

United States Sentencing Commission

Public Hearing on Proposed Amendments to the Sentencing Guidelines

Friday, April 7, 1989,
Ceremonial Courtroom, United States Courthouse
Washington, D.C.

9 a.m.

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission

✓ 9:05 a.m.

Anne Seymour
National Victims Center, Fort Worth, TX

✓ 9:25 a.m.

Edward S.G. Dennis, Jr.
Assistant Attorney General, Criminal Division
Department of Justice

✓ 9:45 a.m.

Joseph B. Brown
United States Attorney, Nashville, TN

✓ 10:05 a.m.

Sam Buffone
Steve Salky
American Bar Association

✓ 10:25 a.m.

Jonathan Macey
Professor of Law, Cornell Law School

✓ 10:45 a.m.

Break

✓ 11 a.m.

Tom Rendino
President, Federal Probation Officers Association

✓ 11:20 a.m.

Benson Weintraub
National Association of Criminal Defense Lawyers

✓ 11:40 a.m.

Derek J. VanderSchaaf
Deputy Inspector General, Department of Defense

Morris Silverstein
Assistant I.G. for Criminal Investigation, Policy & Oversight

✓ noon

Catherine England
Cato Institute

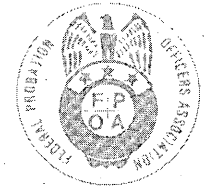
✓ 12:30 p.m.

Lunch

*U.S. Sentencing Commission
Public Hearing - April 7, 1989
Page Two*

- 1:30 p.m. Honorable Warren K. Urbom
 United States District Court, Lincoln, NB
- Honorable Vincent L. Broderick
 United States District Court, New York, NY
- 2 p.m. Dan Freed
 Professor of Law, Yale Law School
- 2:20 p.m. James I.K. Knapp
 Acting Assistant Attorney General, Tax Division
- 2:40 p.m. Lucien Campbell
 Federal Public Defender, San Antonio, TX
- 3 p.m. Larry Ribstein
 Professor of Law, George Mason University
- 3:20 p.m. Philip Bartholomew
 Senior Economist, Federal Home Loan Bank Board
- 3:40 p.m. Public Comment

FEDERAL PROBATION OFFICERS ASSOCIATION



National Officers 1989

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Burlington, VT

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PREPARED STATEMENT OF THE
FEDERAL PROBATION OFFICERS ASSOCIATION
(FPOA)

FOR THE

UNITED STATES SENTENCING COMMISSION

7 APRIL 1989

HEARING ON PROPOSED AMENDMENTS AND ADDITIONS

TO THE SENTENCING GUIDELINES

CEREMONIAL COURTROOM

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

DELIVERED BY:

TOMMASO D. RENDINO
PRESIDENT - FPOA

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West Covina, CA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

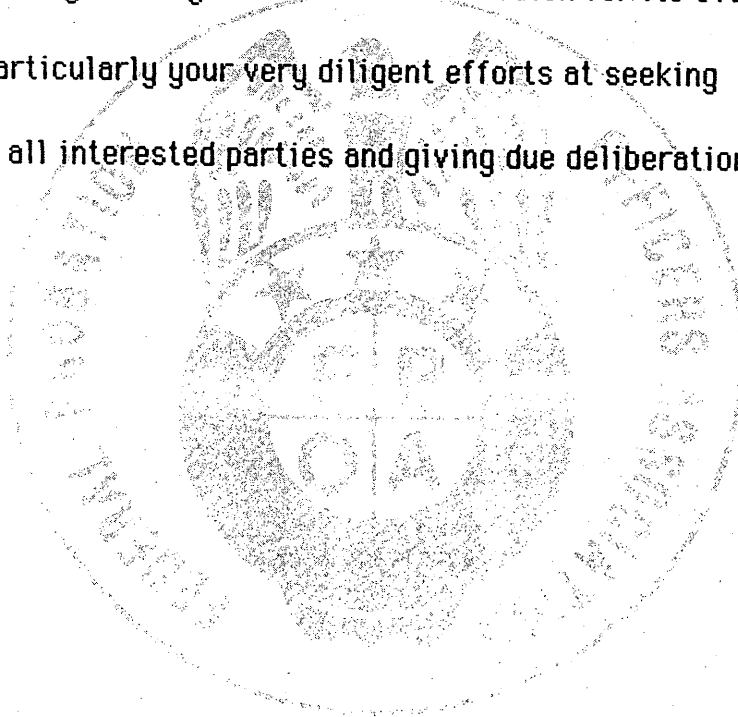
Next, the FPOA wishes to urge the Commission to move as speedily as possible to electronic retrieval of the data which the Commission requires from the field. The necessity of having field staff manually pull together the required papers and send them via surface mail is a burden we would appreciate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

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

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

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

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



ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

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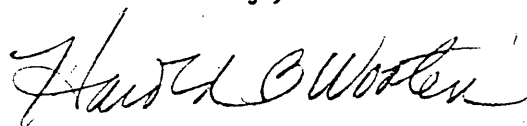
April 3, 1989

Honorable William W. Wilkins, Jr.
Circuit Judge, United States
Court Of Appeals
Post Office Box 10857
Greenville, South Carolina 29603

Dear Judge Wilkins:

On behalf of the Probation Division, thank you for the opportunity to address home confinement augmented by electronic monitoring before the Commission today. Please find enclosed copies for each commissioner of the draft proposal entitled, A Model Home Confinement Program and Research and Evaluation Plan, which was presented to the Committee on Criminal Law and Probation Administration at its January 1989 meeting, made reference to today by Commissioner Nagel. Comments from the Commission would be greatly appreciated.

Sincerely,



Harold B. Wooten
Chief, Operations Branch

Enclosure

cc: Honorable Edward R. Becker

A MODEL HOME CONFINEMENT PROGRAM

and

RESEARCH AND EVALUATION PLAN

Presented to the
Committee on Criminal Law and Probation Administration

January 1989

This draft proposal, presented by the
Community Corrections Task Force,
was developed with the assistance of the
Probation Division
and the
Federal Judicial Center Research Division
in consultation with the
United States Sentencing Commission,
United States Parole Commission,
and the Bureau of Prisons.

Paul J. Hofer & Harold B. Wooten.

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Introduction

Home confinement with electronic monitoring has gained acceptance throughout the criminal justice system. It is increasingly used at several stages: for pretrial release instead of jail detention; as a condition of probation; as a sentence in lieu of prison; as a condition of parole or supervised release; and as a method of early release instead of continued imprisonment or placement in community correctional centers. At the core of these programs is the goal of ensuring that offenders abide by the condition of their home confinement and minimize the risk that they engage in new criminal behavior, fail to appear for court proceedings, or endanger their communities.

Within this broad common base, home confinement can have additional aims depending on the intent of the judge and on the legal status of the offender. For instance, the purpose of pre-trial detention under the Bail Reform Act of 1984 is to ensure the appearance of the person and the safety of any other person and the community. Punishment is not appropriate for someone still presumed innocent.

Home confinement as a condition of probation, however, might be imposed as part of a punitive sentence designed to ensure that the defendant repay his debt to society. Judges are to impose sentences "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment...(B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."¹ Home confinement is often suitable for satisfying both punitive and additional goals of sentencing.

Early release from prison---in addition to conserving valuable prison bedspace---has traditionally been used to ease the offender's readjustment to the community and to help establish stable family and work patterns. Electronic monitoring entails closer supervision for offenders in this group with a high risk of recidivism. Again, a well-designed home confinement program holds promise for improving post-incarceration control and reintegration of offenders.

Why should U.S. Probation Offices develop comprehensive home confinement programs?

Accommodating these many goals and types of offenders within a single home confinement program presents an organizational challenge. Some argue that separate programs targeting one type of

1. U.S.C. 18§3553(a).

offender, e.g. early releasees, should be developed. Yet home confinement supervision involves many common elements, regardless of how or at what stage offenders are selected for the program. Multiple programs designed for each type of offender would contain similar elements. All home confinement programs require probation offices to establish policies and procedures, obtain equipment, and train officers to monitor the offenders under supervision. In offices relying on electronic monitoring, the same equipment will probably be used in all cases. The placement screening, the survey of the offender's home and family, the review of computer reports, and other program elements are so nearly identical---and so different from traditional supervision---that the same officers, especially trained, may be assigned to all offenders regardless of their technical legal status.

What is needed in the Federal system is a program that can accommodate the diverse needs of judicial, prison, parole, and sentencing authorities with a maximum of efficiency. The Probation Division of the Administrative Office of the U.S. Courts seems best situated to take this systemic view of home confinement and develop a comprehensive plan. It is the agency traditionally charged with the community supervision of offenders. It has responsibility and statutory authority for the supervision both of offenders given probation, community confinement, or supervised release at sentencing and for offenders released from prison under the authority of the Parole Commission or the Bureau of Prisons.

In addition, it is crucial that the Probation Division manage the number and type of responsibilities imposed upon its officers so that neither the public safety nor the other supervision and investigation duties of probation officers are compromised. A proliferation of programs administered by different agencies could lead to burdens placed on probation officers over which they have little control. Home confinement programs managed through private contractors or other agencies would result in Federal offenders being placed under divergent authority without the local probation office having clear supervision responsibility. Coordinated community supervision becomes far more difficult.

Accordingly, the Supervision Task Force of the Criminal Law and the Administration of the Probation System Committee, as a part of a number of recommendations about supervision-related strategies, adopted a resolution in support of home confinement with electronic monitoring as an option for those under prerelease, probation, furlough, parole, or supervised release supervision. The resolution also sets forth the general principle of priority use of electronic monitoring for higher risk offenders.

The Probation Division of the Administrative Office of the U.S. Courts, as part of a working group with other relevant agencies, developed this proposal outlining the home confinement

program that it is willing to provide. The proposal specifies for the benefit of the courts, the Sentencing Commission, the Parole Commission, the Bureau of Prisons, and the United States Congress exactly what type of supervision can be provided at the levels of funding and offender placements they may choose to provide. Field practitioners, armed with resources to accomplish the task, are eager to begin.

One program with many goals: Entry points and tracks

The model program outlined in this report is designed for the placement of offenders at all stages of criminal justice processing. It provides core program elements focused on incapacitating the offender and minimizing the risk to society. But in addition to this core, the program provides two further tracks---one for punishment and deterrence and one for training and treatment. The tracks might be thought of as "sub-programs" that provide a cluster of additional conditions, policies, and procedures meant to achieve additional criminological purposes. The tracks are not meant for all offenders. The additional conditions---which entail added time and expense---should be used judiciously for those offenders on whom they are likely to be beneficial.

The tracks proposed in this plan are intended as shorthand for describing clusters of program elements meant to accomplish different goals. We need some way of distinguishing among supervision policies for offenders under different legal authority. Judges, the U.S. Sentencing Commission, probation officers, the Parole Commission, and prison authorities are free to tailor sentencing options and supervision plans to individual offenders as they see fit, within statutory limits. Our hope is that the core program and tracks provided here will help them understand what type of supervision probation officers can reasonably be expected to provide and help them communicate to the officers their goals for the supervision of any particular offender.

Every supervision plan for particular offenders will be composed of many elements---uniform policies and procedures, and specific conditions. The model proposed here is not meant to limit the options nor inhibit the creativity of local offices. It is intended as a distillation of many of the best ideas we have seen in our research into home confinement programs around the country and the experience of the experimental pilot programs in Miami and Los Angeles.

The core philosophy. The basic home confinement program outlined here provides a degree of intensive supervision and control of offenders unlike anything previously seen in the Federal probation system. The restriction to the home enforced

with electronic surveillance not only impedes offenders from engaging in criminal activity, but also permits the probation officer to immediately detect violations of confinement so that sanctions can be imposed---with an arrest warrant if necessary. Home confinement is inherently punishing for offenders accustomed to freedom of movement. It also fosters a more intimate relationship between the offender and his family and encourages good work habits. The simple regime of closely monitored attendance at employment and return to the home in off hours can change lifestyles and help make the offender a productive member of society.

The core program is designed to provide a high degree of control at a relatively low price. But home confinement supervision is still more expensive than regular parole or probation. Considering both budget constraints and projected prison population figures, a crucial goal for the Federal system in the long run is to identify offenders who are good candidates for home confinement, but who would be undesirable risks for curfew parole, probation, or other less expensive and far less intensive alternatives. By identifying this population the Federal system can save the most money at the lowest risk by using home confinement as a substitute for imprisonment.

With these goals in mind, the Subcommittee on Community Corrections endorsed the use of home confinement, and emphasized that it should be used with high risk offenders.² The U.S. Congress has recently included house probation as a sentencing option, but only as a substitute for imprisonment. The clear message is that home confinement in the Federal system is to be used as a diversion from prison, not to "widen the net" and used with offenders who could be adequately controlled with less restrictive---and costly---means. The core program presented here is designed to identify, as best we can with current data, those offenders who would be good risks for home confinement but poor

2. Additionally, the American Bar Association's Criminal Justice Section endorsed "Principles for the Use of Electronically Monitored Home Confinement as a Criminal Sanction." (ABA House of Delegates resolution approved August 1988.) Its recommendations include:

"1. A sentence may include home confinement monitored by an electronic monitoring device if the judge finds, on the record, that such...confinement is the least restrictive alternative which should be imposed consistent with the protection of the public and the gravity of the offense.

2. In no event should a court or probation office automatically require electronic monitoring as a condition of probation."

risks for less restrictive supervision. The home confinement condition is then closely monitored electronically to ensure compliance.

Punishment and deterrence track. The sole exception to use of home confinement for high risk control is when home confinement is also the major punishment given an offender at sentencing. Even good risks may need to be punished more severely than is possible with probation alone. The sentencing model based on the "just deserts" of crime has recently been expanded to nonprison sanctions.³ Interviews with offenders under home confinement confirm that it can be a very punishing experience. Some have refused to participate in programs once they learned of the strict rules because they felt it would be easier to spend the time in jail. Community treatment facilities are widely perceived by offenders as more lenient than home confinement.

The offender's perception of the punitiveness of a sentence is central to any attempt to make the punishment fit the crime. But the community's perception is critical as well, not only because it affects the appearance of justice, but also because the effectiveness of the law as a deterrent depends on everyone's understanding that lawbreaking will lead to real punishment. There is little empirical research documenting public opinion about home confinement. The literature contains anecdotal accounts both of favorable media coverage and widespread community satisfaction and of attempts to keep home confinement programs low-key to avoid negative public reactions. Much depends on the effectiveness of public education and on luck; a violent crime committed by a home detainee early in a program's history may be enough to spoil its reputation in some jurisdictions. A well-known offender sentenced to a luxurious apartment will give the impression that home confinement is a way of "getting off easy."

A home confinement program used as a punishment and deterrent must have several additional elements in addition to the core control program. It must exclude persons whose offenses are so serious that no duration or conditions of home confinement could adequately punish them. It must either exclude persons whose homes are so luxurious that confinement would not be experienced or perceived as punishing, or it must dramatically alter the environment. Leave time, sanctions for violations, and other

3. For the theory of sentences as "just deserts," see: R. Singer, Just Deserts: Sentencing Based on Equality Deserts, Ballinger (1979); A. von Hirsch, Doing Justice: The Report of the Committee for the Study of Incarceration, Hill and Wang (1976). For its extension to nonprison sanctions, see Thomson, "Prospects for Justice Model Probation," in P.D. McAnany, Thomson & Fogel (eds.), Probation and Justice: Reconsideration of Mission (1984), at 101-35.

program policies must be tailored to the punishment goals of the sentence. The punishment and deterrence---"P&D Track"---conditions outlined below are intended to ensure that home confinement can be used as a punitive sanction for those persons who have been found guilty and deserving of punishment.

Testing, treatment and training track. In addition to incapacitation, deterrence, and punishment, the criminal justice system helps offenders become productive citizens to the extent this is possible. Research has just begun, but there are signs that home confinement may hold significant promise as a rehabilitative tool. At a minimum, keeping offenders at home shields them from the sometimes criminogenic conditions of prison life. By reducing disruptions to family and employment, the offender is less likely to develop a criminal outlook and lifestyle. Requiring the offender to continue to support his family, and even pay for his supervision, teaches an important lesson in responsibility.

There are anecdotal reports that offenders can learn to structure their time, budget their money, and generally make significant changes in their habits under the enforced regime of home confinement. Interviews with Federal offenders in Nebraska indicate that for some persons, arrest and conviction marks a turning point in their lives when they are followed by a mandatory radical change in lifestyle. Offenders who were hard living, reckless, and relished their image as "outlaws" became "domesticated" under the enforced regime of home confinement. Girlfriends and wives reported that they were no longer taken for granted; offenders became involved with their children. Improvements were made around the house, or time for study was finally found. Though reports such as these must necessarily be met with skepticism, there are sufficient indications of a real therapeutic potential that further research is justified. The impact of an enforced regime of domestic life should not be underestimated.

The home does not in itself offer any other systematic treatment or training. Community mental health counseling, substance abuse treatment, and educational services must be relied on to provide the needed professional assistance. Completion of adult literacy courses or high-school equivalency studies can often be accomplished at home or with short trips to school. Special rewards for attaining treatment goals, such as a night out, can be used to encourage offenders to complete training programs. Probation offices might offer counseling for home detainees. Other treatment resources can surely be identified or developed in most jurisdictions.

Drug testing provides for the detection of substance abuse and in conjunction with drug abuse treatment may help keep offenders drug free. New devices permit the breathalyzer

monitoring of alcohol consumption through telephone contact. Alcoholics Anonymous is a popular treatment for which offenders might be permitted to leave home. Monitoring and treatment of drug use while the offender is in the home environment promise to establish longer-lasting drug-free lifestyles than does treatment in the artificial environment of a prison.

The testing, treatment and training (3T Track) conditions outlined below are intended to encourage judges and supervising officers to identify offenders with a good prospect of making a significant lifestyle change. They can then develop supervision and self-improvement plans and identify community-based testing, treatment, and educational facilities. For carefully selected offenders, the use of home confinement as part of a comprehensive self-improvement plan may prove to be one of the most powerful tools for behavior change ever in the hands of probation officers.

| Core Program | P&D Track | 3T Track |
|---|--|--|
| Select mid-range risks: not too low or too high | Select those who can be punished at home | Select only those likely to benefit from testing, treatment, or training |
| Employment required | Employment, consider hard labor | Employment or schooling |
| Detention for non-working hours except routine weekly leave | Detention for all non-working hours | Detention for non-working hours, reduced to curfew as behavior warrants |
| Slowly increasing leave time if acceptable risk | Leave time only for essential tasks | Leave time granted trx, school, and as reward |
| Travel restrictions | Severe travel restrictions | Travel only as reward if behavior warrants |
| | Vehicle restrictions | |
| | Community service | |
| | Submission to search and seizure | |
| | Environmental restrictions | |

Table 1: Elements of Core Program and Tracks

Empirical Questions for Research and Evaluation

The empirical research concerning home confinement, though growing, is still meager and any program must be considered experimental.⁴ Several projects funded and monitored by the National Institute of Justice (NIJ) are under way, but the bulk of results from these studies are not yet available. The pilot programs in Los Angeles and Miami have addressed some important threshold issues in the development of home confinement programs. An expanded comprehensive program that included pretrial releases and probationers could address a wider range of empirical issues. Selection criteria, supervision strategies, and other program elements can then be refined as our experience with this criminal justice innovation grows.

In the next sections we propose several studies that are needed to effectively evaluate home confinement programs in the Federal system. Evaluation must be an integral part of program design, but we do not here address the details of data collection or analysis. Nor do we propose that all the potential projects be implemented; policymakers must decide what information would be most useful and set research priorities. Experimentation could proceed nationwide or with a sample of districts.

Reliability of the equipment

The Division and the local offices have had extensive contact with Guardian Technologies, the contractor for the pilot program. The officers in Miami conducted their own tests of the equipment, wearing the transmitters, logging their movements, and attempting to fool the computer. The NIJ has commissioned a study using students to do the same, but results are not yet available.

Initial reports suggest that the equipment is very reliable. But additional experience studying the number of problems and how labor-intensive it is to solve them might be helpful. The results of the pilot study are limited to one contractor and one hardware. It may be valuable to document that there is a range of technology out there that can do the job.

Supervision strategies

With the results from the "Community Supervision of Federal Offenders Study" completed earlier in 1988 we have been able to establish that home confinement offers a degree of intensive

4. See P. Hofer & B. Meierhoefer, Home Confinement: An Evolving Sanction in the Federal Criminal Justice System (1987) for a review of the major research findings.

supervision unlike anything ever seen in the Federal system. Data collected by the Parole Commission can paint a detailed picture of the number of contacts, the degree of surveillance, and the hours spent by the offender at work, in school, in treatment, at church, and for other regularly scheduled activities. Additional research might focus on how probation officers are granting leaves from confinement or adding restrictions. Strategies for managing a home confinement caseload efficiently, and for using home confinement as a tool to shape productive behavior, might yield helpful results.

Probation officer workload

The Administrative Office may want to develop workload measures so that budget requests can accurately reflect personnel needs for a comprehensive program. Aspects of the program that are the same as regular supervision (e.g. time needed for house calls, phone contacts, etc.) may not need to be studied, even if these activities are more frequent in the program than in regular supervision. We can simply multiply the known time needed for these contacts by the number of them required in typical home confinement programs. But time needed for aspects that are unique--such as orientation of family to the program, equipment installation, and followup on computer-reported absences---do need to be documented. And there are some things that take less time in home confinement. For example, officers do not waste time making home visits only to find the offender isn't there. Estimating workload requirements in a wide range of jurisdictions might help refine budget requests. As a rule of thumb at this point we estimate that electronic monitoring programs are three or four times as time consuming as a typical supervision case.

Offender and community perceptions of the program

We have conducted many confidential interviews with offenders in Miami and Nebraska. This has provided useful insight into how to construct a closing questionnaire for offenders at the end of their home confinement. Questions to be addressed include problems with the equipment, changes in lifestyle as a result of the program, the effect on family members, the relative punishment of home confinement, imprisonment, and half-way houses, and ways of coping with "cabin fever." These insights may be helpful in developing a model operations manual.

Equating ratios. The question of how much punishment is needed to retribute for a crime is an ethical question that cannot be answered with scientific methods. But the problem of equating the perceived punishment of imprisonment to the perceived punishment of home confinement can be approached empirically using methods developed for the study of choices and decisionmaking.

Offenders who have experienced both prison and home confinement could be asked to choose between prison and home sentences of various hours and durations. The point at which the average person was indifferent to a choice between the two would be one possible definition of an equivalent sentence.

The perception of the community is also important, since the fear of punishment is crucial to the deterrent effect of a sanction. To measure the perception of the community, public opinion surveys might be supplemented with equating judgments similar to those made by offenders. Any mismatch between the perceptions of offenders and the perceptions of the public would represent a gap in public understanding of prisons, home confinement, or both. The results of an equating study would be to establish a ratio of home confinement to imprisonment that would provide equivalent punishment.

Refining selection criteria

Predicting success. Empirically derived methods of classification often improve selection compared with haphazard release of offenders or with intuitive "armchair" selection by probation officers or judges. The latter are often unreliable and can be contaminated by errors of induction, personal biases, and manipulation by canny offenders. Attempts to predict risk have often identified many of the same factors: prior criminal record, drug addiction, employment, age, sex, and other demographic variables. An empirically based system for identifying good risks for home confinement would likely include these as well.

But there may be factors that lead to specific problems complying with the home confinement conditions. Psychological tests that measure impulsiveness, for example, might help identify persons who are simply incapable of keeping themselves from walking out the door. Probation officer ratings of the home environment or other factors may reliably correlate with successful adjustment to the program. The validity of whatever screening methods are used should be evaluated, and if possible, supplemented with objective criteria.

Research to identify risk factors for home confinement would have a major advantage over traditional recidivism prediction studies. The outcome variable in traditional research often is rearrest as recorded on FBI rap sheets---a coarse measure of success. Electronic monitoring involves continuous recording of absences from the home. We have detailed records of how strictly offenders comply with this condition. There will be a wide range across offenders on this variable. Background information on offenders that might be useful for selection can be gleaned from currently available data such as presentence reports. Officers

would make additional ratings. Offenders could be asked to take a psychological test.⁵

By correlating the number of unauthorized absences from home and other outcome data with offender characteristics, predictors of risk and success could be identified. A screening device would then be developed that probation officers could use to identify offenders who pose too great a risk for home confinement.

To best refine selection criteria for home confinement, a wide range of offender types should be admitted into the program on an experimental basis. We can assess the risk of a factor only if there are a significant number of offenders with that factor in the program.

Preventing discrimination. Care must be taken to ensure that home confinement is available to all qualified offenders, regardless of race, religion, national origin, or other discriminatory classifications. Many commentators---including the Criminal Justice Section of the American Bar Association---have recommended that "3. The ability of an individual to pay for the use of an electronic monitoring device should not be considered in determining whether to require the use of such a device when imposing sentence."⁶ Requirements that offenders pay for their own supervision, that they have a home, a telephone, and a job also raises the possibility that selection procedures could have an adverse impact on the poor or on minorities.

Several Federal jurisdictions currently require offenders to bear the costs of meeting probation conditions of treatment, training, and the costs of surveillance under home confinement. The General Counsel to the Administrative Office of the United States Courts has not issued advice on the legality of these probation conditions and urges caution as well as experimentation. (Telephone conversation with David N. Adair, Jr., Assistant General Counsel, May 14, 1987.) In Nebraska---location of the largest Federal home confinement program---offenders are required

5. Discussions with suppliers of computer-administered tests suggest that these might be made available free of charge for purposes of our research. Offenders could be tested automatically in the probation office on the same equipment that is used for monitoring. The test is scored electronically, and the data are automatically formatted for analysis.

6. Supra, note 2.

to pay if they are able, but supervision is provided free to all otherwise qualified indigents.⁷

Policymakers must decide which criteria are permissible bases for classification and selection into the program and which should not be considered. The model program should collect demographic data on offenders to evaluate whether the program disproportionately excludes minorities, indigents, and other suspect classifications. If so, additional study can determine if this is due to bias in the selection process or is an adverse effect of facially neutral or otherwise permissible selection criteria.

Evaluation of home confinement's effects on recidivism and productivity

A full evaluation of home confinement requires that we assess multiple effects of the programs both during the period of confinement and in the long term. A comprehensive definition of success or failure includes: 1) how often offenders are not at home when checked, or 2) how often they abscond and are never found, 3) the frequency of revocation, or 4) the frequency of new crime and recidivism while under supervision. True success in the long run can be validated only by investigating: 5) the number of violations or new crimes eventually committed by the offender, 6) the number of days employed and earnings made, compared to previous history, 7) educational advances, 8) the number of days free of drugs, and numerous other outcome measures of control and rehabilitation.

Several research designs allow us to evaluate home confinement programs, but they raise serious methodological problems. Many measures of success depend not only on the actual behavior of the offender, but also on the rigidity of a probation department's monitoring and enforcement. The strictest supervision

7. In the case of Bearden v. Georgia, 461 U.S. 660 (1983), the U.S. Supreme Court invalidated under the due process clause a revocation of an indigent's probation for failure to pay fines and restitution, absent a finding of fault and inadequate alternatives. Yet in dicta in the same opinion, the court stated that "[a] defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources." Whether the state's legitimate penological interests include requiring offenders to pay for their own supervision remains unclear.

may actually result in rates that make a program look the least successful.

The mere finding that a group of home detainees has a high or low success rate, without a comparison group of similar offenders not in home confinement programs, does not allow us to infer that it was the program that caused the success. Since any program will require some screening of applicants and selection only of better risks, high success rates do not necessarily mean that a program is effective.

From a purely research perspective, the ideal procedure for creating a comparison group is random assignment following selection for the program. All candidates are screened with the standard selection procedures. Only then are they divided randomly: some assigned to home confinement and others to imprisonment, probation, community confinement, or to whatever option one wishes to compare (and for which comparable success measures can be obtained).⁸ Although such a design would isolate the effects of the program from the effects of selection, the ethical concerns stemming from the unequal treatment of similar offenders might preclude its use.

If randomization is not feasible, less powerful alternative designs are available. One possibility is to form a matched control group of similar past cases.⁹ It is unlikely, however, that complete and comparable outcome information can be obtained for persons not part of the program. One could also evaluate the a priori probabilities of recidivism for the type of offenders given home confinement by using the existing salient factor score and RPS-80 risk assessments routinely done for probationers and comparing these to the actual recidivism of the group. These scores could also be used as a matching variable or as a covariate in an analysis of covariance comparing home detainees with offenders who received other sentences. None of these quasi-

8. The exact size of the comparison group needed for statistically stable results depends on the variability across groups on the success measures and the precision desired in the results. A rough estimate is that 50 would be adequate for detecting differences in earnings, violation rates, or other measures with moderate variability. More would be required to detect differences in violation or rearrest rates.

9. See Pearson & Bibel, "New Jersey's Intensive Supervision Program: What Is It Like? How Is It Working?" 50 Fed. Probation 25 (1986), for a similar design to evaluate the New Jersey intensive supervision program. The Bureau of Prisons is developing a matched control group for its evaluation of the pilot program in Miami and Los Angeles.

experimental designs would provide the certainty of a randomized design, however.

What are the costs of home confinement compared with other sentences?

The savings and costs to the courts, probation offices, prisons, and society as a whole resulting from use of home confinement depend on which alternatives it replaces and the costs of those alternatives. The Bureau of Prisons estimates the cost of incarceration. The Federal probation service estimates the costs of various levels of probation supervision. We can estimate the cost of different types of confinement and monitoring and of additional conditions typically used with home confinement. Given these estimates and projections of the likely disposition of home detainees if the programs didn't exist---prison or probation---the savings or expenses created by the program can be estimated. For example, if home confinement were used with 20 percent of Federal criminal offenders---of which 5 percent would have gone to prison and 15 percent would have been placed on high supervision probation---we could use the cost estimates to calculate the savings, or in this example the extra expense, generated by the program.

Program Entry Points: Selection Procedures and Criteria

The decision to use home confinement can be made at several stages in the processing of an offender and by several different authorities. Here we review four points at which offenders might be referred to the program, and briefly discuss the current authority and criteria for these referrals. We offer suggestions about how referring agencies might integrate their needs with the comprehensive program envisioned here. We review the tracks or additional conditions that are appropriate for offenders entering the program at different stages and with different legal status.

All offenders in the program would be routinely screened through the program-wide selection criteria. These considerations are outlined at the end of this section. We begin here by discussing additional criteria relevant to offenders entering at different points and under different authorities.

Judicially imposed conditions of pretrial release

The Bail Reform Act of 1984¹⁰ requires that defendants be released on personal recognizance or unsecured personal bond unless the judicial officer determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."¹¹ If not released as above, the court must impose the least restrictive condition or combination of conditions to assure appearance and protect others.

Six Federal districts are already contracting for electronic monitoring as part of their pretrial services. It seems it may often qualify as the least restrictive method of accomplishing the purposes of pretrial release conditions. Pretrial home confinement should be considered after a detention order has been issued and only in lieu of detention. It should not be used where other less restrictive conditions would satisfy the purposes of the act. Risk of flight or dangerous activity should be the sole selection criteria.

Core risk-control conditions are generally the only appropriate track for these offenders. In some cases additional precautions such as phone tapping or restrictive travel conditions may be necessary. Under the recently passed drug act, additional drug testing or treatment conditions may be appropriate in some

10. 18 U.S.C. §3141-3150.

11. See D. Golash, The Bail Reform Act of 1984 (Federal Judicial Center 1987), for an introduction to and discussion of the factors to be considered when making pretrial release decisions.

pilot districts. The P&D track is not suitable for offenders still presumed innocent.

Judicially imposed conditions of probation

The recently enacted drug bill has also included provisions making explicit the authority of judges to impose "house probation" requiring an offender to "remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic electronic signaling devices... ." The bill further provides "that a condition under this paragraph may be imposed only as an alternative to incarceration..."¹² In addition to this constraint, judges can use home confinement only if appropriate to satisfy the statutory purposes of sentencing.¹³ They are bound to consider "(3) the kinds of sentences available;" and "(4) the kinds of sentence and the sentencing range established...by the Sentencing Commission."¹⁴

The Sentencing Commission, on the view that home confinement is not as punishing as either imprisonment or community confinement, has restricted its use to only those less serious cases where routine probation without home confinement is also an option. Currently, judges bound both by the new house probation provisions of the drug act and the sentencing guidelines have the option of sentencing to home confinement only in those cases with a minimum guideline range of zero where they would nonetheless have imposed some sentence of imprisonment. There is evidence that these cases are rare under traditional sentencing practices and that home confinement was used for a much broader range of offenders before the guidelines took effect.¹⁵

One of the empirical assumptions underlying the guidelines now appears to be incorrect: offenders report that home confinement is often at least as punitive as community confinement. At some ratio (days of home confinement to days of prison) it becomes as punishing as prison. Similarly, the public

12. §7305 (a)(20)

13. See text on page 2 above for the complete list.

14. U.S.C. 18§3553(a)

15. Telephone conversation with William Beach, U.S. Probation Officer in the District of Nebraska, who oversees the largest home confinement program in the Federal system. Probation Officer Beach has calculated that the vast majority of the over 50 cases currently in the District's program could not be given home confinement under the guidelines without a departure.

perception of the severity of home confinement---a crucial consideration for determining its deterrent effect---is in flux. Public opinion is easily influenced by the media coverage, both favorable and unfavorable. Jurisdictions which have undertaken public education campaigns as part of their program development have generally had success in alerting the community to the effectiveness of this new sanction.¹⁶

Consistent with the Sentencing Commission's concern to ensure punishment commensurate with the seriousness of the crime, additional punishment conditions should generally be a part of sentences of home confinement. In addition, the punishment and deterrence track introduced above and outlined in the supervision overview below is designed to ensure that offenders are punished adequately and that the community is deterred by the threat of the home confinement sanction. It should be routine with offenders for whom home confinement is the sole sanction. Some offenders, and some homes, may simply not be suitable for the program if the period of confinement cannot be made sufficiently unpleasant to be punitive.

The selection options proposed here tie the availability of the program to the seriousness of the person's offense, as measured by the offense level score from the guidelines. Not only will this help satisfy the punitive purpose of sentencing, but it will also help ensure that home confinement is no more available for "white collar" crimes than for other types, since the Commission has been careful to establish offense levels for these crimes that reflect their harm.

Given the multiple goals of sentencing and the multiple purposes motivating this proposal---the need to provide a non-incarcerative alternative in jurisdictions where community treatment facilities are not available, the need to continue research on home confinement so that we can appreciate its potential with a variety of offenders and the need to conserve valuable prison bedspace---we leave to policymakers the final formulation of selection criteria. Here we propose a range of options for consideration by the Sentencing Commission and the judiciary.

Figure 1 on the following page illustrates the cells in the guideline sentencing grid where home confinement would be available, currently and under each of the three options described below. Criteria in addition to offense level and criminal history category, many of which are provided in the text, would further narrow the population of offenders for whom the sentence would be available.

16. See R. Ball, C. R. Huff & J. R. Lilly House Arrest and Correctional Policy: Doing Time at Home, Sage Publications, 1988.

SENTENCING TABLE

Criminal History Category

| Option | Offense Level | Criminal History Category | | | | | |
|---|---------------|---------------------------|--------------|----------------|---------------|-----------------|------------------|
| | | I 0 or 1 | II 2 or 3 | III 4, 5, 6 | IV 7, 8, 9 | V 10, 11, 12 | VI 13 or more |
| | 1 | 0 - 1 | 0 - 2 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 |
| | 2 | 0 - 2 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 | 1 - 7 |
| Current: | 3 | 0 - 3 | 0 - 4 | 0 - 5 | 0 - 6 | 2 - 8 | 3 - 9 |
| Regular probation or home confinement available if min=0 | 4 | 0 - 4 | 0 - 5 | 0 - 6 | 2 - 8 | 4 - 10 | 6 - 12 |
| | 5 | 0 - 5 | 0 - 6 | 1 - 7 | 4 - 10 | 6 - 12 | 9 - 15 |
| | 6 | 0 - 6 | 1 - 7 | 2 - 8 | 6 - 12 | 9 - 15 | 12 - 18 |
| Option 1: Permit home confinement where comm. confinement now available | 7 | 1 - 7 | 2 - 8 | 4 - 10 | 8 - 14 | 12 - 18 | 15 - 21 |
| | 8 | 2 - 8 | 4 - 10 | 6 - 12 | 10 - 16 | 15 - 21 | 18 - 24 |
| | 9 | 4 - 10 | 6 - 12 | 8 - 14 | 12 - 18 | 18 - 24 | 21 - 27 |
| | 10 | 6 - 12 | 8 - 14 | 10 - 16 | 15 - 21 | 21 - 27 | 24 - 30 |
| split sentence | 11 | 8 - 14 | 10 - 16 | 12 - 18 | 18 - 24 | 24 - 30 | 27 - 33 |
| | 12 | 10 - 16 | 12 - 18 | 15 - 21 | 21 - 27 | 27 - 33 | 30 - 37 |
| Option 2: Permit home confinement for first offenders | 13 | 12 - 18 | 15 - 21 | 18 - 24 | 24 - 30 | 30 - 37 | 33 - 41 |
| | 14 | 15 - 21 | 18 - 24 | 21 - 27 | 27 - 33 | 33 - 41 | 37 - 46 |
| | 15 | 18 - 24 | 21 - 27 | 24 - 30 | 30 - 37 | 37 - 46 | 41 - 51 |
| Option 3: Expanded availability | 16 | 21 - 27 | 24 - 30 | 27 - 33 | 33 - 41 | 41 - 51 | 46 - 57 |
| | 17 | 24 - 30 | 27 - 33 | 30 - 37 | 37 - 46 | 46 - 57 | 51 - 63 |
| | 18 | 27 - 33 | 30 - 37 | 33 - 41 | 41 - 51 | 51 - 63 | 57 - 71 |
| | 19 | 30 - 37 | 33 - 41 | 37 - 46 | 46 - 57 | 57 - 71 | 63 - 78 |
| | 20 | 33 - 41 | 37 - 46 | 41 - 51 | 51 - 63 | 63 - 78 | 70 - 87 |
| | 21 | 37 - 46 | 41 - 51 | 46 - 57 | 57 - 71 | 70 - 87 | 77 - 96 |
| | 22 | 41 - 51 | 46 - 57 | 51 - 63 | 63 - 78 | 77 - 96 | 84 - 105 |
| | 23 | 46 - 57 | 51 - 63 | 57 - 71 | 70 - 87 | 84 - 105 | 92 - 115 |
| | 24 | 51 - 63 | 57 - 71 | 63 - 78 | 77 - 96 | 92 - 115 | 100 - 125 |
| | 25 | 57 - 71 | 63 - 78 | 70 - 87 | 84 - 105 | 100 - 125 | 110 - 137 |
| | 26 | 63 - 78 | 70 - 87 | 78 - 97 | 92 - 115 | 110 - 137 | 120 - 150 |
| | 27 | 70 - 87 | 78 - 97 | 87 - 108 | 100 - 125 | 120 - 150 | 130 - 162 |
| | 28 | 78 - 97 | 87 - 108 | 97 - 121 | 110 - 137 | 130 - 162 | 140 - 175 |
| | 29 | 87 - 108 | 97 - 121 | 108 - 135 | 121 - 151 | 140 - 175 | 151 - 188 |
| | 30 | 97 - 121 | 108 - 135 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 |
| | 31 | 108 - 135 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 |
| | 32 | 121 - 151 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 |
| | 33 | 135 - 168 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 |
| | 34 | 151 - 188 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 |
| | 35 | 168 - 210 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 |
| | 36 | 188 - 235 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 |
| | 37 | 210 - 262 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life |
| | 38 | 235 - 293 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life | 360 - life |
| | 39 | 262 - 327 | 292 - 365 | 324 - 405 | 360 - life | 360 - life | 360 - life |
| From Guidelines Manual, U.S. Sentencing Commission, 1987. Entries are months of imprisonment. | 40 | 292 - 365 | 324 - 405 | 360 - life | 360 - life | 360 - life | 360 - life |
| | 41 | 324 - 405 | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life |
| | 42 | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life | 360 - life |
| | 43 | life | life | life | life | life | life |

Figure 1: Areas of sentencing table where home confinement would be allowed under options

Option 1 is tied most closely to the seriousness of the crime and the punishment required under the present guideline structure. It simply allows the use of home confinement in the same way that community confinement is presently used as an alternative to imprisonment or as part of a split sentence.

In effect, judges could impose home confinement in lieu of imprisonment at a 1:1 ratio for up to 6 months minimum required imprisonment. For 8 to 10 months minimum they could impose home confinement at a 1:1 ratio for at most half of the required imprisonment; the remainder must be served in prison.

It may be desirable to consider two additional revisions in the present guideline structure: 1) in the ratio of home confinement to required imprisonment and, 2) in the portion of split sentences served in prison. For punitive purposes---and especially if additional conditions such as community service or fines did not adequately punish---a greater ratio of home confinement for required imprisonment might be used. Two-to-one ratios are typically found in state programs.¹⁷

Differently portioned split sentences should also be considered. Briefer periods of "shock incarceration"¹⁸ followed by longer periods of home confinement may provide more punishment per dollar and also be more effective at preventing the disruptions to family, loss of job, or exposure to criminogenic prison experiences.¹⁹

Option 2 expands the availability of home confinement to those convicted of somewhat more serious crimes, but who have no

17. Remember that extending the period of home confinement decreases the cost effectiveness of the sanction.

18. See E. J. Latessa & G. F. Vito, "The Effects of Intensive Supervision on Shock Probationers," Journal of Criminal Justice, 1988, pp. 319-330.

19. The guidelines as currently written contain an anomaly in their use of split sentences. For minimum ranges of 1-6 months, judges have the option of either community confinement, imprisonment, or a split sentence. For minimum range 8-10, they have only the options of imprisonment or split sentence. So for an offender in guideline range 6-12, the judge could sentence to 6 months in a halfway house. But for an offender in range 8-14, the judge must sentence to at least 4 months in prison before halfway house placement. Judges cannot fashion what might in some cases be a very effective sentence: 1 month hard time in jail, followed by a year of home confinement.

or little criminal history.²⁰ For persons who have previously been convicted and imprisoned, home confinement may seem relatively easy. But to first offenders or those who have previously gotten simple probation, home confinement represents a significant sanction and a substantial increment in punishment and control. These offenders are also those most likely to be harmed by prison.

We propose that the Commission and judiciary consider the experimental use of home confinement for Category I offenders up to Offense Level 15 if they satisfy the additional program screening conditions. This permits a fuller exploration of the types of people who can be controlled with electronic monitors. Those with a previous probation violation or violent offense should be excluded. Policymakers may wish to develop additional exclusions.

Since the minimum term of imprisonment for Offense Level 15 is 18 months, full home detention in non-working hours for the entire length of supervision is not realistic. Similarly, lengthening the term at a 2 to 1 or other ratio to obtain equivalent punishment would be impossible. To increase the punitiveness of the sentence, it may be desirable to mandate a period of incarceration at the beginning of the sentence. Additional punitive conditions and assignment to the P&D Track must be part of the sentence. In some cases, the goal of equivalent punishment must be balanced by the goals of inexpensive incapacitation, the potential for rehabilitation, and the experimental value of the research program.

Option 3 is intended to maximize the research potential of the program. It abandons use of the guideline grid as the primary criteria for selection, except to place an upper limit on the seriousness of offenses for which home confinement would be permitted. No offender with an offense score greater than 17 would be admitted to the program. In these cases no conceivable combination of additional conditions could adequately punish the offender, and the research goals and other purposes of sentencing cannot outweigh this inadequacy.

The remaining pool of offenders must meet the core program selection criteria. They should have no history of violent offenses or parole or probation revocations. Even with these additional exclusions, a wide range of offender types and criminal

20. This is roughly congruent with Criminal History Category I from the guideline grid, though this category includes both first offenders and those who have previously been convicted but not incarcerated for more than 60 days. Policymakers may wish to narrow the availability of the program to only first-timers, to those never before incarcerated, or make it available to all Category I offenders.

histories would likely be available for the program. If the remaining pool of eligible offenders is quite large, then random selection from the pool of eligible offenders should be considered. With adequate followup, this would permit the design of a true evaluation of the effectiveness of home confinement.²¹

Administratively initiated conditions of supervision

Once the offender has been sentenced to probation, or referred on parole or supervised release, the probation office has discretion to assign him or her to different levels of supervision. This discretion may be limited by legally imposed conditions, but the officer generally may implement daily, weekly, or less frequent contacts. This discretion may permit the probation officer to place an offender in the home confinement program even though the judge did not stipulate such a condition at sentencing. At the very least, the officer can ask the judge or parole commission to hold a hearing and add the condition of home confinement.

The availability of this sanction is an important new supervision tool meriting further study. The pilot curfew parole program in Miami has developed procedures and criteria for referral by supervising probation officers. Parolees are considered for the program "as a result of violations or other problems that would have resulted in a request for revocation or CTC placement." The suitability of the home, employment, and other factors are also considered by the deputy chief probation officer, who decides whether to request a Modification of Parole Conditions.

At this point we don't know what selection criteria would ensure that this new sanction is used with maximum effectiveness. Offenders exhibiting signs of a high risk of absconding, offenders having trouble on the job, or those not complying with treatment conditions may be suitable candidates. Additional research is needed.

21. Random selection could be instituted under the other options, but several considerations weigh against it. First, many of the offenders included under Option 1 already have home or community confinement available as a sentence. Denying them a present benefit on a random basis creates serious ethical and perhaps legal questions. In addition, we question whether a sufficiently large population of qualified offenders could be found under Option 1 or 2 to justify randomly excluding a proportion of them for experimental purposes. This is especially true if the experiment is to be done in jurisdictions where there are no community treatment facilities, which tend to be non-metropolitan areas.

Conditions of parole or early release from imprisonment

Parole officials have authority to impose conditions of supervision on those released under their jurisdiction. Prison authorities have some release discretion while an offender is under their jurisdiction, based primarily on their authority to designate place of imprisonment and to grant furloughs. One common use of this authority has been assigning offenders to serve the last portion of their prison term in community treatment centers; another is the curfew parole and pilot electronic monitoring study. The Probation Division has statutory authority to assist in the supervision of offenders released under all these procedures when requested by the attorney general or his or her designee.²²

Prison and parole authorities have their own criteria for release and their own views regarding the appropriate elements in an early release home confinement program.²³ The emerging

22. 18 U.S.C. § 3603(f), as modified by the Sentencing Reform Act of 1984. (Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, October 12, 1984).

23. See, for example, the proposal by Parole Commissioner Rast for a "Community Based Offender Sanction and Control Program" (July 28, 1988) and the letters in reply of Donald Chamlee, Director, Probation Division (August 16, 1988) and Michael Quinlan, Director, Bureau of Prisons (September 28, 1988).

Commissioner Rast's proposal was for a program intended to ensure "that society maintain the integrity of its penal function" and contained "sufficiently punitive provisions that the participant is little or no better off than he would be if he were still in the custody of the BOP." It excluded inmates with a Salient Factor Score of greater than three, major drug dealers, RICO or continuing criminal enterprise offenders, those convicted of violent or sex offenses, or those with a history of escapes or absconding. It contained stringent provisions for time off and other conditions of confinement. Many of Commissioner Rast's ideas are included in the core program outlined in this proposal, and many of the punitive elements are found in the P&D track.

Director Chamlee replied that the selectivity of the program was wrong---that the expensive monitoring resources should be used on the worst risks, precisely those excluded under the Rast proposal. Better risks could be cycled through the program only briefly or supervised under simple curfew parole. Additional program elements---calling for the "highest and most remunerative employment possible," for community service, for abstention from alcohol, prohibitions against visits from persons who are not "law abiding," and expanding the search and seizure authority of probation officers---were seen as unworkable or not cost

consensus is that post-incarceration use of home confinement should be restricted to high-risk offenders requiring intensive supervision. In some cases, T&T Track conditions may be useful for easing the transition back to the community and encouraging the development of law-abiding habits and lifestyles.

The pilot program in Miami has developed these procedures and criteria for selection into its' home confinement program:²⁴ The Community Programs Managers review cases referred for CTC placement, select those that appear to be eligible for the Community Control Program, and refer them to the Probation Office, providing a copy of Bureau of Prisons file materials and (if the offender was sentenced in another district) a copy of the presentence report. The Probation Office then conducts a pre-release investigation and makes a recommendation concerning the inmate's eligibility for the program using the following criteria:

- 1) The inmate must be scheduled for release by parole or mandatory release. Mandatory release cases must also have a salient factor score of at least four and must not have been convicted of a drug offense rated category six or higher.
- 2) The inmate must be eligible for parole on or shortly after his proposed CTC placement date. (Otherwise, inmates would have to stay in prison longer in order to participate in the program.)
- 3) The presumptive parole date must be at least 68 days beyond the parole eligibility date (to allow sufficient time in the program).
- 4) There should be no detainers or other legal barriers to early parole. (An exception may be made for INS detainers when the probation officer determines that there is a strong likelihood that the detainer will be dropped or the offender will be released on bond.)

effective.

Director Quinlan replied that the program was "more restrictive than is appropriate for offenders following a period of incarceration. The program described seems to fit better at another point in the criminal justice system, perhaps as an alternative to institutionalization."

24. This material is taken from the Policy Statement and Guide to Operations of the Community Control Project of the U.S. Probation Office, Southern District of Florida, R. F. Miklic, D.B. Spogen, and D.C. Baab, authors.

- 5) The inmate must have an acceptable residence which can accommodate the electronic monitoring equipment.
- 6) The inmate must have either:
 - a) A valid offer of employment; or
 - b) a reasonable expectation of employment and the resources to maintain himself while looking for work.
- 7) The inmate must have no other special needs that require a CTC placement.

Program-wide selection criteria and procedures

The limited number of monitoring devices, trained personnel, and other resources available to the program require that officers allocate slots to those candidates from each entry point that most need it. Initially, all inmates who meet the selection criteria will be assigned to the program. Once the number of participants begins to approach the limit, officers must identify offenders who most need the program and reserve slots for them. Remaining qualified offenders should be assigned to the program on a random basis.

Offender characteristics. Home confinement can provide a form of incarceration for persons who are unsuitable for the prison environment because of illness, handicap, pregnancy, or other condition. Other special considerations to be taken into account include: the inability to pay restitution absent ongoing employment, whether the offender is the sole caretaker of minor children, and permanent effects on an offender's career should he or she be imprisoned. Another consideration is the availability of other community placement options.

Candidates for the program---and if possible, spouses, housemates or parents---must be interviewed before acceptance into the program to gauge their willingness to abide by program rules. Home confinement may simply be ineffective for preventing a return to certain types of criminal activity, such a drug dealing or racketeering. Offenders who commit domestic violence or other crimes against the family are not good candidates for home confinement if the victims remain at home as well.

Home characteristics. Careful pre-placement planning is essential in these cases. It is especially important to make sure that the proposed residence will be suitable for electronic monitoring. The minimum requirements are:

- 1) A private telephone line.
- 2) A telephone with a modular (RJ-11) connector.

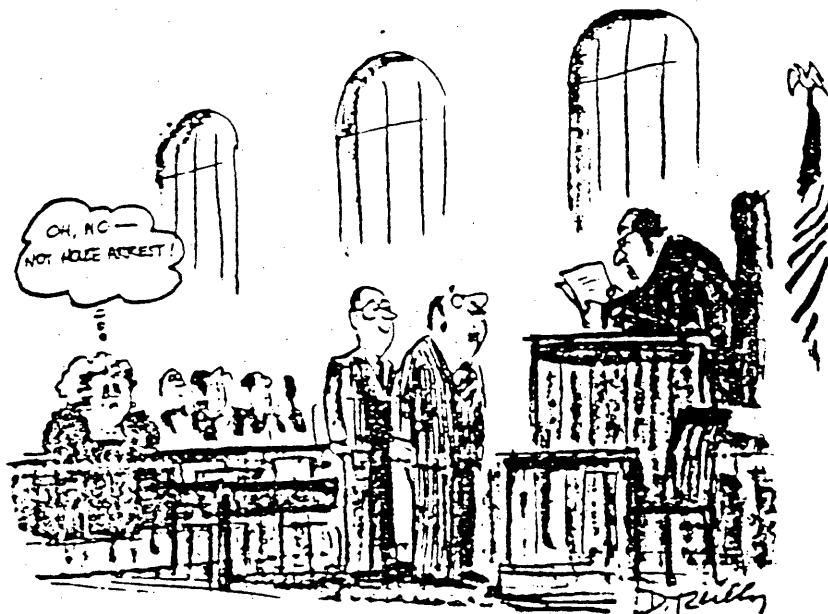
- 3) A power outlet near the telephone connection (an adaptor will be needed if the residence does not have 3-prong grounded outlets).
- 4) No "call forwarding" or "call waiting" services.
- 5) No cordless telephones or answering machines.

Plans should be made to rectify any problems so that the home will be ready to accept the monitoring equipment when the offender enters the program. The Authorization to Release Telephone Subscriber and Service Information and Authorization to Deny or Terminate Call Forwarding and Call Waiting Service forms should be executed at this time if the person with whom the offender will be living is the subscriber.

If the offender will be living in someone else's home, that party must agree to allow installation of the monitoring device. He must also agree to remove any of the prohibited services or equipment listed above. The probation officer should carefully explain the monitoring program and the restrictions that come with it in order to ensure that relatives or other third parties who agree to participate in the program do so freely and voluntarily.

P&D Track. The home of offenders on this track must be surveyed to establish whether it is of such a luxurious nature that the offender will not be adequately punished or that the community would not find the sanction adequate to reflect the

seriousness of the crime. It may be possible with careful placement of the electronic monitoring receiver to restrict access to yard, pool, or other conveniences. Draining of a pool, discontinuation of maid service, or other hardship conditions should be considered if necessary. If no arrangements can be made to ensure adequate punishment, the offender should not be admitted to the program.



STATEMENT
OF
JOE B. BROWN
CHAIRMAN
SENTENCING GUIDELINES SUBCOMMITTEE
ATTORNEY GENERAL'S ADVISORY COMMITTEE
BEFORE
THE
UNITED STATES SENTENCING COMMISSION
CONCERNING
SENTENCING GUIDELINES
ON
APRIL 7, 1989

Mr. Chairman and Members of the Commission:

I greatly appreciate the opportunity to appear before the Commission as a member of the Attorney General's Advisory Committee's Subcommittee on Sentencing Guidelines. As you know, this Subcommittee, comprised of ten United States Attorneys, has met periodically over the last couple of years, generally with members of the Commission staff and often with Commission members to discuss problems and solutions to those problems under the Sentencing Guidelines. At our most recent meeting following the training seminar in Phoenix, we discussed the proposed amendments to the Guidelines in detail.

We will be submitting through the Department's ex officio member of the Commission, Steve Saltzburg, our comments on these very shortly. The members of the Sentencing Subcommittee feel that they do have a good perspective of the Sentencing Guidelines and the problems that do arise from time-to-time, since the United States Attorneys in the field are the ones most directly affected by the Guidelines.

In the time allotted to me this morning, I would like to address a few of the more important issues remaining after Ed Dennis' very thoughtful comments.

BANK ROBBERY (AMNEDMENT 50)

Bank robbery is an issue that has generated a number of comments to members of the Subcommittee. Our belief that the Guidelines as currently written are too low for bank robbery is borne out by the January 12 report to the Commission Research and Development Program by Mr. Baer, Chairman of the United States Parole Commission. From that study, the Parole Commission concluded that 57% of the robbery cases currently under the Guidelines would end up serving less time than they would have under the old parole guideline range. Of the 21 cases making up this study, it appeared that one received a more severe sentence than he would have under the old parole guidelines, 7 received the same sentence and 13 received a lesser sentence. The Subcommittee's recommendations is that the basic offense level for robbery under Guideline 2B3.1 be raised substantially from the basic offense level of 18.

The Commission has solicited comments on whether additional robberies not covered by the count of conviction should be used to enhance punishment. We believe that they should be and recommend the adoption of option 2 which would provide for increased punishment based on the number of robberies the defendant is found to have committed.

ROBBERY INVOLVING USE OF A FIREARMS (AMENDMENT 50)

We also believe that there needs to be a very substantial increase in the specific offense characteristics where a firearm or explosive device is involved. Congress has clearly indicated that it feels the use of a firearm in carrying out a serious felony such as robbery warrants a mandatory five-year consecutive sentence. We believe that this specific offense characteristic for robbery carried out with a firearm or explosive device should reflect this Congressional mandate. This could be accomplished by providing, in §2B3.1(b)(2), that if a firearm or explosive device is discharged the increase shall be 10 levels, if the firearm or explosive device is used, 9 levels, and if the firearm or explosive device is brandished, displayed or possessed, 8 levels. An 8 level increase would be very close to the five-year consecutive minimum mandatory that Congress has provided.

Of course, in those cases where an 18 U.S.C. §924(c) violation is also charged, the enhancement under this specific offense characteristic would not normally be applied. However, the application of such a specific guideline would allow the Court to impose the justifiable increase for an armed bank robbery even though §924(c) was not specifically charged. We believe it would also bring the robbery guidelines more into keeping with existing practices and sentences and adequately punish robbery offenses where a firearm or explosive device is used.

We would also strongly recommend that a specific offense characteristic be put into the Guidelines for those individuals who use a fake or simulated firearm or explosive device. The fear engendered by victims is the same whether the firearm or explosive device is real or fake. In many cases, what appears to be a real firearm or explosive device will be displayed but it may be difficult to establish, even by a preponderance of the evidence, that what was displayed was in fact real. The defendant will normally, of course, claim that it was not real where he is not caught in actual possession of the weapon. A 2 level increase for use of a simulated or fake firearm or

*2 level for
fake weapon*

explosive device would be entirely appropriate. This would recognize the fear caused to the victims and would also recognize that there is an increased risk in general when even a fake is possessed or displayed. With these additional adjustments, we would also recommend that the cumulative adjustment from Subsections (2) and (3) not be limited but in fact be given full force and effect.

NEW CRIMINAL HISTORY CATEGORY.

Mr. Dennis has already pointed out the Department's position concerning the career criminal guidelines. Based upon the Congressional language and the Department's interpretation of it, we agree that the current guideline is required absent statutory change. We do support an acceptance of responsibility reduction to the current Guidelines.

However, in discussing the career offender offenses, the Commission proposed in option 1 a criminal history category VII. The Subcommittee believes that a criminal history level VII along the lines of option 1, should in fact be considered and adopted across the board without reference to the career offender provisions.

Many of us are seeing presentence reports which indicate that defendants have criminal history points in excess of 20. The current category 6 does not take into account criminal history points above 13. While it is always possible for the court to use a departure, an upward departure almost assures a defense appeal. the Subcommittee believes that there are a number of individuals who are in fact habitual criminals but who do not meet the violent or drug offense career test. These criminals are individuals who have committed repeated property immigration, and fraud related offenses. Given the fact that recent studies by the Department of Justice indicate that a large number of defendants, in fact, do come back into the criminal justice system within five years after release, we believe that those defendants who continue to commit crimes even though not violent, reach a point where they need to be incapacitated for increased periods of time. The range set for a new category VII would accomplish this.

The Subcommittee was particularly concerned, in many cases, in the immigration area that offenders with a history of many, many violations are simply not adequately punished.

CAREER OFFENDERS (AMENDMENT 243)

On the issue of career criminals, the Subcommittee was bothered by the current definitions in 4B1.2(3) which define prior felony convictions. This current definition as applied to the career criminal and criminal history scores seems, at times, to produce an arbitrary result.

For example, an individual who many years apart commits two unarmed bank robberies using a note only would qualify for career offender status upon his third note job and would be sentenced with a offense level of 32. On the other hand, an individual who commits five armed bank robberies over a five-year period is caught, pleads not guilty, and is convicted of all five bank robberies, would be deemed to have only one conviction and would not qualify for the career offender status. He could also have a criminal history level as low as II. It appears to us to be much more logical and consistent with the Congressional intent for the Commission to provide that prior felony convictions will be counted separately, where for sentencing purposes they would not have been grouped but counted separately. Thus, in the example that I cited, the individual convicted of five separate bank robberies would not have had those five robberies grouped together but would have received a sentence based upon these offenses being treated separately. To arbitrarily limit prior offenses to those which do not occur at a consolidated trial or consolidated plea seems unreasonable. An individual committing bank robberies in two states will normally be tried and convicted separately. An individual committing two bank robberies in the same locality will very often have his cases tried or sentenced together. The different treatment given these situations, particularly when it moves the defendant from a normal criminal history into the criminal career category seems to induce a tremendous disparity in the sentencing process.

HOBBS ACT (AMENDMENT 6)

Another area of considerable concern to the Subcommittee are those violations involving the Hobbs Act, particularly offenses committed under the color of official right. The current guideline 2C1.1 sets a base level of 10 but then applies the greater of either the value of the bribe or an 8 level increase by an official holding a high level decision making or sensitive position or an elected official. We believe that

these two offense characteristics should be added together to arrive at a substantially higher violation for those officials who have used their position to secure substantial sums of money. Offenses involving color of official right are extremely serious since they erode the public confidence in its elected and appointed officials. This erosion of confidence justifies severe punishment. Many of the United States Attorneys who have had experience under the guidelines with the Hobbs Act have pointed out that the current sentences often run well under two years real time. The base level for this offense also needs to be raised at least two levels. We will address this further in our written submission to the Commission.

ESCAPE PROVISION (AMENDMENT 160)

In connection with the escape provision, we believe that there should be a specific offense characteristic enhancement for those individuals who escape whether from a secured or non-secured facility who are serving time for drug or violent offenses. At least a 2 level adjustment upward should be given those individuals to insure that society remains protected from them as long as is reasonably practical.

RELEVANT CONDUCT (AMENDMENTS 11 & 12)

Concerning the amendments on relevant conduct, we believe that some clarification may be needed in some areas to prevent placing too much conduct on a low level defendant. We will submit more specific comments on this issue later.

SETTING LEVELS WHERE THERE IS A MINIMUM MANDATORY SENTENCE

The Commission in several cases has asked for comment on where offense levels involving minimum mandatory sentences should be set (Amendment 96). The Subcommittee recommends these be set above the minimum so there can be a reduction to the minimum mandatory sentences upon acceptance of responsibility. Without some flexibility and give, these minimum mandatory sentences risk clogging the system with trials.

TIME OF ACCEPTANCE OF PLEA (6B1.1(c))

The Subcommittee is worried that using this rule, many judges defer accepting any part of a plea until the presentence report is completed. This leaves the government in an awkward position for a couple of months until the PSI is completed. A defendant can withdraw his plea at any time for no real reason during this period. We recommend that the court be advised to

accept the plea itself at the time it is offered and only defer accepting the plea agreement until later. By accepting the plea, the defendant will have to show good cause to withdraw his plea. Should the court reject the plea, the defendant would have good cause to withdraw, but would not have two months or more to think about withdrawing for any reason that was not fair and just.

Again, the Sentencing Guidelines Subcommittee appreciates the opportunity to work with the Commission, and welcomes any questions that the Commission has now or in the future.

STATEMENT OF SAMUEL J. BUFFONE
CHAIRPERSON

COMMITTEE ON THE U.S. SENTENCING COMMISSION
SECTION OF CRIMINAL JUSTICE
AMERICAN BAR ASSOCIATION

Before the
U.S. SENTENCING COMMISSION

On the
PROPOSED AMENDMENTS TO THE
SENTENCING GUIDELINES

April 7, 1989

Mr. Chairman and Members of the Commission:

My name is Samuel J. Buffone. I appear today to testify on behalf of the 350,000 members of the American Bar Association. I serve as Chairperson of the American Bar Association, Criminal Justice Section Committee on the United States Sentencing Commission. I am accompanied today by Steven Salky, a member of our Committee. Both Mr. Salky and I are practicing criminal defense attorneys.

In the past I have appeared and testified before the Commission and Committees of the United States Congress in order to address the ABA's continuing support for the work of the Sentencing Commission and the concept of Federal Sentencing Guidelines. As you are aware from our past testimony, the ABA's positions are founded on the Association's 25 year history of development and refinement of its Standards for Criminal Justice (Standards). While we will seek in these comments to address a wide variety of issues raised by the Commission's February 28, 1989 proposed amendments to the Sentencing Guidelines, the absence of ABA policies prohibits us from commenting on a number of the specific offense guidelines.

During past appearances before the Commission I have expressed our Committee's concern that the Commission's process be as open and public as possible. We commend the Commission for its serious effort to implement its responsibilities pursuant to

28 U.S.C. § 994(x) and 5 U.S.C. § 553 requiring notice and comment on the promulgation of Guidelines. While it is our belief that the Commission has used the resources available to it to respond to new Congressional legislation and the strictures imposed by the Sentencing Reform Act, we suggest careful analysis of not only the substance of the proposed amendments but the process by which the Commission will propose future amendments. We suggest that the Commission establish its own regulations for amending the Guidelines and consider recommending to Congress additional changes in statutory authority to ease the amendment process. Section 994(a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." We support a Commission effort to promulgate rules and regulations to govern the Guideline amendment process.

Amending the Sentencing Guidelines

Our Criminal Justice Standards advocated the establishment of a commission to engage in an on-going, evolving process of formulating sentencing guidelines. The Sentencing Commission concept was viewed as having the additional strength of providing a depth of expertise that would be insulated from pressures in the legislative process and accordingly be more capable of formulating fair and workable guidelines.

Our interpretation of the legislative history of the Sentencing Reform Act is that it embraced these core concepts. Additionally, the Sentencing Reform Act contemplated a commission that would actively seek out comment from the public and those involved in the criminal justice system in an on-going effort to refine existing guidelines and develop new ones. The Act contemplated the gathering, review and interpretation of data as a critical component of this process.

The duties of the Commission set forth in 28 U.S.C. § 994 contemplate an on-going process of formulating and amending Guidelines. Subsection (g) requires that the Commission continually assess the impact of these Guidelines on the existing capacity of penal, correctional and other facilities and services. It further requires that any guidelines be formulated to minimize the "likelihood that the federal prison population will exceed the capacity of the federal prisons." We urge the Commission to evaluate the potential impact on prison population of any amendment to its Guidelines.

The specific obligation to revise the Guidelines is contained in subsection (o), which requires that the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the Guidelines promulgated pursuant to the provisions of this section." The

Commission is required to consult with a variety of institutions and representatives and to consider annual reports submitted by various organizations regarding the operation of the Guidelines and suggesting changes. Finally, § 994(o), as amended by § 21 of the Sentencing Act of 1987, and § 7109 of the Omnibus Anti-Drug Abuse Act of 1988 has given specific authority to amend the Guidelines.

The proposed Guideline amendments cover the full range of likely potential types of changes with which we believe the Commission will be routinely confronted. Many of the proposals are merely clarifying or corrective and can accordingly be labeled as technical. They carry out the Commission responsibility is to make sure that its Guidelines are as comprehensible and accurate as possible. These types of "technical" amendments will ordinarily be non-controversial. While they should be subject to notice and comment, this is merely a safety valve to ensure that a substantive or controversial amendment does not escape consideration by being labeled as technical. We assume that the relatively large number of technical amendments contained in this package was necessitated by the newness of the Guidelines and that these types of amendments will become fewer as experience unfolds.

The second type of Guideline amendment is that required by a new act of Congress. Several of the proposed amendments respond to newly created criminal offenses for which there is no currently applicable guideline. See, e.g., No. 126, 128, 158,

194. We see only two alternatives available to the Commission in such situations. The first is to promulgate no guideline and leave sentencing largely to the discretion of individual judges applying the Guideline most analogous to the offense of conviction. The second possibility is to formulate a Guideline without the benefit of information on prosecutorial patterns or conviction records for the newly created offense.

This course, the one adopted by the Commission in the current proposed amendments, carries with it the risk of establishing arbitrary Guidelines. While several of the newly created offenses are similar in nature to past offenses and the Commission can draw on experience, some of the offenses are totally new and there is no experiential basis for formulating guidelines. For example, proposed Amendment 176 deals with the new offense of placing hazardous or injurious devices on federal land. The novelty of this new offense makes it difficult to fashion guidelines based on past practice or analogy to other similar laws. The absence of such reference points renders any guidelines somewhat arbitrary.

We recommend that the Commission adopt a flexible approach and promulgate guidelines where there is a historical basis for formulating an appropriate offense range. Where, however, a totally new offense is proscribed by legislation the Commission should not hesitate to refrain from promulgating a guideline and await at least the initial prosecutions under the statute to have some basis for determining how the statute will be applied and what reaction sentencing courts will have to it.

The provisions of the Anti-Drug Abuse Act of 1988 and the Major Fraud Act of 1988 have presented the Commission with three different types of Congressional action. In some instances, Congress has fixed a mandatory minimum penalty, see, e.g., No. 96. In other cases Congress has specified a specific offense level. See, e.g., No. 102, No. 171. In other instances, such as No. 119, Congress has listed factors and directed the Commission to consider the appropriateness of providing an enhancement of a specified number of levels for particular conduct. Finally, in a number of instances Congress has provided no direction other than the statutory minimum or maximum penalty to guide the exercise of the Commission's discretion.

The Commission sought comments on a variety of issues raised by this range of Congressional approaches. In proposed Amendment No. 96 the Commission has sought comment on how it should respond

to mandatory minimum sentences. During the legislative process leading to enactment of the Omnibus Drug Abuse Act of 1988 Chairman Wilkins in a letter of August 22, 1988 responded to a question from Senator Nunn regarding the appropriateness of mandatory minimum sentences. As Chairman Wilkins recognized at the time, mandatory minimum sentencing "may not be the best way for Congress to set sentencing policy." The delegation of authority to the Sentencing Commission to utilize its expertise in formulating a comprehensive set of sentencing guidelines is inconsistent with Congressional imposition of mandatory minimum sentences. Additionally, fixing of mandatory minimum sentences will upset the carefully structured balance of the Guidelines' consideration of multiple sentencing factors. We recommend that the Commission formulate offense levels irrespective of a Congressional enactment of a mandatory minimum sentence. The Commission should formulate such guidelines just as it would for any other offense.

Such guidelines will not be superfluous. Amended Rule 35(b), Fed.R.Crim.P. as well as the provisions of 18 U.S.C. § 3553(e) permit a court to depart below a mandatory minimum where a defendant offers substantial assistance to law enforcement authorities. In such circumstances, guidelines setting an appropriate offense level could set a benchmark for

departure by the sentencing judge. In addition circumstances will face sentencing courts in which the Guidelines' "charged based" determinations may require consideration of offense conduct that is not charged under a statute requiring a mandatory minimum sentence. We urge the Commission to express its views forcefully to Congress on the inconsistencies of mandatory minimum sentencing with its function under the Sentencing Reform Act.

In the Omnibus Anti-Drug Abuse Act of 1988 Congress, in at least two instances, gave specific instructions for setting an offense level within a specified numeric range. At proposed Guideline Amendment 102 the Commission responds to a Congressional directive to set an offense level of not less than 26 if death results from a violation of 18 U.S.C. § 342 and an offense level of not less than 21 if serious bodily injury results. The Commission has sought comment on whether it should utilize these minimum levels or set a higher offense level for these aggravating factors. Proposed Amendment 171 responds to § 6468 of the Omnibus Anti-Drug Abuse Act of 1988 which requires a two level increase for providing controlled substances to an inmate with a base level of not less than level 26.

The Association views these two Congressional directives as reflecting a possibly significant policy decision that should be

more directly confronted by the Congress. As Chairman Wilkins pointed out in his August 22, 1988 letter to Senator Nunn the 98th Congress explicitly rejected opportunities to write mandatory sentencing provisions into the Sentencing Reform Act. The legislative history cited in the letter reflected the view of the Judiciary Committee that policy directives to the Commission are the most appropriate way to proceed. At the first available opportunity we will make our views known to Congress that Congressional enactment of specific offense levels should be avoided. Rather, we favor a policy of expressions of Congressional intent which should be considered by the Commission in its overall Guideline formulation process. Congress will of course reserve the right to specifically amend or repeal guidelines should it disagree with the Commission's efforts to carry out such policy directives.

We strongly favor a legislative procedure such as that contained in proposed Amendment 119. That Guideline implements § 2(b) of the Major Fraud Act of 1988 which requires the Commission to promulgate a new guideline, or amend existing Guidelines, to include an enhanced penalty based on conscious or reckless creation of risk of serious personal injury resulting from fraud. Congress stated its intent that the Commission

consider the appropriateness of assigning a two level enhancement in such cases but did not mandate such an increase.

In proposed Guideline Amendment 28 the Commission specifically seeks comment on whether it should increase an offense level where Congress subsequently increases the maximum sentence covered by the Guideline. Where Congress increases a statutory maximum it may well be difficult to determine whether it viewed the crime generally as one that required an increased sentence or whether it responded to particularly heinous violations of the statute which should be punished by a more severe sentence. Our Standards recommend use of the least restrictive alternative necessary to effectuate sentencing policy. Similarly, 18 U.S.C. § 3553(a) requires that a court impose a sentence "sufficient, but not greater than necessary" to comply with the overall purposes of the Sentencing Reform Act. Consistent with these policies it is the Association's belief that in the absence of a clear declaration of Congressional intent to increase sentences generally, or in the absence of the Commission's own conclusion, supported by adequate data, that sentences for a particular offense should be increased generally, the Commission should apply a rule of lenity. Such a rule of lenity would be consistent with general principles of criminal law, implement § 3553(a) and help deal with the ever-increasing

overcrowding of federal prisons. It is our belief that such a rule of lenity and emphasis on alternative sentencing opportunities should be utilized by the Commission wherever possible. In particular we favor an expansion in the availability of probation and non-incarcerative sentences.

A third general category of proposed amendments is reflected in the Commission's Item 50 proposing increases in the offense level for robbery. Unlike the majority of the Commission's other proposals which are technical in nature or which respond to legislation, this proposal is based upon the view that the current Guidelines result in sentences that are too lenient. While we will discuss this particular Guideline later in our testimony, we urge the Commission to consider such modifications of the Guidelines only where there is adequate data and sufficient comment from judges, prosecutors, probation officers and defense attorneys familiar with past applications to establish a clear factual basis for a determination that the Guidelines should be amended. The notice of rule making itself appears to concede that the data available to the Commission at this time does not provide a reliable basis for evaluating the workings of the current Guidelines. It is particularly dangerous to amend Guidelines based upon anecdotal or impressionistic views of their severity or leniency. It is inevitable that some

observers will perceive a particular Guideline to be too lenient and others will perceive the Guideline to be too harsh. Such impressions and anecdotes cannot be a substitute for hard data.

It is the Association's view that the existing legislative authority for amending the Guidelines requires further clarification. Section 7109 of the Omnibus Drug Abuse Act of 1988 provides authority to the Commission to submit amendments to Congress with delayed implementation dates. While the facial language of the amendment is not clear, it would appear to permit submission of proposed amendments in January as well as May. Such January amendments could take effect by July of the same year. This would of course create problems for practitioners with amendments having a range of effective dates. Even this process, however, will provide only a narrow window of authority for amending the Guidelines.

The Association supports legislation to provide on-going authority to the Commission to amend the Guidelines: we will urge legislation to permit amendment of the Guidelines whenever the Commission deems them appropriate. Such amendment authority would be independent of any temporary authority and would contemplate ultimate review by Congress. This modification would recognize that under the Supreme Court's decision in Mistretta the Sentencing Reform Act provides adequate limitations on any

delegation of authority to the Commission. We do not read Mistretta as requiring Congressional approval in order to avoid such delegation problems. Congress would, of course, retain the authority to review on its own initiative any Guidelines that it did not approve of. Through specific legislative enactments it could obligate the Commission to amend or modify these Guidelines. The submission of regular reports by the Commission to Congress would simplify this review and oversight process.

This expansion of amendment authority would be consistent with our view that the Sentencing Commission should function as a true administrative agency applying its particularized skill and expertise to the difficult sentencing determinations. Within the parameters of the clearly defined policies of the Sentencing Reform Act the Commission should gather data and seek public comment in order to establish a factual basis for drafting future Guidelines and amending existing ones. It is the Association's view that the solicitation of public comment is the cornerstone of this process. The Commission is to be commended for its efforts in this direction over the past months. The distribution of a wide range of proposals and supportive materials on organizational sanctions, combined with the public hearings and advisory group process should be a model for further amendments of the Guidelines. In the organizational sanctions area the

Commission has had the benefit of numerous studies, reports and formal and informal contacts from a variety of interested parties including government agencies and personnel, practicing defense attorneys, judges and academicians. This process should be expanded to other areas.

In the coming weeks our Committee will formally recommend to the Commission that it establish an advisory committee of practitioners. Such a committee would provide the Commission with the on-going views of criminal law practitioners on Guideline application and amendment issues. We encourage the Commission to additionally seek comment on a variety of general issues including alternative sentencing, availability of probation, prison overcrowding and the need, if any, for modification of the Sentencing Act. Additionally, we believe that the Commission should begin to prepare for the variety of tasks that it will need to respond to during the coming years under specific provisions of the Sentencing Reform Act such as the need to report to Congress on the adequacy of the existing minimum and maximum sentencing levels.

A particularly important component of this process should be the gathering, rationalization and distribution of data. The Commission's effort to formulate a robbery guidelines is a case in point. The unavailability of any data on existing Guideline

practices until days before this hearing demonstrates the current inability of the Commission to gather and assimilate sentencing data. Our own review of case law interpreting the Sentencing Guidelines indicates an almost geometric progression in the number of cases being sentenced. The process of gathering and interpreting data from this ever-increasing number of sentencings will be a significant task for the Commission.

We recognize that the range of functions we have suggested for the Commission may well extend beyond its available resources. In this regard our Committee will support efforts by the Commission to obtain increased funding to make implementation of these additional functions possible.

With these general considerations in mind, we offer the following comments on specific proposed amendments:

Amendments to §2A2.3 (Minor Assault).

The substitution of the phrase "physical contact" for "striking, beating or wounding" expands the reach of the guideline to a range of less serious conduct. It would require jail sentences for individuals who engaged in very innocuous conduct so long as it constituted "physical contact". A preferable alternative is to assign a higher base offense level to "conduct that resulted in bodily injury."

Amendments to §2b3.1 (Robbery).

While ABA policy takes no position on the appropriate offense level for particular crimes we urge caution in proceeding with any significant increases in offense levels absent clear data reflecting a significant flaw in the workings of an existing guideline. We have not had an opportunity to examine the preliminary drafts of data analysis released this week but our preliminary review indicates that there is not an adequate basis to modify existing practice.

If the Commission elects to enact the significant increases in offense level for this or any other guideline we urge routine examination of the impact of such increases on prison overcrowding. Incremental increases in prison population could create a crisis in the federal prison system.

Amendment to §2D1.1(a) (Drug Offenses Resulting in Death).

The current guideline establish a presumptive life sentence if the drug offense "results in death or serious bodily injury with a prior conviction for a similar drug offense." While the intent may have been to track statutory language it introduced a real offense standard. The amendment requiring a conviction of the statute authorizing the life sentence is desirable.

Amendment to §2D1.5 (Continuing Criminal Enterprise).

This is one of several guidelines where the commission is responding to an increase in the statutory maximum penalty. In light of the policy reasons stated earlier in this testimony favoring lenity and the crisis in prison overcrowding created by drug related cases the Commission should include the mandatory minimum in the guideline range for a defendant in Criminal History Category I.

Amendments to § 4B1.1 (Career Offender).

The current Guideline is flawed for the reasons cited by the Commission in the proposed amendments. The overly literal interpretation of the statutory directive in 28 U.S.C. 994(h) may be inconsistent with the legislative history of the Sentencing Reform Act. Generally speaking, the Commission should look for a way to increase the flexibility in sentencing "career offenders." Option 1 is a start in this direction because it ensures lengthy sentences, but does not incapacitate for a period beyond that necessary to ensure against repetition.

In considering how to revise this Guideline, the Commission may want to consider making the career offender designation a basis for a departure, given the tremendous variations among the underlying prior convictions that define a "career offender." Creating a single new criminal history category may not make

adequate distinctions among offenders. By adopting Option 1 as proposed as well as specifying circumstances in which departure from the resulting guideline is appropriate (both upward and downward), the Commission will build additional flexibility into the sentencing of career offenders and can more usefully evaluate the data thereby generated.

Amendments to Guideline § 4B1.3 (Criminal Livelihood).

The present Guideline on criminal livelihood unfairly discriminates against the indigent or unemployed defendant. Numerous "horror stories" exist regarding this Guidelines' application. For instance, the Guideline was applied to a defendant who pled guilty to an offense that allowed for a probationary sentence and then reported to the probation office that she had fed herself in part over the past several months by shoplifting. On this basis, a finding was made of "criminal livelihood" and her offense level was increased to a level that resulted in her imprisonment.

By creating a monetary floor and a requirement that the defendant's criminal conduct be his or her "primary occupation" in that "12 month period," the Commission has substantially eliminated the prior discrimination. The new provision will target those limited number of offenders who more accurately meet the type of offender envisioned by 28 U.S.C. § 994(i)(2).

Amendments to § 5F5.2 (Home Detention).

Home detention should be an alternative to imprisonment. Home detention is a less costly means of punishment that imposes significant restriction on liberty and enhances public safety without the attendant disruption on an offender's family caused by imprisonment in a federal institution. The ABA has long endorsed alternatives to imprisonment.

There is no significant distinction between home detention and other forms of alternatives to incarceration that exists in the Guidelines. The schedule of substitute punishments of § 5C2.1 should be amended to provide that 30 days of home detention equals one month of imprisonment. Home detention, particularly with the supplement of electronic monitoring, is a safe and useful alternative as other forms of community confinement.

Amendments to § 5G1.3 (Conviction on Counts Related to Unrelated Sentences).

The current Guideline is subject to abuse, particularly where an offense (or offenses) is committed in separate jurisdictions. When charges arising out of a course of conduct are adjudicated in separate jurisdictions, this Guideline presumes separate consecutive Guideline sentences. Thus, a person who commits three bank robberies in jurisdiction A and

three in jurisdiction B as part of a spree would, presumably, be sentenced to consecutive Guideline terms. This result is contrary to the Guidelines' general intent and cannot be correct.

Judge Howard's decision in United States v. Scott, Cr. No. JH-87-0570 which concluded that the current Guideline was contrary to 10 U.S.C. § 3584(a) is clearly correct. Thus, the proposed amendment is proper.

Sentences imposed at different times should be treated as though they represent multiple counts. The timing of the actual sentencing ought to make no difference in the outcome of the Guidelines.

Amendments to § 5B1.3, § 5D3.3 (Conditions of Probation and Supervised Release).

While the amendments require no comment, the Commission may wish to consider giving additional direction to the courts regarding their obligations in imposing conditions. As now drafted, no conditions other than the "mandatory" conditions required by statute apply when the court imposes probation or supervised release and fails to specifically order specific "special" or "standard" conditions.

Amendment to § 5E4.2(i) (Fines for the Cost of Imprisonment).

As currently drafted, this provision will apply to few defendants, since most courts will invoke the authority of

§ 5E4.2(f) to waive the requirement. While potentially worthwhile in the sentencing of organizations, the cost of implementing and monitoring this provision is probably greater than the rewards when applied to individual defendants.

Amendment to § 6A1.3 (Resolution of Disputed Facts).

This is one of the few areas where we believe the Commission's amendments are improper: the designation of this provision as a policy statement rather than a Guideline allows courts additional discretion to avoid factfinding as to disputed facts. Factfinding is important because it not only creates a record for appellate review, but allows the Commission to study actual courtroom experience in revising and modifying the Guidelines. While the Guidelines generally impose additional burdens on courts, the salutary feature of the Commission's role and of appellate review will be partially defeated by this lack of emphasis on factfinding and written/recorded statements by the court.

Conclusion

The American Bar Association is pleased to have the opportunity to continue to work closely with the Commission, and to have this opportunity to appear before you.

I would be pleased to answer any questions you may have.

REMARKS BY ANNE SEYMOUR
DIRECTOR OF PUBLIC AFFAIRS
NATIONAL VICTIM CENTER
FORT WORTH, TEXAS

U.S. SENTENCING COMMISSION PUBLIC HEARING
APRIL 7, 1989
WASHINGTON, D.C.

Mr. Chairman, Commissioners, my name is Anne Seymour and I am here on behalf of the National Victim Center. The Center has offices in Fort Worth and New York City, and serves over 6,400 victim service and criminal justice organizations. I appreciate this opportunity to present the views of the Center on the proposed amendments to the Federal sentencing guidelines which the Commission published in the Federal Register on March 3, 1989.

While the injuries suffered by the victims of crimes vary, their desire to see justice done remains constant. In our view, one of the most important remedies which the criminal justice system can offer to victims is the promise that similar offenders who commit similar crimes will receive swift, proportionate, and uniform punishment. Indeed, the Congress enacted the Sentencing Reform Act of 1984 in an effort to fulfill that promise. It was through the creation of this Commission and its guideline sentencing system that Congress intended, not only to eliminate unwarranted sentencing disparity, but also the change "historical patterns" of punishment in areas such as "serious violent crimes or white collar offenses for which plainly inadequate sentences have been imposed in the past." S. Rep. No. 255, 98th Cong., 1st Sess., 116 (1983).

Those goals remain as urgent today, if not more so, than they were in 1984. In our cities, whole neighborhoods have become the alien preserve of drug dealers and the open battleground for increasingly bloody gang conflicts. Indeed, this Commission sits in the city which has the dubious distinction of being the drug-murder capital of the Nation. Sadly, illegal use and trafficking in drugs has permeated virtually all levels of society: from the backstreets to Main Street.

Nor is it only in the area of drugs that a new wave of lawlessness is felt. In recent years, the Nation has witnessed an explosion in white collar and economic offenses. Insider trading and stock fraud provide a prime example. As the House Commerce Committee concluded in a report issued last year, "the [insider trading] scandal [on Wall Street] represents far more than the transgressions of a few individuals." Instead, the Committee found criminal conduct to be "at the heart of a substantial amount of market activity by established securities industry professionals." H. Rep. 910, 100th Cong., 2d Sess., 14, 11

(1988). In his annual report for 1986, the Attorney General placed losses due to economic crime generally at over \$200 billion. (Annual Report of The Attorney General of the United States, 60 [1986]). That annual report--the most recent available--could not take into account more recent developments, such as the massive defense procurement fraud investigation currently being spearheaded by the United States Attorney in Alexandria or the Savings and Loan crisis which continues to unfold.

Against this backdrop, we find a number of the proposals being considered by the Commission to be difficult to support. For example, we are perplexed by the two proposals currently before you which would substantially reduce sentences for career offenders. Under Section 994(h) of Title 28, United States Code, the Commission is required to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term" where a defendant over the age of eighteen is convicted for the third time of a crime of violence or a drug felony. Given the current high and increasing levels of drug-related and violent crimes--levels of crime which are nowhere more evident than here in the District of Columbia--it seems at best perverse for the Commission to consider at this time a change that would seriously undermine that very specific Congressional directive. Yet that is exactly what the proposals, if promulgated, would do.

The sentence discounts that would be affected by the career offender proposals are far from minimal. According to the Commission's own calculations, under the proposals a career bank robber convicted this particular time of unarmed robbery could look forward to a reduction in existing guidelines of up to twelve years. If he uses a gun, his discount could be increased to as much as fifteen years below present guidelines. If the armed robber seriously injured someone during the course of the offense, he could receive up to a 140 month discount below present guidelines. Similarly, if the offender is a career pusher and is convicted this time of selling 10 grams of heroin, he could look forward to a reduction in his sentence of as much as 255 months--that is, more than 21 years as compared to the extant guidelines.

According to the proposal, if the offender would happen to turn 50 before the end of his potential term of imprisonment, he could be eligible for even greater discounts. If we correctly understand this aspect of the proposal, those over 50 would be entitled to a sort of senior citizens discount in part because--in the words of the Commission--"criminal careers generally do not extend beyond age 50" and, in any event, "criminality is not a good predictor of future criminality beyond 10-15 years." 54 Fed. Reg. 9161 (March 3, 1989).

Surely that argument proves too much. If the primary concern of this or any other criminal statute is "criminality as a

predictor of criminality" then, under the Commission's reasoning, there would never be reason for imposing a sentence of imprisonment for a term of more than 15 years. Nor is it clear that the purpose of this or of any other criminal statute is primarily to incapacitate an offender until the age of voluntary retirement. If that were so, then the Commission would need to adopt a system of penalties which diminish with the age of the offender, taking care, however, to account for individual differences.

In its explanation of the proposals, the Commission also notes criticism that the career offender guideline does not adequately reflect the instructions which the Congress has given to the Commission, not only in 28 U.S.C. §994(h), but in the Sentencing Reform Act as a whole and in other enactments as well. Notably, although the Commission's explanation claims a Congressional source for that criticism, it fails to cite any House or Senate Report, any Bill or Resolution, or any statement in the Congressional Record.

Indeed, when one inspects Congress's recent actions, its will with respect to crimes of violence and drug felonies is unmistakable. For example, just last year Congress:

- ** raised the minimum mandatory penalty for carrying a firearm during a crime from 10 to 20 years;
- ** raised the mandatory penalty for committing a crime which involved carrying a machine gun or silencer from 10 to 30 years and made a second conviction for such an offense subject to a mandatory term of life imprisonment; and,
- ** created a mandatory life term of imprisonment for offenders convicted for the third time of a drug felony.

Of course, one should not forget that as a result of the 1986 and 1988 Anti-Drug Abuse Acts, Title 21 is replete with mandatory minimums.

In our view, that recent record stands in stark contrast to an argument that Congress would be sympathetic to newly promulgated sentencing discounts for career drug and violent offenders. On the contrary, it would seem that Congress intends the opposite. Namely, that upon conviction the penalties would hit career offenders like a brick wall: certain, severe, and high. Provisions like the career offender statute are intended to recognize those who repeatedly commit drug felonies and violent crimes as posing a threat to society and as possessing a level of culpability far above other offenders. Accordingly, the career offender statute singles-out such criminals for harsher treatment.

Remarkably, the Commission seems to be flinching at the prospect of certain severe punishment for serious offenses.

Significant in that regard is the apparent policy of the guidelines, which is continued and intensified in the proposed amendments, to convert statutory mandatory minimum sentences into guideline maximum sentences.

In commenting on the Anti-Drug Abuse Act of 1988, Senator Strom Thurmond warned that a potential problem with mandatory minimum sentences was that they "may have the practical effect of becoming a flat sentence which judges tend to impose regardless of aggravating factors which should warrant a more severe penalty." The Senator further recognized that sentencing guidelines could "overcome" that problem by "tak[ing] into account such aggravating circumstances." Cong. Rec. S17353 (daily ed., November 10, 1988).

Unfortunately, the proposed new guidelines generally fail to meet Senator Thurmond's concerns. Indeed, they often aggravate the problem by ensuring that the statutory minimum becomes a flat sentence imposed without regard to aggravating factors. To illustrate, the proposed guidelines for drug importation by aircraft, for drug offenses involving children, for drug offenses in prisons, and for using certain weapons in connection with a drug felony or crime of violence, merely repeat the statutory language creating the minimum or simply incorporate the statute by reference. Yet under each of those provisions of the Anti-Drug Abuse Act of 1988, when read in the context of the powers and authorities which the Commission received in the Sentencing Reform Act of 1984, the Commission has the authority and responsibility to include aggravating factors in its guidelines. We are at a loss to understand why the proposals fail to do so.

The guidelines seem strangely blind with respect to drugs in other ways as well. For example, Congress has required that the Commission increase the penalty for operating a common carrier under the influence of a controlled substance or alcohol where death or serious bodily injury results. Somewhat strikingly, however, the Commission seems to interpret that mandate as not even suggesting reconsideration of whether the current flat offense level of 8 in Chapter Two is appropriate for all other circumstances.

We believe that it is not. When the pilot of an airliner or the engineer of a train operate their vehicles under the influence of alcohol or drugs, at the very least, they place their passengers in grave danger. That no mishap occurs is purely fortuitous. Under the current guidelines, such offenders would receive a level 8 which, with a 2 level reduction for acceptance of responsibility, could result in a sentence 0 to 6 months probation with no jail time at all. Clearly that sentence is disproportionately low to the risk created by the offense. Must the victims die or be seriously injured before we are prepared to punish those who put all our lives at risk with such

careless behavior? Can we not recognize the inherent criminality of a pilot of a major commercial airline who takes drugs before or while flying and set the sentence so as to deter and punish?

The proposed guideline is also disproportionately low compared to the way that the guidelines treat far less serious offenses. For example, a con man who fraudulently takes \$10 under the pretext of collecting donations for charity receives an offense level of 10 under Chapter Two as does the thief who steals one undelivered letter from the post office. Even allowing for the 2 level reduction for acceptance of responsibility, the offenders in those cases would be required under the guidelines to serve some time in confinement. Surely placing the entire crew and passengers of an airliner in jeopardy by piloting under the influence of drugs or alcohol is a more serious offense which deserves greater, not less, punishment. Why don't the guidelines treat it as such?

And, again, as with the other drug provisions mentioned earlier, the Commission's treatment of the Congressionally mandated increase for death or serious injury virtually converts a statutory minimum into a guideline maximum. Why is there no increase for the number of victims, the nature of the drugs, etc.?

Similarly perplexing is the Commission's agonizing over the treatment of marijuana plants. In the Anti-Drug Abuse Act of 1988, Congress created an equivalency between 100 marijuana plants and 100 kilograms of marijuana. The Commission seems concerned that extending that equivalency beyond what is absolutely required by statute would be to treat "small" marijuana growers--in the Commission's view, those with fewer than 50 plants--too severely. Yet, even assuming that Congress was primarily concerned with targeting "large-scale marijuana growers" as the Commission contends, 54 Fed. Reg. 9163 (March 3, 1989), that is no reason to give a discount to other offenders. As far as we can tell, there is not a problem with over-detering the production of marijuana plants.

The Commission also seems concerned that weighing both the LSD and the medium within which it is dispersed (usually blotter paper or a sugar cube) would be unfair to the pusher. Yet, for many offenses--including those involving LSD--the prohibitions contained in Title 21 are tied to the weights of "a mixture or substance containing a detectable amount" of a controlled substance. Why the sugar cube should be treated as something other than the substance containing a detectable amount of LSD because it weighs more than blotter paper is unclear. The law addresses the entire substance or mixture and does not attempt to separate out the drug in its pure form. The Commission's concern here runs contrary to the policy which Congress has set in these matters.

Indeed, in *United States v. Bishop*, No. CR 88-3005 (N.D. Iowa Feb. 7, 1989), the court addressed the questions whether the penalty imposed under the guidelines should be determined according to the weight of the LSD alone or as dispersed in a medium (there blotter paper). In his opinion, Judge Hansen found that "the plain language of [21 U.S.C. § 841] indicates that Congress intended for the penalties imposed...to be driven by the quantity of 'a mixture or substance containing a detectable amount of [LSD]' and, hence, relevant weight for purposes of determining sentence is the weight of the blotter paper in which the LSD is disbursed."

Given the current national commitment to stemming drug abuse, we see no justifiable reason for the Commission to resist the Congressional resolve by, in effect, mandating lower sentences under the guidelines for certain drug offenses involving LSD than would otherwise be provided under statute.

The Commission should, however, give consideration to increasing the drug quantity table to provide scaled penalties for quantities which exceed the current ceilings. As drug interdiction efforts increase, the number of cases involving massive amounts of controlled substances are on the rise. Already we have seen such cases brought--such as the Leher case. The guidelines should provide certain penalties for such--undoubtedly the most serious--drug offenders.

The Commission should not hesitate in pushing forward in the white collar area. With respect to fraud, the \$5 million ceiling in the table contained in §2F1.1 simply is too low. Insider trading cases, not parenthetically in our judgment, a victimless crime, alone often involve amounts substantially in excess of that amount. For example, the Dennis Levine case involved an alleged \$12.6 million in unlawful gain. Ivan Boesky allegedly made \$50 million dollars in unlawful profits. And the case against the firm of Kidder, Peabody & Co. involved profits of over \$13.6 million.

In the area of procurement fraud, the picture is similarly devastating. The General Accounting Office reports that 148 procurement fraud cases involving the Defense Department involved an estimated loss of \$387,396,999. DOD Fraud Investigations GAO/AFMD 88-5B. Moreover, cases against single defendants have involved losses as high as \$90 million dollars. See, H. Rep. 610, 100th Cong., 2d Sess., 4 (1988).

Of course, defense procurement fraud can involve more than mere economic loss. It can also jeopardize the lives of our men and women in uniform and place the national security at risk. We would therefore urge the Commission to comply with the mandate of the Major Fraud Act and increase the penalties for major frauds which involve a conscious or reckless risk of death or serious bodily injury. We would recommend an increase in such offenses of

at least 4 levels--thus corresponding to the standard enhancement for offenses involving serious bodily injury used in the guidelines.

The Commission has also requested comments concerning a proposed new Abusive Sexual Contact guideline. While the proposed guideline represents an improvement, we believe that it should provide higher penalties. Moreover, with respect to the proposed penalties where the offense involves a minor, we believe that the effective 2 level discount where the victim is between the ages of 12 and 15 years is highly inappropriate.

Finally, we would recommend that the Commission further amend its guidelines for escape from a correctional institution. Under the current guidelines, a 7 level reduction is available for less serious cases. As currently written, however, that reduction is available even for those who are imprisoned as a result of committing a crime of violence or a drug felony. Such leniency is wholly inappropriate; we would urge the Commission to close this unnecessary and dangerous loophole in the guidelines.

Thank you for this opportunity to appear and express the views of the National Victim Center. If the Commission has any questions, I would be happy to answer them.

*Filed
Public Hearing
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STATEMENT OF
Philip F. Bartholomew
Financial Economist
Office of Policy and Economic Research
Federal Home Loan Bank Board
BEFORE THE
UNITED STATES SENTENCING COMMISSION
APRIL 7, 1989

Mr. Chairman and members of the Committee, I am pleased to appear before you today. I would like to comment on the presence of negligence and fraud in thrift institutions on which federal regulators have taken action in recent years. I also would like to comment on issues pertaining to appropriate sentences for those individuals found guilty of criminally fraudulent actions directly related to federally regulated thrift institutions.

I am a financial economist with the Office of Policy and Economic Research at the Federal Home Loan Bank Board. I am not a lawyer and do not consider myself an expert on the legal issues surrounding criminal fraud. However, I am able to provide some information on the recent problems experienced in the thrift industry. Since coming to the Bank Board, I have been involved in an economic analysis of the causes of the recent thrift failures. As I am not a legal expert, I apologize if I make any mistakes in the correct use of legal terms. My remarks draw upon previous testimonies given before Congressional committees by the Chairman of the Federal Home Loan Bank Board and the Director of the Office of Enforcement at the Bank Board.

The Federal Home Loan Bank Board (Bank Board) is the federal regulator of U.S. thrift institutions that are either federally chartered or insured by the Federal Savings and Loan Insurance Corporation (FSLIC). As of the end of 1988, the Bank Board was responsible for regulating 2,949 thrift institutions.

As has been well publicized, the U.S. thrift industry has suffered a number of problems during the 1980s. During the period 1980 through 1988, the Bank Board and the FSLIC have resolved 488

failed thrift institutions. A resolved thrift is one that was closed by federal regulators and either liquidated or merged with a healthy institution with assistance from the FSLIC. The number of resolutions does not include those thrifts that were merged into healthier thrift institutions through federal supervisory assistance but at no cost to the FSLIC, nor does it include the currently operating insolvent thrifts that have yet to be resolved.

The causes of the problems experienced by the thrift industry are complicated and not simply generalized. The unusually high interest rates of the early 1980s were a contributing factor to the failure of some thrifts. At that time, the interest rates on new short-term instruments were higher than those on new long-term instruments. This caused financial difficulty for traditional thrift institutions that financed their offerings of long-term mortgages through short-term deposits.

Congress responded to the problems facing the thrift industry in the Garn-St Germain Act of 1982 by expanding the range of permissible activities available to thrifts. These changes were intended to make thrifts more competitive in the changing financial environment. Whereas some of the subsequently resolved thrifts did engage in some of the activities made permissible by Garn-St Germain, it is as yet unclear whether this was a contributing factor to thrift failure (thrift use of new powers has not been extensive; moreover, some thrifts have successfully made use of the new powers and have not failed).

Unfortunately, economic conditions in certain regions of the

U.S. took a turn for the worse in the mid-1980s. Real estate values, especially in Texas, declined substantially. The depressed real estate markets contributed greatly to the problems of thrift institutions that held mortgages on these properties.

The unusual interest rate conditions of the early 1980s and the depressed regional economic conditions of the mid-1980s are the contributing factors that are generally held by the Bank Board to be the major reasons for the inordinate number of thrift failures in recent years. Because of a lack of resources available to the Bank Board and the FSLIC, not all of the failed thrift institutions could be resolved as quickly as would have been preferred. However, owners and managers of operating insolvent thrifts have faced special supervisory and regulatory restrictions to prevent imprudent behavior.

Unfortunately, the thrift industry appears to have experienced a significant amount of fraudulent activity that was perpetrated by both thrift institution insiders and outsiders. This has recently been documented in a study by the General Accounting Office. Presently, it is too early to say to what extent this factor contributed to the failure of thrifts or to the cost of resolving failed thrifts.

The Office of Policy and Economic Research at the Federal Home Loan Bank Board has undertaken a detailed study of the characteristics of resolved institutions and the costs of resolution. All 205 institutions that were resolved in 1988 were analyzed; these resolutions are estimated to cost the FSLIC \$31

billion. A summation of the preliminary findings of this study are shown in Chart 1. The 50 most costly resolutions in 1988, with an estimated cost of \$24 billion, were analyzed separately.

The preliminary results shown in Chart 1 illustrate some distinct characteristics of thrifts that were resolved. Fifty-six percent of all 1988 resolutions and 80 percent of the 50 costliest resolutions were state chartered at the time that they became GAAP-insolvent (i.e., when their capital level fell below zero according to generally accepted accounting practices). On average, during the past five years, 45 percent of all thrifts were state chartered.

Many of the costliest resolution cases had relatively heavy holdings of direct investments and brokered deposits. These activities are felt to reflect strategies that were riskier than those traditionally used by thrift managements.

Many troubled institutions had grown very rapidly prior to recent regulatory restrictions. This also is an indicator of the possibility of the presence of a riskier strategy being used.

These characteristics may be a reflection of poor management decisions or judgment. They do not necessarily imply that some form of fraud was perpetrated by managers of the thrifts or related parties. Moreover, these characteristics do not necessarily identify the causes of the failure of these institutions. Rather, they provide some insights for further study of the characteristics of these thrift failures.

The study also examined the 1988 resolutions for the presence

of negligence and fraud. It is important to note that the analysis only ascertained the presence of activities characterized as being negligent or fraudulent. At this stage of the analysis it is not possible to determine if negligence and/or fraud was a contributing factor in the failure of the thrift institution. Moreover, estimation of the scope of damage done by negligent and/or fraudulent activities was not attempted.

The information collected on the presence of negligence and fraud in the 1988 resolutions was based upon the determination of the Bank Board's Litigation Division of the Office of the General Counsel. The attorneys working on these cases were surveyed as to their opinion of the presence of several categories of negligence and fraud in a particular case. Their findings may be considered to be those that they feel are actionable and non-actionable on the part of federal regulators. No attempts were made to distinguish the degree to which an activity had been present.

In virtually all cases, the Boards of Directors of resolved institutions were found to not have acted prudently. Fraudulent activities and regulatory violations were found at a number of the resolved thrifts. Our preliminary study showed a higher incidence of self dealing, other fraud, and regulatory violations in the most costly institutions.

At this time, it is too early to tell for some of the 1988 resolutions whether categories of negligence or fraud were present. However, based on the count to date, self dealing was present in at least 34 percent of the 205 cases. For the 50 costliest

resolutions, such activity was found in 50 percent of the cases. In 27 percent of all the 1988 resolutions (and 42 percent of the costliest cases), other forms of fraud were present. Other fraud may be characterized as that perpetrated by outsiders, such as borrowers or futures and options traders with whom the thrift dealt.

Loans-to-one borrower violations occurred in at least 34 percent of the 1988 resolutions. For the 50 costliest resolutions, such violations were found at 50% of the institutions. While these proportions are the same as those for self dealing, self dealing was not found for all institutions that had loans-to-one borrower violations.

Whereas this analysis is preliminary and does represent merely the presence of categories of negligence and fraud, it does appear that there was a significant amount of negligence and fraud present in those institutions that were resolved in 1988. It also appears that costlier resolutions had a higher incidence of the presence of fraud and negligence than the resolutions in general. However, although there was a presence of negligence and fraud in the 1988 thrift resolutions, it is not currently possible to determine the magnitude of damages associated nor to what degree negligence or fraud contributed to thrift failures.

As a civil agency, the Bank Board is not empowered to do criminal investigations or to handle criminal prosecutions. However, the Bank Board assembles information and refers it to the criminal authorities. The Bank Board also provides technical

assistance and support wherever possible.

The Bank Board has cooperated with the Justice Department's investigation and prosecution of individuals that perpetrated illegal activities at federally-insured thrift institutions. The Bank Board participates in the Inter-Agency Bank Fraud Working Group as well as regional working groups around the country. The number of criminal referrals involving crimes against savings and loans increased from 434 in 1985 to over 6,100 in 1987.

In 1983 there were two significant criminal convictions obtained against individuals associated with FSLIC-insured institutions. One was that of an officer for embezzlement, and the other was that of a major borrower for making false statements. In 1987 there were 66 convictions obtained against insiders and outsiders of thrift institutions for a variety of charges. For the first eleven months of 1988 there were 58 convictions obtained.

During January through November 1988, civil judgments were rendered in favor of the U.S. Government in 56 cases with some \$97 million awarded. These cases were associated with 38 thrift institutions and involved fraud and negligence.

Certainly, this information does reflect the fact that the thrift industry has experienced a significant amount of what is called "white-collar crime." The Bank Board has made significant strides in encouraging prosecution of those suspected of crime. The Bank Board supports the proposal under President Bush's thrift recovery plan to provide the Department of Justice with a budget increase of \$50 million to pursue these prosecutions.

In addition to encouraging the prosecution of individuals suspected of committing fraud against insured institutions, the Bank Board has aggressively supported the imposition of orders requiring restitution to the FSLIC by convicted criminals, along with prison sentences and fines. Federal law affords a victim of crime an opportunity of obtaining recovery of funds lost as part of the criminal's sentence. Restitution orders issued pursuant to the Victim and Witness Protection Act are routinely sought by the FSLIC from the court at the time of sentencing.

The FSLIC has been successful in this area. In 1987, restitution orders were obtained in an amount of \$12 million. In 1988, recoveries totaled \$34 million plus an additional \$16 million in RICO forfeitures. During the first two weeks of 1989, restitution orders totalling \$23 million were ordered. These actions have contributed to the integrity of the FSLIC insurance fund and they have sent a message to criminals that the government will aggressively seek to make sure that savings and loan fraud does not pay.

Whereas federal efforts have been increased, problems currently exist in preventing this type of crime, prosecuting the perpetrators, and in recovering from the perpetrators the damages that they caused. Successful prosecution of white-collar crime in the thrift industry involves presentation of time consuming, paper-intensive cases.

As an economist, it is difficult to determine the appropriate sentence for the variety of white collar crime that exists.

Criminal penalties offer a disincentive to the potential criminal. It is not clear that a fine is a sufficient penalty for criminal fraud. Whereas a financial penalty may cause hardship to those convicted of white collar crime, a prison sentence may be a greater disincentive.

Certainly, the financial losses associated with most white-collar crime at thrift institutions are greater than most traditional "bank robberies." In this regard, an argument for sentences associated with the magnitude of the financial losses incurred by the crime might be warranted. It seems that this is not currently the case. I understand that the typical prison sentence for a thrift officer convicted of defrauding that thrift of millions of dollars has been just a few years at most.

It might be argued that fraudulent activity perpetrated against a federally chartered or insured deposit-taking institution warrants some special penalty. However, it is unclear, in an economic sense, that such criminal activity is any more reprehensible than that perpetrated against an individual or, say, a state-chartered thrift.

It is certainly clear that the damages incurred through criminally fraudulent activity should be recovered. This is not always possible, as the convicted perpetrator may already have spent or hidden the proceeds of their fraudulent activity. From the point of view of a disincentive, if an individual convicted of fraud cannot pay restitution, then an additional penalty that reflects unrecovered damages seems to make sense. In this way,

the potential perpetrator would understand that the consequences of his/her criminal activity would be fully subject to some form of effective punishment. Accordingly, the FSLIC generally seeks criminal restitution, pursuant to the Victim and Witness Protection Act, in cases involving convictions for savings and loan fraud.

In closing, it is necessary to point out that the thrift industry has experienced a significant amount of white collar crime perpetrated both by insiders and outsiders. Sentences that include both fines and prison terms seem to be warranted as an appropriate punishment and disincentive. Sentences that reflect unrecoverable damages definitely seem to be appropriate.

**Statement of
Derek J. Vander Schaaf
Deputy Inspector General,
Department of Defense
April 7, 1989**

I am pleased to appear before you today to discuss the proposed amendments recently published by the United States Sentencing Commission. Let me briefly describe briefly the role of the Inspector General of the Department of Defense in criminal investigations of procurement fraud.

In 1982, Congress established the Office of the Inspector General for the Department of Defense under the authority granted by the Inspector General Act. In so doing, Congress vested the IG with overall responsibility for creating and implementing policy guidance, and conducting oversight over all matters of fraud, waste, and abuse within the DoD. That includes

oversight responsibility for the three military investigative organizations, the Criminal Investigation Command (CIDC), the Naval Investigative Service (NIS), and the Air Force Office of Special Investigations (AFOSI). In addition, the Office of the Inspector General has its own criminal investigators, the Defense Criminal Investigative Service, also known as the DCIS.

In matters involving Defense procurement fraud, the IG gives top priority to the investigation of cost mischarging (charging labor or materials to the wrong contracts); defective pricing (providing the DoD fraudulent cost and pricing data prior to contract award); criminal acts which undermine the integrity of the procurement process (such as bribery, kickbacks and antitrust matters); and, most importantly, those cases we refer to as product substitution. Product substitution is a broad category of fraud involving false

testing, failure to test, defective products, and the substitution of products.

False testing is the falsification of tests results in order to meet the contract specifications. Failure to test involves a contractors failure to conduct a test required under the contract. Defective products are products that do not meet the standard required by the contract such as parachute cords made of inferior nylon which causes the parachute to fail. The substitution of products in general includes the tender by the contractor of a product other than the one identified in the contract such as a specific request for original equipment manufacturer replacement part, but receiving a counterfeit foreign made replacement part.

Product substitution categories often interrelate. Even though no apparent harm seems to exist, there may be substantial harm. For example, the Government

may have requested an original equipment replacement fuel pump because it had previously tested the fuel pump, whereas the foreign counterfeit may never have been tested and may be inferior, resulting in a problem during a critical operation.

In 1988, the efforts of the four Defense criminal investigative organizations (CIDC, NIS, OSI, and the DCIS) assisted the Department of Justice in obtaining 679 convictions and monetary recoveries (including fines, restitution, forfeitures, penalties and civil recoveries through settlements) in the amount of \$445.3 million. That includes the convictions of both large and small contractors, as well as individuals. Since December 1983, DoD criminal investigative efforts have resulted in 21 convictions involving Top 100 Defense contractors.

The IG has a significant interest in proposed amendment 119 which relates to the Major Fraud Act of 1988. The amendment is directed at product substitution. The proposed legislation provides for an additional two years incarceration for matters covered by the Major Fraud Act "where conscious or reckless risk of serious personal injury results from the fraud."

The applicability, however, is limited to contracts over \$1 million. The IG strongly believes, based on our experience in investigating those matters, that the applicability of the enhanced incarceration should not be limited to the amount of the contract.

The DoD procurement system to a large extent depends on the honesty and self certification of the contractor to assure that the required tests have been properly conducted, the product meets the

specifications, and the product is the same as contracted for. Numerous instances have been documented in which the DoD has been provided with nonconforming and faulty products. Occasionally the defects are readily observable by Government inspectors or the end users of the products. Unfortunately, the substituted product usually contains a latent defect that is not readily identifiable because the product is a component of a larger system. For example, an inferior metal may be installed in springs used in an aircraft's hydraulic landing gear or flaps. If the springs fail under stress, the landing gear or flaps may malfunction with potential life threatening circumstances. Such defects in critical parts in weapon systems may cause malfunctions and failures in operation, thereby jeopardizing DoD personnel and missions.

We believe it is imperative in all sentencing in product substitution cases where a risk of serious injury was created, that the Sentencing Guidelines should provide for significant incarceration even if monetary loss to the Government has not been proven. It is generally difficult in product substitution cases to quantify the actual loss to the Government since losses are determined differently depending on the facts of the case. For example, in some instances the replacement value of the individual part may be the measure of the loss, while in others it may be the larger component made ineffective by the defective part.

Only successful prosecution, coupled with meaningful sentencing, will deter individuals from committing that type of fraud and send a clear message to those who

contemplate similar activity that the Government will not countenance such a lack of business integrity.

In September 1987, the OIG conducted a review of selected significant product substitution cases involving the DoD that resulted in convictions and sentences between 1985 and early 1987. The review encompassed cases with either a high dollar loss or where the product substitution had a serious impact on readiness or mission requirements of the DoD. We concluded that few of the sampled cases involved sentences of significant deterrent value. We further concluded that monetary penalties were also generally not significant.

The 15 cases reviewed revealed the following sentencing patterns:

| | |
|---------------------------------|---|
| Minimum 18 months incarceration | 3 |
| 12-18 months incarceration | 4 |

| | |
|---------------------------------|---|
| 6-12 months incarceration | 1 |
| 1 day to 6 months incarceration | 6 |
| no incarceration | 9 |

Relatively lenient sentences may have been attributed to several factors. For example, defendants successfully argued their prior unblemished record. Courts were routinely presented with the picture of a defendant who was otherwise the pillar of the community. Courts were frequently told that the contractor found it necessary to commit the improper conduct to stay solvent which, in turn, represented jobs for the community, or was needed by the military for the security of the Nation. In other instances, the court was told that the product substitution was of no great consequence to the Department of Defense, in other words, no harm, no foul. In nearly all instances, the contractor denied any knowledge that individual lives,

I will be pleased to answer any question you may have at this time.

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Testimony by
Catherine England, Ph.D.
Director of Regulatory Studies,
Cato Institute
before the
U.S. Sentencing Commission
April 7, 1989

I'd like to thank the Commission for the opportunity to comment on proposed amendments to the U.S. anti-fraud laws. In particular, I am concerned with questions about how the law should be applied to owners and managers of federally insured savings and loans and other depository institutions.

I am not a lawyer, and I have no in-depth knowledge of how the proposed changes will affect the legal sanctions applied economics, and I have spent considerable time studying how the legal and regulatory environment affect the decisions of economic actors--in this case, owners and managers of insolvent savings and loans.

My understanding is that the legal definition of fraud is not always clear cut--particularly in cases where managerial investment decisions promised large returns and then did not come to fruition. I would argue that it is especially important in the case of depository institutions and in light of the current savings and loan industry fiasco to distinguish between "fraud" in a legal sense and bad judgment or mismanagement. In addition, it is useful to consider the constraints under which savings and loan managers labored as they struggled to protect the interests of stockholders or owner/depositors.

The enormous losses the thrift industry has suffered during the past decade are now being publicly recognized, and elected government officials have promised to address the problem. The unprecedented infusion of taxpayer funds that will be required to protect depositors in hundreds of insolvent S&Ls, and the size of the proposed bailout, has caused widespread concern and indignation. The natural tendency in a situation like this one is to attempt to identify those who are culpable, to search for villains to shoulder the clean-up costs. In making this effort, many politicians, journalists, and taxpayers have directed their attention to the part played by savings and loan owners and managers who, after all, made the investment decisions that generated these substantial losses.

There is no doubt that fraudulent and speculative owners and managers were attracted to the savings and loan industry during the past decade by low capital requirements, a loose supervisory environment, and federal deposit insurance. During the 1980s, neither regulatory authorities nor federally insured depositors monitored very effectively the investment decisions of individuals operating thrifts. S&L managers were able to raise large sums of federally insured money and then pursue a wide range of investments, some of them embodying substantial risk. Because public supervision was ineffective, and private supervision from federally insured depositors was almost totally lacking, individuals with a speculative or fraudulent bent found the savings and loan industry a more than normally inviting

environment. But the greatest portion of the \$100 billion in losses suffered by the thrift industry can be attributed to unlucky and incompetent managers who, with the very best of intentions, found themselves attempting a task at which they could not possibly succeed.

To understand how hundreds of thrift managers, and with them the nation's taxpayers, were placed in a no-win situation, we need to review recent history. In the late 1970s and early 1980s, adverse interest rate and general economic conditions left hundreds of savings and loans insolvent. Rather than providing the funds and the manpower to close these institutions quickly, however, Congress and the Administration chose to follow a policy of "forbearance." That is, they redefined the way capital was measured, they lowered capital standards, and when all else failed, federal authorities simply ignored the continued operations of institutions that had no capital.

Now consider the well-intentioned manager at one of these insolvent savings and loans. Under normal circumstances, the value of a financial institution's assets, on which income is earned, exceeds the value of its liabilities (deposits) for the bank or S&L to prove profitable, but the larger size of the asset base works in favor of managers attempting to cover operating costs in addition to interest expenses and earn a reasonable profit.

For the manager of an insolvent institution, however, this situation is reversed. The value of his liabilities, on which he

pays interest, exceeds the value of the assets on which he earns income. To make a profit, therefore, the spread earned by an insolvent institution, the difference between the average interest earned on assets and the average interest paid on deposits, must be much larger than the spread for a healthy organization. But earning a larger than normal "spread" is all but impossible in a competitive environment.

We can get some idea of how difficult the task presented to depository managers was by reviewing the performance of those savings and loans placed in the FSLIC's management consignment program. In the management consignment program, the FSLIC took over the thrifts losing the most money and placed them under the management of hand-picked teams, hoping to at least slow their losses if not return these institutions to profitability and health. The management consignment program was begun in 1985, and in September 1987, the General Accounting Office reported on the condition of the 45 institutions in the program as of the end of 1986. As a group, the institutions in the program reported \$2 billion in losses between the end of the quarter during which they entered the program and year-end 1986. Furthermore, their aggregate GAAP (generally accepted accounting procedure) net worth declined from -\$0.8 billion to -\$3.49 billion over the same period. If the best hand-picked FSLIC management teams encountered such difficulties, what can we expect from less skilled managers left to attempt to deal with losses at their institutions?

In fact, the chances of success for well-intentioned managers of any single insolvent institutions were undermined by the hundreds of other troubled thrifts with which they had to compete. Just to meet cash flow requirements, these insolvent S&Ls had to continue attracting new funds. To compete effectively for new deposits, insolvent thrifts bid up the interest rates paid by all banks and S&Ls, regardless of their financial condition. To cover the rising costs of attracting new accounts and holding onto exiting customers, all depository managers sought to increase expected income on their loan and investment portfolios. Generating higher expected returns was particularly important for managers of S&Ls whose liabilities exceeded their assets. The catch is that assets promising a higher return also generally embody greater risk. So what began as an interest rate problem in the late 1970s became an asset quality problem in the mid-1980s.

My point is reviewing the downward spiral of the bottom third of the thrift industry is this: The largest portion of the current problem did not grow out of an malicious intent on the part of thrift industry managers. The substantial losses incurred by the industry arose out of an impossible situation created by a misguided federal policy of forbearance. Managers are charged first with attempting to protect the interests of the owners of the companies they oversee. In the case of insolvent thrifts, affected managers also were instructed by government regulators to outgrow the problems created by the

adverse economic conditions of a decade ago. Unfortunately, the steps that seemed necessary to regain profitability and recoup losses for owners, the efforts to outgrow past problems, represented gambles that for most insolvent thrifts did not pay off, and losses mounted.

Because of these considerations, I would urge you to go slow in answering the question you posed: "Should there be a higher offense level for fraud involving a federally chartered or insured financial institution?" Certainly, fraud should be punished. Strong anti-fraud laws are necessary for the efficient operation of a market economy. But before punishment can be meted out to managers of federally insured depository institutions, especially in the current crisis situation, "fraud" in managing a depository institution needs to be carefully defined. Careful deliberation is especially important now as political actors attempt to avoid blame themselves by levelling vaguely worded charges of fraud at thrift managers throughout the country.

Federally insured depository institutions are different from other corporations. The existence of federal deposit guarantees means that less competent managers will not be eliminated by the operations of the market as they are in other industries. With extensive federal deposit insurance in place, decapitalized banks and S&Ls can continue to operate indefinitely because they can continue to attract funds from federally insured depositors. For the most part, the government has replaced the

market, not only in overseeing the decisions of depository managers but also in deciding when an institution will be closed. We face a \$100 billion problem, not because of any inherent market failure among savings and loan managers generally, but because the government failed to do the job it has assumed from the private sector.

It is certainly not my intent to serve as an apologist for the savings and loan industry. Indeed, I would argue that it is a mistake to subsidize an industry devoted to housing finance. Mortgages would continue to be readily available without a thrift industry as such. But it is not even clear what "mismanagement" should mean in the context of the hundreds of weak and insolvent thrifts that were allowed to continue to operating during the past decade, kept alive by the life support system of federal deposit insurance. That makes it especially important to carefully communicate to regulatory authorities and judges throughout the country what "fraud" should mean in this context.

In the widespread search for villains in the savings and loan industry fiasco, many are pointing a finger at the managers of these institutions. There is public indignation and outrage at the presumed profits made by fraudulent managers, and many frustrated taxpayers feel there ought to be a way to make those directly responsible pay a more sizable portion of the clean-up costs, or at least make them pay. But the Bush Administration's proposal for additional Justice Department funding to address fraud among depository institutions, and congressional pressure

to bring these individuals to trial are distractions, meant to direct public attention away from the real causes of the problem. At the root of the \$100 billion mess is a federal policy of capital forbearance coupled with extensive federal deposit guarantees. Had sanctions been in place 10 years ago that imposed penalties two or three or ten times the current levels for "fraud" in managing depository institutions, the last decade in the savings and loan industry would have played out much the same. The managers who were not removed from insolvent thrifts in 1981 and 1982 have been as victimized by the government's mistakes just as we taxpayers have been.

Statement of Professor Daniel J. Freed
 Yale Law School
 before the United States Sentencing Commission
 Washington, D.C.
 April 7, 1989
 on
Home Confinement as a Prison Substitute
under the
Federal Sentencing Guidelines

Introduction

I appear today in response to the Commission's public invitation for comments on the proposed Guideline Amendments. My remarks will be directed to item #260, "Use of Home Detention as an Alternative to Imprisonment."

Joining me is Marie Casper, a second year student at Yale Law School who has done some very useful field research on this subject in recent months.

Our purpose is to offer some observations about home confinement experience to date. Throughout we will use the generic term "home confinement," rather than "home detention," for the reasons spelled out so thoughtfully by Paul J. Hofer and Barbara S. Meierhoefer of the Federal Judicial Center in their excellent FJC Monograph entitled Home Confinement: An Evolving Sanction in the Federal Criminal Justice System (1987).

We suggest that you revise the Guidelines in three respects:

[1] Amend §5F5.2, which now reads "Home detention may be imposed as a condition of probation or supervised release," to add the words

"but only as an alternative to incarceration in accord with the schedule of substitute punishments set out in §5C2.1(e)(2)."

The Application Notes to this Guideline should be amended to cite the new Act of Congress dealing with home confinement, i.e., §7305 of the Omnibus Anti-Drug Abuse Act of 1988; to drop the word "exclusively" in the last sentence of Note 1; and to delete Note 2.

[2] Amend §5C2.1(c), (d) and (e) to add the words "home confinement" after each reference to "community confinement." This change will make home confinement the equivalent of community confinement as a day-for-day prison substitute within the limitations of Guideline §5C2.1.

[3] Replace the term "home detention" wherever it appears in the Guidelines, e.g. §5B1.4(b)(20) and §5F5.2, by "home confinement." This new terminology should embrace the three forms of increasingly strict confinement to a residence, i.e., "curfew,"

"home detention" and "home incarceration," by referring to the Federal Judicial Center monograph.

These Guideline suggestions are intended to make it clear that courts may impose home confinement on terms similar to those governing community confinement and intermittent confinement as prison substitutes at the low end of the Sentencing Table in Chapter 5.

The Commission's invitation for comments on home confinement asked "whether electronic monitoring should be required to supplement ~~probation officer enforcement.~~" For reasons set out below, we urge that electronic monitoring be permitted but not required.

At the end of our statement we will suggest that you take special steps to keep track of the imposition of, reasons for, and results of home confinement sentences so as to assemble an empirical foundation for more specific guidelines, if needed, a year or two down the road.

A. Alternative sentences

Home confinement is one of many alternative punishments that have been invoked in recent years to overcome the justice system's excessive dependency on lengthy imprisonment, on one hand, and straight probation on the other.

The disadvantages of crowded prisons and unsupervised probation are well known. They punish offenders too harshly or control them inadequately. Too often their invocation is followed by high recidivism rates. They deliver the message that society does not succeed often enough in redirecting errant citizens into law-abiding pathways.

A whole array of intermediate sanctions---less than prison but more than probation---has been developing in recent years. These sanctions offer more options to criminal sentencers, as well as raise problems of their own. None is a panacea for the ailments of crime and punishment, but they do play useful roles in the search for sanctions that are capable of punishing offenders fairly and economically, while at the same time helping selected offenders take responsibility for their conduct.

The watchword in this area should be experimentation. Criminal justice policymakers and decisionmakers cannot afford to be complacent about the skyrocketing caseloads of prisons and probation services, especially when responsible judges, probation officials, parole commissions, community service programs and others see signs of progress in newer methods of dealing with offenders.

B. Home confinement

1. Current use.

Many if not most states now seem to be using some form of home confinement as an alternative sentence.¹ In some it is expressly authorized by statute. In some it is imposed as a condition of probation. In still others it is employed as a device to relieve prison overcrowding.²

A few notorious cases have given rise to public and professional dismay over well-to-do offenders lounging in comfortable apartments and calling it punishment. But careful decisionmakers are increasingly demonstrating that the sanction of home confinement can be much more punitive than first appeared, and quite capable of being effectively enforced. The United States Parole Commission recently carried out two significant home confinement pilot programs in Florida and California with marked success, and there is considerable optimism among federal correctional officials--in prisons, probation and parole--that these early experiences can be credibly expanded.

A growing number of federal judges have invoked home confinement as an up-front sentence in their respective districts, e.g., Eastern New York, Nebraska, Arizona, Connecticut. In cases subject to the Federal Sentencing Guidelines, judges are presently permitted to use home confinement only as a condition of probation or supervised release. To invoke it as a prison substitute, they are compelled to depart from the Guidelines. So far as we know, none of these departure cases has yet been the subject of appellate review. But the time has come when it is appropriate for the Commission to begin systematically assessing the efficacy of home confinement by authorizing it as a guideline sentence.

2. Statutory framework.

Until now, the Guidelines have allowed "home detention" as a "condition of probation or supervised release" [§5F5.2], but have forbidden it as an alternative to imprisonment [Application Note 5 following guideline §5C2.1]. As promulgated on January 15, 1988, that Note states that

"Subsection 5C2.1(e) sets forth a schedule of imprisonment substitutes. Home detention may not be substituted for imprisonment."

¹According to a 1986 article by Joan Petersilia, Exploring the Option of House Arrest, 50 Federal Probation 56, 42 states had or were considering such programs. Statutes authorizing home confinement have been enacted in, among others, California, Florida, Illinois, New Mexico, New York, Oklahoma and Utah.

²Under current practice, home confinement may be invoked in a wide variety of settings: as a condition of bail; as a direct sentence; as a condition of probation; as a penalty for violation of probation; as an alternative to work release or halfway house confinement under the jurisdiction of the Bureau of Prisons; as a condition of parole; or as a penalty for parole violation.

While we support all of these uses, our testimony is directed to judicial imposition of home confinement as a sanction following conviction, i.e., as a direct sentence, a condition of probation, or a penalty for probation violation.

Late last year Congress acted to overrule that prohibition. In November 1988, it enacted the Omnibus Anti-Drug Abuse Act of 1988 containing express authorizations---in Section 7305---for courts to use home confinement as an alternative to prison at the sentencing and supervised release stages of the criminal process. It also authorized the Parole Commission to impose it as a parole condition for released prisoners.

The three authorizations are similarly worded. Here for example is the provision empowering a judge [by amending 18 U.S.C. §3563(b)] to order a defendant, as a condition of probation, to

"(20) remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration" [emphasis added].

3. Perceptions and disparity.

To proponents, home confinement is a punitive sanction. It deprives offenders of their liberty; incapacitates them, thereby reducing the risk of harm to others; and facilitates supervised release from confinement for community service, or for gainful employment from which to pay restitution to victims, support dependents, and pay court costs and fines.

To doubters, it is a sanction that favors white collar offenders and discriminates against poor offenders. It allows privileged persons to pretend they are being punished while they enjoy the pleasures of home living and companionship. Some observers are concerned that it demeans the sanctity of home as castle, replacing it by the spectre of home as prison.¹

This division of opinion emerges from the reality that home confinement is being applied and enforced in very different ways in different jurisdictions. It makes it important that the Commission develop evidence and expertise to distinguish the variety of situations in which home confinement is invoked, the credibility with which it is enforced, and the extent to which it carries out or frustrates the purposes of sentencing defined by Congress in the Sentencing Reform Act of 1984.

If the Commission makes no change in the current Guidelines,

-some courts will continue to follow Application Note 5 and bar home confinement as a prison substitute; while

¹Lilly & Ball, A Brief History of House Arrest and Electronic Monitoring, 13 N. Ky. L. Rev. 343 (1987)

-others will consider the current guideline restrictions to be superseded by §7305. In their search for a just sentence in individual cases, these courts may feel at liberty to invoke home confinement in light of its explicit authorization by Congress.

Under such circumstances, disparity will reign due to the discrepancy between the Congressional rule and the Commission's guideline.

4. Methods of supervision .

All home confinement sentences impose punishment and incapacitation on offenders. The Federal Judicial Center monograph on Home Confinement carefully distinguishes among three levels of severity: curfew, home detention and home incarceration.

Curfew "requires the offender to be at home during limited, specified hours, generally at night." Curfew programs "vary widely in the strictness of supervision...Many require participation in treatment, training, or drug testing..."

Home detention is "more severe than curfew," requiring the person to stay home at all times except for specified purposes and times of release." It is "more punishing than curfew and affords greater control over an offender's activities."

Home incarceration is "the most severe form of home confinement; the home substitutes for the prison. Offenders are to remain there at all times with very limited exceptions...offenders are precluded from shopping, from working, or from having visitors outside prescribed hours. In some cases offenders may not even be allowed to go outside into their yards. The goal is to punish and maintain control."

A well-designed sentence carefully defines the level of punishment and incapacitation desired by the court. It defines the offender's work schedule, if any, and any allowable out-of-house activities such as religious services or medical appointments. It spells out the route that may be travelled to and from these places and holds the offender strictly accountable to his schedule.¹

Some have suggested that all home confinement sentences be supervised by electronic monitoring. The evidence suggests the importance of flexibility in this regard. The key to offender compliance seems to be a pattern of frequent and random monitoring contacts, so that the offender quickly learns that he will not succeed in manipulating the terms of his sentence.

¹Home Confinement Program, U.S. Probation Department, EDNY, July 1988.

Adequate supervision can be provided by telephone calls, electronic monitors or visits by probation officers or persons with law enforcement experience. Electronic devices are used frequently in some places and not at all in others.

In August 1988 the American Bar Association's House of Delegates adopted a resolution setting forth "principles for the use of electronically monitored home confinement as a criminal sanction." These urge parsimony, i.e., that electronic monitoring be imposed in the discretion of the judge only after a finding, on the record, that such a condition is "the least restrictive alternative which should be imposed consistent with the protection of the public and the gravity of the offense." The principles go on to declare that

"In no event should a court or probation office automatically require electronic monitoring as a condition of probation."

5. Prison-Home Confinement Ratio.

Some have suggested that home confinement is an inherently soft sentence that ought not be equated with prison on a day for day basis. Therefore, the proposal goes, a day in prison ought to be equated with 2 or more days in home confinement. For the same reason that caused the Commission to reject any such discount for community confinement in guideline 5C2.1, it ought to be rejected here.

Properly supervised and enforced, there is no reason to believe that this sanction is inherently any less severe than a work release center, a community treatment center, or a minimum security federal prison camp. Questioned about a home confinement sentence he had imposed, Judge Peter Dorsey of the United States District Court in Connecticut noted that "he does not see a great deal of difference between house arrest and being sent to some of the low-security federal prisons that are equipped with tennis courts and have no fences."¹

There is evidence to suggest that home confinement is in some ways a more difficult sentence to complete than a prison sentence of similar length. This view emerged, for example, in responses to a written questionnaire by offenders sentenced by Judge Warren Urbom in the District of Nebraska; from offenders who participated in the pilot home detention study of the US Parole Commission;² and from the first federal offender sentenced to home confinement in EDNY.³

¹ Florist Placed Under House Arrest in Credit-Card Scam, National Law Journal, August 11, 1986, page 6.

² James L. Beck and Jody Klein, Community Control Project Interim Report [US Parole Commission draft, October 1988]

³ Interview with Maureen Murphy, April 4, 1989. See United States v. Maureen Murphy, 108 F.R.D. 437 (E.D.N.Y. 1985).

Various offenders highlight the restrictiveness of their supervision, the unavailability of organized activities---such as sports and recreation, or the isolation and stress of being deprived of social identity with a group that can understand the offender's remorse, stigmatization and loss of liberty.¹ Anecdotal reports suggests that some home confinement offenders even ask to return to community treatment centers or prisons, in lieu of further imprisonment at home.

In examining studies of home confinement, it is important to recognize a major difference between parolees and offenders who are sentenced directly to home confinement. Parolees receive gradually relaxed supervision as they are reintegrated into the community after serving part of their sentence in prison. Newly sentenced offenders, on the other hand, are committed to their own homes at the front end of the term for the explicit purpose of punishment.

6. Selection criteria.

It may be helpful to illustrate some of the variables that arise in formulating home confinement sentences. A much more complete discussion of these options is found in the Federal Judicial Center monograph referred to at the outset of this statement.

a. Crimes. A wide variety of crimes and offenders have already been the subjects of home confinement sentences in federal and state courts. Federal usage to date includes fraud, embezzlement, assault, and minor drug offenses. Florida, the state with the oldest continuous home confinement program, authorizes it as a separate criminal sanction, rather than a condition of probation, and allows it to be applied to all felony offenders except in capital cases.² Because legislatures and courts differ as to the sorts of cases that are and are not appropriate, our information-gathering suggestions below are designed to assist the Commission in canvassing the sentences imposed by federal judges, and the aftermath of those cases.

It is premature for the Commission to impose additional restrictions respecting crimes or offenders eligible for home confinement. The limitations inherent in guideline §5C2.1 already restrict the sanction to offenders with relatively slim criminal records, and to crimes in the low seriousness range. These sufficiently structure judicial discretion without further tying the hands of judges on the basis of inadequate research.

¹This isolation is, of course, a positive feature of home confinement in that offenders are not socialized into a prison system where, by identifying with other offenders, they may become more strongly committed to crime.

²Florida Stat. Ann. §§94B.001, 94B.01 (West 1985); Community Control: In Lieu of Incarceration, Florida Bar J. 45 (July/Aug 1985)

b. Type of residence. To ensure that a home confinement sentence is sufficiently punitive, some judges consider the kind of residence and the lifestyle of the offender, and tailor the sentence accordingly.

For example, in the District of Nebraska an offender with a luxury residence was ordered to spend the "home" component of his sentence in a detoxification center where he also performed community service. Similarly, a judge may wish to place a homeless offender in a noncustodial residential setting, where adequate housing will be available, and a community service sanction can be carried out. Home confinement, in other words, need not be limited to the offender's normal place of residence. As decisions on home confinement proliferate and are published, judges will no doubt carry on the kind of dialogue that produces common law development regarding issues and innovations of this sort.

An additional reason for wanting home confinement authority is illustrated by the resource shortage in the District of Connecticut. The Chief U.S. Probation Officer, Maria McBride, observes that her district lacks halfway houses for women offenders. The absence of this community-based facility could pose equal protection problems if a woman who qualified for community confinement were denied it in a situation where a male offender would be placed.

c. Telephones. Whether or not electronic monitoring equipment is part of a home confinement sentence, a telephone is usually central to the supervision process. This facilitates random calls by the supervisor as well as checking-in by the offender. Because an offender's lack of a telephone cannot fairly be made a factor in determining sanction eligibility, the EDNY program supplies telephones through a special indigency fund during the period of the sentence.

The August 1988 American Bar Association Resolution, referred to earlier, specifies that

The ability of an individual to pay for the use of an electronic monitoring device should not be considered in determining whether to require the use of such a device when imposing sentence.

C. Assessing Home Confinement.

We hope the Commission will follow the lead of Congress in §7305, and will honor the responsible initiatives taken by the Parole Commission and judges in implementing home confinement in a wide range of crime situations. The amendments suggested in the opening section of this statement offer a modest beginning for Guidelines to authorize the home to be substituted for the prison.

Since the sanction is so new, and case reports so few, it may be advisable for the new Guidelines to include a structure that describes the kinds of information courts should file with the Commission for its monitoring, analysis and policymaking functions. In formulating the information request, the Commission might include questions like these in its Commentary:

[1] Describe the characteristics of the defendant, and of the family or other group with whom he resides, which led you to believe that he is well-suited for a home confinement sentence.

[2] Describe the length of home confinement imposed, the conditions---e.g., curfew, home detention, or home incarceration---attached to it, the characteristics of the residence, the gradual relaxation of restrictions, if any, that is contemplated after the most restrictive period has been completed, and the measures of supervision that assure effective enforcement.

[3] What benefit will the defendant receive from being placed in home confinement rather than prison? What benefits will inure to the victim, other persons, or the community at large?

[4] What is the nature of the present offense? How will the defendant be incapacitated during the course of his confinement to protect the community from the possibility of future crimes? Does the defendant have any history of violent crime?

[5] What factors about the offense of conviction and the offender led the court to decide that home confinement was preferable to imprisonment or community confinement, and that this sentence adequately reflected the seriousness of the offense?

[6] What factors led the court to believe that home confinement was preferable to an array of noncustodial sanctions?

Asking judges to report information of this sort to the Commission can serve purposes beyond monitoring and revising the Guidelines. For judges, such questions provide a kind of checklist that increases the likelihood that courts will carefully consider the reasons for and effects of their sentences. For defense lawyers and United States Attorneys, questions structure issues to which sentence planning and advocacy can be directed. For probation officers, they provide guidance for the preparation of presentence reports in potential home confinement cases, and help ascertain that adequate supervisory resources will be available. And for the federal system as a whole, they can lead to a body of case law and visibility that is bound to enhance public understanding of this important and controversial sanction.

Opposes higher sentence for insider trading

Written Comments on Proposed Sentencing Guidelines
For Violation of Rules Against Insider Trading

in anticipation of oral testimony before the

United States Sentencing Commission
April 7, 1989

Jonathan R. Macey
Professor of Law
Cornell University

I. Introduction

Recently, the U.S. Sentencing Commission has asked for public comment on whether there should be a higher offense level for insider trading than for other types of fraud. I welcome the opportunity to address this important matter. In addition, I would like to express my views on what I believe to be a related issue, which is whether it is appropriate to increase the offense level for instances of insider trading that involve: (1) more than minimal planning, or (2) a scheme to defraud more than one victim (see Section 2F1.1 (b) (2) (A) and (C)).

For many of the same reasons that lead me to the conclusion that higher offense levels are not warranted for insider trading than for other sorts of fraud, I believe that it is inappropriate to increase the penalties for violations of the rules against insider trading on the basis of the planning involved or on the basis of whether such trading involved a scheme to defraud more than one victim. Indeed, it seems clear that some of the most benign forms of insider trading may involve some of the most elaborate planning, while some of the most egregious forms of securities fraud may involve virtually no planning. Similarly,

some of the worst sorts of securities fraud may only involve a single victim, while some of the most benign forms of insider trading may involve very large numbers of victims.

Thus, insider trading must be distinguished from other forms of fraud in these respects. In the following section of these remarks, I wish to address the factors that are most often given as the basis for favoring strict penalties for insider trading.

II. Factors Possibly Favoring Increased Penalties

When Congress enacted the Insider Trading and Securities Fraud Enhancement Act of 1988, it evinced a concern that substantial prison sentences would be necessary to deter insider trading (See H. Rep. 100-910, 100th Cong., 2d Sess., at 23 (1988)). There are three arguments that suggest that Congress and the Sentencing Commission should apply stricter sentences for this crime than for other forms of fraud. While one of these arguments has merit, the other two do not withstand close inspection.

First, as is well known, it is very difficult and costly to detect insider trading. The ability of those involved in insider trading to consummate illegal transactions through conduits and through accounts located outside of the United States makes detection extremely difficult. It is well known that where the probability of detection for a particular offense is high, stiff penalties are required to achieve deterrence.

Similarly, the ease with which inside traders can conceal their actions makes it very costly to detect such activity.

Detection involves costly "stock watch" programs that not only require sophisticated computer technology, but constant monitoring by highly trained professional enforcement officials as well. These factors suggest that relatively heavy penalties are appropriate.

Second, it is often said (particularly by the Securities and Exchange Commission) that penalties for insider trading ought to be particularly stiff because the activity undermines the confidence that small investors have in the capital markets, and therefore impairs the capital formation process. This argument is without foundation. Evidence from foreign markets indicates that the operation of capital markets does not suffer from the existence of insider trading. Indeed the Japanese experience indicates that even where insider trading is rampant, investors are not deterred from purchasing securities.

The reason for this is simple. In capital markets where insider trading is widespread, investors without access to confidential inside information are not harmed by insider trading so long as they hold a diversified portfolios of securities, or so long as they adopt a "buy and hold" strategy for their investments. Such investors would not benefit from a ban on insider trading because such a ban would still leave them at an informational disadvantage vis-a-vis market professionals in their quixotic attempts to outguess the direction in which stock prices are likely to move.

Thus small investors are not in fact harmed by insider

trading because they are capable of eliminating the risks associated with such trading, both by holding a diversified portfolio of stock and by adopting a buy and hold investment strategy based on an evaluation of the fundamental factors that effect price levels.

The marketplace appears to recognize the fact that small investors are not harmed by insider trading because the lack of sanctions against insider trading has not retarded the capital formation process in other countries.

Finally, it is often said that insider trading should be severely punished because it effects a large number of disaggregated shareholders who, because of the collective action problems facing such large groups, do not have sufficient incentives to protect their rights in private damages suits. As the following section shows, this argument is fallacious. Contrary to popular belief, logic, as well as the decisions of the Supreme Court on the subject, make it clear that the laws against insider trading enforce highly specific fiduciary duties that are owed by traders to individuals and firms towards whom such traders have a pre-existing relationship of trust. Thus the laws against insider trading do not protect amorphous, unspecified interests of broad groups such as "market participants," or "investors" or even purchasers or sellers of securities who trade contemporaneously with insiders.

Properly construed, the rules against insider trading vindicate the interests of firms and individuals whose property

rights in valuable, non-public corporate information are wrongfully misappropriated by insiders.¹ The assumptions that insider trading rules are designed to vindicate such values as "investor confidence" or the "integrity of the marketplace" are not only wrong; they are dangerous. Applying legal rules or draconian penalty provisions under such an erroneous assumption will create a harmful disincentive to market analysts and other professionals, whose legitimate efforts to obtain non-public information about misvalued public companies drives securities prices to more efficient levels. As the Supreme Court has emphasized, these efforts should be applauded not condemned because they further societal interests by improving the capital formation process.

III. The Real Concerns About Insider Trading

As the preceding discussion suggests, to understand the dynamics of insider trading, one must view inside information for what it really is -- a financial asset. Possession of insider information is the possession of an asset that can be converted into cash by trading in the financial markets on the implications of such information. The issues of who is harmed by insider trading and by how much can only be resolved by examining how the property rights in information have been allocated by the legal system.

¹ See Macey, From Fairness to Contract: The New Direction of the Rules Against Insider Trading 13 Hofstra Law Review 1 (1984).

The Supreme Court has recognized this fact in its decisions in Chiarella v. U.S. (445 U.S. 222 (1980)) and Dirks v. SEC (463 U.S. 646 (1983)) which are the most important opinions on insider trading in the 1980s. Both of these opinions reject the earlier contentions of the SEC that the duty to refrain from trading on inside information stems from some generalized duty of fairness to the securities marketplace. In these opinions the Supreme Court, in effect rejected the contention that the obligation to abstain from insider trading stems from a theory that allocates property rights in valuable corporate information to the markets generally.

In place of its rejection of a generalized fiduciary duty to the trading markets, the Supreme Court repeatedly emphasized that insider trading restrictions are derived from specific breaches of pre-existing fiduciary duties. This means that for an individual to be convicted of violating the rules against insider trading, he must have violated a pre-existing duty to the individual or firm that was rightfully in possession of the property rights in the information upon which the trade was predicated.

Hypothetical #1:

To illustrate the point I am trying to make, suppose for example, Company X, which is owned by a single shareholder, is planning to acquire all of the stock of Company Y at a substantial premium over the current trading price of Company Y's shares. An investment banker for Company X learns of the pending

acquisition in advance of any public announcement, because his firm has been hired by Company X to advise it in connection with the offer. If that investment banker purchases shares in Y for personal gain on the basis of his knowledge of the pending tender offer, he would be guilty of violating the laws against insider trading, particularly SEC Rule 10b-5. But, as the Supreme Court repeatedly has emphasized, the investment banker's conviction would not be based on the fact that he has cheated Y's shareholders, or that he has violated any general duty to the securities market. The investment banker did not owe any pre-existing duty to Y's shareholders or to the securities markets generally. Rather, the investment banker owed a specific fiduciary duty to Company X because it hired him to advise it on its tender offer for Y.

The point becomes even more clear once we recognize the fact that the property rights in the information regarding the pendency of the takeover do not belong to the capital markets generally and certainly do not belong to Y's shareholders. Rather, the information belongs to X: X legally can acquire stock in Y without violating any insider trading rule.²

The above example illustrates what I believe to be a

² X's purchases would, of course be subject to the restrictions of the Williams Act, which is the federal law governing corporate takeovers. The Williams Act would require that X make certain disclosures simultaneously with the announcement of any tender offer. X could, however, acquire all of Y's shares without making any disclosures at all, provided that it could acquire these shares within 10 days of acquiring 5 percent of Y's shares.

particularly serious breach of the laws against insider trading that should result in a stiff penalty. Note, however, that this incident may not have involved more than minimal planning. Moreover, properly construed the incident did not defraud more than one victim: the only victim was Corporation X.

The above hypothetical case illustrates a situation in which there is only one victim. Let me now provide an example of a case in which insider trading involves a multitude of victims and an elaborate planning process, but does not warrant a particularly high penalty.

Hypothetical # 2:

Suppose that Company A is a large, publicly held corporation and is planning to acquire a controlling interest in Company B, another large, publicly held corporation, by means of purchasing shares in B on the open market in an acquisition that does not involve a tender offer within the meaning of the Williams Act. Suppose that Company A approaches an arbitrageur and discloses its plans. The arbitrageur, in exchange for this tip, agrees to purchase shares in B on A's behalf. The arbitrageur expects to profit by reselling B's shares to A at a profit in the near future.

This practice, known as "parking," or "frontrunning," is considered to involve insider trading. This scheme also will involve a violation of the Williams Act if, as is likely, Company A and the arbitrageur do not file a Schedule 13D with the SEC within ten days of acquiring five percent of B's stock. But

where is the harm associated with this transaction? As we have seen in the above example, it is erroneous to conclude that harm falls to B's shareholders. Neither the arbitrageur or Company A owes any fiduciary duty to this group. And, unlike our example above, here there really is no damage to A's shareholders, since here the insider trading was done to facilitate a welfare-increasing transaction. By contrast, in hypothetical #1, X potentially was harmed by the investment banker's purchases because such purchases raised the costs of Y's shares, thereby raising the cost of X's acquisition and increasing the chances that it would fail.

By contrast, where the insider trading violations involve parking or front-running schemes, any harm to investors involves the rather amorphous -- and controversial -- policies surrounding the Williams Act. Thus, despite the intricate planning often involved in these schemes, and the specious arguments that more than one victim is harmed in such arrangements, the penalties for these practices should be very light: certainly lighter than the penalties where the insiders' trading involves an actual breach of fiduciary duty.

The above discussion has implications for certain other aspects of the sentencing guidelines regarding insider trading. For example, because the harm associated with insider trading involves the breach of a fiduciary duty, the harm associated with such trading involves damages to the party to whom that duty was owed, rather than to the defendant's trading partners. This

realization obviously will effect the loss calculations associated with a conviction for insider trading, and hence the penalties involved.

Damages ought not be calculated in terms of the losses incurred by traders who sold to insider-purchasers, or traders who bought from insider-sellers. Rather, the losses borne by the party to whom the fiduciary duty to refrain from trading was owed should represent the actual losses involved in an insider trading case. So for example, hypothetical # 1 involving X corporation's acquisition of shares in Y corporation, the damages would not be the losses to shareholders in Y who sold to the investment banker. Rather, the damages would be the losses to X resulting from the fact that the investment banker's purchases raised its costs of acquiring Y, and lowered the probability that the X's planned acquisition would be successfully completed.

Conclusion

Contrary to popular belief, the law of insider trading in fact does not vindicate damage done to the securities markets generally, or even to individual buyers or sellers who trade with insiders. Rather, properly applied, the law vindicates only the interests of discrete owners of the property rights in valuable, non-public corporate information. Thus, despite all of the publicity surrounding recent insider trading scandals, the concerns about insider trading are not widespread societal concerns so much as they are concerns about violations of specific breaches of pre-existing fiduciary duties. As such, the

concerns regarding insider trading enforcement issues should focus on the individuals and firms to whom the fiduciary duty to refrain from insider trading is directed.



Washington, D.C. 20530

STATEMENT

OF

EDWARD S.G. DENNIS, JR.
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

UNITED STATES SENTENCING COMMISSION

APRIL 7, 1989

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss proposed amendments to the sentencing guidelines. The 290 amendments recently published for comment represent a considerable effort by the Sentencing Commission to develop the guidelines and to enhance the Commission's important contribution to the field of criminal justice. Many of the revisions clarify or refine existing guidelines and should significantly facilitate their implementation. Others were drafted to respond to a myriad of recent statutory amendments establishing new offenses or increasing existing penalties in such diverse areas of criminal law as controlled substances and fraud. Today I would like to stress to the Commission the importance of assuring that the will of Congress, particularly as regards penalty enhancements, is carried out and that the purposes of sentencing set forth in the Sentencing Reform Act of 1984 are met by the proposed guideline amendments. Although, as indicated, many of the proposed guideline changes are unobjectionable or clearly salutary, regrettably, in several important areas, the proposed amendments fail to achieve these goals.

Career Offender

The first area I shall address is the career offender guideline, for which the Commission has proposed alternative amendments. Guideline §4B1.1, Amendment 243. The career offender guideline implements a provision of the Sentencing Reform Act which requires the Commission to assure that the guidelines

specify a sentence to a term of imprisonment "at or near the maximum term authorized" if the defendant is at least 18 years old, is being sentenced for a felony which is a crime of violence or a controlled substance offense, and has previously been convicted of two or more such felonies. 28 U.S.C. §994(h). In enacting this provision, Congress clearly indicated its objective of requiring severe sentences for repeat offenders convicted of violent or drug felonies. Although we understand some members of the Commission may believe that this statutory mandate is ambiguous, in our judgment the provision is clear; it requires the Commission to specify a guideline range at or near the maximum term of imprisonment authorized by the offense of conviction.

The current career offender guideline carries out the Congressional intent by imposing on career offenders specific offense levels based on that statutory maximum. The Commission's proposals offer three options, two of which bear no direct relationship to the statutory maximum for the offense of conviction. By contrast, the third option requires a sentence at the statutory maximum. We disagree with all three proposed approaches to the career offender guideline and recommend that the Commission either retain the current guideline or revise it to authorize a reduction for acceptance of responsibility after calculation of the career offender offense level. If greater flexibility and reduced sentence levels for this category of repeat offender are deemed desirable in the interest of maximizing available use of

existing prison space, or for whatever other reason, in our view Congress should be asked to amend the statute. 1/

The first two options merely establish an additional criminal history category for career offenders. The new criminal history category would result in sentences which are greater than would be imposed on a non-career criminal but in many cases significantly less than the maximum sentence authorized by statute. For example, according to the Commission's own calculations, a career offender convicted of unarmed bank robbery would receive a sentence of approximately ten years under the first two options proposed, despite a statutory maximum of twenty years' imprisonment. Similarly, a career offender convicted of selling 10 grams of heroin would be subject to a term of imprisonment ranging from approximately six to nine years under the first two options, while the statutory maximum for a repeat drug offender convicted of selling this quantity of heroin is thirty years' imprisonment. The scheme embodied by options 1 and 2 simply fails to carry out the statutory directive to assure a guideline sentence of imprisonment at or near the maximum term authorized. The reason for this failing is that these options are based on the guidelines applicable to non-career offenders rather than the applicable statutory maximum for the offense of conviction. While harsh sentences for repeat drug traffickers and violent

1/ The Department might be willing to consider supporting some modest amendments designed to lend more flexibility to the current scheme.

criminals may have some adverse consequences and may not please some components of the criminal justice system, such sentences represent the will of Congress until such time as Congress amends the current law. In our view adoption of option 1 or 2 would amount to a failure by the Commission to implement a statutory requirement.

We believe that option 3 is unnecessarily harsh in requiring a term of imprisonment for a career offender at the statutory maximum. The career offender statute provides at least some leeway by specifying that the sentence may instead be near the maximum. Moreover, a permissible range of sentences for career offenders is in keeping with the statutory direction to the Commission to establish a sentencing range for each category of offense involving each category of defendant. 28 U.S.C. §994(b)(1). The use of judicial discretion within a defined sentencing range to distinguish among offenses and offenders is as appropriate for career offenders as for other offenders.

While we strongly urge the Commission to reject the proposed options for the career offender guideline, we believe that a modification of the current guideline based on a defendant's acceptance of responsibility would be appropriate. The current career offender guideline must be applied after the adjustment for acceptance of responsibility and negates the effect of such a reduction. We believe that a reduction for a defendant who truly manifests an acceptance of responsibility should not be defeated by the operation of the career offender guideline. A two-level adjustment for acceptance of responsibility after application of

the career offender guideline would not in our view violate the principle that career offenders must be sentenced at or near the statutory maximum. At the same time it would appropriately encourage those career offenders who presently have little incentive to plead guilty to do so. This is a particular problem with respect to career offenders who cannot offer substantial assistance in the investigation or prosecution of others and seek a reduced sentence on that basis. The application of a two-level reduction for acceptance of responsibility to the career offender offense level preserves the overall scheme of the career offender guideline and the link to the statutory maximum for the offense of conviction but recognizes an important basis for a reduced sentence.

Statutory Amendments

The next area I shall address is the Commission's effort to respond to recent statutory amendments -- either the creation of new offenses or the revision of penalties for existing ones. Where Congress has significantly increased a maximum penalty for an offense or has converted a misdemeanor into a felony through a penalty increase, in our view the Commission should respond by significantly increasing the applicable offense level for the offense in question, barring some unusual signal by Congress of a contrary intent. ^{2/} Past sentencing practice based on the prior

^{2/} In theory, raising a maximum penalty level could represent a
(Footnote Continued)

statutory provision becomes practically irrelevant when a statutory penalty change is enacted.

Fraud

An example of a recent statutory amendment increasing penalties is in the area of fraud, and the Commission has sought public comment on how the fraud guidelines should be amended. Guideline §§2F1.1 and 2F1.2, Amendment 119. In the Major Fraud Act of 1988, Congress enacted a new fraud provision which subjects government procurement fraud to a maximum term of imprisonment of ten years if the value of the contract is \$1,000,000 or more. The Act also increases the maximum fine applicable to such offenses. 18 U.S.C. §1031(a) and (b). In addition, the Act requires the Commission to amend the guidelines to provide for penalty enhancements where conscious or reckless risk of serious personal injury resulting from the fraud has occurred. As the Commission's commentary to the fraud guideline points out, most frauds are subject to a maximum term of imprisonment of only five years, and the existing guideline is based on a five-year penalty. See §2F1.1. When Congress doubles the penalty for an offense, as it has done for procurement fraud, the Commission needs to respond with appropriately increased guideline penalties.

(Footnote Continued)

Congressional conclusion that only the unusual offender who commits the offense under the most aggravated circumstances deserves a higher punishment, which should be achieved by a departure from the guidelines. We think that is an unlikely message, however, and suggest that absent a specific indication that this is all Congress had in mind, a general increase in the base offense level is warranted to reflect Congress's purpose.

We recommend an enhancement for government procurement fraud generally and an even greater enhancement if the value of the contract was \$1,000,000 or more. We also urge the Commission to adopt an enhancement for all frauds involving a conscious or reckless risk of serious bodily injury. Such an enhancement is mandated in the context of defense procurement fraud; a defense contractor who substitutes substandard parachute cord and thereby endangers life should be subject to a greater sentence than a contractor whose offense does not endanger life. However, the need for an enhancement based on the risk of serious bodily injury is as great in other frauds. Whenever substandard products are sold or misrepresentations are made with reckless disregard that life will be endangered, a sentencing enhancement should apply, whether the purchaser is the government or the general public. Without an enhancement in this regard, a defendant would be appropriately sentenced for endangering human life only if the judge could be persuaded to depart from the guidelines. A departure for a factor as important as a conscious or reckless risk of serious bodily injury does not serve the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. §3553(a)(2), particularly the need to reflect the seriousness of the offense and to deter criminal activity of this type. The enhancements we recommend should be quantified to reflect the ten-year statutory maximum; this means that the enhancements must be substantial and cumulative.

We also recommend that the fraud guideline be amended to provide an enhancement for offenses that involve federally

chartered or insured financial institutions. See definition, 18 U.S.C. §1344(b). With the recent history of serious crimes involving banks and savings and loan institutions and the apparent linkage of such offenses to the threat of collapse, the importance of adequate penalties cannot be sufficiently stressed. Indeed, Congress is currently considering an Administration proposal in this area, which would increase maximum prison terms to twenty years. The repercussions of offenses that threaten the integrity of financial institutions and the widespread effect on innocent investors are too great to treat the harm created by offenses against such institutions through a possible departure from the guidelines.

It is unrealistic to assume that enhancements based on the dollar loss of a fraud will reflect the true degree of harm caused by the offense. It is often impossible to detect, let alone prove, the full monetary extent of harm caused by sophisticated frauds. However, where a high dollar figure can be shown, the guidelines should capture this factor. Therefore, the fraud table, §2F1.1, should provide increments in sentence for dollar losses greater than now represented at the high end of the table.

In addition, the offense levels in the fraud table should increase more rapidly to assure that the greater the loss caused by the fraud, the greater the punishment.

The need for enhancements in the fraud guideline is also applicable to the Insider Trading and Securities Fraud Enforcement Act of 1988. This Act provides a maximum penalty of ten years' imprisonment for insider trading cases. By doubling the penalty,

over
5 mill

Insider
Trading

Congress has sent a definite signal that such offenses are to be sentenced more severely than in the past. We believe that the insider trading guideline, §2F1.2, should be amended to provide a substantially higher base offense level. In addition, enhancements should apply if the offense involved more than minimal planning or a violation of a judicial or administrative order. These enhancements will distinguish offenses in terms of their seriousness.

Finally, we urge the Commission to adopt an amendment providing a substantial upward adjustment for offenses that involve the use of foreign bank accounts or transactions to conceal the true nature or extent of the defendant's conduct. This is particularly appropriate in the fraud context but equally important for other offenses, such as drug crimes and money laundering. Therefore, we recommend that the general adjustments in Chapter Three of the guidelines be amended to provide an enhancement for any offense that involves the use of foreign bank accounts or transactions to conceal the true nature or extent of the defendant's conduct. The use of foreign bank accounts or transactions for this purpose indicates a high degree of intent in committing an offense. Moreover, when foreign accounts or transactions are used, the offense is often extremely difficult to detect. Even if it is detected, the investigation and prosecution are hampered by the need to obtain foreign records and to solicit the cooperation of foreign governments. The problems are exacerbated and sometimes insurmountable when foreign accounts and transactions are protected by secrecy laws of the foreign

nation. In addition, it may be impossible for the United States to collect a fine, restitution, or forfeiture when foreign accounts or transactions are involved; the defendant may leave prison to enjoy the riches derived from his criminal conduct. In short, the use of foreign bank accounts or transactions to conceal the true nature or extent of the defendant's conduct establishes a degree of intent and resulting harm that should be reflected in a markedly increased sentence.

The use of all of the enhancements we recommend would make the fraud and insider trading guidelines responsive to the increased maximum penalties recently enacted by Congress. Moreover, the inclusion in the guidelines of these adjustments would distinguish more serious offenses from less serious ones and thereby serve the purpose of providing fairness in sentencing -- one of the Commission's goals under the Sentencing Reform Act. See 18 U.S.C. §991(b).

There are many other areas where a strong response to a statutory penalty amendment is necessary. I shall mention just two others, but my comments apply equally to any offense for which Congress has substantially increased a maximum penalty.

Abusive Sexual Contact

In the Anti-Drug Abuse Act of 1988, Congress increased the penalties for certain sexual contact offenses. These offenses involve sexual touching as distinguished from sexual acts, as defined by the statute. 18 U.S.C. §2245. See generally 18 U.S.C. §§2241-2245. The recent amendment increased the maximum prison term from five to ten years for the most aggravated category of

unlawful sexual contact -- that committed (1) by force or threat, or (2) with children under the age of 12 even in the absence of force or threat. The Anti-Drug Abuse Act amendment also increased the maximum prison term from one to two years for sexual contact offenses involving minors between the ages of 12 and 16. 18 U.S.C. §2244(a)(1) and (3). This change transforms the offense from a misdemeanor to a felony.

The Commission has proposed several changes to the sexual contact guideline but has not augmented the offense levels for offenses subject to the increased maximum penalties recently enacted by Congress. Guideline §2A3.4, Amendment 28. Rather, the Commission has asked for comment on whether the offense levels in the sexual contact guideline should be increased to reflect the statutory change. We strongly urge the Commission to revise the guideline to implement the increased maximum penalties recently enacted for sexual contact offenses. The Commission should take into account that the maximum penalties were doubled by Congress.

Our concerns are greatest with regard to offenses against children. We have learned that unfortunately sexual contact crimes involving children are not a rare occurrence on the nation's Indian reservations. Some prosecutions have involved teachers who have come from outside the reservation, sought employment in reservation schools -- sometimes boarding schools -- because of the opportunities for sexual crimes with children, and molested countless children. A significant problem of sexual abuse of Indian children occurs with male victims over the age of

12. Force is rarely present; instead, trivial gifts and the teacher-student relationship are typically the means used to seduce these young boys. We understand that the defendants are rarely rehabilitated and, once released, return to the same form of crime for which they were prosecuted.

The Commission's proposed amendments to the sexual contact guideline correct a deficiency by providing an enhancement if the victim of the sexual contact offense is under 12 years of age. This amendment would have been necessary even in the absence of the statutory penalty change because the existing guideline fails to treat sexual contact offenses involving minors as severely as other sexual contact offenses subject to the same statutory maximum. However, more is needed. A defendant convicted of a sexual contact offense (not accomplished by force or threat) involving a child under the age of 12 would be subject to a guideline sentence under the proposal of only 15 to 21 months, assuming no significant criminal history, and 37 to 46 months, assuming a substantial criminal history. The latter sentence represents less than half the ten-year statutory maximum, even for the highest criminal history category. Similarly, if the victim was between the ages of 12 and 16 and no force or threat was used, the guideline provides for a sentence that would allow probation for a defendant in the lowest criminal history category and 12 to 18 months' imprisonment for a defendant in the highest category. These penalties fall short of the new two-year statutory maximum.

While we are concerned with child victims, we point out that the increase in the statutory maximum from five to ten years for sexual contact offenses also affects adult victims if the crime was accomplished through force or threat. However, the proposed guideline amendment actually lowers the offense level by one level for such offenses. We urge the Commission to adopt substantial sentences that reach the statutory maximum in an aggravated case for all sexual offenses and to treat the statutory increase in penalties as a message from Congress that past guideline penalties were too low. Crimes of sexual abuse and sexual violence are classic examples of the need for incapacitation and are too harmful to society for the Commission to err on the side of under-sentencing.

Reentry of Deported Aliens

The Commission has solicited comment on the guideline relating to unlawfully entering or remaining in the United States. Guideline §2L1.2, Amendment 160. Congress substantially increased the maximum penalties in the Anti-Drug Abuse Act of 1988 for unlawful reentry into the United States following deportation subsequent to a felony conviction. Previously, the maximum penalty was two years' imprisonment. However, under the amendment the maximum prison term is five years if the defendant was deported after conviction of a felony and fifteen years if the defendant was deported after conviction of an "aggravated felony." 8 U.S.C. §1326(b). The term "aggravated felony" includes murder, drug trafficking, and illicit trafficking in firearms or destructive devices. 8 U.S.C. §1101(a)(43). An

increased penalty of this magnitude -- two years to fifteen years -- and limited to particularly defined offenses must, in our view, be reflected in the sentencing guidelines if the will of Congress is to be effectuated.

The current guideline for the reentry of deported aliens is keyed to the two-year maximum prison term previously applicable to all offenses under the reentry statute. However, the Commission's amendment suggests alternative enhancements of only two, three, or four offense levels if the defendant was deported after sustaining a conviction for a felony, other than one involving the immigration laws. There is no proposed guideline amendment for aliens convicted of aggravated felonies. Rather, a proposed revision of the commentary suggests the appropriateness of an upward departure if the defendant was deported following conviction of an aggravated felony. This approach is inadequate. Even a four-level increase, the most far-reaching of the options proposed, would result in a guideline sentence of just three years for an offender with an extensive criminal history background; the guideline sentence would be substantially less for an offender with a limited criminal background. This enhancement meets neither the five-year maximum sentence applicable to defendants previously convicted of non-aggravated felonies nor the fifteen-year maximum sentence applicable to defendants previously convicted of aggravated felonies.

Treating prior aggravated felony convictions by way of a suggested departure is practically tantamount to ignoring the statutory amendment establishing a fifteen-year penalty. Merely

to sentence according to the guidance provided by the amended statute in an ordinary case, a sentencing judge would have to determine that the applicable guideline should be rejected. Appeals by defendants would be triggered by the Commission's failure to implement a clearly delineated statutory scheme. If ever there were a case for incorporating a factor into the guidelines, rather than relying on a judge's ability to depart from them, the amendment of the reentry statute represents such a case.

The Commission's amendment states that the issue of an appropriate enhancement for an aggravated felony could be deferred until the Commission can analyze current practice data through its case monitoring. The Department's response is that there is no need for case monitoring data to implement this new statutory scheme and that such data would be meaningless because of the failure of the guidelines to address the relevant offense. Some judges will simply impose the guideline sentence aimed at reentry after conviction for non-aggravated felonies even in the case of aliens with prior aggravated felony convictions. As the Commission knows, prosecutors cannot compel a judge to depart from the guidelines. The data will not provide reliable information on the kinds of sentences judges would have imposed had the guideline addressed the offense of reentry by aliens deported following conviction of an aggravated felony.

Emergency Amendment Authority

Before leaving the topic of implementing statutory amendments affecting penalties, I would urge the Commission to make appropriate use of its emergency amendment authority. It is imperative that statutory penalty amendments be given appropriate effect through the sentencing guidelines and that undue delay not result. If the Commission fails to use its emergency amendment authority, many provisions of the Anti-Drug Abuse Act of 1988 which became effective last November will not be reflected in amended guideline provisions until next November. Because the Commission's emergency amendment power was granted by Congress on a temporary basis and is due shortly to expire, we also recommend that the Commission seek legislation to make this authority permanent insofar as it allows the Commission to respond to statutory changes.

Escape

There are several other guideline amendments that are important to the Department. One of these is the guideline relating to escape from custody, for which the Commission has solicited comment. Guideline §2P1.1, Amendment 169. The guideline currently calls for a reduction in the applicable offense level if the defendant escaped from non-secure custody and returned voluntarily within 96 hours. The Commission has asked whether those who escape from non-secure custody but who do not qualify for this reduction based on return within 96 hours should receive a reduced sentence.

We believe that the reduction provided by the current guideline for escapees from non-secure custody who return within 96 hours should not be expanded. Likewise and more importantly,

* we oppose granting a reduced sentence to a defendant who escapes from non-secure custody and fails to return voluntarily at any time. Such a reduction would mean that the defendant would

receive a benefit on the sole basis that the custody under which he had been confined was non-secure. While an escape from non-secure custody may present less disruption to the prison system than an escape from secure custody, the use of non-secure custody could be severely compromised by a reduced sanction for escape. When a prisoner is in custody without significant physical restraint, the threat of a meaningful sanction for escape becomes the only bars the criminal justice system relies upon to hold the prisoner. A reduction for escape from non-secure custody without the defendant's voluntary return could result in a sentencing range that would permit the imposition of probation alone or probation with intermittent confinement. Such a sanction would not constitute the kind of penalty that adequately deters the offense of escape.

Our concerns about authorizing a reduced sentence on the basis of escape from non-secure custody without voluntary return are heightened by the broad definition of non-secure custody in the commentary to the escape guideline. The term is defined to mean "custody with no significant physical restraint (e.g., where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return

to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier.)" Under this expansive definition, a reduced sentence for escape from non-secure custody without voluntary return would encompass a vast range of escapes.

Firearms

The Commission has proposed a number of amendments in relation to firearms offenses. Guidelines §§2K2.1-2K2.4, Amendments 154-158. Given the dangerous level of violent crime involving firearms in many of our cities, it is imperative that the Commission establish tough sentences for a variety of firearms violations. Our review of the firearms amendments indicates a number of areas in which the guidelines need strengthening. I shall mention just a few but urge the Commission to reexamine the firearms guidelines and proposed amendments to assure that sentences for these offenses reflect the need to protect the public.

Congress has already signaled that tougher sentences are in order for firearms violations by increasing in the Anti-Drug Abuse Act of 1988 the sentences applicable to certain offenses. For example, a convicted felon who receives a firearm which previously was shipped in interstate or foreign commerce is now subject to a maximum term of imprisonment of ten years, rather than five as under prior law. 18 U.S.C. §924(a)(2). As I indicated earlier, the Commission should respond to such a substantial penalty rise by providing a significantly increased

guideline sentence. However, the proposed amendment to guideline section 2K2.1 only increases the base offense level by a modest amount. Under the proposed amendment a defendant subject to the highest criminal history category would still face a maximum guideline sentence of only about three years. Even assuming all applicable enhancements in the proposed guideline apply (e.g., the weapon was stolen), the maximum guideline sentence still falls far short of the ten-year statutory maximum. We believe that the guideline sentence should approach the statutory maximum for the worst offender who commits the offense in the most aggravated manner.

Another problem with the proposed guideline amendment is that, like the current guideline, it includes a substantial reduction if the defendant obtained or possessed the firearm solely for lawful sporting purposes or collection. A sporting or collection purpose is simply not relevant to firearms possession by convicted felons and other persons in prohibited categories. The felon-in-possession statute is often the most effective means of prosecuting persons involved in criminal activity; the need to incapacitate such persons and to protect society from further crimes they may commit is paramount.

The proposed guideline amendments also include a revision of the guideline relating to unlawful trafficking in firearms. Currently, the guideline increases the applicable offense level according to a table based on the number of firearms involved in the offense. The increase in the current table and in Option 1 of the guideline amendment is inadequate. We urge the Commission

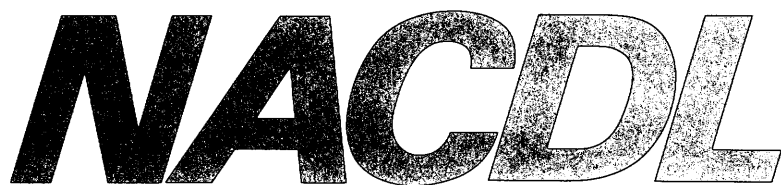
to adopt a table which increases the offense level depending on the number of firearms at least along the lines reflected in Option 2 of the proposal but providing greater incremental increases for more than 50 firearms. We also believe that larger enhancements are needed if the trafficking offense is subject to a maximum penalty of more than five years, particularly if the increased maximum is the result of a recent statutory amendment indicating a congressional intent to defeat past sentencing practice.

Robbery

The final area I shall address is robbery. The current guideline provides extremely low sentences, and the Commission has asked for comment on the need for an amendment. Guideline §2B3.1, Amendment 50. We urge the Commission to provide a substantial increase in the base offense level applicable to robbery. As an indication of how low the current guideline is, defense counsel have readily admitted that they did not challenge the constitutionality of the guidelines in robbery cases prior to the Supreme Court's decision in Mistretta v. United States. They knew that their clients benefitted from the current guideline. United States Attorney Joe B. Brown will discuss the robbery guideline in greater detail.

We appreciate the efforts of the Commission and its staff in the past to allow us to work with you in developing sentencing guidelines. The Department will be pleased to continue this

working relationship and to provide assistance to the Commission in its endeavor to submit amendments to the Congress by May 1.



National Association of
Criminal Defense Lawyers
Suite 1150
1110 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 872-8688

STATEMENT OF
BENSON WEINTRAUB

ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

APRIL 7, 1989

Mr. Chairman and members of the Commission, my name is Benson Weintraub, and I am pleased to appear here today to offer comments on the pending proposed guideline amendments on behalf of the 15,000 members of the National Association of Criminal Defense Lawyers and its state and local affiliates. I am a partner in the Miami law firm of Sonnett Sale & Kuehne, where my practice is limited to Guideline sentencing, direct appeals and habeas corpus litigation. I serve as Vice-Chair of the Association's Sentencing Committee, and represented NACDL as amicus in Mistretta and dozens of lower court cases regarding the constitutionality of the guidelines.

NACDL deeply appreciates the Sentencing Commission's expressed receptiveness to public comment not just on the currently pending package of proposed amendments, but on all aspects of the sentencing guidelines. We wish to take advantage of this openness to urge that, before specific amendments to the guidelines are considered or acted upon by the Commission, careful scrutiny and attention be given to the process by which amendments are developed, and the precedent which is thus set for the development of future amendments.

The initial guideline package developed by the Commission in response to the congressional mandate of the Sentencing Reform Act of 1984 was the product of an extraordinarily thorough deliberative process, according to Commission statements in the guideline commentary and supplementary report, based upon an

exhaustive empirical review of existing sentencing practices. Clearly, the guidelines drew much of their force and justification from the Commission's wide-ranging examination of nearly 100,000 convictions and a sample of 10,500 presentence investigations.

It is precisely this intense level of scrutiny that Congress hoped for when it established the Commission. Congress had been wrestling with the idea of sentencing reform for more than a decade, and the commission approach was born, midway through that process, out of a recognition that such a mammoth, comprehensive task could only be accomplished by an expert body devoting full-time attention to the issue for a prolonged duration.

After reviewing the present set of guideline amendment proposals, however, we are deeply concerned that the Commission appears to be retreating from its earlier painstaking, empirically-based approach. We are concerned that there is not presently enough data available to conduct any meaningful analysis of sentencing practices under the guidelines and whether they are "working" as intended. The Commission appears to concede this point, in frankly stating (with respect to the options under consideration for the offense of robbery) that "the Commission's data on practice under the guidelines are very preliminary, and do not yet provide a reliable basis for evaluating the workings of the current guideline." (Item 50, at page 31).

Federal guideline sentencing is still in its infancy. Mistretta is only a few months old. Training of judges, prosecutors and defense lawyers is in progress and still desperately needed all across the country. The total number of cases sentenced under the guidelines to date (roughly 7,200) constitutes less than three months' worth of the federal sentencing caseload (at the current rate of some 40,000 federal sentencings per year).

Why then, despite the Commission's confession of incomplete data, is the Commission trying to make substantive changes to so many guidelines--guidelines which the Commission obviously once thought to be empirically valid and rationally linked to statistics regarding past sentencing practices--before any new data has come in to undermine the old data? Examples of amendments to such guidelines include amendments 32 and 33 (tables for larceny, embezzlement and other forms of theft), 40 (same--burglary), 48 (same--robbery), 66 (bribery, extortion), 72-78 (drug tables), 116 (fraud and deceit tables), 169 (escapes), 210 (tax evasion tables), 243 (career offenders), and 248 (fines).

A large part of what the Commission appears to be responding to is a variety of comments trickling in from a self-selected array of judges and prosecutors with individual complaints or observations about how the guidelines are working. For example, amendment 97 appears to be a reaction to a single Court of Appeals decision (the Correa-Vargas case); and the bank

robbery proposals (issue 50) is explicitly said to be the result of "comments from several sources, primarily Assistant United States Attorneys and certain District Judges." The process seems to be one of "amendment by anecdote." The Commission's recognition of the great significance of the initial guidelines, and the meticulous attention that the issues merited, appears to have given way to a sense that a less momentous "evolutionary" process is now underway--a process of simply "tinkering" with, or fine tuning, the original product.

(At the same time, we recognize that many of the proposed amendments do not fall into this category, being either purely technical corrections or necessary responses to legislation enacted subsequent to the implementation of the initial guidelines. The concerns we may have about such amendments, particularly in the latter category, relate more to their substance than to the process of their adoption.)

We do not doubt that amendments to the guidelines will, from time to time, be necessary or warranted. We strongly object, however, to the making of important decisions as to what is warranted based on ad hoc review of the extremely limited experience under current law.

The process of making amendments to the guidelines is the process of making law. The amendments are no less momentous, no less binding on the courts, no less dispositive of the rights and liberties of thousands of individual defendants, and no less confusing for defense lawyers, than are the guidelines

themselves. Each one of them will have the force and effect of a legislative enactment. They cannot, and must not, be supported by so slender a reed as a few months of anecdotal experience, informally gathered and not systematically or empirically reviewed.

From the perspective of the defense practitioner, it is virtually impossible to practice sentencing law, to stay abreast of changes in it, and to render effective legal assistance, in the current climate of incessant change--hundreds of guideline amendments and temporary "emergency" amendments, revisions of the Commission's "legislative history" (i.e., guideline commentaries), and scores of legislative changes. Even the most competent attorneys cannot effectively practice when the law changes so readily.

We urge the Commission to sort through the current package of proposed guideline amendments, and to send to the Congress a "bare bones" package made up of only those amendments that are purely technical and noncontroversial in nature and those that are necessitated by recent legislative changes. All others should be set aside until at least the May 1990 submission to Congress, to permit the accumulation and thorough review of a meaningful body of data regarding sentencing practices under the guidelines.

Of particular importance, in our view, would be a comprehensive analysis of the frequency and reasons for judicial departures from the guideline ranges, as an indicator of specific

areas where the guidelines are not perceived as leading to appropriate sentences, and where amendment may be warranted. We also anticipate that as experience accumulates over the next several years, NACDL and individual defense practitioners across the country will be able to offer the Commission valuable insight into the actual functioning of the guidelines, particularly on the issue of plea bargaining and the extent to which the rigidity and harshness of the guidelines may encourage their circumvention.

Such questions, however, are not ripe today. Before whisking through a whopping 290 amendments, there must be some chance for the guidelines to "settle in," for judges, lawyers and probation officers to become acquainted with them, and for the Commission to be able to distinguish real problems from aberrations which may arise solely from confusion or lack of training and which may vanish when the dust settles. We urge the Commission: Take your time; gather the data; do it as carefully as you did the first time.

And please don't keep changing the rules on us. Consistent and rational sentencing is an elusive enough goal as is without making it a moving target.

NACDL has not had sufficient time within which to prepare detailed comments on each proposed amendment. Next week, however, we will file a comprehensive analysis under separate cover. Given the limited time for the public testimony, we summarize some of the most important specific comments below.

*Each amendment should include A "prison impact statement" consistent with the spirit of 28 USC 994.

*Mandatory minimums: Amendment 96 asks for comments on what to do with statutory mandatory minimums, and others ask how to deal with statutory provisions mandating that a specified minimum level be provided in the guidelines. On the latter, it appears that the Commission has no choice (although we do not understand why the Commission is considering setting a guideline minimum level greater than required in such statutory provisions). On the straight-mandatory-minimum provisions, however, our recommendations are twofold: first, ignore them in setting the guideline range; the Commission's job is to set what it finds to be an appropriate sentence range, and it is the judge's job to impose the statutory minimum if it is greater than that provided in the guidelines. Second, and more importantly, the Commission should, in making its legislative recommendations to the Congress, propose that the Congress refrain from enacting mandatory minimums of either kind, since they are utterly inconsistent with the Commission's function and the system

of determinate sentencing that the Congress established in 1984. We are interested to see that Chairman Wilkins has expressed similar sentiments in a letter to Senator Nunn on August 22, 1988.

*Amendment 10 is problematic due to the great potential for abuse of prosecutorial discretion. As drafted, the amendment encourages prosecutors to file one-count conspiracy indictments with multiple objectives, knowing that at sentencing, the multiple objectives--with their higher offense level--could be proven by the preponderance standard.

*What force and effect will an "additional explanatory statement" have? Will it be printed in the guidelines manual?

*NACDL concurs that the tax and theft monetary tables should be the same (amendments 32-33); yet, it is our view that they should not be increased at the higher levels at this time. Nor should amendments 40 and 41, absent empirical data demonstrating disparate sentences.

*NACDL strongly opposes any changes contemplated by amendment 50 unless and until truly empirical data and current sentence

patterns indicate a change from past sentencing practices.

*The defense bar objects -- in the strongest possible terms --- to amendment 97 for several reasons.

First, the Commission has not accumulated or analyzed sufficient data regarding violations of 21 U.S.C. 843(b) to appreciate the far-reaching ramifications of this radical change in Commission policy. Secondly, as I suggested earlier, it sets a dangerous precedent, for purposes of future amendments, to base a proposed amendment upon one or two Court of Appeals decisions which, further experience will only determine, may not be predictively significant as to the manner in which sentencing courts generally treat telephone counts in individual cases. See, e.g. United States v. Correa-Vargas, 860 F.2d 35, 1 Fed. Sent. R. 313 (2d Cir. 1988).

The third reason why NACDL strongly opposes any modification to 2D1.6 relates to plea bargaining. This offense represents the only "safety valve" providing an escape from the restrictive Drug Quantity Table which determines the base offense level for all other narcotics offenses. This valve must be left open in order to avoid a complete and total breakdown of the plea bargaining process, particularly for offenders with relatively low culpability and largely peripheral involvement. The harm to society punished by 843(b) is the use of a telecommunications facility in committing a drug offense. The societal harm sought to be protected by this statute is not necessarily drugs in and of itself. In appropriate cases, 2D1.6 provides for an

equitable and just resolution of the case while adequately reflecting the seriousness of the overall offense conduct. See generally, 6Bl.2, 6Bl.4. See also, U.S. Department of Justice Prosecutors Handbook on Sentencing Guidelines And Other Provisions of The Sentencing Reform Act of 1984, and the "Thornburgh Memorandum"

*Notwithstanding an increase from 5 to 10 years imprisonment as the maximum sentence under Section 6462 of the Anti-Drug Abuse Act of 1988, amendment 154 should not be adopted because of the present lack of experience in acquiring sufficient data upon which to justify an increase in the base offense level.

*Regarding Amendment 210, the Commission lacks sufficient data to demonstrate why the present tax table severity level does not adequately reflect the seriousness of the conduct. Consequently, the amendment should not be approved.

*Career offenders (Amendment 243). NACDL concurs with the criticism enunciated in this section (page 135) but we urge you to reject the amendment at this time. All of the changes appear to result in longer guideline sentences and, as such, are not responsive to the section's critics. More study is needed. At present, judges may be departing downward to avoid purely Draconian sentences. Adoption of this amendment without substantially more experience and empirical data could send the wrong message to the

judiciary.

*No. 260. The commission seeks public comment on the question of whether the policy reflected in the existing guidelines should or should not be revised to accommodate the provision in Section 7305 of the Omnibus Anti-Drug Abuse Act of 1988 providing for the use of home detention as an alternative to imprisonment in light of the existing guideline distinction between home detention, community or intermittent confinement and imprisonment. First of all, it is clear that Section 5C2.1(e) must be amended to permit home detention to be imposed as a substitute for imprisonment. As with intermittent community confinement, home detention, if substituted for imprisonment, should be done as an exact equivalent, i.e., one day for one day. Additionally, NACDL would not object to discretionary electronic monitoring being required to supplement probation officer enforcement of the condition so long as the prisoner not be made to bear the cost of the electronic monitoring thus precluding poor people from that type of alternative sentencing. NACDL also believes that no type of offender should be precluded from home detention. Moreover, NACDL supports the idea that people should be able to be sentenced directly to home detention even if the applicable guideline range in the sentencing table is more than ten (10) months. At the very least, if the sentencing guideline range is more than six (6) months but not more than ten (10) months, a person should be able to be sentenced to home detention without being required to serve at least one-half of the minimum term

in imprisonment.

*No. 268. NACDL strongly opposes this proposed amendment which would revise Section 5K1.1 dealing with substantial assistance to authorities. First, prosecutors have too much discretion in determining whether to move to authorize a judge to depart based on cooperation. NACDL firmly believes that Section 5K1.1 violates 21 U.S.C. Section 994(n) in this regard. Further restricting the use of Section 5K1.1 will hinder effective law enforcement in attempting to get defendants to cooperate to the best of their ability. No criminal defendant in his right mind would subject himself or herself to the hazards of cooperation if his or her "best good faith efforts" will be incapable of being rewarded. Requiring "results" will lead to widespread perjury and confidential informant overreaching in order to secure the benefits of the proposed amendment. This runs the risk of unduly increasing the likelihood of convictions of innocent individuals. Ultimately, we believe that judges should be able to reward cooperation sua sponte. Cf., 18 U.S.C. 3553(e); rule 35(b), F.R.Cr.P.

CONCLUSION

That concludes my prepared statement. I appreciate this opportunity to share NACDL's concerns and comments with the Commission, and I would be happy to answer any questions the Commission may have.

COMMENTS OF THE FEDERAL DEFENDERS
ON THE
1989 PROPOSED GUIDELINES AMENDMENTS
AND OTHER ASPECTS OF GUIDELINE SENTENCING

SUBMITTED ON BEHALF OF
THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

WASHINGTON, D. C.

APRIL 7, 1989

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**COMMENTS OF THE FEDERAL DEFENDERS
ON THE 1989 PROPOSED GUIDELINES AMENDMENTS
AND OTHER ASPECTS OF GUIDELINE SENTENCING**

Introduction

Pursuant to 28 U.S.C. § 994(o) and the Sentencing Commission's call for public comment on the recently published proposed sentencing guidelines amendments, the Federal Public and Community Defenders wish to file these written comments on the guidelines and the work of the Commission. The Federal Defenders appreciate the opportunity to participate in the guidelines development process.

Our organizations operate under the authority of the Criminal Justice Act,¹ and exist to provide criminal defense and certain related services in the United States Courts to persons who are financially unable to obtain counsel. There are currently 41 Federal Public and Community Defender organizations, operating in 47 of the 94 judicial districts. In fiscal year 1988, Federal Defenders represented 36,138 persons, equal to 55% of the total Criminal Justice Act representations.

General Considerations

At the outset, we wish to convey that the Federal Defenders are concerned with the pace of guidelines amendments. While it is

¹Title 18 U.S.C. § 3006A.

0 to be expected that there will be a number of remedial amendments
1 in the early stages of a new sentencing system, the current pace
2 increases the burden on the users of that system. The problem is
3 compounded by the rapid changes in the federal criminal statutes.
4 Because of the interplay between the statute, which requires the
5 sentencing court to apply the guideline in effect at the time of
6 sentencing, and the ex post facto clause, no guidelines manual is
7 usable unless all superseded pages are retained.

8 In responding to calls for guidelines amendments which are
9 based upon impressions, it is well to recall that the guidelines
10 have been in effect on a nationwide basis for less than three
11 months. A number of proposals would have the effect of sharply
12 increasing sentences, before there is any significant experience
13 from the Ninth Circuit and the numerous district courts which have
14 not been using the guidelines. Supplying a quick-fix for any
15 perceived problem risks a move in the wrong direction, which would
16 have to be corrected later, thus undermining confidence in the
17 system. Such a policy would also not allow sufficient time for
18 judicial interpretation of the guidelines, which can be extremely
19 helpful to the Commission in shaping necessary adjustments.

20 The increasing complexity of guideline sentencing (to which
21 the amendment rate contributes) increases the burden on all users
22 of the system, but especially on occasional users. A mandatory

0 guideline sentencing system can be a minefield for the criminal
1 defense attorney, and it must be recalled that many representations
2 are undertaken by Criminal Justice Act panel attorneys who may
3 receive appointments on an infrequent basis.

4 Summary of Key Recommendations

5 In its call for comment, the Commission has identified certain
6 proposed amendments of special note. The Federal Defender
7 recommendations on these highlighted proposals are summarized
8 below.

9 Amendment 50 (Robbery) The Federal Defenders oppose amendment
10 of the robbery guideline at this time. This is a prime example of
11 why the Commission should resist a call for change which is not
12 supported by data. It may well be that the recidivism rate for
13 first-offense robbery offenders is significantly lower than that
14 of offenders with serious criminal records.

15 Amendment 96 (Continuing Criminal Enterprise) We suggest the
16 proposed new guideline be modified to draw a distinction between
17 "manager or supervisor" and "organizer or leader", in accordance
18 with principles informing Guideline §3B1.1.

19 Amendment 119 (Fraud and Deceit) The Federal Defenders will
20 defer to others with more experience in major frauds, insider
21 trading, and securities fraud. We do believe these new offenses
22 should be the subject of separate guidelines or specific offense

0 characteristics, rather than being lumped in with other frauds
1 presently covered by §2F1.1, which may be far less extensive.

2 Amendment 243 (Career Offender) We believe the present
3 guideline interpretation of 28 U.S.C. § 994(h) is overly literal,
4 it leads to a hypermechanical application which is at odds with the
5 overall approach of the guidelines, and it fails to account for the
6 quantum increase in effective punishment by the abolition of
7 parole. Of the three options for change posed by the Commission,
8 the Defenders recommend Option 1.

9 Amendment 247 (Chapter Five, Part A - Sentencing Table) The
10 Defenders oppose the elimination of guideline ranges shorter than
11 0-6 months. Those ranges will typically apply to a minor offense
12 first offender, and the system should guard against unwarranted
13 sentencing disparities as to them. The amendment would diminish
14 the incentive to plead guilty in a significant percentage of cases
15 which the federal system expects to be resolved without trial.

16 Amendment 260 (Home Detention) It would appear that the
17 Congress has already determined that home detention shall be
18 available as an alternative to incarceration; in any event the
19 Commission should so provide by guideline. The equivalency rate
20 should be one-for-one, and electronic monitoring should be
21 discretionary with the court.

0 Comments on the Proposed Amendments and Other Issues

1 There follows the comments of the Federal Defenders on the
2 operation of the guidelines and the proposed amendments. The
3 comments are set out in sequence with the Guidelines Manual, and
4 recommendations on specific proposals are keyed to the number of
5 the amendment.

6 Chapter One, Part A, Section 4(b) Departures

7 3. The concept of interpolation has proved useful to the courts,
8 and we believe some discussion of interpolation—whether in
9 its present form or elsewhere in the guidelines—should appear
10 in the guidelines.

11 Consider the following example: In a recent case under the
12 Arms Export Control Act, a district court was faced with
13 determining which of two levels applied, the base offense
14 level of 14 or the alternate base offense level of 22
15 applicable "if sophisticated weaponry was involved". (See
16 §2M5.2). The items involved, while not unsophisticated, did
17 not exactly fall into the category of "sophisticated weapon-
18 ry"; referring to the discussion of interpolation in the
19 guidelines, the district court chose a base offense level
20 midway between 14 and 22—a decision which seemed not unreason-
21 able both to the government and the defendants. While we

0 understand that departures take place after the court has
1 decided "the applicable category of offense committed by the
2 applicable category of defendant" (see 18 U.S.C. § 3553(a)-
3 (4)), without the interpolation language in the guidelines the
4 court might have felt required to choose one or the other of
5 alternative provisions listed in the guideline when neither
6 alternative truly covered the situation.

7 Therefore we think the guidelines should continue to include
8 a discussion of interpolation and the fact that "middle
9 instances" are bound to crop up in applying the guidelines.
10 If so, there would be no need for specific provisions—such as
11 those in proposed amendments 17, 19, 25, etc.—which state,
12 for example, that if the degree of injury is between bodily
13 injury (+2) and serious bodily injury (+4), the court should
14 give +3 levels.

15 **§1B1.2 (Applicable Guidelines)**

- 16 10. The proposed amendment attempts to clarify how the guidelines
17 apply when a jury finds a defendant guilty of a multiple-ob-
18 jective conspiracy in circuits where the conviction is valid
19 if there is sufficient proof with respect to any one of the
20 objectives. The language in the second sentence of proposed
21 Application Note 5 for §1B1.2 that "if the defendant is
22 convicted of a conspiracy alleging that he conspired to commit

0 two bank robberies, but there is insufficient evidence to
1 support a separate conviction for a conspiracy to commit one
2 of the robberies . . ." is confusing, because the guideline
3 seems to be adopting a sufficiency of the evidence standard
4 rather than, as intended, a reasonable doubt standard. The
5 language "insufficient evidence to support a separate
6 conviction for" should therefore be changed to "inadequate
7 proof of" or, better yet "a reasonable doubt as to". We note
8 that in cases where a defendant pleads guilty to a multiple
9 objective conspiracy, the matter of whether the defendant is
10 admitting guilt to conspiring to commit more than one
11 objective of the conspiracy can usually be taken care of by
12 agreement. In cases contested to a jury, the background
13 commentary might suggest use of a special verdict form. As
14 the necessary procedures would be cumbersome, the Commission
15 may wish to reconsider the need for treating a multiple-
16 purpose conspiracy conviction as separate counts.

17 Although we see no simpler way through the multiple-conspiracy
18 thicket than the one proposed, we are constrained to point out
19 that applying the guidelines in such cases threatens to become
20 a hypertechnical, legalistic exercise in which the ultimate
21 objectives of sentencing will be lost.

0 The existence of the "additional explanatory statement",
1 helpful though it is, creates a problem of its own. If such
2 statements are printed with the guidelines, they make the
3 guidelines longer and more difficult. On the other hand, if
4 an actual case comes up, having to search for such "additional
5 explanatory statements" in the Federal Register is not a happy
6 prospect.

7 §1B1.3 (Relevant Conduct (Factors that Determine the Guideline
8 Range)

- 9 12. We realize that the purpose of the amendment is to exclude
10 from one's "relevant conduct" the conduct of other partici-
11 pants beyond what one has jointly undertaken with the others.
12 We continue, however, to be fundamentally opposed to the
13 notion that if one conspires with another (or now, under the
14 expanded proposed amendment, acts in concert with another)
15 one is just as liable for the reasonably foreseeable conduct
16 of the other as if one perpetrated the conduct oneself. The
17 foreseeability determination is proper for judicial judgment.
18 If A and B jointly perpetrate a crime but in doing so B in
19 fact engages in unnecessary conduct which harms others,
20 which—although perhaps foreseeable—A himself would not have
21 done had he been in B's position, it simply is not fair always
22 to tag A with B's conduct. Would it not be better if the
23 guidelines did not automatically treat A as having done what

0 B did but simply to allow the court to depart upwards to
1 increase A's sentence where appropriate?

2 We also object to the bank robbery example² because it is not
3 necessarily the case that an injury caused by B or C will be
4 foreseeable from A's point of view. If B or C savagely beat
5 a teller for no apparent reason, and very serious injuries
6 resulted, there may well have been no reason for A to foresee
7 the injury or the extent of it. Therefore, the phrase
8 "defendant A is accountable under the guideline for an injury
9 inflicted on a teller by defendant B or C" should be changed
10 to "defendant A may be accountable under this guideline for
11 an injury inflicted on a teller by defendant B or C".

12 Chapter Two - Offense Conduct

13 §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)

14 32. It probably makes sense to have one table for theft and fraud
15 loss and for tax loss. In the absence of evidence that
16 sentences for theft and fraud have been too low, however, we
17 see no reason to adopt the tax loss table—thus increasing the

18 ²The example states: "For example, where Defendants A, B, and
19 C engaged in a robbery, Defendant A is accountable under this
20 guideline for an injury inflicted on a teller by Defendant B or C
21 during the course of the robbery, even if Defendant A did not
22 enter the bank, because such an injury is a reasonably foreseeable
23 (sic) result of the commission of a bank robbery."

0 current punishment for thefts and frauds at higher levels-
1 rather than adopting the theft and fraud loss table.

2 §2B3.1 (Robbery)

3 50. Item 50 results from comments from various sources that the
4 offense level for robbery is too low, especially for first
5 offenders. It has not been the experience of the Federal
6 Defenders that robbery sentences under the guidelines are much
7 lower than pre-guideline sentences. As the Commission itself
8 feels its data do not yet provide a reliable basis for
9 evaluating the workings of the current guideline, it is
10 premature to make any change in the offense level for robbery.

11 Our impression is that the number of bank robbers who are in
12 fact first offenders is small. First-offense bank robbers
13 include a number of individuals who have led stable lives and
14 then rob a bank in the midst of some personal crisis. It is
15 our impression that the recidivism rate of first-offense bank
16 robbers may be lower than that of first offenders generally.
17 We suggest that, before any changes are made in bank robbery
18 sentences, the recidivism rate of first-offense bank robbers
19 be analyzed. The public-protection rationale for increasing
20 the sentences (stated in the second sentence of the fourth
21 paragraph of Amendment No. 50) makes little sense in the case
22 of first offenders if their recidivism is, in fact, low. In

0 evaluating whether the sentences under the robbery guideline
1 are adequate, we ask the Commission to bear in mind that
2 "note" robbers—in contrast to those who in fact carry or
3 display weapons—are in many cases not very sophisticated
4 criminals, and tend not to fit the profile of what the public
5 thinks of as a bank robber. What may appear as low sentences
6 under the guidelines (in the mind of some people) may result
7 from a larger proportion of note robberies.

8 In answer to the specific request for comment in footnote 2
9 of Amendment No. 50, we do not think there should be a great
10 difference in offense level between bank robberies and
11 non-bank robberies. Indeed, "note" robberies—in which no
12 weapon is displayed or used—cause less fear, and, in fact,
13 cause far less social harm than "street-crime" robberies.

14 We are strongly opposed to the suggestion that if a person is
15 charged with multiple bank robberies he might be punished as
16 if he had been convicted of all the bank robberies when in
17 fact convicted of fewer. See the paragraph of the proposal
18 which begins: "Concern also has been expressed that the
19 guideline sentence may be unduly limited by the number of
20 counts of conviction." That the parole guidelines took into
21 account dismissed charges hardly provides support to the
22 suggestion; sentencing based on dismissed charges was one of

0 the primary reasons the parole guidelines were widely
1 considered to be flawed.

2 When a person is charged with, for example, three robberies
3 and two are dismissed, it is simply unfair to treat him for
4 sentencing purposes as if he had been found guilty of all
5 three robberies. Such a course would allow prosecutors to
6 sentence people for crimes which they might be unable to prove
7 beyond a reasonable doubt. Indeed, we suspect that most
8 prosecutors would think this unfair, and we are confident that
9 almost all judges would too. Including such a provision in
10 the guidelines would promote disrespect for the guidelines
11 among those that use them. If it is felt that bank robbery
12 sentences are too low because defendants are permitted to
13 plead guilty to single counts in multiple robbery cases, the
14 answer is not for the Commission to restructure the guidelines
15 but for prosecutors to revise the plea agreements they make
16 in such cases.

17 §2C1.1 (Bribe or Extortion)
18 §2C1.2 (Gratuity)

0 66. On the whole, we favor the proposal which would allow bribery
1 offenses to be grouped. As the example given shows,³ the
2 present guideline structure for bribery creates an anomaly.

3 §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or
4 Trafficking (Including Possession with Intent to
5 Commit These Offenses))

6 77. We oppose the adoption of this amendment to the Application
7 Notes to Guideline §2D1.1. The maximum penalties provided for
8 by level 36 of the guidelines are extremely high, ranging from
9 a maximum of 19 years 7 months for an offender with no prior
10 criminal record to 33 years 9 months for an offender in
11 Criminal History Category VI. We believe that it is unwise
12 to adopt commentary language such as that proposed, which
13 suggests that upward departures from these severe penalty
14 levels may be appropriate solely on the basis of substantially
15 higher quantities of drugs. We submit that upward departures
16 from these already severe penalties should be based on
17 aggravating factors beyond mere increase in the quantity of
18 drugs involved, and we believe that, for the present time, the
19 development of principles to govern upward departure decisions
20 in this area should be left to the appellate process. Once

21 ³"For example, an elected public official who takes three
22 unrelated \$200 bribes has an offense level of 21; the same
23 defendant who took two unrelated \$500,000 bribes would have an
24 offense level of 20."

0 a developed case law emerges through that process, the
1 adoption of Application Notes which focus attention on the
2 factors identified as significant by the case law would be
3 appropriate.

4 If the proposed amendment is, nonetheless, adopted, we urge
5 that the language of the new Application Note be modified to
6 limit its application to cases involving drugs of especially
7 high purity. Indeed, the Commission should consider changing
8 to equivalent pure amounts to determine the existing guideline
9 ranges. Results produced by the current approach are higher
10 than necessary to achieve the purposes of sentencing, and a
11 change would more closely match sentences to offense conduct
12 at a small cost in calculation effort.

13 80. We support the proposal to eliminate the gaps in the Drug
14 Quantity Table through the use of the suggested "at least _
15 _ but less than ___" language. In addition, we urge the
16 Commission to revise the scale utilized in the Drug Quantity
17 Table so as to provide for one-level rather than two-level
18 incremental increases as the quantity of drugs increases.
19 Specifically, we propose that the number of gradations in the
20 Drug Quantity Table be doubled and that the offense level of
21 the lower half of each quantity grouping in the existing table

0 be reduced by one.⁴

1 Under the present scale, with its system of two-level
2 incremental increases, in almost all cases, the lowest "within
3 guideline" sentence for an offender whose offense involved 0.1
4 mg. more than the minimum for a particular quantity grouping
5 is as severe as the highest "within guideline" sentence for
6 an offender whose offense involved 0.1 mg. less than the
7 minimum. We submit that this existing system of increments
8 places undue significance on the presence or absence of minute
9 quantities of drugs as a determinant of the maximum and
10 minimum guideline sentences applicable in a case. Since the
11 true significance of a small increase in quantity will vary
12 from case to case depending upon the purity of the drugs
13 involved as well as the particular defendant's degree of
14 awareness of the exact quantity involved, we submit that a
15 scale which employs a greater number of levels with overlap-
16 ping ranges will result in a fairer system for assessing the
17 severity of narcotics offenses and determining the appropriate

18 ⁴In the few instances in which this results in a guideline
19 range with a minimum sentence below an applicable statutory
20 mandatory minimum, the application notes to the Table would, of
21 course, direct that the statutory mandatory minimum would be
22 determinate of the minimum sentence which can be applied (e.g., a
23 first offender convicted of distribution of 100-249.9 grams of
24 cocaine would be subject to a range of 60-71 months rather than
25 the ordinary Level 25 guideline range of 57-71 months).

0 sentence in each case.

1 82. We urge the adoption of an amendment providing that the weight
2 of the carrier should not be considered in calculating the
3 quantity of LSD involved in an offense. As the Commission has
4 noted in its discussion of this issue, the carrier weight of
5 a sugar cube is 162 times greater than that of blotter paper.
6 As the potential harm imposed by the ingestion of a given
7 quantity of LSD is not in any way greater in a case involving
8 a sugar cube carrier weighing 2,270 mgs. than in a case
9 involving a blotter carrier weighing 14 mgs., there is no
10 rational reason why the penalty should vary between the two
11 cases. The adoption of an amendment which specifically
12 excludes the weight of the carrier in the calculation of the
13 applicable guideline range will best ensure that cases
14 involving similar quantities of LSD are treated similarly.

15 83. The Federal Defenders urge that, except in those instances
16 where statutory mandatory minimum provisions dictate another
17 result, the Commission promulgate a guideline for marijuana
18 plants which employs a ratio of plants to marijuana that
19 reflects the 0.4 kilo average yield per plant which has been
20 found to be the norm by the DEA. We believe that, in view of
21 the DEA's findings, the 1 plant-to-1 kilo ratio which has been
22 adopted by Congress constitutes an arbitrary classification

0 of questionable constitutionality. While the Commission is
1 obligated to adhere to that ratio in instances in which the
2 statutory mandatory minimum comes into play, we submit that
3 in all other instances the experience-based 1 plant-to-0.4
4 kilo ratio should be employed.

5 §2D1.2 (Involving Juveniles in the Trafficking of Controlled
6 Substances)

7 92. The Federal Defenders support the proposed new Guideline
8 §2D1.2(a)(2), which we believe provides a fairer method of
9 dealing with narcotics offenses which occur near a "protected
10 location" than the existing guidelines. Moreover, we urge
11 that the Commission adopt commentary language suggesting that,
12 in cases in which the guideline range as enhanced by the
13 "protected location" factor exceeds the statutory mandatory
14 minimum, the court consider a downward departure from the
15 enhanced penalty level to the ordinarily applicable penalty
16 level, if the activities in which the defendant was engaged:
17 1) were only fortuitously near a "protected location", 2) were
18 not in any fashion directed toward the protected classes who
19 frequent the "protected location", and 3) did not, in fact,
20 expose such persons to the dangers involved in drug transac-
21 tions. A provision calling for downward departures in such
22 circumstances will discourage prosecutors, particularly those
23 in densely populated urban areas, from arbitrarily utilizing

0 the "protected location" statute to enhance penalties in cases
1 in which the conduct charged happened to occur within 1,000
2 feet of a "protected location", but in no way posed the
3 specific dangers which are the object of the "protected
4 location" statute. Finally, it should be recognized that a
5 statute of this type carries a potential for manipulation by
6 investigating agents who may control the site of the transac-
7 tion.

8 §2D1.4 (Attempts and Conspiracies)

9 93. We strongly support that part of this proposed amendment which
10 directs courts to exclude from the guideline calculation in
11 conspiracy and attempt cases those quantities of drugs which
12 the defendant negotiated to sell but which the court finds he
13 was not reasonably capable of producing. The present rule,
14 which merely allows, but does not direct, a sentence reduction
15 in such cases, and provides that such a reduction be a
16 departure, is inadequate to protect those numerous defendants
17 who, in the course of encounters with undercover agents or
18 informants, boast of a capability to provide drugs to which
19 they have no reasonable access.

20 We oppose the proposed amendment's requirement that such a
21 reduction apply only when "a court finds that the defendant
22 did not intend to produce" the negotiated quantity of drugs.

0 If, in fact, a defendant was not reasonably capable of
1 producing a negotiated quantity of drugs, there is no reliable
2 way of determining his true intention. Judicial inquiry into
3 a defendant's intention regarding a proposed future sale which
4 he had no reasonable capability to perform will involve
5 sentencing courts in speculation and guesswork, the results
6 of which will likely be inconsistent and create unwarranted
7 disparity in sentencing. For this reason, we urge the
8 Commission to delete the "did not intend to produce" language
9 from the amendment.

10 94. See our comments on Proposed Amendment No. 12.

11 **§2D1.5 (Continuing Criminal Enterprise)**

12 96. We believe that subsection (a)(1) of proposed new Guideline
13 §2D1.5 should be modified to provide that in cases in which,
14 applying the principles set forth in Guideline §3B1.1 and the
15 accompanying Commentary, the defendant is found by the court
16 to have been a "manager or supervisor" and not an "organizer
17 or leader", the base offense level should be set at "3 plus
18 the offense level from §2D1.1 applicable to the underlying
19 offense" This will ensure that the distinction in
20 treatment between "organizers and leaders" and "managers and
21 supervisors" which is drawn in §3B1.1 is also applied in cases

0 involving persons convicted under 21 U.S.C. § 848.

1 We believe further that subsection (a)(2) of the proposed new
2 Guideline §2D1.5 should be deleted and replaced by an
3 Application Note indicating that if the base offense level
4 arrived at under subsection (a)(1) results in a guideline
5 range whose minimum is less than 240 months, the court should
6 impose a sentence between 240 months and the maximum of the
7 guideline range. The Application Note should provide further
8 that if the base offense level arrived at under subsection
9 (a)(1) results in a guideline range whose maximum is less than
10 240 months, the court should impose a sentence of 240 months
11 as required by statute. Since the calculation arrived at
12 utilizing subsection (a)(1) takes full account of the offense
13 conduct, there is no reason why a defendant convicted of a CCE
14 offense whose offense level as calculated under Guideline
15 §2D1.5(a)(1) yields a guideline range with a maximum under 240
16 months should receive a sentence greater than the 240 months
17 mandatory minimum set by the statute.

18 §2D1.6 (Use of a Communications Facility in Committing Drug
19 Offense)

20 97. The Federal Defenders oppose the adoption of the proposed
21 amendment to Guideline §2D1.6 at the present time. Instead,
22 we urge that the Commission defer any action to amend this

0 guideline pending the collection of further and more complete
1 data on the circumstances in which "telephone count" disposi-
2 tions are utilized in cases throughout the nation. While
3 cases involving unusual circumstances of the kind which were
4 present in the Correa-Vargas case⁵ might warrant a "quantity-
5 oriented" approach to the determination of the appropriate
6 offense level, it is not at this time at all clear that those
7 circumstances pertain in the majority of cases which result
8 in "telephone count" convictions. We are concerned that many
9 such convictions, in fact, involve minor offenders whose
10 conduct, unlike that of Correa-Vargas, is only tangentially
11 connected with major drug offenses, and for whom a guideline
12 keyed to the quantity of drugs ultimately distributed would
13 be unduly harsh, even with the 3-level reduction contemplated
14 by the proposed amendment. We believe that a change in the
15 existing guideline should await a more exhaustive analysis of
16 the factual circumstances and sentences imposed in cases
17 involving "telephone count" dispositions which are reported
18 over the course of the next year.

19 ⁵The case of United States v. Correa-Vargas, 860 F.2d 35 (2d
20 Cir. 1988) involved a defendant who was apparently a major
21 narcotics trafficker and whose offense conduct involved the
22 distribution of over 20 kilograms of cocaine. He was permitted to
23 plead guilty to a "telephone count" because the Government was
24 concerned that a trial of the distribution charges which had been
25 originally filed would compromise the safety of a confidential
26 informant.

0 §2D1.10 (Endangering Human Life While Illegally Manufacturing
1 a Controlled Substance)

2 98. The Federal Defenders oppose the adoption, at the present
3 time, of proposed Guideline §2D1.10. In the absence of the
4 development of case law construing the term "whoever . . .
5 creates a substantial risk of harm to human life", we feel it
6 is unwise to adopt a guideline which would require a minimum
7 base offense level of 20 (requiring a sentence range of 33 to
8 41 months for a first offender) for this offense. Such a
9 minimum base offense level may be appropriate if the courts
10 construe the above-noted phrase narrowly. However, if that
11 term is broadly construed by the courts, we believe that this
12 proposed minimum base offense level would be too harsh.
13 Accordingly, we would urge the Commission to defer the
14 development of a guideline covering this specific offense
15 until the scope of its application is made clear by the
16 courts.

17 Part D, Subpart 1

18 99. With respect to the new offenses created pursuant to §§ 6053,
19 6055 and 6057 of the Anti-Drug Abuse Act of 1988, we believe
20 the Sentencing Commission should adopt a guideline which
21 utilizes the principles set forth in Guideline §2X1.1 with
22 respect to attempts, solicitations and conspiracies. The

0 offense level for these offenses should be set at three levels
1 below that which would apply had the materials and/or
2 equipment been utilized to actually produce controlled
3 substances. The guideline should provide further that if, in
4 fact, the defendant is also convicted of a completed manufac-
5 ture of drugs utilizing the materials and equipment covered
6 by these statutes, the counts charging violations of these
7 statutes should be grouped together with the counts charging
8 the completed offense, in accordance with the principles set
9 forth in Guideline §3D1.2(b).

10 100. The Federal Defenders believe that the guideline applicable
11 to violations of § 6254(h) of the Anti-Drug Abuse Act of 1988
12 should be incorporated in part Q of the guidelines, as the
13 harm at which that offense is directed is the danger to the
14 environment caused by the hazardous precursors rather than the
15 direct dangers to persons arising from abuse of the drugs
16 produced. We believe that the approach taken in Guideline
17 §2Q1.2 should be utilized in fashioning a guideline for this
18 offense. We believe that the base offense level of 8 utilized
19 in that section should be employed with provision for
20 appropriate increases based on whether the defendant's conduct
21 met the requirements of subsections (A), (B) or (C) of the
22 statute.

0 §2D2.1 (Unlawful Possession)

1 101. The Federal Defenders oppose the adoption of this proposed
2 amendment to Guideline §2D2.1. As presently worded, the
3 proposed new subsection (b) would require that, in a case
4 involving a defendant who possessed five grams or more of
5 cocaine base, the guideline applicable to the possession of
6 that quantity of cocaine base with intent to distribute be
7 applied. To the extent that this new subsection is designed
8 to ensure that the guideline applicable to a person who
9 possesses five grams of cocaine base is equal to the new
10 statutory mandatory minimum for that offense, we have no
11 objection. However, to the extent that the new subsection
12 scales the guideline for simple possession of amounts greater
13 than five grams to the guideline that applies to possession
14 with intent to distribute of such amounts, it is objectionable
15 because it does not take into account the fact that the
16 maximum possible sentence for the simple possession charge is
17 only 20 years while the statutory maximum for the possession
18 with intent to distribute charge is 40 years. In light of
19 this difference in the statutory maxima, we submit that any
20 new guideline which addresses the offense of simple possession
21 of cocaine base should scale the increase in offense level for
22 quantities greater than five grams on a less severe slope than
23 that which applies to the possession with intent to distribute

0 offense.

1 §2D2.3 (Operating or Directing the Operation of a Common
2 Carrier Under the Influence of Alcohol or Drugs)

3 102. We believe that the base offense level provided for in
4 subsection (a)(1) of the proposed new Guideline §2D2.3 should
5 be 26 in conformity with the minimal level directed by
6 Congress in the Anti-Drug Abuse Act of 1988.

7 §2F1.1 (Fraud and Deceit)

8 115. Amendments 115 and 116 change the fraud loss table in two
9 respects. First, by eliminating minor gaps. These changes
10 are uncontroversial. Secondly, the proposed amendment
11 conforms "the theft and fraud loss table" in order to remove
12 inconsistency between the two. The effect is to increase the
13 offense level for fraud offenses with larger loss values. The
14 Commission advances no reason for requiring consistency
15 between the fraud loss table and the tax loss table. We
16 submit there are sound reasons for the differences between the
17 two tables. A major tax violation involving substantial loss
18 is arguably a more serious crime than a simple fraud involving
19 a similar loss. Public policy considerations support this
20 argument. Public policy underpinnings of the tax tables are
21 referenced by the Commission in its Commentary to the tax
22 evasion guideline, §2T1.1, where the substantial loss to the

0 United States due to tax violations is discussed.

1 Further, it was the clear intent of Congress that the Guide-
2 lines treat major tax violations as serious crimes. On the
3 other hand, there is no data to support the Commission's view
4 that an increase in the fraud levels is necessary to "better
5 reflect the seriousness of the conduct." Passage of the Major
6 Fraud Act of 1988 argues that Congress recognizes a distinc-
7 tion between certain "major frauds" and the general fraud
8 provisions of §2F1.1. The amendments are unnecessary.

9 We do believe the fraud loss table should be amended. We ask
10 the Commission to consider lowering the offense levels for
11 frauds involving loss of less than \$20,000. As the fraud
12 table stands, it runs counter to the Congressional mandate
13 that the Guidelines "reflect a general appropriateness of
14 imposing a sentence other than imprisonment in cases in which
15 the defendant is a first offender who has not been convicted
16 of a crime of violence or an otherwise serious offense." 28
17 U.S.C. § 994(j). Under the present Guideline, an individual
18 involved in a fraud with a loss of more than \$5,000 but less
19 than \$10,000 has an offense level of 8. Without a prior
20 record, the sentencing range for that level is 2-8 months.
21 Exposure to imprisonment for such a minor fraud is not
22 indicated. The direction of Congress in this respect

0 recognizes that judges rarely, if ever, put someone in jail
1 for a fraud involving less than \$10,000. Moreover, Congress
2 recognized that there would be a true prison crisis should the
3 Guidelines require imprisonment for first-time offenders
4 involved in such non-serious criminal activity. Thus, should
5 the Commission amend the fraud loss table, we suggest that it
6 decrease the offense level where the loss is less than \$20,000
7 rather than raising the offense level as suggested in the
8 proposed amendments.

9 119. Proposed Amendment 119 invites comments on how to address the
10 recently enacted Major Fraud Act of 1988 and Insider Trading
11 and Securities Fraud Enforcement Act of 1988. Federal Public
12 Defenders will rarely be involved in cases prosecuted under
13 these new laws. Thus, we leave to others more expert in the
14 area to address specific questions posed by the Commission.
15 However, we submit that separate guidelines should cover these
16 Acts. They should not be "lumped in" with frauds covered
17 under §2F1.1. Enactment of these laws evidences Congress'
18 concern with insider trader violations and government contract
19 procurement fraud. These are serious crimes usually involving
20 huge monetary loss. The fraud guideline presently covers a
21 wide spectrum of criminal activity ranging from the trivial
22 to the serious. As indicated above, it is our position that
23 the offense levels for the low end frauds are already too

0 high. Thus, we would suggest separate guidelines for major
1 frauds and insider trading to assure that offense levels are
2 not increased across the board.

3 §2G2.3 (Selling or Buying Children for Use in the Production
4 of Pornography)

5 125. The amendment suggests a level 37 or 38 for this offense. The
6 statutory minimum is 20 years. A level 37 would permit a
7 defendant with no enhancements and no record to be sentenced
8 to the statutory minimum. To set a higher offense level than
9 that would exclude imposition of the minimum sentence which
10 would frustrate the intent of Congress.

11 §2J1.7 (Commission of Offense While on Release)

12 142. The Federal Defenders support the proposed amendment to
13 Guideline §2J1.7. We agree with the Commission that 18 U.S.C.
14 § 3147 was intended by Congress as a sentencing enhancement
15 provision rather than one which created a new criminal
16 offense.

17 With respect to the Commission's inquiry as to the appropriate
18 enhancement, we believe that an enhancement of two offense
19 levels should be adopted in the new guideline. A two-level
20 enhancement results in an increase in the defendant's maximum
21 guideline sentencing liability of as much as 25%. Moreover,

0 the increase in liability caused by a two-level enhancement,
1 when one compares the bottom of the original offense level
2 with the top of the new offense level, is often in excess of
3 50%. We believe that this provides adequate scope for the
4 court to take into account the aggravating factor that an
5 offense was committed while the defendant was out on bail on
6 another matter.

7 §2K2.5 (Possession of Firearms and Dangerous Weapons in
8 Federal Facilities)

9 Part K, Subpart 2

10 154. The Commission seeks to consolidate the current three
11 guidelines governing firearms offenses into two in an attempt
12 to create more uniformity. One guideline would govern
13 possession and the other would govern trafficking. The
14 Commission also proposes increasing levels for trafficking in
15 multiple firearms.

16 The proposed consolidation fails to take into account the
17 real distinction between the typical case of possession of a
18 firearm by a prohibited person, 18 U.S.C. § 922(g), and
19 possession of extremely dangerous, highly regulated, machine
20 guns, silencers, automatic weapons and destructive devices.
21 26 U.S.C. § 5861 et seq. Many of the § 922(g) offenses
22 involve conduct that would be lawful but for the defendant's

0 status. For example, many cases involve (1) felons who have
1 simply pawned and redeemed firearms which they had obtained
2 prior to conviction, or (2) individuals who keep a gun in
3 their home for their family's protection. A base level of 12
4 will unduly punish such individuals, particularly since many
5 of them will also have a criminal history category which
6 further increases their sentence. Moreover, the specific
7 offense adjustment for defendants who possess firearms for
8 sport or collection would not assist these individuals.

9 The Commission should retain the base level of 9 for all
10 offenses involving possession of firearms and add an upward
11 adjustment of 3 points if the weapon is covered under 26
12 U.S.C. § 5861. This adjustment would apply regardless of
13 whether the defendant was convicted under 18 U.S.C. § 922(g)
14 or 26 U.S.C. § 5861 and would adequately grade the severity
15 of the typical violation. An additional adjustment would be
16 made for silencers, firearms without a serial number, and for
17 knowing possession of stolen firearms. In addition to the
18 downward adjustment for possession of firearms for sport or
19 collection, a downward adjustment should be available for
20 possession of firearms that would be lawful but for the
21 defendant's status (e.g., possession in the home or at a place
22 of employment).

0 A significant flaw in the guideline is the absence of a
1 requirement in the upward adjustments of knowledge that the
2 weapon is stolen. Normally, a defendant cannot be convicted
3 of possession of stolen goods unless the government proves
4 that he knew the goods were stolen. Other guidelines require
5 that the defendant knew the item was stolen. For example, the
6 guideline covering unlawful possession of explosives, requires
7 knowledge, or reason to believe that the explosives were
8 stolen. §2K1.3(b)(2).

9 The proposed upward adjustments for trafficking in multiple
10 firearms are consistent with the overall guideline system, in
11 which the base level increases as the quantity or value of the
12 contraband or goods increase. Such increases reflect the
13 increasing potential harm to the community. Option 1 is
14 preferable to the more rapid increase contained in Option 2,
15 which overvalues the significance of the number of firearms.

16 158. The Anti-Drug Abuse Act of 1988 increases the maximum sentence
17 for possession of explosives inside federal facilities from
18 one to five years (changing the offense from a misdemeanor to
19 a felony) and includes airports subject to FAA regulations.
20 18 U.S.C. § 844(g). The Sentencing Commission seeks public
21 comment on the appropriate base level for this newly expanded
22 offense.

0 The guidelines already provide a base level of 6 for unlawful
1 possession of explosives, §2K1.3, and property damage by
2 explosives, §2K1.4. These levels increase under certain
3 circumstances, including knowing possession of stolen
4 explosives, §2K1.3(b)(2), and danger to life and property.
5 §2K1.4(b). This approach should be equally applicable to
6 possession of explosives in federal facilities. Notably, the
7 Commission has also suggested a base level of six in its new
8 guideline concerning possession of firearms in federal
9 facilities, in violation of 18 U.S.C. § 930. See Proposed
10 Amendment No. 158, Guideline §2K2.5.

11 **Part L - Immigration, Naturalization, and Passports**

12 159. Most of the proposed amendments to Part L are designed to
13 increase consistency among analogous guidelines. For example,
14 the base level for transporting aliens is currently 9. There
15 is a three-point reduction if the defendant did not commit the
16 offense for profit. §2L1.1. The Commission seeks to raise
17 the base level for trafficking in citizenship and entry
18 documents, and passports to 9 and reduce the level 3 points
19 if the defendant did not commit the offense for profit.
20 §2L2.1, §2L2.3; Amendments Nos. 162, 164. Similarly, the
21 Commission would require a base level of at least 8 for all
22 immigration offenses if the defendant has previously been

0 deported. This is reasonably designed to treat such defen-
1 dants the same as defendants convicted of unlawful entry after
2 deportation. 8 U.S.C. §§ 1325, 1326. Amendments to §2L1.1,
3 §2L2.2, §2L2.4, Nos. 159, 163, 165.

4 160. The Anti-Drug Abuse Act of 1988 increases the penalty for
5 re-entry after deportation from two to five years if the
6 deportation occurred after the defendant had been convicted
7 of a felony. If convicted of an aggravated felony, as defined
8 in 8 U.S.C. § 1101(a), the maximum penalty is fifteen years.
9 The Commission suggests amending Guideline §2L1.2, by
10 providing an upward adjustment if the defendant was deported
11 after a felony conviction not related to immigration. The
12 Commission would permit a departure for aggravated felony
13 convictions. The Commission recommends the departure approach
14 because the aggravated felony classification covers a wide
15 range of conduct, and the Commission wishes to defer determin-
16 ing the appropriate enhancement until it has had an opportuni-
17 ty to analyze current practice. Proposed Amendment No. 160.
18 The Commission also expressly indicates that these upward
19 adjustments would be "in addition to, and not in lieu of,
20 criminal history points added for the prior sentence." Id.
21 This provision is objectionable, because it amounts to double
22 counting of the prior conviction.

0 We would recommend that the Commission defer amending §2L1.2
1 until there has been some experience under the new statutory
2 maximums. Where the old statutory maximum may have resulted
3 in below-guidelines sentences in serious cases, the guideline
4 sentence will now obtain. If the Commission observes a high
5 departure rate in these cases, it would then be appropriate
6 to revisit the guideline. This is an area where it is well
7 to be mindful of the impact on the prison population.

8 §2P1.1 (Escape, Instigating or Assisting Escape)

9 169. Current guidelines make no distinction between escapes from
10 secure custody and escapes from non-secure custody, except
11 where the defendant voluntarily returns to non-secure custody
12 within an arbitrarily set period of 96 hours. §2P1.1(b)(2).
13 The base level, §2P1.1(a)(1), is 13 where the underlying
14 conviction is for a felony; §2P1.1(b)(2) permits a reduction
15 of 7 levels for the voluntary return.

16 Most of our experience with escape prosecutions under 18
17 U.S.C. § 751 involves "walk-aways" from community treatment
18 centers (CTCs). Many defendants abscond after weekend
19 furloughs by simply failing to return. Some abscond with only
20 days left until parole or mandatory release. In one case a
21 woman was permitted to live in her own apartment and was
22 placed on escape status after she refused to come to the CTC

0 for scheduled counseling and then absconded. The distinctions
1 between "walk-aways" and escapes from secure custody are
2 obvious.

3 An escape from secure custody almost always involves a threat
4 to people or property. The potential for violence may be
5 significant. The base offense level of 13 seems to be
6 reasonably calculated to address this potential. The
7 non-violent walk-way, on the other hand, does not present the
8 potential dangers found in "going over the wall." A base
9 offense level of 8 for escape from non-secure custody seems
10 to better punish the actual conduct as well as to conform with
11 prior practice.

12 A defendant with five criminal history points who demonstrates
13 an acceptance of responsibility would be exposed to a range
14 of 2-8 months at base level 8. Without acceptance of
15 responsibility he would face 6-12 months. Sentences at the
16 lower end of the guidelines roughly approximate the adminis-
17 trative sanction of loss of good time credit imposed by the
18 Bureau of Prisons.

19 The current seven level reduction for voluntary return to
20 non-secure custody, §2P1.1(b)(2), seems to be a reasonable
21 recognition that some absconders have a change of heart, or
22 more likely, sober up and come back. As a practical matter,

0 it appears that prosecution is declined after a prompt
1 voluntary return and the CTC imposes its own administrative
2 sanction.

3 There is no justification outside of the political arena for
4 imposing a punitive distinction based on the defendant's
5 underlying offense of conviction. If the purpose of guideline
6 sentencing is to reduce sentencing disparity based on similar
7 conduct and the prior conviction contributes toward a
8 defendant's criminal history category, it does not matter
9 whether the offense was narcotics, white collar crime or alien
10 smuggling. If the escape was from a non-secure facility with
11 no attendant violence, similar conduct should receive a
12 similar sentence.

13 As a final note, there ought to be no distinction between an
14 absconder who fails to return from a furlough from a non-se-
15 cure facility and one who fails to return to a secure
16 facility. The potential for violence is missing in both
17 cases. It must also be kept in mind that the Bureau of
18 Prisons retains a wide range of administrative sanctions in
19 addition to prosecution that it can apply upon recapture of
20 the absconder.

21 §2S1.1 (Laundering of Monetary Instruments)

0 182. The Commission proposes two options in light of the additional
1 subsections added to 18 U.S.C. § 1956(a)(1)(A) effective
2 November 18, 1988. Option 2 should be adopted because 18
3 U.S.C. § 1956(a)(1)(A)(ii), the offense of conviction, is
4 essentially aiding and abetting tax evasion. Therefore, it
5 should be punished consistent with the tax evasion guideline
6 rather than the higher offense level 23.

7 §3A1.2 (Official Victim)

8 220. The Commission would broaden this Guideline by adding a new
9 subsection to reach not only conduct of the defendant, but the
10 conduct of a person "for whose conduct the defendant is
11 otherwise accountable." A problem of a practical nature
12 arises from the need to prove the state of mind of a co-actor
13 who may or may not be before the court. The defendant is
14 liable for a 3 level upward adjustment if his co-actor "[knew]
15 or [had] reasonable cause to believe" the victim was a law
16 enforcement person. A finding of fact on this issue invites
17 speculation.

18 The imprecise definition of "law enforcement or other
19 corrections officer" permits an expanding universe of such
20 victims. In some jurisdictions, private security guards have
21 law enforcement status. In others, reserve deputy sheriffs
22 and members of the sheriff's posse so qualify. Are they

0 official victims? Will the vagaries of state or local law
1 control? Are they victims whether on duty or off, in uniform
2 or in civilian clothes?

3 Finally, by not requiring that the "crime was motivated by
4 [law enforcement] status," the guideline permits application
5 to a situation, for example, where a person holds up a bank
6 teller who happens to be a moonlighting police officer and
7 during the course of their brief encounter, learns of the
8 latter's status. Should the defendant's offense level be
9 raised merely because of this happenstance? The amendment
10 would permit this result.

11 **Chapter Three, Part C - Obstruction**

12 **Guideline §3C1.1, Willfully Obstructing or Impeding Proceed-**
13 **ings, provides:**

14 If the defendant willfully impeded or obstructed,
15 or attempted to impede or obstruct the administra-
16 tion of justice during the investigation or prose-
17 cution of the instant offense, increase the offense
18 level from Chapter Two by 2 levels.

19 Commentary

20 *This section provides a sentence enhancement*
21 *for a defendant who engages in conduct calculated*
22 *to mislead or deceive authorities or those involved*
23 *in a judicial proceeding, or otherwise to willfully*
24 *interfere with the disposition of criminal charges,*
25 *in respect to the instant offense.*

0 The thrust of the Guideline and Commentary is that the
1 adjustment applies to conduct occurring during the pendency
2 of a judicial proceeding; that is what the term "administra-
3 tion of justice" means. Some probation officers, and some
4 courts, are interpreting the adjustment to reach conduct which
5 is res gestae of the offense, occurring prior to arrest and
6 prior to the initiation of criminal charges. Any such
7 misapplication of this guideline is doubly prejudicial because
8 of Application Note 4 to Guideline §3E1.1, Acceptance of
9 Responsibility:

10 An adjustment under this section is not warranted
11 where a defendant perjures himself, suborns perjury,
12 or otherwise obstructs the trial or the administra-
13 tion of justice (see §3C1.1), regardless of other
14 factors.

15 An incorrect application of the obstruction guideline, coupled
16 with a mechanical application of the Commentary to the
17 Acceptance of Responsibility Guideline results in a four-level
18 swing.

19 A recent example of how this adjustment is being applied arose
20 in a drug case. Agents who had been involved in negotiations
21 over a period of time consummated a buy from three suspects.
22 Once the transaction was concluded, the agents commenced to
23 arrest the suspects. One suspect saw the arrests in progress
24 and began to leave the scene on foot, dropping or throwing
25 down her purse in the process. The purse, easily recovered

0 at the scene, contained a telephone number which was deemed
1 to have evidentiary value in the case as well as some \$900.
2 The suspect was also easily apprehended at the scene. That
3 person was found guilty at trial, and the Probation Officer's
4 recommendation was for an upward adjustment for obstruction,
5 based on the above facts. The sentencing judge adopted this
6 recommendation.

7 Every expression but one in Chapter Three, Part C is to the
8 effect that the adjustment applies to conduct during the
9 pendency of a judicial proceeding. The Commentary provides
10 three descriptions of conduct in the disjunctive, one of which
11 is: "[A] defendant who engages in conduct calculated to
12 mislead or deceive authorities" This broad language
13 is being read to permit the application of the guideline to
14 conduct during the commission of the offense, and conduct
15 which is res gestae of the arrest for the offense. From all
16 appearances, however, the guideline is intended to apply to
17 one whose case has passed the point of commission of the
18 offense and arrest therefor. The language of the guideline,
19 "during the investigation or prosecution of the instant
20 offense" seems to assume a chronology of first, offense
21 conduct, followed by the initiation of charges and investiga-
22 tion, followed by the adjudicatory process. In many federal
23 criminal cases, however, the investigation will precede the

0 offense conduct, or be contemporaneous with it—undercover drug
1 investigations being a prime example. The Commission should
2 amend the Guideline and/or the Commentary to prevent such
3 incorrect application.

4 **234. §3E1.1 (Acceptance of Responsibility)**

5 By amendment to the Commentary to this guideline, the Commis-
6 sion proposes a modification of the prohibition against
7 awarding an acceptance of responsibility adjustment where an
8 upward adjustment for obstruction of justice has already been
9 made. The new Commentary would recognize that both adjust-
10 ments may apply in "extraordinary cases". The word "extra-
11 ordinary" should be deleted from the last full sentence of the
12 proposed amendment. It is not uncommon at the onset of a
13 lengthy investigation, that a defendant acts hastily or
14 unwisely in a manner that could qualify for an obstruction
15 adjustment, but thereafter acts responsibly during the
16 remainder of the investigation. The tail would be wagging the
17 dog if the early "obstruction" were to preclude favorable
18 consideration of a defendant's subsequent meritorious
19 behavior. Furthermore, criminal defendants are aware of the
20 guideline provisions, and one who believed he was already in
21 line for an obstruction adjustment would have no incentive to
22 act in a way which might qualify him for an acceptance

0 adjustment. The guidelines should encourage, rather than
1 discourage, affirmative acceptance of responsibility.

2 **Chapter Three, Part E - Acceptance of Responsibility**

3 The original version of Guideline §3E1.1, Acceptance of
4 Responsibility, provided a two level downward adjustment for
5 a defendant who clearly demonstrated an acceptance of respon-
6 sibility for "the offense of conviction". By amendment dated
7 January 15, 1988, the operative language was changed to refer
8 to "his criminal conduct". As the term "criminal conduct" is
9 not further explained, an ambiguity is created. To be in the
10 running for this adjustment, the defendant must accept
11 responsibility for conduct which is criminal, but in the
12 perception of whom? What nexus, if any, must exist between
13 the "criminal conduct" and the offense of conviction?

14 In practice, a Probation Officer preparing a guideline
15 sentencing recommendation to the court will typically expect
16 a defendant to admit to all conduct visible to that officer
17 and perceived by him as criminal. This may include dismissed
18 counts, and conduct which did not result in criminal charges.
19 It may also include conduct rather remote from the offense of
20 conviction. In such a situation, a defendant who has accepted
21 responsibility to the satisfaction of the government by
22 entering a plea of guilty to a charge or charges as dictated

0 by the government, may nevertheless be denied credit for
1 acceptance of responsibility because he did not admit to some
2 other conduct perceived as criminal by the Probation Officer.

3 The harmful effect of this language is exacerbated by the
4 interplay with Guideline §1B1.2, Applicable Guidelines. A
5 defendant who admits to conduct beyond the offense of conviction,
6 as during the establishment of the factual basis for a
7 guilty plea pursuant to Rule 11(f), Federal Rules of Evidence,
8 may have set himself up for a guideline calculation which will
9 negate any benefit from the plea agreement. In fact, one can
10 envision situations where admission of conduct beyond the
11 offense of conviction would more than offset the hoped-for
12 adjustment for acceptance of responsibility.

13 The Commission should restore the original language of §3E1.1,
14 so as to determine the adjustment in light of the defendant's
15 acceptance of responsibility for the offense of conviction.
16 Failing that, the Commission should provide some guidance to
17 the courts in the correct application of the guideline. This
18 might be done by defining "criminal conduct" to be limited to
19 conduct which is "relevant conduct" to the offense of conviction
20 as defined by Guideline §1B1.3. The Commission should
21 further state that denial of the adjustment for acceptance of
22 responsibility may not be based upon the defendant's refusal

0 to admit purported criminal conduct beyond the offense of
1 conviction unless the court finds beyond a reasonable doubt
2 that the defendant was criminally responsible for that
3 conduct.

4 Chapter Four - Criminal History and Criminal Livelihood

5 §4A1.1 (Criminal History Category)

6 235. This proposal would amend §4A1.1(e) by adding an increase in
7 the criminal history score for crimes committed while in
8 prison or on escape status. This proposal is confusing at
9 best. Section 4A1.1(d) already takes into account crimes
10 committed while in prison or on escape status. There is no
11 need for the proposal. The proposal is redundant and would
12 result in double counting.

13 §4A1.2 (Definitions and Instructions for Computing Criminal 14 History)

15 241. This proposal expands the term "commencement of the instant
16 offense" to include any relevant conduct as defined in §
17 1B1.3. We believe this amendment would create substantial
18 confusion and litigation. The amendment would allow a
19 prosecutor to simply allege at the time of sentencing that a
20 defendant began planning the instant offense at a time
21 sufficiently in advance of its commission to bring a prior

0 conviction within the applicable time period of §4A1.2(e).
1 Whether such arguments are advanced in good faith or not, a
2 defendant is left in the position of arguing in the abstract
3 that he didn't begin planning a particular offense until a
4 different time. The court is left with the unenviable task
5 of trying to make factual findings where no facts exist. The
6 present guideline is not particularly clear. In an effort to
7 promote a "bright line" as to what "commencement of the
8 instant offense" means, we suggest that the dates contained
9 in the charging document be used.

10 242. The Commission invites comments on the definitions of "sen-
11 tence of imprisonment" and "related offense", indicating that
12 certain probation officers have had difficulty interpreting
13 the present definitions. The current definitions seem clear.
14 Without knowing why probation officers are confused, it is
15 difficult to suggest clarifying language.

16 §4B1.1 (Career Offender)

17 243. The Commission invites comments on how to improve the career
18 offender guideline. The Commission notes that the guideline
19 has been criticized on a number of fronts suggesting that the
20 penalties under the present guideline are too severe. Thus,
21 critics note that the present guideline provides for sentences
22 that are excessive and unfair, sentences that provide no

0 "marginal deterrence", sentences that threaten to overpopulate
1 our prisons, sentences that fail to take into account accep-
2 tance of responsibility and sentences that do not take into
3 account the age of the offender. The criticisms are well-
4 founded. As the Commission correctly notes, the present
5 guideline resulted from a "literal" interpretation of 28
6 U.S.C. § 994(h). In that statute, Congress directed the
7 Commission to assure that certain career offenders receive
8 sentences at or near the maximum provided by law. However,
9 statutory maxima for the vast majority of offenses presently
10 "on the books" were set at a time when sentencing was discre-
11 tionary and parole was available. The statutory maxima were
12 largely symbolic in light of the availability of parole.
13 Under the present career criminal offender guideline, individ-
14 uals are sentenced to the maximum without the availability of
15 parole. The result is obviously unfair. The Commission
16 suggests three possible options. Of the three, Option No. 1
17 is the best. The sentencing ranges provided in Option No. 1
18 are substantially higher than those presented in present
19 Criminal History Category VI. Thus, Option No. 1 properly
20 reflects Congressional intent that individuals who fall within
21 the career criminal offender category suffer substantial
22 penalties, penalties greater than would be imposed under a
23 straight Guideline application. On the other hand, Option No.

0 1 takes into account the criticisms of the present career
1 offender guideline. The jeopardy of unfairly severe sentences
2 would be lessened. Sentences imposed against older offenders
3 would allow some hope for release before death. Prison
4 population problems posed by the present guideline would be
5 lessened. The deterrent value of sentences would be promoted.
6 Judicial administration would be enhanced in that courts could
7 expect guilty pleas under Option No. 1 while the harshness of
8 the present career offender guideline all but eliminates
9 incentive to plead.

10 Option No. 2 offers sentencing ranges that are greater than
11 those presented in Option No. 1 but less than those in Option
12 No. 3. This proposal would seem to be a "compromise" posi-
13 tion. We believe that Option No. 1 better addresses the
14 criticisms of the present guideline. The sentencing ranges
15 suggested in Option No. 2 are substantial. Thus, criticisms
16 relating to the age of the offender, the prison population
17 problem and court calendar congestion would be addressed only
18 marginally through Option No. 2.

19 Option No. 3 is a mystery. It sets sentences at the maximum
20 and leaves the court with no discretion. It ignores the
21 criticisms which prompted solicitation of proposals for reform
22 and violates Congressional direction that the Guidelines allow

0 a sentencing range and latitude for a sentencing judge to
1 depart from the Guidelines if the range would result in an
2 unjust sentence. Option No. 3 should be rejected outright and
3 should not be seen as a "bargaining chip" in deciding between
4 Options 1 and 2. As indicated above, Option No. 1 best
5 addresses criticisms of the present guideline and would
6 further the purposes underlying in 28 U.S.C. § 994(h).

7 **§4B1.2 (Definitions)**

8 245. This proposed amendment clarifies the definitions of "crime
9 of violence" and "controlled substance offense". The new
10 definitions are unobjectionable. However, proposed amendments
11 to the Commentary include redefining the two terms to expand
12 them well beyond the statutory definitions that the Guidelines
13 copy. Specifically, the Commentary indicates that "the terms
14 'crime of violence' and 'controlled substance offense' include
15 aiding and abetting, conspiring, and attempting to commit such
16 offenses." This language is objectionable and should be
17 deleted. Serious constitutional questions are implicated when
18 a defendant who is involved in an unconsummated crime stands
19 to suffer the same penalties as an individual who is involved
20 in actual violent misconduct. The Commentary is unnecessary.
21 The facts of each case will allow a judge to determine whether
22 the career criminal offender guideline is applicable. The

0 proposed amendment places everyone on equal footing without
1 regard to the circumstances of the offense or relative
2 culpability. Because probation officers will automatically
3 apply the career criminal offender guideline where it seems
4 applicable, the sentencing court will be left to untangle the
5 mess at protracted sentencing hearings.

6 §4B1.3 (Criminal Livelihood)

7 246. This proposed amendment suggests amending §4B1.3 by substi-
8 tuting the term "engaged in as a livelihood" for "from which
9 he derived a substantial portion of his income." The proposed
10 amendment goes on in the Commentary to define "engaged in as
11 a livelihood". This proposal is objectionable for several
12 reasons.

13 First, the statutory underpinning for this Guideline, 28
14 U.S.C. § 994(i)(2), speaks in terms of a "substantial portion
15 of income". The Commission is, in effect, rewriting the
16 statute in its Guideline to the detriment of indigent criminal
17 defendants. In United States v. Rivera, 694 F.Supp. 1105
18 (S.D.N.Y. 1988), the Court recognized that the criminal
19 livelihood guideline needs clarification in order to prevent
20 discriminatory application against the poor. The Court in
21 Rivera interpreted a "substantial portion of income" to mean
22 substantial income in real terms. This result was mandated

0 by the enabling legislation to the Guidelines which requires
1 that the Guidelines be neutral as to economic status. The
2 purpose of the statute was to imprison individuals who are
3 involved in crime as a livelihood and who operate at a "sub-
4 stantial" level. The proposed amendment would allow for its
5 application in a case where an individual realized in excess
6 of \$6,700 in income during a 12-month period and who did not
7 have regular employment. This would have the effect of
8 penalizing individuals who are no more than petty thieves.
9 At the same time, individuals who reap substantial profit from
10 criminal enterprise would be immune from the criminal liveli-
11 hood guideline if they have "regular, legitimate employment".
12 This anomaly is at odds with Congressional intent and the
13 requirement that the Guidelines be neutral as to economic
14 status.

15 Apparently the Commission recognizes the potential of the
16 proposed amendment to discriminate against the poor. The
17 Commission suggests amending the Commentary to delete the
18 present Guideline Commentary indicating that the criminal
19 livelihood guideline is "not intended to apply to minor
20 offenses." We object to applying the criminal livelihood
21 guideline to minor offenses.

0 The net effect of the proposal is to both rewrite the law and
1 to do so in a way which violates the requirement that the
2 Guidelines not discriminate based upon economic status. We
3 believe a better approach would be to adopt a definition of
4 "substantial portion of income" consistent with that used in
5 United States v. Rivera, supra. We suggest that a "substan-
6 tial portion of income" be defined as:

7 Income sufficiently large in amount to be considered
8 'substantial' in real terms. Courts should analyze
9 applicability of this guideline on a case-by-case
10 basis taking into account factors such as per capita
11 income for individuals in the judicial district in
12 question, the cost of living index in the judicial
13 district, the nature of the misconduct, the defen-
14 dant's employment record and, any other factor
15 relevant to the question.

16 Chapter Five, Part A - Sentencing Table

17 247. The Commission proposes to amend the Sentencing Table by
18 changing all 0-1, 0-2, 0-3, 0-4 and 0-5 ranges to 0-6. The
19 reason given is to cure an anomaly said to arise from the
20 elimination of petty offenses from coverage of the guidelines.
21 Certain felonies and Class A misdemeanors cases will yield
22 guideline ranges below 0-6 months, thus restricting the
23 sentencing judge's discretion more than in a petty offense
24 case.

25 While ranges smaller than 0-6 months are not required by
26 statute, they assist in fulfilling the Commission's mandate

0 to avoid unwarranted sentencing disparities. The person whose
1 case falls in such a range will typically be a first offender
2 convicted of a minor offense. While the difference between
3 a 3 month sentence and a 6 month sentence may seem slight on
4 an absolute basis when compared to the ranges at the upper
5 levels of the table, any such relative increase in a sentence
6 is significant. From 1 month to 6 months is a sixfold
7 increase; from 1 day to 6 months is an increase by a factor
8 of 180. For a person who has never been incarcerated before,
9 these are quantum differences.

10 It has already been observed that in many types of cases the
11 guidelines remove most or all of the incentive for a defendant
12 to plead guilty. As the guidelines are becoming fully
13 implemented on a nationwide basis, that tendency will become
14 more apparent. The system expects that a very high percentage
15 of the minor offense cases which presently fall into ranges
16 below 0-6 months will be resolved by a plea of guilty. The
17 elimination of guideline ranges below 0-6 months could have
18 an adverse effect, from the standpoint of the courts, on the
19 trial rate in criminal cases.

20 While petty offenses are not presently covered by the guide-
21 lines, the Commission may in the future restore coverage to
22 those offenses. Declining to amend the table now would

0 obviate the need to amend it again in the future.

1 §5B1.3 (Conditions of Probation)

2 249. The statutory reference in the Reason for Amendment should be
3 to Section 7303 of the Drug Act.

4 253. The statutory reference in the Reason for Amendment should be
5 to Section 7303 of the Drug Act.

6 §5E4.1 (Restitution)

7 255. This amendment effectuates Section 7110 of the Drug Act, which
8 eliminated the restriction on restitution as a condition of
9 probation to convictions under the statutes covered by the
10 Victim and Witness Protection Act. Because the authority to
11 order such unrestricted restitution was only "inferred" prior
12 to this amendment, the proposed amendment to the Commentary
13 should give the full date citation to the statute, i.e.,
14 "(Nov. 18, 1988)".

15 §5E4.2 (Fines for Individual Defendants)

16 257. This amendment would raise the lowest fine ranges (offense
17 levels 1 and 2-3) from \$25-\$250 and \$100-\$1000 to a combined
18 range of \$100-\$5000, and the next highest range (for offense
19 levels 4-5) from \$250-2500 to \$250-\$5000. For the reasons
20 given above on proposed amendment number 247, the Commission

0 should not make these upward changes in the fine table.
1 Raising the minimum fine guideline range to \$100 because the
2 guidelines now cover only Class A misdemeanors and felonies
3 is not necessary, and will only force sentencing judges more
4 often into a §5E4.2(f) determination of ability to pay.

5 258. The Commission has solicited comment on the appropriateness
6 of existing guidelines which require the court to impose a
7 fine on every defendant who possesses the ability to pay or
8 is likely to become able to pay, and to impose an additional
9 fine sufficient to reimburse the government for the cost of
10 imprisonment, probation, or supervised release.

11 The Commission should amend Guideline §5E4.2 to comport with
12 the underlying statute and to carry out clearly expressed
13 Congressional intent.⁶ Title 18 U.S.C. § 3572(a) provides
14 that in determining whether to impose a fine, as well as the
15 amount and other incidents of the fine, the court shall
16 consider seven specified factors, in addition to the sentenc-
17 ing factors set forth in 18 U.S.C. § 3553(a). Contrary to
18 this clear expression, the existing guideline says that except
19 for one of those factors (ability to pay), "the court shall
20 impose a fine in all cases." §5E4.2(a). The § 3572 factors

21 ⁶The guidelines promulgated by the Commission must be "consis-
22 tent with all pertinent provisions of [title 28] and title 18,
23 United States Code" 28 U.S.C. § 994(a).

0 are then picked up in subsection (d) of the guideline,
1 governing determination of the amount of the fine only. The
2 guideline thus deprives the defendant of the exercise of
3 judicial judgment required by the statute, without ever
4 referring the sentencing judge to the provisions of § 3572(a).
5 As amended to properly effectuate the statute, the guideline
6 would not require imposition of a fine in every case, subject
7 only to ability to pay.

8 Guideline §5E4.2(i) requiring an additional fine to cover the
9 costs of imprisonment, probation, or supervised release,
10 should be deleted. First, as a mandatory additional fine
11 subject only to ability to pay, and calculated in a mechanical
12 manner rather than in compliance with § 3572(a), this portion
13 of the fine guideline exceeds statutory authority. Second,
14 the wording is most unfortunate, in requiring the imposition
15 of an additional fine that is "at least sufficient to pay the
16 costs to the government" of imprisonment, etc. (Emphasis
17 added.) Because the basic fine calculated under subsections
18 (c) and (d), taken together with other sanctions, is intended
19 to be punitive,⁷ the appearance is that of an intention to
20 earn some profit on the punishment.

21 The weakened financial posture of the federal government,

22 ⁷Guideline §5E4.2(e).

0 compared to the recent past, is a matter of common knowledge.
1 In the area of fine imposition as a criminal sanction, it is
2 important that fines be, and be perceived as being, in service
3 of the statutory purposes of sentencing and not the fiscal
4 needs of the government. To do otherwise weakens the moral
5 authority of the government in imposing criminal sanctions.
6 The fine statute is designed to achieve the purposes of
7 sentencing; the fine guideline, in going beyond the statute,
8 carries the appearance of attempting to raise revenue.

9 The Commission states that the manner in which the fine
10 guidelines have been imposed to date is of particular inter-
11 est. The Federal Defenders, of course, represent persons who
12 have been judicially determined to be financially unable to
13 obtain counsel. In the great majority of those cases, no fine
14 is imposed, because inability to pay is apparent. Neverthe-
15 less, resources have been consumed in calculating the indi-
16 cated guideline fine, and in entertaining objections to that
17 fine. Fines are imposed more often in petty offense cases,
18 which do not fall under the guidelines at all at the present
19 time.

20 §5F5.2 (Home Detention)

21 260. The Commission has queried whether home detention should be
22 imposable as a substitute for imprisonment, in light of § 7305

0 of the Drug Act. That amendment added home detention to the
1 statutory list of discretionary conditions of probation, with
2 the specific proviso that it may be imposed only as an
3 alternative to incarceration. It would appear that Congress,
4 in passing the amendment, has already answered the question
5 in the affirmative. The Congress was presumptively aware of
6 Guideline §5C2.1(e) and Application Note 5, which established
7 a schedule of substitutes for incarceration, specifically
8 excluding home detention. By passing a law creating a new
9 discretionary condition of probation and a new alternative to
10 incarceration, Congress overrode the Commission's exclusion
11 of home detention.

12 Even if § 7305 of the Drug Act is not read to create a new
13 guideline substitute for incarceration, it is nevertheless
14 proper for the Commission to take that step by amendment of
15 the guideline. As a practical matter, not only is prison
16 space scarce and expensive, but community confinement space
17 is limited as well. In many areas of the country, judges who
18 wish to impose community confinement are told there is no
19 space available in local facilities. This results in the
20 imposition of a sentence that is significantly greater or
21 lesser than that determined by the sentencing judge to be
22 appropriate. The addition of home detention as an incarceration
23 alternative would provide a broader range of authorized

0 sanctions, while relieving somewhat the burden on the govern-
1 ment's confinement resources. In addition to the beneficial
2 effect on the government's direct costs, increased use of home
3 detention as an alternative to imprisonment would ameliorate
4 the societal costs of imprisonment.⁸

5 As to the equivalency rate, home detention should be credited
6 at a one-for-one rate toward imprisonment, just as intermit-
7 tent confinement and community confinement are credited. Home
8 detention is certainly punitive, and because home detention
9 may take different forms, there is some overlap in the
10 punitive quality of community confinement and home detention.
11 That is, some home detentions may be specified to be more
12 restrictive, and thus more punitive, than some community
13 confinements.⁹

14 Electronic monitoring should not be required to supplement
15 Probation Officer enforcement, but instead should be left to
16 the judgment of the sentencing judge. The availability of the
17 alternative should not be governed by the availability of

18 ⁸See United States v. Murphy, 108 F.R.D. 437, 441 (E.D.N.Y.
19 1985), reproducing as an appendix the Probation Department's
20 Protocol on Home Detention.

21 ⁹See P. Hofer & B. Meierhoefer, Home Confinement (Federal
22 Judicial Center 1987) at p. 6, dividing types of home confinement
23 (the authors' generic term) into curfew, home detention, and home
24 incarceration, in increasing order of restriction.

0 monitoring equipment in a given district.

1 It is not necessary to limit home detention to certain
2 categories of offenses and offenders. The existing Commentary
3 to the effect that home detention should generally not be
4 imposed for a period in excess of six months, Guideline §5F5.2
5 Application Note 2, already achieves a limitation of the
6 alternative to appropriate cases.

7 **§5G1.3 (Convictions on Counts Related to Unexpired Sentences)**

8 267. The Commission proposes to delete Guideline §5G1.3 and the
9 Commentary thereto in its entirety, because it was based upon
10 an erroneous interpretation of 18 U.S.C. § 3584(a). In its
11 stead the Commission has proposed a new guideline treating
12 only the situation of an offense committed while serving a
13 term of imprisonment. The proposal would mandate a consecu-
14 tive sentence in that circumstance.

15 The Commission is correct in deleting the existing guideline,
16 but should recede from promulgating the new guideline as
17 proposed. The Commission was not directed to promulgate a
18 guideline on this subject by the Congress. In 28 U.S.C. §
19 994(a)(1)(D) on guidelines promulgation, the language "a
20 determination whether multiple sentences to terms of imprison-
21 ment should be ordered to run concurrently or consecutively",

0 refers to the determination covered by Guideline §5G1.2,
1 Sentencing on Multiple Counts of Conviction. While the list
2 of guideline subjects in § 994(a)(1) is not exhaustive—it is
3 introduced by the word "including"—the mandate to promulgate
4 guidelines is far less expansive than the mandate to promul-
5 gate policy statements.¹⁰

6 The Congress has spoken to this matter in 18 U.S.C. § 3584(b)
7 by requiring the court to consider the sentencing factors set
8 out in 18 U.S.C. § 3553(a) in determining whether to impose
9 concurrent or consecutive terms, and the guideline should
10 restate those factors for the convenience of the sentencing
11 court.

12 §5K1.1 (Substantial Assistance to Authorities (Policy
13 Statement))

14 268. It is proposed to amend the policy statement on cooperation
15 to cover one who "provided substantial assistance", rather
16 than one who "made a good faith effort to provide substantial
17 assistance". The stated reason is that the existing policy
18 statement could be interpreted to require only a "willingness"

19 ¹⁰"The Commission . . . shall promulgate . . .

20
21 "(2) general policy statements regarding application of the
22 guidelines or any other aspect of sentencing or sentence implemen-
23 tation that in the view of the Commission would further the
24 purposes set forth in section 3553(a)(2) of title 18, United States
25 Code, including" 28 U.S.C. § 994(a)(2).

0 to provide such assistance. The proposed amendment carries
1 a risk of depriving certain persons from the consideration
2 intended by Congress in 28 U.S.C. § 994(n). There may be
3 situations where a defendant provides valuable, substantial
4 assistance to authorities, but through happenstance or law
5 enforcement error no results are produced. Such a person is
6 also deserving of favorable consideration toward his sentence.
7 If there is to be a change in the policy statement, the
8 Commentary should make it clear that positive results are
9 evidence of entitlement to consideration, but the lack of a
10 positive result does not necessarily preclude favorable
11 consideration for substantial assistance.

12 There may also be situations where a defendant proffers
13 substantial assistance, but the government elects not to act
14 upon it for reasons unrelated to the value of the assistance,
15 such as unfavorable timing or lack of investigative resources.
16 Such a person should also be entitled to some favorable
17 consideration, because his conduct evidences a break from
18 criminal associations and a positive step toward rehabilita-
19 tion.

20 In reviewing Policy Statement §5K1.1 the Commission should
21 reconsider the introductory words, "[u]pon motion of the
22 government" Engrafting a threshold requirement of a

0 motion of the government for consideration for cooperation
1 is not supported by the underlying statute and is at odds with
2 the nature of policy statements. Title 28 U.S.C. § 994(n)
3 directs the Commission to "assure" that the guidelines reflect
4 the general appropriateness of imposing a lower sentence to
5 take into account a defendant's substantial assistance to
6 authorities. Nowhere does that statute suggest that such
7 consideration should have as a condition precedent a motion
8 of the government, and adding such a requirement can thwart
9 Congressional intent. In some areas, there is a prosecutorial
10 practice of exploiting that language in the policy statement
11 by refusing to file a § 3553(e) motion, and agreeing only to
12 make the extent of a defendant's cooperation known to the
13 court.¹¹ Under the existing language, this would have the
14 effect of limiting the reduction for cooperation to placement
15 of the sentence within the indicated guideline range.

16 Title 18 U.S.C. § 3553(e), reduction of sentence below a
17 mandatory minimum, does carry the requirement of a motion by
18 the government. It is certainly understandable why Congress
19 would require the government's motion to initiate the extraor-
20 dinary relief of a sentence reduction below a statutory
21 minimum. It is not understandable why the Commission should

22 ¹¹See United States v. Coleman, ___ F.Supp. ___, Nos. 88-00013-
23 03/06, 1989 WL 17254 (W.D.Mo. February 28, 1989).

0 require that condition for any departure on account of
1 cooperation. Finally, it is inconsistent with the nature of
2 policy statements, which stand on a different footing from
3 guidelines, see 18 U.S.C. § 3553(a) and (b), to dictate an
4 absolute condition precedent to a particular type of depar-
5 ture.¹²

6 ¹²See United States v. White, No. 88-1073, 1989 WL 19309 (5th
7 Cir. March 24, 1989), in which the policy statement on substantial
8 assistance was challenged on this ground. The court of appeals
9 wrote: "This policy statement obviously does not preclude a
10 district court from entertaining a defendant's showing that the
11 government is refusing to recognize such substantial assistance."



U.S. Department of Justice

Tax Division

Washington, D.C. 20530

STATEMENT

OF

JAMES I. K. KNAPP
ACTING ASSISTANT ATTORNEY GENERAL
TAX DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED REVISIONS TO PART T, SUBPART 1

ON

APRIL 7, 1989

PROPOSED REVISIONS OF PART T, SUBPART 1

Mr. Chairman and Members of the Commission:

I appreciate the opportunity to address you today regarding the proposed changes in Part T of the Sentencing Guidelines, pertaining to the sentencing of violations of the internal revenue laws. My appearance today is intended to underscore the critical importance we attach to effective sentencing deterrence in the overall Federal Tax Enforcement Program, which the Tax Division and the Internal Revenue Service administer.

Our tax system principally relies on taxpayers to voluntarily determine their own tax liability, file their returns, and pay their taxes on time. The Internal Revenue Service simply would not be able to adequately administer the tax laws without voluntary compliance by taxpayers. Unfortunately, there is a substantial disregard for the principle of voluntary compliance. It has been estimated that the amount of unpaid taxes is now more than \$84 billion a year.

The Internal Revenue Service uses a variety of methods to encourage voluntary compliance. In this era of increasingly scarce investigative and prosecutorial resources, one of the most important is the deterrent effect flowing from successful criminal prosecutions for violations of the tax laws. It is not enough, however, for those contemplating cheating on their taxes to believe that there is a good chance that they will get caught. They must also believe that, if caught and successfully prosecuted, they will pay a stiff price for their failures to

comply with our Nation's tax laws. While fines certainly have their place in the total sanction imposed for a violation of the tax laws, we believe that prison time is undoubtedly the most effective deterrent sanction. Paying a fine may be economically burdensome or even, in some instances, financially ruinous. But, in terms of its deterrent effect, it simply cannot approach the message sent by imposition and service of a prison sentence.

Too often in the past, violations of the tax laws have been viewed as less serious offenses. In great part, this view flows from the perception that those convicted of tax offenses rarely are sentenced to serve a prison term, but, instead, receive a suspended sentence, probation, and a fine. This perception must change if the sentence for a tax violation is to serve as a deterrent to the growing number of people tempted to evade their obligations under the tax laws.

Commendably, in drafting the guidelines in Part T, Subpart 1, the Commission sought to increase the average length of sentences imposed upon those convicted of tax crimes and reduce the number of purely probationary sentences. Unfortunately, however, we do not believe that this objective may have been achieved for the great majority of tax cases. If implemented as presently proposed, in our view, the Part T taxation sentencing guidelines not only will not increase average sentencing length in tax cases, but also may actually reduce the percentage of cases in which a term of imprisonment is imposed. As shown by the attached chart (Attachment A) prepared by the Criminal Investigation Division of

the IRS based on a study of 1987 criminal tax convictions, 55% of convicted taxpayers in General Enforcement Program cases went to prison. Yet more than two-thirds of those convicted would have fallen in the level 10 or below category -- and over 90% would if the acceptance of responsibility downward adjustment also applied. While it is possible that those persons falling in the levels 7 to 10 category could receive a prison sentence, it is far more likely that courts would be prone to impose mere "intermittent confinement" when permissible.

Consequently, we believe that certain changes need to be made in order to insure that imposition of a sentence of imprisonment is more of a certainty. In addition, we believe that some of the Commission's proposals fail to clarify certain key aspects of the sentencing calculus to avoid needless sentencing-related litigation.

My remarks today will center on three principal areas of concern: (1) the need for a one-level across-the-board increase in the Tax Table; (2) the need to clarify the term "tax loss" by re-labeling it as a "criminal tax deficiency" and excluding non-willful (i.e., non-criminal) tax deficiencies; and, (3) the need to clearly specify that all provable criminal tax deficiencies, including those from non-indictment years, may be used in determining the "relevant conduct." My remarks should be viewed in conjunction with the overall package of written comments to be forwarded by the Department which, with respect to Part T and pertinent portions of Part S (Money Laundering) dealing with

taxes, were prepared with substantial input from the Tax Division and the Internal Revenue Service's Offices of Chief Counsel (Criminal) and Assistant Commissioner (Criminal Investigations).

I. One Level Increase At All Levels Of The Tax Table

The Commission proposes, largely for reasons of reducing perceived complexity, the elimination of interest in the determination of total "tax loss" in Guideline §2T1.1 and §2T1.6. While we do not share the view that the calculation of interest will bring undue complexity to the computation of tax loss, we do not oppose the elimination of interest in the pertinent portions of Part T. Including an interest calculation in determining the base offense level is likely to result in more contests over the exact amount of tax lost and, as interest is to be calculated to the date of the filing of the indictment or information, often will lead to substantial litigation regarding the speed with which the Government conducted its investigation.

The elimination of interest, however, will produce a substantial change in the percentage of likely incarcerable cases by decreasing offense levels by one, on average. Calculations by the Internal Revenue Service (Attachment B) indicate that for a three-year evasion case involving a \$30,000 evasion, indicted two years after the filing of the last fraudulent return, the amount of tax loss is increased 26.2% at an 8% interest rate, 33.5% at a 10% interest rate, and 41.1% at a 12% interest rate.

This erosion in the offense levels for tax evasion can be offset by increasing the offense levels in the Tax Table by one level at all levels of tax loss. More importantly, for all tax offenses, this one-level across-the-board increase will insure that the Guidelines' stated goal of increasing the average sentence length in tax cases will be realized.

We recognize that the Commission has proposed a stretching or increase in the offense levels in the upper ranges of the Tax Table to "better reflect the seriousness of the conduct." Such proposed increases, however, do not impact amounts below \$70,000, which is where the vast majority of criminal tax cases fall. For example, according to Internal Revenue Service statistics, approximately 75% of convictions obtained in fiscal year 1987 for General Enforcement Program cases involved amounts of \$70,000 or less. Moreover, again according to the same statistics for 1987, more than 67% of the cases will fall at level 10 or below, without consideration of the 2-level adjustment for acceptance of responsibility, thus raising the spectre that sentences for such offenses at those levels will be served in either intermittent or home confinement rather than imprisonment. This approach will result in the imposition of fewer actual prison terms for tax offenses than under the pre-Sentencing Guideline cases, which in years immediately preceding the implementation of the Guidelines saw prison terms imposed in more than 60% of all criminal tax cases, with the average sentence imposed approximating 3½ years.

In addition, we believe that the Guidelines should treat tax evasion more seriously than the filing of false tax returns. With the elimination of interest, the calculation of tax loss will be virtually the same under Guideline §2T1.1, pertaining to attempted tax evasion (26 U.S.C. §7201), and under Guidelines §§2T1.3 and 2T1.4, pertaining to the filing of false tax returns (26 U.S.C. §7206). Section 7201 of the Internal Revenue Code proscribes the most serious felony among the internal revenue offenses and has been described as the "capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax laws." In keeping with its place as the most serious felony against the revenue, Section 7201 provides for a term of imprisonment of up to five years. Section 7206, on the other hand, provides for a term of imprisonment of up to three years. To retain the distinction between the two statutes made possible by the inclusion of interest in the base offense level calculation in §2T1.1, and to better reflect the more serious nature of a violation of Section 7201 and the different maximum sentences imposable under the statutes, we believe that the Guidelines should provide that the base offense level under §2T1.1 is one level greater than the level from the Tax Table corresponding to the tax loss.

Criminal tax offenses are unique in federal criminal law, insofar as the income tax laws affect each and every one of us. Everyone is subject to the temptation to cheat on their taxes. Consequently, there is a correspondingly unique need for a strong

deterrent system to promote the goal of voluntary compliance, which has long been the hallmark of our system of taxation.

II. "Criminal Tax Deficiency:" The Need to Redefine and Clarify The Term "Tax Loss"

In our view, there is a need to clarify the term "tax loss" to avoid confusion, and subsequent litigation, in guideline application over the scope of items included with the ambit of a "tax loss." At numerous seminars, as well as within the Tax Division, we have encountered uncertainty over whether the term "tax loss" might include purely civil items in addition to those which are clearly the result of willful (i.e., criminal) conduct.

We believe that all confusion in this regard can be eliminated by substituting the term "criminal tax deficiency" for "tax loss" and including necessary explanatory language in the Application Notes to make clear that only items resulting in an understatement of tax which are due to the willful actions of the defendant are to be used in determining the base offense level. Thus, purely civil items, for example, matters arising as a result of an honest dispute over a provision in the Internal Revenue Code, would be excluded from the "criminal tax deficiency" in determining the base offense level. The basic theory behind the concept of "criminal tax deficiency" is that a violator is to be sentenced based on tax losses to the Government resulting from a criminal violation of the tax laws by the defendant, and not just from any tax deficiency. What the IRS internally calculates as the "criminal computations" in a given criminal investigation for

all years under investigation would be in a majority of cases the basis for determining the "criminal tax deficiency" for the prosecution period. However, the "criminal tax deficiency" is not limited to amounts contained in any particular investigative report (e.g., Special Agent's Report or Revenue Agent's Report), but rather, as will be explained later, should include any deficiency established to have been willful.

By the clarification proposed above, we believe that any confusion which may currently exist in the Guidelines, and proposed changes thereto, will be avoided. Sentencing in criminal tax cases will clearly be limited to willful actions by the defendant in not complying with the nation's tax laws.

III. Clarification of Scope of Relevant Conduct

The Commission proposes (Proposed Amendments 188, 196 and 199) to clarify the determination of tax loss by providing that the tax loss is to be determined by the same rules applicable in determining any other sentencing factor and that in determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.

We do not believe that this amendment does anything to clarify the determination of what is the "total tax loss attributable to the offense." The language of the proposed amendment (i.e., "unless the evidence demonstrates that the conduct is

clearly unrelated"), as well as the language in §1B1.3(a)(2) (i.e., "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction"), is vague and not particularly helpful insofar as tax offenses are concerned. For example, undoubtedly, in a continuing fraudulent tax shelter scheme, all of the conduct would be considered in determining the tax loss. Similarly, where an individual fails to report income in two successive years from the same business, undoubtedly this would be considered clearly related and part of the same course of conduct or common scheme or plan. However, if an individual fails to report income from one business in one year and another business in another year, it might be argued that this is not clearly related.

Nor is it necessarily clear that in the case of an individual who fails to file a tax return in one year and several years later attempts to evade his tax for several years, the tax loss from all years would be included in the determination of tax loss. The possible combinations of individuals, entities, types of tax offenses, and years involved in tax violations are infinite and a "presumption" that all conduct violating the tax laws is to be considered in determining the tax loss provides courts with no guidance in dealing with all the various possible combinations.

In short, we believe that this language will only generate litigation and delay what should otherwise be a rather summary proceeding. We believe that all tax offenses committed by a defendant, regardless of the individuals, entities, statutory

violations, or years involved, can be classified as part of the same course of conduct. At bottom, any such violation evidences a disregard of the taxing statutes of the United States.

It may very well be that an act of evasion, false statement, or the like may not be provable beyond a reasonable doubt but only by a preponderance of the evidence. Hence, the "criminal tax deficiency" should embrace any tax loss caused by a criminal violation even though it was not covered by the activity to which the defendant pleaded guilty or even the activity covered by the indictment. The court should consider nonindictment years where the violation is established to have been willful. However, it is contemplated that in the majority of cases the scope of the "criminal tax deficiency" would not extend beyond the violations revealed in the investigation which led to the indictment and in any additional background investigations involving the defendant.

Courts presently consider all such conduct now, even where prosecution might be foreclosed for some reason like the running of the statute of limitations. This consideration insures that the punishment imposed is commensurate with the defendant's actions and prior history. Indeed, Section 3553 of Title 18 provides that in imposing sentence, the court shall consider the nature and circumstances of the offense and the history and characteristics of the defendant to insure that the sentence reflects the seriousness of the offense; promotes respect for the law; affords adequate deterrence to criminal conduct; and protects the public from further crimes of the defendant. Consequently, we

believe that the Guidelines should provide that all conduct constituting a willful (i.e., criminal) violation of the tax laws should be considered in determining the tax loss if that conduct has not been considered before in a prior sentencing.

IV. Standardizing "Tax Loss" ("Criminal Tax Deficiency") and Other Areas of Comment

a. The Commission has sought comments (Request for Comments 205) on standardizing the definition of "tax loss," (which we would rename "criminal tax deficiency" and redefine) if the calculation of interest is eliminated in Part T. In our view, if the calculation of interest is deleted from §2T1.1, there will be few, if any, cases where the amount of the tax evaded will be greater than 28 percent (34 percent in the case of a corporation) of the amount by which the greater of gross income or taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. Therefore, it makes no sense to retain part (A) of the definition of "tax loss" in §2T1.1. If the amount of tax evaded or attempted to be evaded is eliminated as a basis for determining "tax loss" in §2T1.1, then the definition of "tax loss" in §§2T1.1, 2T1.3, and 2T1.4 will be the same.

We believe that the best way to accomplish the objective of standardizing the term "tax loss" is to define "tax loss" in §2T1.1 and then simply reference that definition in the remaining sections of Part T, Subpart 1 where the base offense level calculation depends upon a determination of "tax loss." This

change would include referencing the definition of "tax loss" contained in §2T1.1 in §§2T1.2, 2T1.3, 2T1.4, and 2T1.9.

The base offense level for §2T1.2 (Willful Failure to File Return, Supply Information, or Pay Tax) (26 U.S.C. 7203) is currently set at one level less than the level from the Tax Table (§2T4.1) corresponding to the tax loss. The tax loss is defined as the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any one year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000. As the definition of tax loss in §2T1.2 is already keyed, in part, to the amount of tax evaded, no great change is worked by having the base offense level of §2T1.2 depend upon the definition of tax loss in §2T1.1.

The floor currently provided by the "not less than 10 percent" language can be retained simply by providing a minimum base offense level when there is no ascertainable tax loss. Similarly, keying the definition of tax loss in §2T1.9 (Conspiracy to Impair, Impede, or Defeat Tax) (18 U.S.C. 371) to the definition in §2T1.1 will not be a serious break with the current version of §2T1.9, which, in part, now defines that tax loss as the tax loss defined in §2T1.1 or §2T1.2, as applicable.

b. The Commission proposes to amend (Amendments 190, 193, and 197) the specific offense characteristic in §§2T1.1, 2T1.2, and 2T1.3 for "income from criminal activity" to provide for a two-level enhancement whenever the defendant failed to report or correctly identify the source of \$10,000 in income from criminal

activity in any year, rather than per year. We fully support this proposed amendment. In our view, it comports with the original and overall intention of the Guidelines in this regard.

Certainly, it makes sense to sentence more severely one who violates the tax laws as part of another criminal violation. And, while some limitations on the enhancement may be appropriate to insure that only major criminal figures are sentenced more severely, it makes little sense to make the limitations so restrictive that they exclude many clearly deserving of more severe treatment. Yet, this would be the result if the Government were required to prove a failure to report or to correctly identify the source of \$10,000 in income from criminal activity per year. It should be enough to distinguish those deserving of more severe treatment from those not so deserving, to require the Government to prove no more than a failure to report or correctly identify the source of \$10,000 in income from criminal activity in any one year.

c. With respect to the amendments intended to clarify the specific offense characteristics in Part T relating to "sophisticated means" (Amendments 191, 195, 198, and 201), we do not oppose them as far as they go. But we do not believe the amendments do enough to clarify the meaning of the term and avoid further litigation. They attempt to clarify the term by stating that it means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." No guidance is given for a court to use in deciding what is a

"routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." It may be that this is a concept which does not lend itself to more precise definition, and we have not yet attempted to address this issue -- but we will be glad to work with the staff to attempt to do so. At least more examples of what is or is not included would be helpful.

d. Outside of Part T, the Commission has proposed certain changes to Part S, Money Laundering and Monetary Transaction Reporting, in light of the Omnibus Anti-Drug Abuse Act of 1988, which will affect the sentencing of tax or tax-related offenses. First, with respect to the new statutory subsection (18 U.S.C. 1956(a)(1)(A)(ii)) proscribing money-laundering with intent to violate 26 U.S.C. 7201 (tax evasion) or 26 U.S.C. 7206 (false returns), we support the sentencing option (Amendment 182 - Option 1) which treats a conviction under the new subsection the same as any other conviction under the same statutory provision. To treat the various subsections of the statute differently would undermine the legislative effort to enhance the effectiveness of the statutory money laundering scheme.

Second, the Commission proposes (Amendment 194) to add a cross reference to §2T1.2, providing that if the defendant is convicted of a willful violation of 26 U.S.C. §6050I, the court should apply §2S1.3 (Failure to Report Monetary Transactions) in lieu of Guideline §2T1.2.

As the Commission notes, this change was made necessary by the Omnibus Anti-Drug Abuse Act of 1988, which amended Section 7203 of the Internal Revenue Code of 1986 to provide for a maximum term of imprisonment of five years for a person willfully violating a provision of 26 U.S.C. 6050I, rather than the one-year maximum prison term for other violations of Section 7203. Section 6050I requires the filing of reports of certain types of monetary transactions. To deal with this increased penalty for failure to file certain internal revenue forms, the Commission proposes to have the court sentence under §2S1.3.

We have no problem with that approach. But we do perceive a potential loophole in §2S1.3. That guideline sets the base offense level at 13 if the defendant (1) structured transactions to evade reporting requirement; (2) made false statements to conceal or disguise the activity; or (3) reasonably should have believed that the funds were the proceeds of criminal activity. In all other situations, the base offense level is 5. Thus, if the government can show that a defendant knew of the reporting requirement and knew that the transaction was covered by the reporting requirement, but willfully failed to file the necessary report, the base offense level will be 5 if there is no proof that the defendant structured transactions, made false statements, or reasonably should have believed that the funds were the proceeds of criminal activity. If such a defendant's violation is a failure to file the report required by Section 6050I of the Internal Revenue Code of 1986, he would be sentenced no more

severely under §2S1.3 than he would under §2T1.2. This anomaly can be avoided if §2S1.3 is amended to provide that any willful failure to comply with reporting requirements will be punished at a base offense level of 13, whether the result of structured transactions or not.

V. Conclusion

In conclusion, I thank the Commission for the opportunity to present testimony here today. We look forward to continuing involvement in the evolutionary process envisioned by the Guidelines.

ANALYSIS OF FY '87 GEP CONVICTIONS

GEP FY '87 Convictions That Were Sentenced

New Guidelines

| <u>Offense Level</u> | <u>Total Cases</u> | <u>Number and Percentage To Prison</u> | <u>For Those Sentenced Av. Sentence (Mons.)</u> | <u>Sentencing & Range (Mons.)</u> | <u>Minimum Sentence Options</u> | <u>Percentage in each Offense Level</u> | <u>If All Taxpayers Accept Responsibility, New Percentage In Offense Levels</u> |
|----------------------|--------------------|--|---|---------------------------------------|--|---|---|
| 3 | -0- | -- | -- | 0-3 | 1) Probation | -0- | -- |
| 4 | -0- | -- | -- | 0-4 | 2) Imprisonment | -0- | 9 |
| 5 | -0- | -- | -- | 0-5 | 3) Intermittent | -0- | 5 |
| 6 | 89 | 48-54 | 32 | 0-6 | Imprisonment 4) Community Confinement | 9 | 14 |
| 7 | 50 | 19-38 | 14 | 1-7 | One of the Following | 5 | 20 |
| 8 | 122 | 56-46 | 10 | 2-8 | Equal to the Minimum | 14 | 29 |
| 9 | 181 | 90-50 | 13 | 4-10 | Within the Range: | 20 | 10 |
| 10 | 269 | 154-57 | 13 | 6-12 | 1) Imprisonment 2) Intermittent Imprisonment 3) Community Confinement | 29 | 7 |
| 11 | 89 | 56-63 | 15 | 8-14 | One of the following | 10 | 4 |
| 12 | 56 | 32-57 | 15 | 10-16 | Equal to the Minimum Within the Range, but With at Least 1/2 the Minimum Being Imprisonment: 1) Imprisonment 2) Intermittent Imprisonment 3) Community Confinement | 7 | 1 |
| 13 | 39 | 26-67 | 22 | 12-18 | 1) Imprisonment Equal | 4 | .04 |
| 14 | 14 | 13-93 | 28 | 15-21 | to the Minimum Within | 1 | .04 |
| 15 | 7 | 6-86 | 18 | 18-24 | the Range | .04 | .02 |
| 16 | 6 | 4-66 | 29 | 21-27 | | .04 | -- |
| 17 | 2 | 2-100 | 27 | 24-30 | | .02 | -- |
| TOTAL | 924 | 506 | 20 | | | 100 | |

*Assumes Criminal History Category I

Analysis of the Effect of Interest on the Amount of Tax Loss

In determining the overall effect of the inclusion of interest on the computation of the tax loss several assumptions have to be made. These assumptions are:

- 1) The taxpayer evaded his/her tax for three consecutive years.
- 2) The amount of tax evaded was the same for each year.
- 3) The taxpayer was indicted on a date which was:
 - A) Two years after the date of the filing of the last fraudulent return.
 - B) Three years after the date of the filing of the middle fraudulent return.
 - C) Four years after the date of the filing of the first fraudulent return.

The Tables below show the compound interest factor and its effect on the total tax loss for interest rates of 8%, 10%, and 12%. For purposes of illustration, \$10,000 per year is assumed to have been evaded with a total tax evaded for three years of \$30,000. The percentage increase due to the inclusion of the interest is the same for any amount of tax.

| | <u>8% Interest Rate</u> | | |
|--------------------------|-----------------------------|---------------------------------|-----------------|
| | <u>Amount of Tax Evaded</u> | <u>Compound Interest Factor</u> | <u>Tax Loss</u> |
| Last Fraudulent Return | \$10,000 | 1.166 | \$11,660 |
| Middle Fraudulent Return | 10,000 | 1.260 | 12,600 |
| First Fraudulent Return | <u>10,000</u> | 1.360 | <u>13,600</u> |
| | <u>\$30,000</u> | | <u>\$37,860</u> |

% Increase in tax loss attributed to interest $\frac{7,860}{30,000} = 26.2\%$

| | <u>Amount of Tax Evaded</u> | <u>10% Interest Rate</u> <u>Compound Interest Factor</u> | <u>Tax Loss</u> |
|--------------------------|-----------------------------|---|-----------------|
| Last Fraudulent Return | \$10,000 | 1.210 | \$12,100 |
| Middle Fraudulent Return | 10,000 | 1.331 | 13,310 |
| First Fraudulent Return | <u>10,000</u> | 1.464 | <u>14,640</u> |
| | <u>\$30,000</u> | | <u>\$40,050</u> |

% Increase in tax loss attributed to interest $\frac{10,050}{30,000} = 33.5\%$

| | <u>Amount of Tax Evaded</u> | <u>12% Interest Rate</u> <u>Compound Interest Factor</u> | <u>Tax Loss</u> |
|--------------------------|-----------------------------|---|-----------------|
| Last Fraudulent Return | \$10,000 | 1.254 | \$12,540 |
| Middle Fraudulent Return | 10,000 | 1.405 | 14,050 |
| First Fraudulent Return | <u>10,000</u> | 1.574 | <u>15,740</u> |
| | <u>\$30,000</u> | | <u>\$42,330</u> |

% Increase in tax loss attributed to interest $\frac{12,330}{30,000} = 41.1\%$

If it is then assumed that tax cases will fall evenly throughout the range in the tax losses associated with a particular offense level, it can be said that the percentage of cases that would increase an offense level would be equal to the percentage of the tax loss attributable to interest i.e. at 8%, 26.2% of the cases in a particular offense level are increased one offense level due to the inclusion of interest , and so forth for other interest levels.

FEDERAL DEFENDER OFFICE

DISTRICT OF MASSACHUSETTS

195 STATE STREET, 4th Floor

BOSTON, MASSACHUSETTS 02109

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

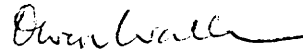
April 17, 1989

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

Dear Paul,

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

Sincerely,



Owen S. Walker

OSW:eka

Enclosure

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

April 14, 1989

Introduction

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

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

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

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

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Import and Export Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

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

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

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

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

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

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

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

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

make sensible judgments about the allocation of scarce penological resources.

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

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

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

Conclusion

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

UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

(202) 662-8800

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Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



April 6, 1989

MEMORANDUM:

TO: Commissioners
Staff Director
Legal, Research, Drafting & Hotline Staffs

FROM: Paul K. Martin

SUBJECT: Public Comment

Attached for your review is comment on the proposed amendments from the United States Attorney, District of Nebraska; the American Family Association Education and Legal Defense Foundation; an AUSA from the New England Drug Task Force; an AUSA from the District of Maryland; the Heritage Foundation; and Morality in Media.

Attachments

March 29, 1989

The Honorable William Wilkins
U.S. Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington D.C. 20004

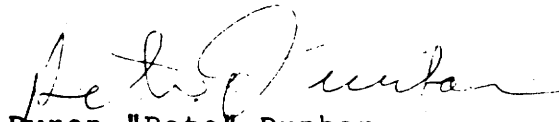
Re: Upgrade to Level 24 of 8 U.S.C. 1326 (Re-Entry After
Deportation of an Aggravated Felon)

Dear Honorable Wilkins:

This letter is to voice my support, and that of the Assistant U.S. Attorneys in my District involved in prosecuting Immigration Federal Crimes, to upgrade 8 U.S.C. 1326 violations for aggravated felons, as that term is defined under the 1988 Anti-Drug Abuse Act (Drug Traffickers, Weapons Traffickers, Murderers and those who attempt or conspire to commit these offenses) to a Grade 24 rather than the low level grade presently attached to this violation under the Federal Sentencing Guidelines.

We feel that the upgrading of this offense to a Level 24 would be a more appropriate Level for such aggravated felons as there would then be a very real deterrent since these individuals, if convicted, would receive from five and one half to ten and one half years real time.

Sincerely,



Byron "Pete" Dunbar
United States Attorney
District of Montana

Memorandum



UNITED STATES IMMIGRATION & NATURALIZATION SERVICE

Subject

Enhancing Criminal Penalties Under
The U.S. Sentencing Commission
Guidelines for Aggravated INS Felons

Date

March 29, 1989

To

PETE DUNBAR
U.S. Attorney
Billings, Montana

From

ROBIN L. HENRIE
District Counsel
Helena, Montana

The Immigration and Naturalization Service is presently attempting to create a meaningful deterrent for "aggravated felons" re-entering the United States through enhancement of the criminal penalties involved.

The 1988 Anti-Drug Abuse Act (ADAA) contains a statement, in the legislative intent, by Senator Lawton Chiles:

"This provision [15 year enhancement on re-entry as a mandatory minimum] is intended to strengthen Immigration Law by creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States. In addition, this criminal offense will give law enforcement authorities a broader arena for prosecuting the drug offenders as current tax fraud and mail fraud violations provide."

Unfortunately this 15 year enhancement on re-entry provision was deleted along with other provisions, in the informal conference between the House and Senate. This means that at present the Congressional intent of the measure is severely hampered by the very low level attached to this violation under the Federal Sentencing Guidelines.

The Immigration and Naturalization Service needs support through the United States Attorneys to bring this topic up on the agenda

and to pass it at an upcoming hearing of the Sentencing Commission in early April.

Accordingly, it is respectfully requested that you review the letter which I have attached and forward the same to the Honorable William Wilkins, U.S. Sentencing Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robin L. Henrie".

ROBIN L. HENRIE
District Counsel



Education and Legal
Defense Foundation, Inc.

April 5, 1989

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:

I am writing to you on behalf of the American Family Association Education and Legal Defense Foundation which represents over 360,000 people in the United States. We are a non-profit organization committed to the preservation of traditional American family values. Consequently, the enforcement of obscenity and child pornography laws in an effort to control the production and distribution of this material is of paramount importance to this organization.

Specifically, the proposed amendments to the Sentencing Guidelines reflect a disturbing attitude toward individuals who are convicted of federal obscenity violations. In enacting sections 1461, 1462, 1463, and 1465 of Title 18 of the United States Code, the Congress stated that the maximum penalty for each violation would be five years imprisonment. This statement is a clear reflection that the Congress did expect that some individuals convicted for the crime would receive the maximum sentence. The proposed amendments eliminate this possibility.

In addition, Congress recently spoke very clearly on the need to regulate obscene telephone communications. In its careful consideration, the Congress found that upon conviction the offender may receive a term of imprisonment of up to two years. Under the proposed Guidelines the maximum, with all enhancements added, is sixteen months. This clearly does not reflect the intent of Congress.

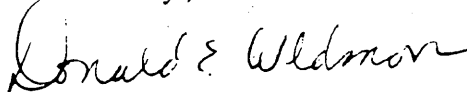
The concern of our organization and several others, is that the will of the people as reflected through Congressional action will be thwarted by enacting Sentencing Guidelines that do not acknowledge the societal damage that has taken place. Our society, and the child in particular, is being inundated with pornographic and obscene messages every day. Congress has recognized the harm in this and has consistently sought to protect the American public from these dangers. This effort must

be supported through a punishment that is commensurate with the crime.

As you are well aware, those individuals and companies that traffic in obscene and indecent material are purely profiteers. They have no regard for the traditional foundations upon which this nation was built and little concern for America's future with the attempts to make this material accessible to children. It is absolutely essential that a clear signal is sent to the criminals who profit in this manner that the distribution of obscene and indecent material, as proscribed by law, will be dealt with seriously.

I appreciate your concern in this matter and I am certain that the final Sentencing Guidelines will reflect the will of the American people.

Sincerely,

A handwritten signature in cursive script that reads "Donald E. Wildmon".

Donald E. Wildmon
Executive Director

U.S. Department of Justice

*United States Attorney
New England Drug Task Force*

*1009 J.W. McCormack POCH
Boston, Massachusetts 02109*

April 5, 1989

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

Re: Upgrading Sentencing Offense Level for
Certain Alien "Aggravated Felons"

Dear Judge Wilkins:

As coordinator of the New England Region Organized Crime Drug Enforcement Task Force, I am writing to urge that the Sentencing Commission upgrade the offense level for certain aliens defined as "aggravated felons" under the Sentencing Guidelines.

As you know, under the current guidelines an alien who is convicted of unlawfully entering the country after deportation is sentenced for that offense based on an offense level of 8. Even if the alien had a criminal record in this country before being deported, the offense level is not enhanced. Similarly, the use of false papers by an alien unlawfully to enter this country is a level 8 offense, regardless of whether the alien previously was deported or had a criminal record in this country.

The classification of the above-mentioned immigration crimes as level 8 offenses has deterred us from prosecuting these crimes, for two reasons. First, judges and magistrates will hesitate to detain defendants before trial, because the duration of sentences under the guidelines will often be less than the time from arrest until trial. Yet, these defendants are almost certain to flee if released before trial. Second, even if defendants are successfully prosecuted, the short sentences will have virtually no deterrent effect on the most serious offenders, those aliens who enter the country illegally to ply the lucrative drug trade.

Our office recently prosecuted an alien, under the immigration laws, who had entered the country illegally after prior convictions on drug and weapons charges. After illegally entering the country but before his arrest, the defendant was the


assailant in a shooting and a separate assault on law enforcement officers. Because the crime predated the effective date of the guidelines, the government recommended -- and the defendant agreed to -- an 18-month sentence. It is discouraging to think that under the guidelines, based on the offense level and the defendant's acceptance of responsibility, the defendant would have received a sentence of less than eight months.

Enforcement of the immigration laws should be a crucial component of the federal effort against the illegal drug trade. Those of us throughout New England hope that the Sentencing Commission will upgrade the offense level for certain immigration law violators to reflect the seriousness of their immigration crimes.

Very truly yours,

PETER A. MULLIN
United States Attorney

By:



JONATHAN CHIEL
Assistant U.S. Attorney
Coordinator, New England Region
OCDEF



U.S. Department of Justice

KJA:nmd/LTRSent

United States Attorney
District of Maryland

United States Courthouse, Eighth Floor
101 West Lombard Street
Baltimore, Maryland 21201-2692

301/539-2940
FTS/922-4822

April 3, 1989

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

Re: Proposed Amended Sentencing Guidelines
for 8 U.S.C. Section 1326

Dear Mr. Martin:

Ronnie Scotkins of your office kindly forwarded to me a copy of the proposed amendments to Section 2L1.2 of the Sentencing Guidelines relating to the unlawful re-entry of an alien to the United States. As you are aware Section 7345 of the Omnibus Anti-Drug Abuse Act of 1988 amended 8 U.S.C. Section 1326 and set up a three-part sentencing structure: For an alien who re-enters after a prior deportation and does not have any prior convictions, the maximum penalty remains two years; for a defendant who was deported after a conviction of a felony and returned to the United States, the maximum penalty is five years imprisonment; and for a person who was convicted of an aggravated felony (which includes any drug trafficking crime), the maximum penalty is fifteen years imprisonment. The Sentencing Commission has proposed amendments to the current guidelines to accommodate these new statutory changes.

The proposed amendments which relate to those aliens who return and have no prior convictions or have a plain felony conviction seem appropriate. The suggested "specific offense characteristic" which would raise the offense level from 8 another four levels would reflect the seriousness of the offense. The proposed enhancement for those defendants convicted of an "aggravated felony" does not seem to be adequate however. The proposed guidelines suggest that in the case of an illegally re-entering defendant previously convicted of an aggravated felony "an upward departure should be considered." We are concerned that the proposal does not provide adequate deterrence to re-entering aliens, especially for those defendants who have been convicted of prior drug offenses because the enhancement

does not set a definite, stern term of imprisonment that an alien knows will be imposed if he returns illegally.

Our district has experienced numerous cases of drug dealers who have been previously deported and then have returned to the United States illegally in order to continue to carry on their drug business. If we had definite, stringent sentences for those returning aliens, we believe word would soon filter back to their counterparts in Jamaica and elsewhere and the flow of illegally re-entering aliens could be stemmed. Some case illustrations of the problems facing our district might be helpful to the Commission. Last month we arrested a previously convicted Jamaican drug dealer, Henry Gilbert Martin, who had been deported two different times by the Immigration and Naturalization Service. We have an arrest warrant outstanding for another previously convicted Jamaican drug dealer who also had been deported two times. Our Immigration agents know of at least four other Jamaican drug dealers whom we had previously deported but who have returned to the Maryland area and are involved in drugs again. Obviously to defendants of this kind, the risk of spending some time in jail is considered just a cost of their doing business as an American drug dealer. The problem of these re-entries will not abate, we believe, until a heavier, definite guideline range is created.

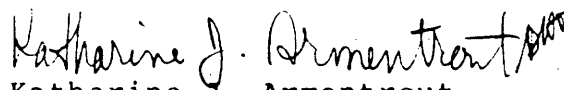
The proposal to have the court "consider" an upward departure in the case of these aggravated felons we believe would not provide sufficient deterrence. It would lead to highly variable sentences from district to district and in many cases it might lead to a sentence that is not lengthy enough to be deemed a deterrent to other returning drug dealers. It should be noted that the returning aliens often are part of an organization that has members both in the United States and in other countries. News between members of the organization people does travel. If we intend to provide both specific and general deterrence to those who are considering re-entry after deportation, a special offense characteristic level which would raise the offense level to 24 would provide such a deterrent. The time of incarceration then would range between five and twelve years. This would provide the kind of deterrence that we believe would be effective and commensurate with the seriousness of the offense.

In sum we hope the Commission will raise the offense level so that returning drug dealers will realize that their actions will result in long-term incarceration, rather than a brief stop on their way back to dealing drugs in the United States.

Thank you for your consideration.

Very truly yours,

Breckinridge L. Willcox
United States Attorney


Katharine J. Armentrout
Assistant United States Attorney


The Heritage Foundation

A tax-exempt public policy research institute

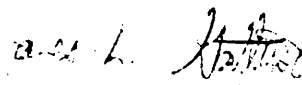
April 5, 1989

Paul Martin
Communications Coordinator
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Dear Mr. Martin:

Please find enclosed a statement, for inclusion in the record of your April 7 hearing, regarding proposed amendments to the sentencing guideline on insider trading.

Sincerely,


James L. Gattuso

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STATEMENT OF
JAMES L. GATTUSO
MCKENNA SENIOR POLICY ANALYST
IN REGULATORY AFFAIRS
THE HERITAGE FOUNDATION
TO
THE UNITED STATES SENTENCING COMMISSION
ON
PROPOSED AMENDMENTS TO INSIDER TRADING GUIDELINE
APRIL 7, 1989

As an analyst specializing in regulatory issues at The Heritage Foundation, a non-profit public policy research institute, I wish to express my concern about possible adverse consequences from amending section 2F1.2 of the Commission's guidelines so as to increase the penalties for insider trading violations.¹ Because of the vagueness of the insider trading laws, and confusion as to how losses caused by such trading should be measured, such action may actually deter beneficial trading activity, to the detriment of the stock market and the economy as a whole.

The buying and selling of stocks in the market is a crucial part of the U.S. economic system. It is through this process

¹The opinions expressed in this statement are my own, and do not necessarily reflect those of The Heritage Foundation.

that the resources of the economy are allocated to various enterprises. For the system to work efficiently, however, it is important that information be transmitted smoothly through the marketplace. Holders of information as to the value of particular enterprises should therefore, to the greatest extent possible, be able to convey that knowledge to the market through their trading. When this knowledge cannot be conveyed, resources are not allocated to their most valuable use, to the detriment of the economy.

By their very nature, the insider trader laws constrain the transmission of valuable information: persons with knowledge as to the value of an enterprise are prohibited from acting on that information. This has been justified on the ground that the loss of marketplace efficiency is outweighed by the benefits of marketplace fairness.² Yet, because of the vagueness and ambiguity of the insider trading laws, they can deter conduct which is generally accepted as legitimate. Because actions constituting insider trading are not specifically defined, persons engaging in seemingly legitimate activities can find themselves the target of an insider trading action.

For instance, important issues -- such as the degree of

²This is far from a unanimous view, as a number of scholars have taken the view that insider trading should not be prohibited at all. See, Manne, "Insider Trading and Property Rights in New Information," 4 Cato Journal 933 (1985).

personal interest a "tipper" or "tippee" must have to be found liable -- remain unsettled. Other questions, such as whether a "tippee" knew of a "tipper's" motivation, or whether a particular piece of information was "inside" information or just a general rumor may be difficult to determine in court.³

Many of the ambiguities in the law have been intentionally preserved in the law so as to preserve the flexibility of prosecutors. Yet, the result can be a deterrence of legitimate, and desirable, activity. A market analyst, for instance, may be deterred from using information gained from an industry source, even though it could be useful to investors, if there is even a slight chance that liability would later be found.

Resolving the uncertainties of insider trading law is, of course, an issue for the SEC and Congress, rather than this Commission. Yet, a general increase in penalties could significantly increase the deterrence of beneficial economic activity. Increasing the base "offense level" for insider trading violations would deter many from taking actions which could have positive economic effects, simply out of fear of an overzealous prosecutor. Investors and consumers would be hurt, rather than helped, by such action. Increasing penalties based on the defendant's gain would suffer from the same problems.

³For a further description of these problems, see, "Fuzzy Laws Help Blur the Boundaries," The New York Times, March 19, 1989, F3.

Since the size of the gain has little relation to whether a transaction has positive or negative economic effects, many legitimate and economically beneficial transactions would be deterred.

I therefore urge that the penalty levels for insider trading, as contained in the sentencing guidelines, not be increased. The increased penalties for insider trading authorized by Congress can instead be accommodated by the guidelines through the existing adjustments for such factors as abuse of a position of trust and prior criminal history. Deterrence of potentially beneficial activity thus would not be increased.

Thank you for the opportunity to present these comments to the Commission. I hope they will be useful to you in your important work.



April 5, 1989

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Alma Products, Inc

MISS LORETTA YOUNG

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, D.C. 20004

Attn.: Paul Martin

Re: Proposed Amendments 126-128,
Pertaining To Obscenity

Dear Mr. Chairman:

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. The founder and President of Morality In Media (until his death in 1985) was Rev. Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography" [two copies enclosed].

Morality In Media, Inc. files the attached Comments with a genuine appreciation of the complexity of the task faced by the Commission, but also with deep concern about the impact that the Guidelines and Proposed Amendments 126, 127 and 128 [pertaining to obscenity] will have on the future enforcement of both federal and state obscenity laws.

The Proposed Amendments 126, 127 and 128 are set forth verbatim. Our Comments follow.

Sincerely,

Robert Peters
Attorney

RP/mtb

COMMENTS REGARDING THE
PROPOSED AMENDMENTS 126-128 (OBSCENITY)
TO THE FEDERAL SENTENCING GUIDELINES

Prepared by:
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115

126. Proposed Amendment to Section 2G3.1 Of the Guidelines
[pertaining to Title 18, Sections 1460-1463 and 1465-1466].

**"§2G3.1 Importing, Transporting, Mailing, or Distributing
(Including Possessing With Intent to Distribute) Obscene Matter**

Base Offense Level: 6

Specific Offense Characteristics:

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material but in no event by less than 5 levels

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. **"Base Offense Level: 6"**

Comment: The proposed Amendment does not change the Base Level Offense established under the existing Guidelines. The existing Guidelines permit a sentence range between 0-6 months for an Offense Level 6, which may be satisfied solely by probation. Under the existing Guidelines, even repeat obscenity offenders have little to fear, so long as their offenses are not "related to distribution for pecuniary gain."

In contrast Sections 1461, 1462 and 1465 of Title 18 permit a maximum prison term of 5 years for a first offense and Sections 1461 and 1462 permit a maximum term of 10 years for each subsequent offense, irrespective of whether there is a commercial element. In United States v. Orito, 413 U.S. 139 (1973), the United States Supreme Court upheld 18 U.S.C. 1462 as applied to a person who allegedly transported the obscene material (which included 83 reels of film) by private carriage and "solely for the private use of the transporter." The Court stated:

That the transporter has an abstract proprietary power to shield the obscene material from all others...is not controlling. Congress could reasonably determine such regulation to be necessary..., based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In July 1986 the Attorney General's Commission on Pornography released its Final Report—revealing both an explosive increase in the quantity of pornographic materials and a radical degenerative change in their content since 1970. The Commission had access to testimony from victims, victimizers, law enforcement officials, physicians, psychologists and pastoral counselors, as well as social scientists, which showed the destructive impact that substantial, habitual exposure to pornographic materials can have on users. The Commission found that youth, ages 12 to 17, constitute the largest audience for pornographic material in America today. Several Commissioners noted the moral harms of pornography as well as its destructive impact on family life—concerns which the Supreme Court has also raised in its decisions upholding obscenity laws.

The harms associated with obscene material occur irrespective of whether distribution is for pecuniary gain, and we respectfully suggest that the Commission's classification of obscenity offenses at Base Offense Level 6 neither promotes respect for the federal obscenity laws nor reflects the nature and degree of harm caused by the crime.

Of course, if the Proposed Amendment is accepted, the Base Level Offense will be 6 even where the act is "related to distribution for pecuniary gain"—if the defendant is not also "in the business."

B. "Specific Offense Characteristics

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels."

Comment: The proposed Amendment changes the existing Guideline which reads, in part:

"(1) If the offense involved an act related to distribution for pecuniary gain, increase by...."

The "**Reason for Amendment**" provided in the Proposed Amendment states:

"The purpose of this amendment is to incorporate the new offenses created by sections 7521 and 7526 of the Omnibus Anti-Drug Abuse Act of 1988..., and to make clarifying changes." (emphasis supplied)

The "new offenses" noted are Sections "1466. Engaging in the business of selling or transferring obscene matter" and "1460. Possession with intent to sell, and sale, of obscene matter on federal property." Section 1466 does include an "engaged in the business" requirement. Section 1460 includes only a "sale" requirement. As stated previously, it is not necessary to prove a commercial element in order to convict under Sections 1461-1465 of Title 18.

Under the existing Guidelines, a showing that the offense "involved

an act related to distribution for pecuniary gain" is necessary to upgrade the Base Offense Level to eleven (11). Such a showing would seldom place an additional burden of proof on the U.S. Attorney. On the other hand, a showing that the defendant "denotes time, attention, or labor to such activities, as a regular course of business, with the objective of earning a profit" may very well add such a burden—a burden Congress placed on a prosecutor only regarding Section 1466.

Further, the Proposed Amendment relegates an offense involving "pecuniary gain" to a Base Offense Level 6, unless it can also be proved that the defendant is, so to speak, "in the business." At the same time, the Proposed Amendment does not increase the Base Level Offense beyond grade 11 even where a defendant is in fact "in the business." Of course, the Base Level Offense can, theoretically, be increased beyond grade 11 if the "retail value of the material" exceeds \$100,000. This, however, will almost never happen in obscenity cases because of the requirement that the trier of fact must make an obscenity determination for each item. Prosecutors will seldom if ever ask a jury to make such a determination for each of hundreds, even thousands, of individual magazines, films, and books.

C. "Specific Offense Characteristics

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Under the existing Guideline, the offense need only "involve" material depicting sadomasochistic abuse. The Proposed Amendment also requires a "distribution" element. Presumably, the terms "distributed" and "distribute" mean that defendant would have to sell, rent, lend, or give the material to others or intend to do so. Accordingly, if an American travelling abroad returned with boxes of sadomasochistic tapes and magazines "solely for private use" [i.e. no distribution or "intent to distribute"], the Base Level Offense would not be increased—despite the fact that much of the material would almost certainly "find its way" into others' hands—including children's. See United States v. Orito, supra.

But there is a further problem with both the existing Guideline, as well as the Proposed Amendment--to wit, the special treatment accorded material "that portrays sadomasochistic or other violent conduct." It is for the trier of fact to determine what is obscene, and there is no concept of "degrees of obscenity" in the obscenity law field. Nor is it clear that materials depicting "sadomasochistic abuse" per se pose a greater threat of harm to society, or to individual victims, than do materials "portraying," for example:

1. incest;
2. man/boy love—with "performers" who look 14 but are 18 or over;
3. bestiality;

4. sodomy, group sex, or promiscuous sex, in the age of AIDS;
5. adultery, in the age of family breakdown; or
6. excretory activities or products.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, the United States Supreme Court spelled out the various governmental interests that justify obscenity legislation. These include:

"[T]he interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers...."

The Paris Court continued:

"Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature...could quite reasonably determine that such a connection does or might exist. ...[t]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis supplied)

In Roth v. United States, 354 U.S. 476, at 502 (1957), Mr. Justice Harlan, in a concurring opinion, elaborated:

It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.

[E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

Few would quarrel with the assertion that materials depicting sadomasochistic abuse are heinous, but it is a great and tragic mistake to ignore or downgrade the harms associated with other types of hardcore pornography.

Congress has not made distinctions, and we respectfully urge this Commission to also avoid doing so.

127. Proposed Amendment to Section 263.2 of the Guidelines
[pertaining to 47 U.S.C. 223(b)]

***263.2 Obscene Telephone Communications for a Commercial Purpose**
(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved material that describes sadomasochistic or other violent conduct, increase by 4 levels.

(2) If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

A. "(a) Base Offense Level: 6"

Comment: The "dial-a-porn" industry is a multi-million dollar business and a major U.S. distributor of hardcore pornography. Congress in part recognized this by upgrading the penalty from misdemeanor to felony status for making any "obscene communication for commercial purposes." Yet, the Proposed Amendment simply turns a "blind eye" to the commercial aspect of the dial-a-porn industry, relegating all offenses to Base Level 6, unless the communication describes sadomasochism or the person receiving the communication is a child. We think this ignores the nature and degree of the harm caused by the crime, as well as the community view of the gravity of the offense.

Kim Murphy (Staff writer), "Regulators Answer Protests Of Huge 976 Phone Charges," Los Angeles Times, Sept. 28, 1987, at p. 3:

Clester Jones' 15-year-old son hid the...phone bill when it arrived, so Jones did not see it until the phone was shut off for nonpayment of \$5,312 for calls to a 976 number that offered sexually explicit conversation. "The boy didn't realize it was going to cost that much. He got hooked.... He just got so that he couldn't keep from calling," said [the boy's Aunt].... Complaints like the Jones' have drawn the attention of regulators [of] the nation's booming dial-a-message industry, which is expected to expand by 80% this year....

Dr. Victor Cline (psychologist), NFD Journal, Nov. 1985:

With the sponsorship of the U.S. Justice Department, I conducted a pilot field study of the effects of Dial-a-Porn on child consumers in January 1985.... With everyone of the children we studied we found an "addiction" effect in making these calls. In every case...the children (girls as well as boys) became hooked on this sex by phone and kept going back for more.... I next found that nearly all of the children had clear memories of a great deal of the content of the calls they heard.... We also found that almost without exception the children felt guilty, embarrassed, and ashamed.... In nearly all cases there were some problems and tensions generated in the parent-child relationships....

Dr. Cline continues:

When one makes a call to Dial-A-Porn, it is usually answered by a very sexy, seductive sounding female (actually a recording) who talks directly to the caller about how bad she wants to have sex with him now. She then tells the caller all the things she wants to

do to him--oral sex, vaginal sex, anal sex, etc. This is done with a lot panting and groaning suggesting that she is in intense heat. She may discuss the turgid state of her sex organs or that of the caller. There may be a second female on the line and they may talk about having sex together as well as with the caller. They may mention having a sex marathon today will all the explicit details. In some cases bondage is a part of the scenario.... Sex with animals is also included as well as group sex (e.g., five guys at once), lesbianism, anal sex, rape, having sex with a "baby sister," a school teacher having sex with class members, inviting the married male to have sex with the babysitter, inviting the caller to urinate in the woman's face, inviting beatings, torture and physical abuse as part of the sexual activity. The messages keep changing every hour or so and new numbers are given out in order to encourage constant call backs.

From a letter to a public official. Names have been changed:

I must relate to you a terrible incident that happened to our family.... It occurred July 26, 1987. My 13 year old son Tim called the dial-a-porn number.... Tim's friend Edward, aged 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me Tim's 14 year old brother was listening on another line with his two friends.... Karen, age 10, was also listening on her extension. Within the next 48 hours, Edward and his 11 year old brother molested my daughter Karen. Police were notified and in their investigation revealed that Karen had encouraged the boys by asking them to touch her and "do it with her." She actually used phrases she heard on the "Dial-a-Porn."

From an article in the Daily News (LA), 10/3/87:

"A man who ran up nearly \$38,000 in phone-sex bills has been ordered to spend 180 days in a psychiatric hospital and repay the money he embezzled from a North Hollywood insurance agency to support his habit." (emphasis supplied)

From a May 1987 letter from a Christian ministry to people coming out of homosexuality:

"But there is another matter I would like to address and that is the possibility of proposing and lobbying for legislation that would prohibit the networking of gay telephone sex across this nation.... All I can tell you is that many, many men and women I counsel are being dragged into sexual addiction in this form of perverse activity." (emphasis supplied)

B. (b) Specific Offense Characteristics

- .
- .
- (2) If a person who received the communication was less than

18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

Comment: The Commission is certainly aware that in early 1988, Congress amended 47 U.S.C. 223(b) to prohibit obscene or indecent communication for commercial purposes to any person, regardless of the caller's age, and to abolish the "defense" under the old law for those who complied with FCC regulations intended to restrict access to adults only. Congress did so because it concluded that a "safe harbor" for obscene or indecent dial-a-porn was not constitutionally required for adults or minors.

On July 19, 1988, the United States District Court for the Central District of California upheld the prohibition in 47 U.S.C. 223(b) on obscene commercial messages, but invalidated 223(b)'s prohibition on indecent commercial messages. The United States Supreme Court agreed to hear the appeal of that decision, and oral argument is scheduled for April 19. [Sable Communications of California, Inc. v. FCC, 88-515 & 88-525.]

We fully expect the Supreme Court to uphold Section 223(b), as amended, and urge the Commission to follow the good example of Congress which did away with both the distinction in the previous law between adults and minors and with the statutory "defense" for those complying with ineffective FCC regulations--lest the Commission unwittingly grant dial-a-porn operators what is in effect a "partial immunity" for following its ineffective "rules."

It is to be noted that the Guidelines do not elsewhere make distinctions based on the age of the recipient of obscene (or indecent) matter. There is no reason to do so here.

128. Proposed Amendment: Adding An Additional Guideline, §2G3.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

- (a) **Base Offense Level: 6**
- (b) **Specific Offense Characteristic:**
 - (1) **If the offense involved the broadcast of material that portrays sadomasochistic or other violent conduct, increase by 4 levels."**

Comment: Again, the Commission chooses to treat obscenity offenses as "low grade;" again, chooses to turn a "blind eye" to the commercial element in most broadcast and cable TV programming; again, attempts to determine "degrees of obscenity."

Conclusion

We genuinely appreciate the difficulty faced by the United States Sentencing Commission in determining appropriate Sentencing Guidelines for the hundreds of criminal provisions contained in the United States Code. We fear, however, that in determining sentencing ranges for obscenity offenses, the Commission has been unduly influenced by a policy of non-enforcement of obscenity laws that existed for approximately 20 years, roughly from the United States Supreme Court's Fanny Hill-Memoirs decision in 1966 (requiring proof that material was "utterly without redeeming social value"--a burden almost impossible to discharge) until the Final Report of the Attorney General's Commission on Pornography in 1986. The prosecution and sentencing practices of the late 1960's, the 1970's and early 1980's are simply an inadequate basis for determining appropriate sentencing ranges for obscenity offenses.

This is not to say that every obscenity offense should be put in the the highest possible offense level. Nor is it to say that noncommercial offenders, those who profit financially from the distribution of obscenity, and those who are "in the business" of distributing obscene material should be treated exactly alike.

It is to say that those who violate the federal obscenity laws, like those who violate federal drug laws, should know that if apprehended, they will not be treated with "kid gloves." It is to say that if a prosecutor expends the office resources needed to investigate and successfully prosecute a major distributor of obscene matter in his or her district—including a "dial-a-porn" provider, he or she can know that the defendant will not get off with a "slap on the wrist" simply because the defendant is a "first offender" or because the dollar value of the materials that formed the basis of the prosecution is relatively small.

We think too that it is not for the Commission to attempt to establish "degrees of obscenity." Hardcore pornography by its very nature reduces human beings to objects for sexual gratification, and, as noted by the United States Supreme Court in its Paris Adult Theatre I v. Slaton, supra, decision:

The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Congress passed laws punishing the transportation and dissemination of obscene material, and all obscene materials endanger the social fabric.

THE UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



April 19, 1988

Honorable Warren K. Urbom
United States District Court
586 Federal Building
100 Centennial Mall North
Lincoln, Nebraska 68508

Dear Judge Urbom:

Thank you for your informative letter regarding home detention. I have circulated copies to all Commissioners. The Commission will be addressing, among other things, the use of home detention during its review of possible amendments to the guidelines. As you may know, there was reluctance on the part of the majority of the Commissioners to provide a guideline which generally authorized home detention, for it was felt that its appropriate use is peculiar to the individual defendant. But, of course, the Commission was well aware that in appropriate cases, the district judge could depart.

We have not closed the door to further consideration and your comments are most helpful.

With personal regards, I am,

Sincerely,

A handwritten signature in cursive script that reads "Billy Wilkins".

William W. Wilkins, Jr.
Chairman

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

WARREN K. URBOM
UNITED STATES DISTRICT JUDGE
586 FEDERAL BUILDING
100 CENTENNIAL MALL NORTH
18TH AND O STREETS
LINCOLN, NEBRASKA 68508

April 13, 1988

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

RE: Home Detention under the Sentencing Guidelines

Dear Judge Wilkens:

My experimentation during the past two years has led me to conclude that home detention is an excellent alternative to imprisonment in selected cases. My experience is sufficiently positive that I take the liberty of encouraging the Sentencing Commission to expand the window for its use under the Guidelines.

My encouragement comes from these factors:

1. home detention is restrictive enough to accomplish the punishment purpose of confinement in a fair number of cases;
2. home detention in appropriate situations allows relief from confinement to enable the defendant:
 - a. to work at a job whereby all or most of the support of the defendant and the dependents is provided by the defendant, rather than upon the taxpayers; and
 - b. to receive drug or alcohol treatment or whatever other counseling or treatment is needed, probably with more incentive to succeed than if that treatment or counseling were received in a prison setting;
3. home detention offers placement in an environment more conducive to change of habits and lifestyle, because, in part at least, of the presence and influence of other family members.
4. home detention can be an instrument for relieving in part the pressures of prison overcrowding.

The Honorable William W. Wilkens, Jr.

April 13, 1988

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I have noted a recent statement by Chairman Benjamin F. Baer, United States Parole Commission, that the system is now almost 60 percent over capacity. He raises the question of whether, if we have adequate supervision resources, the good risks could serve more of their punishment in the community. He notes that because of population pressures, the Bureau of Prisons is presently placing offenders in halfway houses four months prior to release even if there is no other need for such a placement. He concludes as follows:

"In conclusion, community corrections involving close supervision offers an avenue for relieving overcrowding in ways that promote public protection, public perceptions of justice, and fiscal responsibility. Now is the time to act before the Federal prison overcrowding problem becomes unmanageable.

"News and Views," Probation Division, Administrative Office of the United States Courts, February 22, 1988.

What I am confident of is that putting home detention in place of imprisonment, even where the risks are medium, the advantages are substantial, because in my experience most of them are successful--that is, most of them complete their home detention as substitutions for prison without violation. I think that is true if they are carefully selected and if they ask for the alternative. That is, I think the defendant must not be required to have home detention, but must be permitted to have it if the home detention and its conditions are carefully proposed by the defendant and a plan is devised by the defendant, even though somewhat altered by the judge before actual imposition of the sentence. To the extent that such a program can replace imprisonment for some, it will have helped avoid what may be a very real problem in the future of having no way to release persons from imprisonment in overcrowded situations. I suggest that allowing home detention at the beginning of the sentence has at least as much prospect of relieving overcrowding, while meeting all purposes of sentencing, as does placement of offenders in halfway houses at the end of their sentences. If a violation of the conditions of home detention occurs, revocation may be had and imprisonment may have to follow.

I tell defendants that if the conditions of the home detention are not strictly followed, incarceration is sure to come--and I mean it. Several have gone to prison.

Under the present Section 5CB1.1(a)(2) home detention can be used only if the minimum term of imprisonment is not more than six months. My suggestion is that that minimum

The Honorable William W. Wilkens, Jr.
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be expanded to, perhaps, a year. I grant that it should not be excessively expanded, but I think such persons, if carefully selected, could well be treated with home detention where their minimum sentence might be a year.

I am enclosing a copy of the fairly recent Federal Judicial Center publication, "Home Confinement: An Evolving Sanction in the Federal Criminal Justice System." It does what I believe to be a careful piece of work with respect to the elements and potential of home detention.

Enclosed also is a summary of the responses I have recently received from an unscientific survey that I took of persons whom I have put on home detention (I have called it house arrest) during the past two years. I think it is accurate and reflective of how these persons think of home detention.

I realize that under the present Guidelines a judge may go below the Guidelines in appropriate situations, but I am sure that most of us shall prefer to remain within the Guidelines and we shall feel more confident about using home detention with a fair degree of frequency if we can see that it is accepted in a larger framework within the Guidelines.

Thank you for your consideration.

Very truly yours,



Enc.

RESPONSES TO WRITTEN QUESTIONNAIRE
REGARDING HOME DETENTION (HOUSE ARREST)
MARCH, 1988

1. Was house arrest in anyway helpful to you? If so
how?

"Yes ... it gave me time to think about a lot of things in my life, such as who my true friends are and now I am finding new friends ..."

"Yes, it allowed me to keep working and care for my family."

"Yes--I was allowed to work during the 60 days. I was allowed to carry on normal functions i.e. church as well."

"I used the time for spiritual growth and was able to keep working so I could support my family."

"Gave me the opportunity to keep my job and get finances in order."

"It gave me a chance to get my life back in order and ... keep my job ... reevaluate my problems with the law ... learn to appreciate my freedom ..."

"House arrest helped me be more aware of where I was spending my time. The time I spent at home made me appreciate my wife more and helped us in reestablishing our marriage."

"Yes, it helped me by keeping home through the first month of my sobriety."

"Yes. It showed me I didn't like having no freedom even under these circumstances."

"It was helpful because I could work at a job ... helped me get my life back on the right track."

"Taught me responsibility and commitment. Planning my activities & following through. I felt a great sense of accomplishment when I finished a day w/ success. One of my defects used to be procrastination."

"Yes, very helpful. House arrest gave me time to reflect on my mistake of the past."

"Yes. It allowed me to continue to work and support my family and gave us an opportunity to start rebuilding our lives."

"Yes, I valued my time. I learned how to keep track of my daily schedule. Being incarcerated [sic] and put in jail with other criminals would have given me negative thoughts."

"Yes, it kept me productive ..."

2. Was house arrest what you would call easy? Hard?
In what way?

"It was hard at first because of the loneliest [sic]. But I believe it would be better than being with other criminals ..."

"Hard. Greatly restricted my travel."

"Hard. I have never experienced a loss of freedom before."

"It was nice to stay with my family and keep my job using [sic] my own disaplent [sic] to stay in the house."

"Easy only because I had two jobs and went to a lot of AA meetings."

"It was not hard for me because I realized I could take this time and use it to my advantage for myself and my wife."

"The only trouble I had with house arrest was filling a work schedule out a week ahead of time ..."

"For me it was fairly easy, as I was living at home with my folks again. They were very supportive and helpful ..."

"No, it was hard. Because you could leave at any time, you had to control yourself. Taught discipline."

"For me it was hard. To be confined to anywhere for me is hard. My nerves are quite bad so it was hard when I wanted to leave and I couldn't."

"My first couple months were hard. I was inexperienced at keeping logs of my activities. Was mentally exhaustive."

"Was not easy at all. It was humiliating in a way, especially when guests of my parents were in the house. I had no job and was very inactive. Gained lots of weight."

"Mentally stressful. I was constantly aware of the fact

that the freedoms I have always taken for granted were not allowed."

"It was hard because I lost all my freedom. I did not have any choice on anything I wanted to do."

"By following the rules it was somewhat easy. The hard part was planning for the week ahead ..."

"Hard."

3. What do you think house arrest as an alternative to incarceration?

"I thinks its [sic] great for non-violent crimes
1. we pay out of our own pockets for our crime
2. its [sic] not coming out of the taxpayers [sic] pockets
3. it keeps us from other criminals
4. helps keep the prisons from more over crowding [sic]"

"I think its [sic] great, saved my family."

"Excellent. I see it as a learning experience without the damage of incarceration."

"I think it's a good thing if you think a person is really trying. ..."

"Anything for me was better than incarceration. ..."

"... it is a good alternative for people who are willing to make their lives better and need time to do that."

"... it is more of a learning experience than being in jail."

"... should be more like incarceration in term [sic] of lenght [sic] ..."

"For non violent [sic] crimes it is good because you see how much self control someone really has."

"... is much better. Going to prison would have made me very bitter and I probably would have been worse ..."

"... can be very effective in instilling good habits ..., making them become responsible ..., leaving them choices to act as a mature person. ..."

"It should be used whenever possible."

"... is an opportunity for anyone who actually wants to rehabilitate themselves."

"I think it is great. ... If they do not abide by the rules they end up in jail anyway."

"... it is an excellent program ..."

"... an opportunity to make a new life."

NOTE:

Nearly all these were on pleas of guilty to nonviolent drug offenses, where the defendants cooperated fully with authorities, expressed the desire for drug or alcohol counseling, and proposed a detailed plan of rehabilitation activities. A typical set of probation special conditions included these features:

1. Defendant shall be under house arrest for (number of months), beginning on September 10, 1987, at 12:01 a.m., whereby defendant is to remain inside the house where he regularly lives except when (a) working at his usual place of employment, (b) undergoing medical treatment or alcohol or drug treatment, (c) attending church, (d) fulfilling his cooperation agreement with law enforcement officers, (e) at such other places as authorized specifically by the probation officer, or (f) traveling in a direct route to and from any of these places.

During the period of house arrest, defendant will be allowed three one-hour periods each week of free time to take care of such matters as may need to be taken care of. Defendant shall work out a schedule, a week in advance, of his anticipated activities to let the probation officer and the house arrest monitor know what defendant's plans are, and then after defendant has gone anywhere keep a log of where defendant went, how long there and persons seen. Defendant shall not have any visitors except for persons specifically approved by the probation officer.

Defendant shall pay a month in advance the fee of Charles R. Gartner, the nongovernmental employee who will monitor the defendant during the period of house arrest.

2. Following the six-month period of house arrest defendant shall perform 400 hours of community service for (organization), on a schedule to be developed by the probation officer, the (organization) and the defendant.

3. Defendant shall not use or possess alcoholic beverages or controlled substances during the entire period of probation except those medicines prescribed by a physician.

4. Defendant shall submit to chemical testing at the request of the supervising probation officer to detect the presence of alcohol or controlled substance in the defendant's body fluid.

5. Defendant shall be subject to search and seizure of the defendant's premises, vehicle or person, day or night, with or without a warrant, at the request of the supervising probation officer to determine the presence of alcoholic beverage or controlled substances. The probation officer may invoke this with or without the cooperation of law enforcement officers.

6. Defendant shall attend and successfully complete any counseling or treatment as deemed appropriate by the supervising probation officer.

7. Defendant shall cooperate as agreed with law enforcement officers.

8. Defendant shall pay costs of prosecution in the amount of \$70.00 within 60 days of this date.

9. Defendant shall make restitution in the amount of (dollars) to (organization or person), on a schedule to be determined by the probation officer.