broadly than do the current Guidelines, but not enough. No proposed amendment would give offender characteristics substantially greater weight than now, in the more specific ways that should be tried. Thus this batch of proposed amendments as a whole does not represent an implementation of the approach I

recommend.

II. Relevant conduct and acquitted conduct

Phrases such as "relevant conduct" are in wide usage, and it is common for people to link the phrase "relevant conduct" with the phrase "real offense sentencing." However, I have long considered use of such phrases confusing and even misleading, for the following reasons.

All can agree that sentences should be based only on relevant facts, not irrelevant ones. Likewise all agree that, among the facts relevant to sentencing, some are best described as facts about the offense or offenses for which this sentence is to be imposed, while the other facts are best described as facts about the offender. Thus, there are relevant offense characteristics and relevant offender characterics, both of which should be considered, while irrelevant offense and offender characteristics should be disregarded.

However, the relevant offense and offender characteristics are not all facts about the "conduct" of the offender and his accomplices. This is true even when we examine only relevant offense characteristics. For example, some of these are facts about the offender's state of mind at the time that he or an accomplice engaged in a particular bit of conduct that is one element of the offense. Others are facts about the results of certain conduct, or about the circumstances existing at the time of certain conduct. Thus, even as to offense characteristics, the phrase "relevant conduct" is misleading.

The point is even plainer when we examine relevant offender characteristics. Some of these, such as prior convictions, are amalgams of prior conduct, states of mind, circumstances, and results. Others, such as an offender's traits of character and personality, are not facts about his conduct at all, but facts inferred from various sources including his conduct, his utterances, and things that others have done to him.

The current Guideline entitled "Relevant Conduct," section 1B1.3, covers not only conduct, but also resulting harm, "any other information specified in the applicable guideline," and "the conduct and information specified in the respective guidelines." The latter phrases cover numerous and various provisions, many of which describe mental states, circumstances, and results, rather than conduct.

The real function of section 1B1.3, beyond merely cross-referencing other Guidelines, is to prescribe the extent to which offenders will be held responsible at sentencing for the conduct of others and for resulting harms. This function is much narrower than the title "Relevant Conduct" suggests. More importantly, section 1B1.3 barely scratches the surface of the issues encompassed by the idea of "real offense sentencing," as the Commission discusses it in Chapter 1 Part A.4.(a) of the current Guidelines.

I therefore suggest different terms in which to frame the issues that people usually have in mind when they use phrases such as "relevant conduct," "acquitted conduct," and "real

offense sentencing." The essential concerns regarding these issues are procedural. That is, on what kinds of evidence should a finding be based that certain alleged facts are true, when a sentencing court will rely on the finding? See, e.g., United States v. Shonubi, 1997 WL 2540 (2d Cir. 1997). How heavy a burden of persuasion should the proponent of the finding carry? See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996). Otherwise what procedures should be used to make the finding? See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981); Specht v. Patterson, 386 U.S. 605 (1967). Whatever the answers are to those questions, is there unfairness in letting the government propose such a finding where the offender has obtained an acquittal of a charge in which the government alleged the same or similar facts?

Terms such as "relevant conduct" are misleading ways in which to refer to these procedural issues, because the same procedural concerns should be raised not only when the facts to be found are covered by the "relevant conduct" guideline (e.g., acts committed by the offender during the offense of the current conviction (sec. 1B1.3)), but also when the facts to be found are facts about offender characteristics. Under the current Guidelines, for example, they might be facts (a) about other crimes of the offender (e.g., the offender's prior similar crimes not resulting in conviction, sec. 4A1.3(e)), (b) about the offender's lack of legitimate economic resources (e.g., his dependence on criminal activity for a livelihood, sec. 5H1.9), or

(c) about his mental and emotional condition (sec. 5H1.3).

Consequently, one should not refer to this as an issue of "relevant conduct." This phrase would not be apt unless expanded to cover various other kinds of facts, e.g., "relevant harms." Nor should one refer to it as an issue of "real offense" sentencing. This phrase would likewise have to be expanded to cover the analogous question of "real offender" sentencing: should we, for procedural reasons, make judges close their eyes to some facts about the offender that bear on the risk of his offending again?

Instead of using these misleading phrases, one should simply address this topic as a set of interrelated issues in the law of sentencing procedure. There are constitutional limits, and within such limits these issues of procedure should be resolved as a matter of policy.

This is not a semantic quibble; these choices of terms have practical consequences. Discussion of these issues of policy and of constitutional law is impeded by use of misleading phrases such as "relevant conduct" and "real offense sentencing." The persons who initially chose these phrases apparently believed in the implicit premise they convey: that the sole or dominant purpose of sentencing is to give offenders their "just deserts," that is, sentences designed entirely to be proportional to the specific crimes for which they are being sentenced. However, the premise that "just deserts" are the purpose of sentencing is unsound, as Congress, judges, and most experts have recognized

for most of American history. I shall explain below why the premise is unsound. For now, it suffices to observe that, for those who view the primary purpose of sentencing as prevention of future crimes, phrases such as "relevant conduct" and "real offense sentencing" impede rational discussion of issues of sentencing procedure.

The discussion is facilitated when the procedural issues are identified more precisely: What kinds of evidence should be usable? What burdens of production of evidence and of persuasion should each party bear? What other procedures should be used? Are crimes of which an offender was previously acquitted a special case for these purposes? What does the Constitution require on each point?

The proper starting place to address these issues is recognition of the functions of procedural rules. In the context of sentencing, there are two principal functions.

First, the procedures should strike a wise balance between (a) reducing the risk of error by using thorough, careful procedures, on the one hand, and (b) reducing delay and expense by using simple, informal procedures, on the other hand. The most important factor in striking this balance is that federal sentencing is done by judges, not juries. Federal judges generally are good at evaluating evidence and applying informal procedures in a sensible and fair manner. For that reason, it has been wise for Congress and the courts to conclude, as they always have, that the rules of evidence applicable in trials

should not govern sentencing, and that simple, informal procedures are wise.

The second principal function of rules of sentencing procedure is to allocate the risk of error between the parties. Since errors will certainly occur under any set of procedures, the procedures should wisely allocate the risk of such errors as between the parties.

The most important factor in allocating the risk of error is that (a) errors in favor of the offender typically increase the danger of future crimes by him and by other prospective offenders, due to inadequate incapacitation and deterrence, while (b) errors in favor of the prosecution typically increase the punishment of an offender above the optimal level, i.e., the level that best achieves crime prevention while limiting the economic costs of punishment and preventing greater punishment than is fair to the offender.

Sentencing procedures should be designed to place most of the risk of error on the offender, rather than on the public. After all, this problem of allocating the risk of error in sentencing would never have arisen but for the offender's admitted or already proven criminal behavior. His presumption of innocence has been waived or rebutted. The current Guidelines unwisely refer to him as the "defendant," a term that ignores the crucial change in his status when he pled or was found guilty. That misleading appellation tempts one to draw unsound analogies between sentencing procedures and trial procedures.

Contrary to the implication carried by the word "defendant," the offender being sentenced is guilty of the crime for which he is about to be sentenced. The prospective victims of his and others' future crimes are innocent, or at least strongly presumed so. Wise procedures would be designed, in cases where facts and predictions bearing on the sentence are in doubt and errors may occur, to protect innocent members of society more than may be necessary, rather than to give convicted offenders undue leniency.

This principle should lead us, for example, to establish burdens of persuasion of sentencing facts different from the preponderance standard currently endorsed by the Commission (sec. 6A1.3) and used by most federal courts. When a convicted offender tries to prove a fact that would mitigate his sentence, he should have to prove it by more than a preponderance. Clear and convincing proof might wisely be required, for example.

Conversely, when the government tries to prove a fact that would support a more severe sentence, the burden of persuasion should be less then a preponderance. There are, of course, other contexts in which a standard lower than a preponderance is used. See, e.g., Kyles v. Whitley, 115 S. Ct. 1555 (1995) (holding that a defendant claiming a violation of the prosecutorial disclosure requirement articulated in United States v. Bagley, 473 U.S. 667 (1985), need only adduce less than a preponderance of evidence that the undisclosed evidence would have been likely to prevent a conviction). "Substantial likelihood" of an aggravating fact

describes pretty well the showing that should justify greater protection of the innocent public from a guilty offender.

Congress has not forbidden this general approach, i.e., allocating most of the risk of sentencing error to offenders. It remains to be seen what constitutional limits the courts will set on the resolution of most specific issues of sentencing procedure. Certainly the Supreme Court has not categorically rejected the general approach I suggest. The Commission, the Congress, and the courts should do all in their power to adopt sentencing procedures that limit the risk of error to the degree that best makes practical sense, and that then allocate most of the remaining risk to the guilty offenders who have created the problem.

An acquittal should not be treated as a special matter for this purpose. Current constitutional precedents make it quite clear that it need not be so treated. See, e.g., United States v. Watts, 117 S.Ct. 633 (1997); Dowling v. U.S., 110 S. Ct. 668 (1990). All an acquittal shows is that the government failed, under the especially rigorous rules of procedure and evidence that govern the trial of one who is presumed innocent, to prove at least one element of the charged offense beyond a reasonable doubt. The acquittal creates no reasonable expectation in the defendant (who later becomes the offender being sentenced for another crime), or in the public, that the same misconduct will not later be proven under less rigorous procedural and evidentiary rules, to a lower degree of probability, at the

subsequent sentencing.

All three of the options in proposed amendment number 9 are unsatisfactory, even Option 3. It provides no articulation of the "substantial concerns of fundamental fairness" that supposedly might arise. Attempts by courts and commentators to identify and explain the nature of any perceived unfairness have not been specific or cogent. There should be no general invitation to depart downward on such a vague ground and, unless the Commission can articulate the purported unfairness specifically and persuasively, there should be no such invitation at all.

III. Simplification of the Guidelines

It may seem that my suggestion to add more offender characteristics is incompatible with simplification of the Guidelines. The impression that my views are contrary to simplification may be strengthened when I add that, in my view, the current Guidelines unduly limit the number of offense characteristics courts can consider, and their ways of doing so. It may also seem that the Congressional limit on ranges of terms of imprisonment to the lesser of six months or a 25% span obstructs simplification.

Despite these likely impressions, simplification is indeed possible and desirable. The Commission's attempt to simplify the Guidelines should be based on the following fundamental observations and principles.

Criminal behavior is enormously voluminous, varied, and

complex. Likewise, the character traits and other personal qualities that lead offenders to commit crimes are extremely varied, complex, and subtle, and the facts about an offender's life that shed substantial light on these traits and qualities are even more numerous, varied, and complex.

Crime prevention is extremely important. Therefore, it is wise to design the criminal justice system so that the public actors (e.g., legislatures, prosecutors, judges, and jurors) who make decisions about criminal law, prosecutions, convictions, and sentences can consider every important fact about each crime and each defendant. Only in that way can crime prevention be made as effective as practically possible, while at the same time unjust convictions and excessive sentences are avoided.

However, it would be impracticable to consider every significant offense and offender characteristic at every stage of the criminal process. Dealing sensibly with information that is so voluminous, varied, complex, and subtle requires great flexibility and discretion to handle every case in a unique way. The presumption of innocence and other important procedural protections would be impossible to enforce adequately if every stage of a criminal case were handled with great flexibility and discretion.

The basic solution to this problem that the federal and all state governments have followed for most cases, for almost the entire history of the Republic, is as follows. To protect the presumption that one accused of crime is innocent until proved

guilty by overwhelming evidence under rigorous procedures, the middle stage of the criminal process, that of formal adjudication of guilt, is designed in peculiar way.

First, the facts to be proved at this middle stage relate only to the charged offense, not to the character or personality of the defendant. Then, those facts are deliberately selected and worded so as to be few in number and relatively simple and specific in content. These elements are chosen and defined in such a way as to make them provable in a very technical and rigorous trial process; the other side of the same coin is that these elements lack realistic richness and subtlety. For example, the defendant is alleged to have possessed something specified (burglar tools, or a specified drug, for example) with a specified state of mind (e.g., the intention to make an unauthorized entry of another's property, or to transfer the drug).

These few facts, deemed the elements of the crime, must be proved to a very high probability, through rigorous evidentiary and procedural rules. Harmful errors in application of these requirements can almost always be identified and remedied on direct or collateral review of the conviction.

As a result of these rules for the stage at which guilt is adjudicated, it is extremely rare for innocent defendants to be convicted of crimes. A collateral result is that, during this middle stage of the criminal process, the decisionmaker (the judge or jury deciding whether guilt has been proven) learns very

little about the defendant's character and personality. In addition, the decisionmaker makes findings that describe even this particular crime in a peculiar way: the findings leave out many significant facts about the crime, and they oversimplify or state very generally even the facts the findings do cover.

For example, the jury returning a guilty verdict may find only that the offender possessed at least one object designed to open a locked door. The jury may find it unnecessary to decide whether the offender also possessed a large kit of other, highly sophisticated devices indicating great professional skill at such a crime. He may or may not, as far as the verdict indicates, have possessed also equipment for disabling alarm systems, a case designed for transporting valuable crystal without damage, and the like.

In the other hypothetical case mentioned above, the jury may find only that the offender possessed heroin, not also facts about its quantity, purity, and packaging that indicate his role in its distribution. In neither of these two cases does the jury find the offender's ultimate motive for the crime, nor his character or propensity to commit similar or different kinds of crimes in the future.

Thus, in the stage of a criminal case where guilt is adjudicated, an unrealistically simplified presentation is made of some of the key facts about the crime. No facts at all are presented about other offense characteristics or about the characteristics of the offender that should inform the selection

of a punishment.

This partial blindness and complete oversimplification during the middle stage of a criminal case did little harm in the traditional American system, because the first and third stages allowed consideration of all relevant facts, as well as discretion to respond to all of them. At the first stage, that of charging, the prosecutor had almost complete discretion (1) not to charge at all, (2) to charge a less serious offense than the evidence would justify if the narrow view taken during the middle stage governed, or (3) to accept a bargain for a lesser conviction. He could base such leniency on details of the offense that are ignored or oversimplified in the middle stage, and on facts about the offender that could not be proved at all at trial.

In view of these facts, the prosecutor could be lenient when more aggressive prosecution would strike an unwise balance among competing factors such as the seriousness of the offense in all its real, complex details; the degree of likelihood that the defendant or others would commit future crimes of various kinds in the absence of any criminal conviction or punishment; the likelihood that the defendant would respond well to probation or various kinds or treatment or training; and various other facts and predictions too numerous, varied, complex, and subtle to be considered during the much more formal and structured middle stage.

Similarly, the third stage of a criminal case, sentencing,

traditionally allowed another consideration of any kind of information bearing on the whole gamut of offense and offender characteristics. Cases that appeared identical, if one looked only at the indictment and verdict, were examined again at the sentencing stage and found to be very different, as the judge took a more thorough and subtle look at the facts of the offense, as well as his first thorough look at the character of the offender. This system thus had a first and third stages in each of which a decisonmaker had discretion to consider and act upon all relevant information about the offense and the offender, and a middle stage where artifically narrow factual allegations must be proved through rigorous evidentiary and procedural methods.

This system is excellent in conception. It allows potential criminal defendants to be screened out of the process before being tried or even charged, or to receive other forms of leniency, where the specifics of the offense or the offender make this a wise resolution of the competing demands of crime prevention, economy, and justice. This system also minimizes the chance that an innocent defendant will be convicted, by requiring very strong proof of just a few important facts under very demanding procedures. And then it creates an opportunity for wise crime prevention and punishment of the guilty offender, by basing the sentence on all significant information about the crime and the offender.

Under this basic, traditional system, sentencing should not be simple. There are methods by which to achieve simple

sentencing, but each of them fails to accomodate adequately the needs for effective crime control, economy, and justice.

One such failed method is embodied by the current Guidelines. The Guidelines preclude or strongly discourage consideration of many facts, such as an offender's unadjudicated crimes dissimilar to the one for which sentence is to be imposed, that are of substantial importance in selecting a sentence to prevent future crimes. As to facts the Guidelines do allow judges to consider, i.e., the offense characteristics comprising most of the current Guidelines' great bulk, they are defined in ways that are artifically narrow and discontinuous; they inadequately reflect the true variety and subtlety of such facts. The result is that the Guidelines unduly restrict and oversimplify sentencing criteria.

Consequently, the current Guidelines set a task for sentencing judges that is much more technical than before the Guidelines, but is also simpler in substance, for two reasons. First, judges must ignore or give trivial weight to much important information. Second, even the information that the Guidelines do make significant in sentencing is broken into artifically defined and discontinuous bits, and given predetermined interrelationships. Judges must use this information more to make a calculation than to make a judgment.

Thus, the difficult and complex judicial sentencing process, which formerly involved weighing many, varied, interrelated factors having different degrees of importance, is replaced in

the current Guidelines by a computation. This computation has only the technical complexity of a math problem, not the substantial complexity of an attempt to evaluate human behavior and character, to predict criminal conduct and the reactions of criminals to sanctions, and thus to prevent and punish crime with optimal effectiveness.

The ultimate results of the current Guidelines are that crime prevention is less effective than it should be, that unjustified disparity and unjustified parity of sentences are unduly frequent, and that all we gain is an illusion of sentencing parity.

It is also true that the pre-Guidelines system of federal sentencing was grossly inadequate. There, too, unjustified disparity and unjustified parity were both rampant. Also, many sentences were surely ill-designed to prevent crime or to punish wisely. Sentencing was lawless, unreviewable, and insufficiently explained. There were inadequate processes for Congress and courts to create data, analyze them, and improve sentencing by learning from experience.

The concepts of Guidelines to be announced and then amended regularly, of limits on departures from the Guidelines, of stated reasons for sentences, and of appeals by both parties were sound. These concepts could have led to a great improvement in sentencing. Instead, the Commission has implemented these concepts in a way that (1) has definitely impaired crime prevention and just sentencing by barring or minimizing reliance

on some important sentencing factors, (2) has probably increased the problem of unjustified parity, (3) has not necessarily reduced that of unjustified disparity, and (4) has produced sentencing law that is excessively technical and complicated.

The wise approach to simplification, which also is the wise approach to solving the other problems just mentioned, would be as follows. Sentencing cannot be both simple and wise. We therefore must choose between having either (1) relatively simple Guidelines or (2) relatively simple judicial application of them. So far, the Commission has made the latter choice.

The Commission designed the initial Guidelines, effective in 1987, so as to limit courts to simple functions of factfinding and technical application of relatively precise rules. It tried also to make the Guidelines themselves rather simple, by leaving out important sentencing factors and by unduly quantifying the ones it put in. Even so, the initial Guidelines were rather complicated. Then the Commission promulgated annual sets of amendments making the Guidelines ever longer, more precise, and more complicated. At present, we therefore have a system where the judicial function is more mechanical (and thus easier in substance) than before the Guidelines; where the Guidelines are so technical as to be hard to use; and where, ironically, these complicated Guidelines are so much more simple than the real world of crimes and criminals that they do not produce sufficiently effective, economical, and fair crime prevention and punishment.

At this time, the Commission should begin experimenting with an approach that is virtually the opposite of the approach it has used to date. To be cautious, it should try this new approach at first only for a few kinds of offenses and a few kinds of offenders. The Commission should replace some of the current provisions with new ones so designed that the new Guidelines will be relatively simple and their use by the courts will be as complex as good crime prevention and just punishment demand.

Application of this approach should begin with the following observation: Although the statute requires that each range of imprisonment prescribed by the Guidelines cannot be wider than the greater of 25% or six months (sec. 994(b)(2)), the act does not require that the Guidelines employ narrow or specific factual categories or calculations in the preceding steps by which a judge considers facts relevant to the sentence. Offense and offender characteristics can be described in general language. The numerical values assigned to them can consist of ranges.

For example, the Commission might choose to experiment with this new approach by replacing the Guideline for the offense of Failure to Appear by Offender (sec. 2J1.6). The Commission might also create a new Offender Characteristics Category Guideline to apply to this offense instead of the current Criminal History Category Guideline (sec. 4A1.1).

The new Failure to Appear Guideline could begin, as does the current one, by making 11 the base offense level for failure to report for service of sentence, and 6 the base level otherwise.

Then the new Guideline could authorize the sentencing judge, for example, to "decrease the offense level by 4 levels or less, or increase it by 6 or less, because of offense characteristics warranting the decision, including but not limited to the gravity of the charge or conviction in the case in which he failed to appear, the stage of the proceedings when he failed to appear, the kind of facility to which a sentenced offender was ordered to report, how long after he was scheduled to report he surrendered or was apprehended, and the circumstances under which he surrendered or was captured."

This draft adds offense characteristics that the current Guideline omits, such as the gravity of the offense for service of whose sentence the offender failed to appear. It also eliminates arbitrary discontinuities in the weight given to offense characteristics covered by the current Guideline, such as the 3-level difference between a pending charge punishable by 15 years imprisonment and one punishable by any less. In addition, it eliminates the unjustified parity of giving the same significance to a pending capital case as to a pending case where the maximum punishment is as little as 15 years.

The new Guideline for Offender Characteristics, to be adopted only for use with the new Failure to Appear Guideline, could direct the judge to determine the offender's "offender characteristics points" in a similar fashion. The court would choose from a wide range of points by considering a wide variety of facts, such as the nature, seriousness, and recency of prior

convictions and sentences and of prior crimes established for the first time in this sentencing proceeding.

To combine this new set of offense levels with this new set of offender points, the Commission could use a Sentencing Table very similar in substance to the current one. However, for this offense the vertical column would be headed "offender charactistics category," not "criminal history category."

These proposals are simpler than the current Guidelines, and they encourage judicial consideration of all significant offense and offender characteristics in their true subtlety and interrelatedness. They facilitate use of the kinds of procedures I recommend in the previous section of these comments, because they treat most sentencing facts as evidentiary rather than ultimate facts. They thereby confine the issue of burdens of persuasion, as well as other crucial procedural issues, to a manageably narrow scope of application.

At the same time, my proposals confine and guide judicial discretion vastly more than the pre-Guidelines law of sentencing. Coupled with the requirement of stated reasons for sentences, the authorization of appeals from sentences, and the roles of the Commission in gathering data and learning from experience, Guidelines drafted in this manner could promote effective sentencing while making unjustified disparity of sentences much less common than before 1987, and unjustified parity of sentences much less common than after 1987.

It would at least be worthwhile experimenting with this

approach. The current Guidelines comprise a lurch from the pre-1987 extreme of completely lawless sentencing, to the current extreme of artificial, unrealistic sentencing. It is time to try a more humble, cautious, and incremental method of reform.

It must be clear by now how interrelated are my views on the three sets of issues addressed above. Federal sentencing will not become as effective as it should be to prevent crime until offender characteristics are made much more important determinants of sentences than under the current Guidelines, nor until offense characteristics are described more comprehensively and in terms that encompass all their important variations. The only way the Guidelines can adequately cover all important offense and offender characteristics, and cover them with language that is reasonably simple, is to describe them in general terms and to provide ranges of numerical values for them. Procedures for finding sentencing facts and for applying Guidelines to the facts should be relatively informal, and should place most of the risk of error on convicted offenders, not on a public entitled to protection from crime.

This approach is so different from the current Guidelines that it should be tried in small steps. The results of both approaches should be studied carefully. In the long run, it will be found that the current Guidelines produce only illusory parity and indiscriminate prevention of crime, while the new approach produces more effective crime control, fairer sentences, relatively little unjustified parity or disparity, and a more

workable system.

Very truly yours,

Russell M. Coombs

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February 6, 1997

MEMORANDUM

TO: Chairman Conaboy
Commissioners

FROM: John Steer

SUBJECT: Digest of Public Comment on Emergency Amendments

Attached for your information is a digest of the written public comment submitted on the Commission's proposed emergency amendments as of February 6, 1997, prepared by Jeanne Gravois.