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March 6, 1991

**MEMORANDUM:**

**TO:** Legal, Drafting and Hotline Staffs  
**FROM:** Mike Courlander *MC*  
**SUBJECT:** Written Statements from March 5th Hearing

Attached for your review are statements submitted to us at the March 5 public hearing on amendments to the sentencing guidelines. Included are materials from Paul Borman (ABA Criminal Justice Section), Joe Brown (Department of Justice), Barry Portman (Federal Public Defender), Alan Chaset (NACDL), Paul Kamenar (Washington Legal Foundation), and Judge Vincent Broderick and Judge Mark Wolf (Judicial Conference of the United States).

Attachments

# NACDL

National Association of  
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STATEMENT OF  
ALAN J. CHASET  
ON BEHALF OF THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE  
UNITED STATES SENTENCING COMMISSION  
PUBLIC HEARING ON PROPOSED AMENDMENTS  
TO THE UNITED STATES SENTENCING GUIDELINES

WASHINGTON, D.C.

MARCH 5, 1991

Judge Wilkins and Members of the Commission, my name is Alan Chaset, and I am pleased to testify today on behalf of NACDL on the Commission's new package of proposed guideline amendments. I am a partner in the Law Offices of Alan Ellis, P.C., with offices in Alexandria, Virginia, Mill Valley, California and Philadelphia, Pennsylvania, and was formerly privileged to serve as a member of the staff of the Commission. My practice is substantially limited to federal post-conviction matters, including the representation of offenders under the sentencing guidelines. For the past three years, I have served as the Chair or Vice Chair of the NACDL Sentencing and Post Conviction Committees and have had the pleasure of working with members of the Commission and its staff in matters concerning the drafting of guidelines and proposed amendments. I also have had the distinct privilege of serving on the Commission's Practitioners' Advisory Group.

My testimony today is presented on behalf of more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its forty State and Local affiliates includes criminal defense practitioners, public defenders, law professors and law students.

While I am prepared to offer comment on salient portions of the proposed amendments, I would first like to address several relevant, recurring themes that those members of NACDL who have studied these and prior sets of amendments wish to note. Most of these items are not new; we and others have said much of what follows before. Because of their continuing significance, however, these matters clearly bear repeating.

While the total number of amendments now being proposed has been reduced from years past, the changes are still most numerous and significant. Even for those of us whose practices are limited to this area of the law, it is difficult to keep up with and keep track of a set of rules that keeps changing. Given the huge number of guidelines cases being decided each week by the courts of appeals, the problem of staying current is exacerbated. More importantly, the Commission and others are committed to undertake extensive studies on the impact of the guidelines on several different fronts and from several different perspectives; but, with the benchmarks constantly changing, it becomes more difficult to accurately assess what has happened and what the true consequences have been. NACDL thus implores the Commission to give serious consideration to permitting an amendment cycle to go by without offering any new amendments.

Next, for any future amendments, NACDL concurs with those

who have expressed the position that proposals being considered for the May 1st submission to Congress should be circulated and published for comment no later than December 15th of the preceding year. We recognize that the Commission has taken steps to commence the amendment process earlier and we applaud the fact that this year's proposals came out in mid-January. The format for this year's amendments, while still a bit confusing, is a clear improvement over prior submissions. The illustrations make it easier to decipher the proposed changes and the Commission has attempted (although not always succeeded) to give more elaborate and detailed reasons for most (but, unfortunately, not all) of the amendments. The Commission can and should do more.

For example, at several places throughout the package, the Commission makes reference to various studies and other documents available for review at the Commission's offices. Since it is most difficult for all but a very few to come to Washington to inspect and review such materials and since the Commission will not provide copies of same to requesters, it is clear that more detail as to the contents of those studies and documents should be included within the amendment notice itself. Alternatively, those items themselves should be published and distributed separately.

Furthermore, the Commission remains dutybound to conduct extensive empirical research in monitoring sentencing trends

under the guideline system in order to best reflect how this new and ever-changing process is working. Prior to the development of the initial set of guidelines, the Commission reviewed previous sentencing practices through statistical analysis based upon summary reports of approximately 40,000 convictions and 10,000 Presentence Investigation Reports. Without more realistic access to those studies and reports and with still no acceptable access to the raw data upon which the baselines were initially developed, it is difficult, if not impossible, to evaluate the need for many of these amendments and to get a good handle on the real impact that they will have.

Similarly, we have not discerned any evidence that the Commission has or is considering guidelines which "reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. §991(b)(1)(C). Moreover, but maybe most importantly, since the vast majority of the substantive changes appear to significantly lengthen the amount of actual prison time required to be served under the guidelines, there is no indication that the Commission has complied with its statutory mandate to consider the impact of the guidelines and amendments on prison population. (See generally 28 U.S.C. §994(g). If prison impact studies have been accomplished, they should be included within the amendment package to be read along side the proposals.

Next, as in prior sets of amendments, the Commission seeks to further limit the dwindling ability of the trial courts to exercise discretion at sentencing by proposing changes to guidelines where the courts might otherwise employ a departure or exercise sound judgement. NACDL is concerned that the Commission is, at best, overreacting and, at worst, attempting through the amendment process to become the ultimate guideline court of last resort. The criticism here should also be read as a function of the above articulated request to limit changes in the Manual generally. According to the Commission's own statistics and pronouncements, departure activity remains most limited. Facts and circumstances differ greatly from case to case and courts should be ordinarily able to distinguish the heartland when it sees it and to act accordingly. And the courts themselves should be given a chance to disagree and to work things out as the issues percolate through the system.

Finally, NACDL has continued to note with interest the apparent impact of the Department of Justice on this judicial branch agency. While we applaud the fact that a federal defender has been serving on loan as part of the staff and while we are most pleased with the development and growth of the Practitioners' Advisory Group, more balance is still needed to assist and inform the deliberative process. We believe that the Commission should support such a goal by seeking the establishment of an Ex Officio position for a defense

practitioner or by working to have the next commissioner vacancy filled by same.

Proceeding to the merits, I will address certain of the amendments that have been proposed. However, no inference should be drawn with respect to any amendment which is not specifically addressed. Given the fact of the March 18, 1991 deadline for written comments, the Association will forward additional materials and discussion as appropriate.

1. As to the initial question posed by the Commission concerning the retroactivity of the proposed amendments, NACDL believes as a general proposition that all guideline amendments should be retroactive when they benefit the defendant, but otherwise should be prospective to avoid ex post facto problems. Certain changes, although labeled as mere clarifications, will have a very real impact in increasing sanctions; these, likewise, should be applied prospectively.

**2. §2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts (Amendment No. 1)**

The proposed changes here highlight an important issue previously not addressed by NACDL: whether the mere fact that the statutory maximum has been increased can serve as the sole justification for a guideline amendment. We believe that, while



such Congressional action should be an important factor in the overall decision to amend, the Commission must demonstrate empirically and otherwise why such changes are warranted. And the Commission must next demonstrate why the new specific offense characteristics are the kinds of relevant factors that should be used to differentiate amongst cases similarly to the process that was used to craft the original set of base levels and specific offense characteristics. While Option 2 (with a 2 level increase) appears the more appropriate and reasonable approach and would be less factually complicated to apply, the Commission has not provided enough justification to permit the making of a more informed assessment.

3. Amendment No. 4, with changes to §§2B1.1, 2B4.1, and 2F1.1.

We recognize the fact of the specific instructions contained in the Crime Control Act of 1990, and we acknowledge that such instructions are preferable to the Congress's previous preference for straight statutory mandatory minimums, because they at least permit departures where appropriate in extraordinary cases.

However, we express our hope that whenever Congress takes such action to clamp down on the "Crime du Jour"--which commonly occurs without benefit of any hearings or opportunity for public comment--the Commission will move subsequently to inform the Congress of any possible adverse consequences, particularly with

respect to two of the Commission's most important mandates: to insure that any guideline changes do not upset the proportionality in other sections of the matrix, and to minimize the effect on prison overcrowding.

**4. §2B3.1 Robbery (Amendment No. 7)**

As to each of these proposals, NACDL is concerned that the emphasis is misplaced. The plea bargaining process remains essential to the overall successful operation of the criminal justice system, most often with good and sufficient reasons available to support a variety of charging decisions that cannot be adequately captured and described within the sentencing guideline context. If there really is a problem with disparate application amongst various U.S. Attorney's offices as to these matters, that is a problem for the Department of Justice to address. And the Department should be permitted to make such an attempt before the Commission moves to amend the guidelines. In other similar contexts, the Commission has not moved to rectify such disparity even where the NACDL and other entities have brought same to its attention. Further, it is not at all clear whether or how the Commission study on this topic referred to in the amendment materials supports the proposals being put forward.

As to the proposed increase under 7(A), NACDL opposes such a

change. The Commission has yet to demonstrate with any data why the current provisions do not adequately reflect the seriousness of this offense; the mere statement is insufficient. As to the proposed change under 7(B), NACDL is opposed for the reasons stated above. As to 7(C), NACDL is opposed out of a concern that it will encourage prosecutors to pick and chose amongst potential robbery counts, leaving the "weaker" cases to get factored into the sanction equation under a less stringent preponderance standard.

5. §2B3.2 Extortion by Force or Threat of Injury or Serious Damage (Amendment No. 8)

NACDL opposes each of the proposed amendments here, especially since the Commission has not provided any basis as to why the increases are necessary and in the amounts proposed, as to what the data has demonstrated in that regard and as to why departures are not otherwise appropriate to sanction these unusual cases. We are particularly concerned with the vagueness of some of the language contained therein. Under 8(A), an "implied threat" must be more particularly limited to avoid its application to almost every extortion situation; under 8(C), the terms "organized criminal activity," "over time," and "a period of time" are too ambiguous to avoid disparate application. As to the question raised under 8(D), it would appear that §5K2.5 should be sufficient here to capture other losses to the victim.

6. Amendment No. 9 with changes to §§2C1.1 and 2C1.2

While reserving comment as to 9(A), NACDL opposes the proposed changes under 9(B). The Commission provides no reason nor any basis for its determination that the present sanctioning rubric is less appropriate than what is being proposed. Given the fact that the Commission otherwise sanctions the abuse of a public position of trust with a two level increase, the eight level increase already within this guidelines seems more than adequate without an additional rationale being provided to go any higher.

7. Proposed Amendment 11

The consensus of defense practitioners indicates that drug quantity frequently overstates an offender's actual or relative culpability. As a threshold issue, the impact of mandatory minimum sentences renders this anomaly largely unavoidable. However, to the extent permitted by the offense of conviction, NACDL believes that the Commission should seriously consider the development of guidelines and implementing policy statements or commentary to broaden the discretion of sentencing judges in rating the relative severity of drug offenses according to offense and offender characteristics without being dominated by issues of quantity.

In the specific context of the mitigating role adjustment (§3B1.2), the guidelines frequently fail to adequately account for the actual nature and extent of the defendant's participation in the offense. One of the principal factors used in determining a defendant's level of participation or role is culpability, a complex factual determination rather than a conclusion of law. U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989). As a factual determination, however, appellate courts are loath to reverse a sentencing judge's findings here unless they are clearly erroneous.

Reacting to this problem, departures are seemingly available where the defendant's role in the offense is inadequately accounted for under Chapter 3B of the guidelines. The adequacy of the role adjustment may be a factor for departure under 18 U.S.C. §3552(b). See e.g. U.S. v. Crawford, 883 F.2d 963 (11th Cir. 1989).

However, as noted in Professor Deborah Young's observations entitled "Rethinking The Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990), the various mechanisms used to date "come nowhere close to meeting a standard of proportionate justice." Id. at 64. While Ms. Young cites two examples of trial courts attempting to avoid excessive quantity based sentences, she notes that such "visible" adjustments are rare. "Instead, efforts to adjust

sentences may be achieved in less visible ways, often as part of a plea, when there is a consensus among the prosecutor, defendant and court." Id. at 65.

In short, the defense bar firmly believes that there is clear over-punishment due to an over-reliance on quantity of drugs in determining the applicable offense level as well as an insufficiency of the reductions under §3B1.2. In considering potential amendments to the guidelines in this context, NACDL urges to Commission firmly adhere to the principle of parsimony codified at U.S.C. §3553(a) to develop a broadly based approach that will allow the courts to impose sentences which are "sufficient, but not greater than necessary" to achieve the purposes of sentencing. Renewed efforts to eliminate mandatory minimums must be undertaken to permit the guidelines to accomplish all the ends they were created and designed to accomplish. Offense level capping mechanisms (like that contained in proposed Amendment 15) should be explored and their applicability to certain offense/offender characteristics crafted. Additional, larger adjustment levels in Chapter Three should be considered. And some specific departure language capturing mitigating fact pattern scenarios should be prepared.

**8. §2D1.8 Renting or Managing a Drug Establishment  
(Amendment No. 15)**

For many of the reasons addressed within the comments to proposed amendment 11 above, NACDL strongly supports Option 1 and the concept of capping the sanctions for certain offenses as contained therein. We would like to see this rubric become a road revisited and well traveled in the future.

**9. §2D3.5 Violation of Recordkeeping or Reporting Requirement (Amendment No. 16)**

Without any express approval or disapproval of the offense level here, NACDL seeks clarification as to why the Commission has seen fit to offer guidelines for these misdemeanor offenses.

**10. §2J1.3 Perjury (Amendment No. 19)**

While Option 2 appears preferable, we question the need to amend the guidelines on the basis of such a small number of cases.

**11. §2J1.10 Harboring a Fugitive (Amendment No. 20)**

NACDL opposes this proposed new guideline. The "Reason for Amendment" section does not adequately explain how the harborer is presumed to know the fugitive's pending charge. The existing provision, which ties this conduct to Accessory After the Fact, requires proof of such knowledge. Such a provision appears to be

more consistent with the concept of due process.

**12. Chapter Two, Part K - Offenses Involving Public Safety**

While NACDL applauds the Commission's stated intent to simplify the guidelines concerning explosives and firearms in Amendments 21 and 22 by consolidating several sections into two new sections, the overall impact of these changes is difficult to follow and evaluate, and the explanatory materials provide little guidance. While generally opposed to the proposed base offense level increases and while expressing concern over the consequences of relying on real offense conduct especially in the context of these offenses, we reserve further comment until we have had an opportunity to examine the Commission's firearms and explosive materials report.

**13. Part L - Offenses Involving Immigration, Naturalization, and Passports (Amendment No. 23)**

NACDL expresses concern over the proposed change to §2L1.2 which would treat a foreign conviction as an aggravator, even though the country of conviction might have failed to afford the defendant with some of the due process guarantees/requirements. Part of the concern here relates to how the Commission treats foreign convictions in other contexts and the lack of a rationale to differentiate between the two approaches. See §4A1.2(h).



14. §2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors (Amendment No. 25)

Given the small number of cases that are prosecuted annually here, NACDL believes that the Commission should permit additional experience with the existing guidelines before embarking on the changes as proposed.

15. Proposed Amendments Concerning Chapter Four (Amendment No. 29)

As to Proposed Amendment 29(A), NACDL opposes adding criminal history points for sentences that included periods of unsupervised probation. While the Commission indicates that this proposal is a mere clarification, we are concerned that it is more than that; it curtails the current judicial flexibility to differentiate rationally between the severity of offenses for which prior probationary sentences have been imposed. We also object to the disparate impact vis a vis more affluent defendants sentenced to pay fines rather than bear a probationary sentence.

As to proposed Amendments 29 (B) and (C), we oppose the changes as unnecessary. §4A1.3 appears adequate to address these rare situations, providing the sentencing judge with the discretion to take into account facts and circumstances peculiar to the case being considered rather than mandating an enhanced

term of confinement in all cases.

NACDL opposes proposed Amendment 29(D), particularly as to new subsection (n): the failure to report for a sentence is distinctly different from escape from custody and should not be equated. Again, §4A1.3 appears sufficient to address these matters.

NACDL opposes all the remaining proposals under Amendment 29 as either unnecessary or as unnecessarily harsh.

**16. Proposed Amendments Concerning Chapter Four (Amendment No. 30)**

While Option 2 is the least objectionable of the three alternatives, we oppose making any changes concerning the assignment of criminal history points for related cases until the Commission has completed its recidivism study. In the interim, we believe that §4A1.3 is adequate to address the Commission's evident concerns.

**17. Chapter Five, Part A - Sentencing Table (Amendment No. 31)**

While we are concerned over the extent and breadth of some of the departures imposed in this regard, we question the need to

tinker with the Sentencing Table as it relates to defendants with high numbers of criminal history points and strongly opposes each of the options. As noted above in related contexts, we believe that §4A1.3 is presently still adequate to address this problem and to provide the courts with the opportunity to weigh and consider all the facts and circumstances related to a particular offender's criminal history. The Commission has heretofore failed to provide data within the amendment package as to the number of cases where the need for such changes might have occurred and has failed to demonstrate what the impact of each of the options might have been in those instances.

Combining the proposals here with those recommended in amendments 29 and 30 would significantly lengthen sentences without any clear rationale. At some number of criminal history points, this particular offender characteristic reaches the point of diminishing returns and cannot rationally support increasing sanctions any further. Without more information on the inadequacy of current procedures to handle extensive criminal histories through departures, no changes should be made.

**18. §5E1.1 Restitution (Amendment No. 32)**

NACDL is opposed to this proposed change to the restitution guidelines because of its mandatory nature. Nowhere is it made clear why the present discretionary provisions are inadequate.

**19. §5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment (Amendment No. 33)**

NACDL opposes changing this guideline from its present form, but sees Option 1 as the more acceptable alternative. While the Commission explains that this guideline has been criticized as leaving too much discretion to the sentencing court, it does not either identify these critics or document the adverse consequences of the present structure. How many cases have required such an exercise of discretion? How many were "correctly" decided? How many cases involved an abuse of discretion and in what increments?

**20. Chapter Five, Part H - Specific Offender Characteristics (Amendment No. 34)**

NACDL most strongly opposes the proposed changes in this section of the guidelines.

While the statement of reasons here speaks of the need to correct numerous inconsistencies and ambiguities, we are concerned that the goal is simply to further restrict the already overly limited exercise of judicial discretion, and to effectively overturn isolated court decisions with which the Commission obviously disagrees. Without statistics, without prison impact statements and without any reasons why the current

restrictions contained within the applicable policy statements are insufficient, the Commission is seeking to exclude the consideration of such factors as age, mental, emotional and physical conditions from being realistically factored into the sentencing decision even in unusual situations when those factors should rationally be considered.

Individual objections to each of the subparts here can be offered, but our broader--and greater--concern is that the sentencing process is desperately in need of more "humanizing," not less.

We firmly believe that the congressional mission of eliminating unwarranted sentencing disparity does not necessitate the elimination of all sentencing disparities; those which are rationally related to the individual's offense and level of personal culpability must be not only tolerated, but encouraged. By shutting off such options and mandating "cookie cutter" justice for dissimilarly situated individuals convicted of committing the same offense, the Commission, we fear, is creating a new breed of disparity.

We believe it is no better to treat offenders arbitrarily differently than to treat them arbitrarily the same.

**21. §5K1.1 Substantial Assistance to Authorities**

(Amendment No. 35)

While NACDL applauds the addition of language addressing those circumstances where the Government in bad faith breaches an agreement to file the requisite motion here, we believe that this guideline should go further to both clarify that §5K1.1 applies to both mandatory sentences and mandatory minimum sentences. And we believe that the Commission should adopt the position that the sentencing judge is not prohibited from going below the non-mandatory guideline minimums, where rationally supported, on the basis of a defendant's motion. We and others have made that argument before and we renew it here again.

**22. Miscellaneous Substantive, Clarifying, Conforming and Technical Amendments: (Amendment No. 37)**

As to proposed amendment 37(F), the Commission has offered no reasons why this guideline provision is being revisited and why current language is insufficient. NACDL opposes the change in that regard. Further, as we believe that the characteristic is being applied too broadly and that this proposal would further exacerbate that situation, we urge the Commission to reject it.

As to proposed amendment 37(I), we are concerned about the imposition of substantial penalties for offense involving the equivalent of .0125 grams of marijuana, and about the equating of

heroin and marijuana for purposes of setting such equivalencies.

As to proposed amendment 37(P), NACDL opposes this change. §4A1.3 can be used to address this problem and will still permit the sentencing judge to consider all relevant facts and circumstances.

As to proposed amendment 37(T), NACDL opposes the change as unnecessary. The Commission's mission would be better served by concentrating on the fleshing out of a definition of "sophisticated means" rather than by infecting another guideline with this ambiguous term.

As to proposed amendment 37(X), NACDL supports all efforts to provide additional grounds for downward departures. As to §5K2.15, however, the requirement that "full" restitution must be made before this departure can be considered discriminates against defendants who are financially able to only partially make the requisite payments; we believe that it should apply also to those who make "good faith efforts" to make such restitution prior to the discovery of the offense.

On behalf of NACDL, I thank you for this opportunity to offer our comments, suggestions and criticisms and look forward to our continuing relationship with the Commission on these and other matters.

**STATEMENT**

of

**HON. VINCENT L. BRODERICK, CHAIRMAN,  
COMMITTEE ON CRIMINAL LAW & PROBATION ADMINISTRATION  
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

and

**HON. MARK WOLF, CHAIRMAN  
SUBCOMMITTEE ON SENTENCING GUIDELINES AND PROCEDURES**

before the

**UNITED STATES SENTENCING COMMISSION**

March 5, 1991

We appreciate the opportunity to appear before the Commission to comment on various proposed amendments to the Sentencing Guidelines. We speak on behalf of the Committee on Criminal Law and Probation Administration, a Committee of the Judicial Conference of the United States. Federal judges are in a unique position to assess the Guidelines. We see them in operation every day. We bear primary responsibility for their implementation. Because of this close involvement, the Judicial Conference, through our present Committee and its predecessors, has maintained a working relationship with the Commission. We recognize that the Sentencing Guidelines are a permanent part of the federal criminal law landscape, and we are anxious to work with the Commission to make them as effective as possible. We welcome this and other opportunities to work with the Commission in the development of a fair and workable guideline system.

We want to emphasize this point of "development." Congress in establishing the Sentencing Commission recognized that there would be a process of development. Thus it conferred upon every sentencing judge the authority to depart from the Guidelines, up or down, if the judge found that there existed a circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the relevant Guidelines, provided that the judge also found that the existence of that circumstance should result in a departure. This concept of



departure is essential to the future resiliency and health of the Guidelines. Departures will be considered by the Sentencing Commission in refining and fine-tuning the Guidelines in the future: the interplay between departures and the Sentencing Commission's oversight will result, in time, in the Sentencing Guidelines reflecting, in fact, a process of common law growth.

In September of 1990, the Judicial Conference of the United States sent to the Commission eight recommendations for amendments to the Guidelines. These recommendations, which were formally adopted by the Judicial Conference, were addressed to problems identified by members of our Committee, drawing on the experience of sentencing judges. Many of these same problems had also been identified by the Federal Courts Study Committee (FCSC). A principal problem which these recommendations addressed was a lack of flexibility on the part of the judge at the low end of the Guidelines. Most judges agree with Congress that the Guidelines should "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Most judges also believe that under the Guidelines there is too little flexibility in sentencing first offenders. A copy of the Judicial Conference's recommendations, which were delivered to the Commission in September 1990 and which we understand are presently under study by the Commission, is attached to this statement.

At the urging of the Committee on Criminal Law and Probation Administration Committee, the Judicial Conference took no action on several measures with respect to the Sentencing Guidelines urged by the FCSC, such as the recommendations to make the Guidelines merely advisory, and to establish a distinct standing Committee to study proposed Guidelines. Instead, the Judicial Conference authorized our Committee to recommend specific guideline amendments, as needed, to address problems we perceived with the Guidelines, and to comment directly to the Commission, when we deemed it appropriate, on Guideline matters.

Today we are faced with 51 pages of amendments to the Guidelines proposed by the Commission in January of 1991. Obviously, the time has been too short for any comments we make to reflect a position with respect to these proposed amendments which has been taken by the Judicial Conference, which does not meet until next week, or even by our own Committee, which does not meet until June. Thus, what our comments do reflect are the views of our Subcommittee on Sentencing Guidelines and Procedures.

We derive from these proposed amendments the strong sense that the members of the Commission and we in the judiciary seek the same goals: the development of a system of sentencing which is fair and efficient, and which reflects, to the extent possible, proportionality, uniformity, and honesty. The goal is not easy to achieve. Indeed Congress has charged the Commission in carefully chosen words to recognize that disparities (but not unwarranted disparities) will persist, and that the establishment of general sentencing practices does not eliminate the need, on occasion, for a judge to consider individualizing disparities:

“The purposes of the United States Sentencing Commission are to---

(1) establish sentencing policies and practices for the federal criminal justice system that---

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(B) provide certainty and fairness in meeting the purposes of sentencing , avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

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28 U.S.C. §991(b).

We understand that we are not the only constituency with which the Commission must be concerned. The Commission in fact is directed, in fulfilling its duties and exercising its powers, to consult not only with the Judicial Conference, but also with representatives of the Bureau of Prisons, the Department of Justice, and the Federal Public Defenders. But we draw attention to the numbers of amendments which have been made since November, 1987, and we suggest that some attention need be given to whether the present amendment process lends itself to meaningful input by any of the constituencies.

In the comments which follow we direct our attention to three areas which the proposed amendments point up: that of the amendment process; lack of flexibility in sentencing; and plea negotiation.

## The Amendment Process

Understanding the goals of the guideline system. In order to decide what amendments are needed, we need to understand what the Guidelines are trying to do, and how well they are working. The Guidelines are part of a complex system. Their effectiveness depends on their interaction with other sentencing statutes and with the policies and practices of prosecutors, probation officers, defense attorneys, and judges. Attempts to correct problems in one area can create new ones in another. No significant amendment can be considered in isolation.

To weigh the costs and benefits of the present proposals, we need to understand how they fit into the Commission's view of problems with the current system, and its vision of a better one. The Commission outlined the purposes of the Guidelines and its resolution of major policy issues in Chapter 1 of the Guidelines Manual. It has since published annual reports containing data on the operation of the system. But hard data on how the system as a whole is working are sorely needed. The proposals before us are not accompanied by a comprehensive evaluation of the Guideline system, nor by a comprehensive explanation of how the amendments will help accomplish the Commission's goals. The brief "Reason for the Amendment" published after each proposal is only somewhat informative.

The amendments appear to be piecemeal. This would not be unusual in cases of technical amendments or those that clarify a simple ambiguity in application, though a piecemeal approach still creates problems for judges and probation officers and prosecutors and defense counsel who must struggle to stay abreast of each round of changes. Some of the amendments seem to be reactions to individual court decisions rather than part of a comprehensive program of refinement and evolution. Some amendments appear designed to advance a particular policy agenda--- further to reduce prosecutorial and judicial discretion, or to ensure real-offense sentencing without regard to offender characteristics. But there is no public study of plea bargaining, no comprehensive analysis of how judges have exercised their departure power, and no invitation to public debate on whether this is the direction in which the system should be going.

The Commission has requested comment on several areas of special interest to the judiciary. Proposals concerning the appropriate sentence for multiple counts of perjury (proposed amendment 19) would undoubtedly benefit from the comment of judges familiar with such cases. The organizational Guidelines now under consideration raise a multitude of

issues of concern to the bench. We cannot arrange a helpful response to your requests, however, unless we are given sufficient time and data. Absent personal experience in these areas, and absent time to elicit views of judges who have had such experience, and absent the data which underlie the making of the proposals, we cannot usefully respond (except as to organizational proposals, to the limited extent we already have).

We understand that to a certain extent the amendment process is driven by statutorily ordained time tables, but we strongly suggest that a more extended public gestation period for analysis and development of meaningful comment on proposed amendments will in the long run be in the interests of the Commission, and will result in the development of the Guidelines in the directions anticipated by Congress.

Our suggestion is, therefore, that there should be a more extended period for public comment on proposals by the Commission to amend the Guidelines. We also urge the Commission to propose amendments in related packages. This would permit the "Reason for Amendments" section to contain a more general discussion of the problems and policy goals each package is designed to address.

The Commission has proposed amendments in areas that we believe are the unique province of the court, and which are the subject of rapidly developing case law. For example, proposed additions to Chapter 6 of the Guidelines state the Commission's view of what standard of evidence is required by due process and who should bear the burden of persuasion (proposed amendment 36). We suggest that the development of sentencing procedures are beyond the Commission's statutory authority, and that difficult questions of procedural fairness are best left to resolution through traditional case-by-case adjudication.

We believe the Guidelines are here to stay, and that they work. As developed under the Commission's empirical approach, they tell judges what the average imprisonment for various types of crimes and offenders has been. They thus help judges identify in each case the fair sentence, and they restrain those who might otherwise have imposed an atypical sentence due to lack of familiarity with general practice or idiosyncratic sentencing philosophy. The departure power gives judges the additional discretion they need when the Guidelines have not taken into account an important factor present in a given case. The Guideline system will be accepted and faithfully implemented when it adheres to this approach.

The Guidelines will create problems if they attempt to limit the judge's ability to fashion a fair sentence. The Judicial Conference recommendations are aimed at giving judges greater flexibility to tailor sentences to the individual, either within the guideline structure or through reasoned departure. They are largely aimed at the first offender end of the sentencing scale, where the considerations are prison or no prison. They seek to ensure that explicit incentives will be found within the Guidelines so that prosecutors will not resort to, and judges will not accept, plea agreements that misrepresent the real offense. These concerns need attention if the system is to be fair and workable. The proposed amendments do not adequately address them: certain proposals may exacerbate the problems or create new ones.

We turn now to a consideration of certain of the current proposals that affect sentencing flexibility and the plea negotiation process.

### Flexibility in Sentencing

Offender Characteristics. A major goal of the Judicial Conference's recommendations was to increase judges' flexibility to take into account offender characteristics. We note with approval that the Commission has proposed eliminating language in Chapter 5, Part H, that attempts to keep judges from considering offender characteristics when choosing a sentence from within the Guideline range (proposed amendment 34(A)). However, the overall and ultimate thrust of the Commission's proposed amendments may be to prevent or deter judges from considering individual characteristics.

Thus Recommendation 5 of the Judicial Conference asked the Commission to accord judges greater flexibility to consider the youth of an offender, but the Commission has proposed the opposite (proposed amendment 34(a)). Where the Judicial Conference asked for greater flexibility to depart if an offender has combinations of characteristics that make a sentence outside the Guidelines better suited to the purposes of sentencing (listed at 18 U.S.C. 3553(a)), the Commission proposes to add to the list of characteristics that *cannot* be considered by eliminating consideration of characteristics such as exemplary military service and good works, which many judges believe are relevant to the purposes of sentencing (proposed amendment 34(C)).

Many of the proposed amendments to Part H appear designed to "plug holes" that have been opened by judicial departures from the

Guidelines. It has always been our view, which we understood that each of the Commissioners shared, that departures are crucial to the creative evolution of the Guidelines. If this is so, is it useful to correct departures with which the Commission may disagree by immediate amendment of the Guidelines? Will this not have a chilling effect upon other judges who may contemplate departures in conscientious attempts to accommodate the Guidelines to individual offenders? Is the departure power so subject to abuse that an amendment is required instructing judges that "physical...appearance, including physique," is not ordinarily a basis for departure? (Proposed amendment 34(B).)

The Commission's proposed restrictions on the consideration of offender characteristics go well beyond those required by 28 U.S.C. 994. They will stunt the development of a common law of sentencing, as envisaged in the Sentencing Reform Act. Departures are now subject to review by the Courts of Appeals, which have required that judges give detailed statements of reasons and that the degree of departure be structured. We ask the Commission to allow, and indeed encourage, this emerging area of law to develop. We urge you not to respond by amendment to every case where a judge has considered a factor the Commission believes is inappropriate.

We also ask that the Commission adopt the Judicial Conference's Recommendation 5 to add an application note to Part H of Chapter 5, which will make it clear that factors that are not ordinarily relevant "may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case:" This would help reinforce the position that while offender characteristics are not *ordinarily* relevant, they may be considered in the unusual case.

We applaud the Commission's addition of two new policy statements on grounds for departure; restitution prior to the discovery of the offense and voluntary disclosure of the offense (proposed amendment 37(x)). These additions should add needed flexibility to recognize the remedial efforts of offenders. However, as proposed the amendments contain so many conditions that they may as a practical matter actually limit the availability of departure on these grounds. The statement on restitution limits the departure to situations where there has been full restitution. We urge the Commission to also permit significant restitution to be recognized, particularly since restitution may be limited by ability to pay. Similarly, the limitation to offenses that are totally unplanned and isolated seems unnecessary. The statement on voluntary disclosure limits the departure to

cases that were unlikely to have been otherwise discovered. Few offenses fall into this category. Early disclosure can limit harm and should be encouraged. We urge the Commission to allow judges to tailor the departure to the individual circumstances of each case when a defendant has made significant remedial efforts.

Sentencing Options. The Guidelines not only radically reduce the proportion of offenders for whom probation is an option, but they also virtually rule out judges' ability to consider many of the factors they believe are most important to the decision of prison or probation: factors such as the threat to the community posed by the defendant; his potential for rehabilitation; the effect imprisonment is likely to have on the defendant's family, and on his post-release life. Consequently, this is the area where acceptance of the Guidelines by judges has proven most difficult, and where judges see the greatest need for change. This is especially so since many judges believe that the present Guidelines do not conform to the statutory requirement that they "reflect the general appropriateness of imposing a sentence other than imprisonment" for first offenders (U.S.C. 28 994(j)) nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons..."(U.S.C. 28 994(g)).

The Judicial Conference recommendations now pending before the Commission seek to increase the availability of sentencing options at lower guideline ranges, especially for first offenders. They recommend that the Commission redefine the split sentence (recommendations 1 and 2); that the Guidelines provide a probation option for Category I offenders up to offense level 8 (recommendation 3), which would add two new cells to the probation range; and that the Guidelines provide for the option of probation with confinement conditions for 10 additional cells in the sentencing table (recommendation 4). We ask the Commission to consider as soon as possible these, and other recommendations from your Alternatives to Incarceration Task Force, that seek to expand sentencing options with particular emphasis on the lower end of the sentencing range.

This round of amendments proposes a new category VII for offenders with very serious records (proposed amendment 31). The Commission's monitoring data show there have been 13 upward departures from Category VI based on the seriousness of the offender's criminal record. We suggest that the Commission allow judges to exercise their departure power as needed rather than build more rigidity into the sentencing table. We also urge the Commission to consider the Judicial Conference recommendation to amend policy statement §4A1.3 to

encourage judges to consider both the length and nature of a defendant's criminal record so that departures protect the public from the most dangerous repeat offenders (recommendation 6).

Individualizing Culpability. The Commission has requested comment on "whether the Guidelines place too great a reliance on drug quantity in punishing drug offenders, particularly for less culpable aiders and abettors" (proposed amendment 11). They do. The Guidelines often force judges to impose draconian sentences on "mules" or other marginally involved participants which are grossly disproportionate to their culpability or threat to the community. We applaud the Commission's examination of this issue.

Our committee in fact struggled with this problem when developing the Judicial Conference's recommendations to the Commission. At that time we studied two approaches: 1) Providing a 6-point reduction under the mitigating role guideline §3B1.2 for "passive participants," or 2) limiting the amount of drugs included in a defendant's relevant conduct to that which a defendant was actually aware of, or might have foreseen. We preferred the second approach because the drug amounts included in defendants' relevant conduct are often so high, and so arbitrarily related to their culpability, that a fixed reduction from that level would still not bear a rational relationship to the punishment they deserve. We appreciate that concepts such as "foreseeability" have problems of their own, however, and share the Commission's interest in finding some principled way of defining the class of less culpable defendants and assigning appropriate punishment.

In proposed amendment 15, the Commission introduces a third approach that might be used for this problem: 3) Cap the base offense level for defendants playing limited roles in various types of crimes. For example, if the defendant has "no role other than renting or allowing use of the premises," (proposed amendment 15, option 1) then the offense level is 4 levels below the table from §2D1.1, but not greater than 16. A similar amendment might work for defendants having "no role other than delivery."

This is a problem which deeply disturbs judges, and we shall welcome the opportunity to work with the Commission and its staff in seeking a solution. This third approach has promise, but in the absence of more comprehensive analysis we are reluctant to endorse it at this time.



Relevant Conduct. The Commission's central principle for individualizing punishment and implementing "modified real-offense sentencing" (initial Guidelines Manual, page 1.5; phrase deleted in later amendments) has been the relevant conduct guideline §1B1.3. It permits judges to look beyond the counts of conviction to impose a sentence (within statutory limits) that is more appropriate to a defendant's actual criminal behavior. But how does one define the scope of conduct to be assessed against each defendant? The distinctions in the Guideline and its application notes have too often confused instead of clarified. And the Commission appears to be changing its own policies regarding the types of charge bargains to be respected by the Guideline. The esoteric distinctions and shifting policies have led to serious confusion and disparate application.

In some cases, the relevant conduct principle has appeared to include too much. The initial training provided probation officers often led them to assess to each participant the total harm caused by a criminal enterprise. Later training and Guideline amendments emphasized that relevant conduct is not necessarily the same for each participant, but how to draw the line has proved troublesome. The Guideline instructs that all acts actually committed or "aided and abetted" or for which a defendant is "otherwise accountable" shall be included in the base offense level (§1B1.3(a)(1)). For so-called "aggregable" offenses, any conduct that is part of a common "course of conduct" or "scheme or plan" as the offense of conviction is included (§1B1.3(a)(2)). For jointly-undertaken criminal activity, judges are encouraged to draw lines based on "foreseeability" and the "scope of the defendant's agreement" (application note 1). Since aggregable crimes such as the importation of drugs are also often jointly undertaken, there appear to be confusing if not competing definitions governing the scope of each defendant's culpability.

In other cases, the principle has appeared to include too little. The Commission is apparently concerned that the common "course of conduct" or "scheme or plan" principle has not always led to enhancement for possession of a firearm unless it was present during the act constituting the count of conviction (proposed amendment 37(F)). The proposed change, however, would do little to clarify the real cause of the confusion--the relevant conduct Guideline. What we need is clarification of how the distinctions in that Guideline are to work for firearms possessed by co-conspirators. If the firearm was used by one defendant in the course of a common plan to import drugs, but was not part of the defendant's agreement, is it included? What if the defendant was not aware of the gun, and could not have foreseen it? We urge the Commission not to expand the

cases when a firearm enhancement is to be applied without clarifying when it should be excluded.

Since the common "course of conduct" or "scheme or plan" principle is limited to aggregable offenses, prosecutors have been able to exclude from consideration at sentencing firearms or robberies that were part of the real offense conduct by reaching plea agreements that drop those counts. This latter problem is addressed by the Commission in this round of amendments (proposed amendment 7(C)). Regardless of whether the policy of reducing the effectiveness of this type of charge agreement is a good one, we are convinced that this method of doing so is not. The proposed amendment would add a special instruction to the robbery Guideline that creates yet another distinction specific to robberies---those that are, or are not, part of the "same series." This standard is parallel with, but not synonymous to, the common "course of conduct" or "scheme or plan" principle that applies to aggregable offenses. The use of a time interval to differentiate series seems arbitrary. The amendment would lead to very awkward application of the multiple count rules when the defendant is convicted of more than one robbery. We urge the Commission not to add confusing special cases.

The Judicial Conference's recommendation 7 was intended to help clarify some of the confusion surrounding relevant conduct. It sought consistent treatment of all types of offenses by moving the distinctions from Application Note 1 into the text of the Guideline. We urge you to consider it as part of a thorough re-examination of the language and structure of the relevant conduct Guideline. Also useful would be a clear statement of the current policy goals meant to be implemented through this Guideline, and how the distinctions it contains are part of a rational plan for the regulation of plea agreements as well as sentences.

### Plea Negotiations

Judicial review of plea agreements. A number of amendments in this and previous cycles move the Guidelines further toward a real-offense sentencing system. Cross-references to the drug tables added to the Guidelines for "Use of a communication facility" or "Managing a drug establishment" eliminate base offense level caps for these crimes and peg the punishment to the amount of drugs within the scope of relevant conduct. The Commission clearly has a legitimate concern; disparity is created if some defendants are arbitrarily allowed to plead guilty to a lesser offense when the real offense conduct was more serious. The

"Thornburgh Memorandum" to federal prosecutors states that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt about the government's ability to prove a charge for legal or evidentiary reasons." But there is an exception if an office is "particularly over-burdened" and there is little doubt that plea agreements that limit the defendant's exposure to punishment are still common.

The Sentencing Commission has encouraged judges to defer acceptance of all pleas pending receipt of the PSR and to reject agreements that fail to "adequately reflect the seriousness of the actual offense behavior." (Policy statement §6B1.2(a)) We know of no data on how frequently pleas are rejected, but reports from probation officers and judges around the country confirm our sense that many judges are reluctant to engage in detailed review of plea agreements. Many judges believe that charging and bargaining decisions are the province of the prosecutor. They question whether they have the authority or resources to review decisions not to bring or to drop charges. They do not want to re-open investigations, second-guess the prosecutor about the availability of persuasive evidence, or tell the government how to use its time.

Detailed review of plea agreements and implementation of real-offense sentencing will increase the burdens on judges. The FCSC found that 90% of judges believe the Guidelines have already made sentencing more time-consuming. The Commission initially moved away from a real-offense system because "it found no practical way...to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process" (Guidelines Manual 1.5). We urge the Commission not to change its policy toward charge bargains without a thorough analysis of the entire plea negotiation system.

Incentives for guilty pleas. A concern of our Committee and the FCSC is that the Guidelines may also increase the number of cases going to trial. The federal bench is already burdened with an increasing workload, especially in the criminal docket. Since historically about 90% of all cases are resolved with a guilty plea, a drop of even a few percentage points in this rate could dramatically increase the number of trials.

The Commission has reported that the Guidelines have had no effect on the percentage of cases resolved through guilty plea (Sentencing Commission Annual Report). However, the FCSC reported that half the judges surveyed stated that the Guidelines had decreased the percentage of guilty pleas in their caseloads, and that 70% of judges surveyed believe the Guidelines had reduced the incentives to plead guilty. Recommendation

8 of the Judicial Conference, which suggests that the Commission reconsider the "Acceptance of Responsibility" Guideline, was predicated on the assumption, which we believe is solidly grounded, that at the upper end of the Guideline range the incentives within the Guidelines are sometimes not adequate to induce a timely plea. Recommendation 8 would increase the incentives to plead guilty *within the Guidelines*.

Absent incentives within the Guidelines to induce pleas at the upper ranges, surrogate incentives may operate outside the Guideline system. For example, if charge dismissals become an ineffective incentive, prosecutors can resort to pre-indictment or collateral bargains that are virtually unreviewable, such as promises not to indict family members. In other cases, defendants may be misled into thinking they have won a bargaining concession, when in fact the relevant conduct included in the remaining counts incorporates all the conduct in the dismissed charges. Judges at the Sentencing Institute held for the Fifth Circuit last September were concerned about the poor "quality of justice" afforded these defendants. As defense attorneys become more familiar with the Guidelines, these deals may become less frequent. But can we say we have achieved honesty in sentencing when defendants are misled in plea negotiations?

In some districts the major tool to induce bargains is the departure under 5K1.1 for substantial assistance to the government. Our Committee engaged in lengthy consideration of problems created by this guideline. On the issue of whether a motion by the government should be required for this departure (proposed amendment 35), we concluded that requiring a motion would prevent courts from having to make difficult determinations of the extent of a defendant's cooperation. We are in substantial agreement with the Commission's resolution of this issue.

Encouraging meticulous implementation of the Guidelines. When the Guidelines attempt radical changes from traditional plea negotiation and sentencing practices, they encounter resistance from prosecutors and from judges. If the Guidelines don't provide adequate bargaining incentives, prosecutors may use their charging and bargaining discretion to avoid strict application of the statutes and Guidelines.

The jury is still out on whether the Guidelines have attained the acceptance and refinement needed to fulfill the purposes of the Sentencing Reform Act. Tables of so-called judicial "compliance rates," as found in the Commission's Annual Reports, tell us very little if the charges, facts, and Guidelines on which sentence calculations are based have already distorted the real picture of the defendant's conduct. We need a study at least as

comprehensive as that now underway by the General Accounting Office--- which compares the investigating officer's files, the original indictment, the plea agreement, the presentence report, and the final sentence. Only then can we answer the important question: Have the Guidelines truly eliminated unwarranted disparity without creating more problems than they solve?

If the Guidelines are to be strictly applied, we believe the Commission must accommodate, within the Guideline structure, the need of prosecutors and judges for negotiating and sentencing flexibility. The Committee's approach has been to work with the Commission for the elimination of mandatory minimum statutes, for the creation of explicit bargaining incentives and options within the Guidelines, and to encourage departure where appropriate. We undertake to continue to work closely with you as we both strive for a better federal criminal justice system.

RECOMMENDATIONS OF THE JUDICIAL CONFERENCE  
OF THE UNITED STATES TO THE  
UNITED STATES SENTENCING COMMISSION

Recommendation #1: Redefine the "Split" Sentence in a Probation Sentence

This proposed revision redefines the split sentence as the imposition of at least 1 month of imprisonment rather than the current requirement of imprisonment for at least one-half of the minimum term. The Judicial Conference believes that the proposed change would do little to diminish the punishment meted out to these offenders. The punitive value of short periods of incarceration is greatest at the start, with the "clanging of the prison doors," netting diminishing returns (at great cost) after that.

§ 5B1.1(a) Imposition of a Term of Probation

Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized: ... (2) if the minimum term of imprisonment ... is at least one but not more than ~~six~~ ten months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2)...

Recommendation #2: Redefine the "Split" Sentence in a Supervised Release Sentence

The rationale for redefining the split sentence for a supervised release sentence is the same as for a probation sentence. Currently, the definitions of this sentencing option are equivalent for probation and supervised release and in the proposed revision, the definitions would also correspond.

§ 5C1.1(c) Imposition of a Term of Imprisonment

If the minimum term of imprisonment ... is at least one but not more than ~~six~~ ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in § 5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e)

provided that at least ~~one-half of the minimum term,~~  
~~but in no event less than one month,~~ is satisfied by  
imprisonment.

Recommendation #3: Permit Straight Probation at Two Additional  
Offense Levels for Category I Offenders

Category I of the Criminal History Score includes first offenders. This recommendation permits probation without confinement conditions at two additional offense levels for this category only (i.e., moving two cells from Zone B to Zone A) by changing the current range.

Judges have the greatest sentencing flexibility when the guideline range permits, but does not require, straight probation. Within these ranges, the decisions of whether to imprison and, if not, what conditions to impose, are left to the discretion of the court. Since the guideline table is expressed in "months of imprisonment," and all of the ranges include a term of imprisonment, all cells in the table would seem to be subject to the statutory requirement that the maximum of the range not exceed the minimum by the larger of 6 months or 25 percent (28 U.S.C. 994(b)(2)). Therefore, the only way to increase the availability of probation without conditions specifically deemed the equivalent of prison is to increase the number of 0-6 cells in the guideline table. Accordingly, the Judicial Conference recommends a revision to Offense Levels 7 and 8 in Category I only.

In the Sentencing Table at Category I:

<u>Offense Level</u>	<u>Current Range</u>	<u>Recommended Range</u>
7	<del>1-7</del>	0-6
8	<del>2-8</del>	0-6

Recommendation #4: Combine Zone B and C in the Sentencing Table

This revision would combine Zones B and C to permit probation with community confinement/home detention conditions to substitute for imprisonment in 10 additional guideline cells. This change would remove the requirement for some term of imprisonment in cells with minimum terms of from 7 to 10 months, while maintaining the availability of the "split sentence" where it is now permitted.

§ 5C1.1(d) Imposition of a Term of Imprisonment

Delete this provision:

(d) ~~If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

Adoption of Recommendations 1 - 4 would modify the Sentencing Table at the lower end of the guidelines in the following fashion:

Offense Level	Criminal History Category (Criminal History Points)					
	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	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
A 4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
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
B 10	6-12	8-14	10-16	15-21	21-27	24-30
& 11	8-14	10-16	12-18	18-24	24-30	27-33
C 12	10-16	12-18	15-21	21-27	27-33	30-37
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
	↓	↓	↓	↓	↓	↓



Recommendation #5: Revise the Policy Statement Pertaining to Age

The Judicial Conference believes that judges need greater flexibility to consider age as a basis for departure or when determining length or type of confinement, and to consider other offender characteristics when present in unusual degrees or combinations.

The Commission's policy statements regarding age restrict judicial discretion beyond that required by the statute. Section 994(e) does not define age as a factor that is generally inappropriate for consideration in sentencing. But policy statement 5H1.1 directs that age is not ordinarily relevant for deciding whether a departure or the use of sentencing options may be appropriate (except that a departure may in some cases be appropriate for offenders who are "elderly and infirm"). Further, the Commission's restrictions on consideration of age are confusing in light of the distinctions found in 994(e). For example, the policy statement for age is more restrictive than the ones for factors statutorily restrained by the "general inappropriateness" standard. The Commission directs that family and community ties and employment record may be relevant to whether the use of sentencing options is appropriate while the policy statement for age states that it is not ordinarily relevant to either a decision to depart or for the use of sentencing options.

The following revisions are recommended to make the guidelines more consistent with statutory language and less restrictive in the use of offender characteristics in the sentencing decision.

5H1.1 Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. ~~Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines propose sentencing options.~~ Age may be a reason to go below the guidelines ~~when the offender is~~ if combined with another factor (e.g. young and naive or elderly and infirm) and where a form a punishment (e.g: home confinement) might be equally efficient as and less costly than incarceration. ~~If, independent of the consideration of age, a defendant is sentenced to probation or supervised release,~~ Age may also be relevant in the determination of the length and conditions of supervision.

Application Note (to Chapter 5, Part H):

1. Those offender characteristics that are not ordinarily relevant when determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, or the type of sentence to be imposed when the guidelines provide sentencing options, may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case.

Recommendation #6: Delineation of Policy Statements Pertaining to Departure for Dangerousness

The Judicial Conference is concerned that the guidelines do not give enough flexibility to depart upward based on offender dangerousness. The guidelines address the concept of dangerousness at two places: the Career Offender provisions (§ 4B1.1) and the Adequacy of Criminal History Category (Policy Statement § 4A1.3). The former, however, only applies when the current offense involves violence or drug trafficking. The latter addresses both the degree of risk and type of risk, and, although obviously contemplated as the vehicle for addressing dangerousness, is not explicit.

The proposed revision would clarify the Commission's position on dangerousness by dividing its current policy statement on the adequacy of the criminal history category into two parts, one focused on the degree of risk (i.e., over- or under-representation of the likelihood that the defendant will commit further crimes); the other, on the type of risk (i.e., if the defendant does re-offend, what type of crime is s/he likely to commit). In the following recommended amendment, current text that is moved rather than deleted is indicated by a strikethrough bracketed by asterisks.

§ 4A1.3 Adequacy of Criminal History Category:  
(Policy Statement)

(a) Degree of Risk If reliable information indicates that the criminal history category does not adequately reflect ~~\*the seriousness of the defendant's past criminal conduct or\*~~ the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (a-1) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);
- (b-2) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (e-3) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
- (d-4) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;
- ~~\*(c) prior similar adult criminal conduct not resulting in a criminal conviction.\*~~

A departure under this provision is warranted when the criminal history category significantly under-represents ~~\*the seriousness of the defendant's criminal history\*~~ or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults criminal acts, (3) ~~\*had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding,\*~~ (4-3) committed the instant offense while on bail or pretrial release for another serious offense or (5 4) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious extensive than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents ~~\*the seriousness of a defendant's criminal history\*~~ or the likelihood

example, if the court concludes that the defendant's criminal history of III significantly under-represents the seriousness or extensiveness of the defendant's criminal history, and that the ~~seriousness of the defendant's~~ criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

Recommendation #7: Include the Definition of "Otherwise be Accountable" from the Commentary in § 1B1.3 to the guideline.

The Judicial Conference proposes that the Sentencing Commission revise the relevant conduct guideline (1B1.3) and accompanying commentary to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

Commentary accompanying the guideline defines the phrase "otherwise be accountable" in (a)(1) as follows, "Conduct 'for which the defendant would be otherwise accountable,' as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced procured, or willfully caused." Foreseeability is also addressed in the commentary. The proposed amendment would make the Commission's definitions of "otherwise be accountable" and foreseeability part of the guideline itself.

In addition, these revisions would clarify that the foreseeability standard applies to (a)(2) aggregable offenses. At present, the first illustration in the commentary suggests that defendants who aid and abet a joint criminal activity are liable for the full amounts of drugs or money, notwithstanding

claims that they were not aware of and could not reasonably foresee the amounts involved.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

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

(a) Chapters Two (Offense Conduct) and Three (Adjustments).

- (1) all acts and omissions committed or aided and abetted by the defendant, ~~or for which the defendant would otherwise be accountable, or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan, that~~ occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
- (2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and amounts that were part of the same course of conduct or common scheme or plan as the offense of conviction, and of which the defendant was aware or which were reasonably foreseeable to the defendant.

Recommendation #8: The Sentencing Commission Should Consider Modification of the Offense Level Adjustment for Acceptance of Responsibility.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his

criminal conduct." The guideline appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.<sup>1</sup> The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.<sup>2</sup> It also appears that there were greater reductions where offenders faced longer sentences.

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and

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1. For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, \_\_\_ F.2d \_\_\_ No. 89-1799 (June 1, 1990).

2. The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

"related conduct." This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial Conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6

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3. There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, \_\_\_ F.2d \_\_\_, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.



**TESTIMONY OF PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR  
OF THE WASHINGTON LEGAL FOUNDATION  
BEFORE THE UNITED STATES SENTENCING COMMISSION  
MARCH 5, 1991**

**WASHINGTON LEGAL FOUNDATION  
1705 N STREET, N.W.  
WASHINGTON, DC 20006**

202-657-0240

Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a non-profit public interest law and policy center that engages in litigation and the administrative process in a number of substantive areas, including criminal law and judicial reform. I have testified before and submitted comments to the Commission on several occasions on behalf of WLF regarding the formulation of the guidelines, and appreciate the opportunity to express our views before the Commission again today.

While we have been generally supportive in the past of substantial periods of incarceration for drug offenders and those convicted of violent crimes, we are also concerned that the Commission's guidelines for non-violent and non-drug regulatory offenses, particularly in the environmental area under Part 2Q, have resulted in substantial periods of incarceration that are wholly unjustified and contrary to Congressional intent that the guidelines reflect the general inappropriateness of any incarceration for first offenders who have committed such regulatory or minor offenses. See 28 U.S.C. 994(j). As I will note in my testimony, some of the proposed guidelines for this cycle graphically illustrate the gross disparities between offense levels for certain serious offenses, such as drug offenses, and the current guidelines for minor regulatory offenses.

Because the Commission, to use its own words, "emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment," I intend to do just that by first making some general observations about the formulation of the guidelines, then commenting on a few of the proposed revisions, and finally, urging the Commission to revisit the environmental guidelines which are desperately in need of revision.

## I. General Observations on Guideline Formulation

The Commission has stated that the basic approach it used in devising the guidelines was "the empirical approach that used as a starting point data estimating pre-guidelines sentencing practice." Section 1A3. Indeed, this approach is consistent with the wishes of Congress. 28 U.S.C. 994(m)(requiring Commission to ascertain average sentences of pre-Guideline cases). In some cases, the current guidelines and the ones proposed for this cycle, do not reflect or reveal the empirical research or study conducted by Commission. This general concern was expressed at length by Samuel J. Buffone who testified before the Commission last year on behalf of the American Bar Association, and we believe those concerns remain legitimate ones. This problem is particularly acute with respect to the development of the environmental guidelines, but others could make the same argument with respect to the proposed revisions relating to bribery (Amendment 9(A): Sec. 2C1.1,.2), extortion (Amend. 8; Sec. 2B3.2) and other areas.

If the Commission has conducted a work study in particular areas, the Commission should explain its reasons as to why a departure from past sentencing practice is warranted. This is not only sound practice, but is suggested if not mandated by the Commission's own policy. Principles Governing the Redrafting of the Preliminary Guidelines, para. 6 (Dec. 16, 1986)("when departures. . . are substantial, the reasons for departure will be specified").

We also wish to make two recommendations related to this empirical issue that should be relatively easy for the Commission to adopt and would be of considerable help in utilizing the guidelines. One is to list the statutory sentencing range in the applicable statute or statutes which follows each guideline in the Commentary [e.g., for Sec.2D1.8 Renting or Managing a Drug Establishment, the Commentary would read "Statutory

Provision: 21 U.S.C. 856 (0-20 yrs.)]. The Commission currently provides this information under the listing "Background," but only in certain isolated cases. The other recommendation is to list, where available, the average sentence imposed for that category of offenses, preferably both pre-Guideline and the latest post-Guideline figures, if available. For example, the Commission's 1989 Annual Report, Table VI (attached) lists the average sentence for auto theft under the guidelines to be 17 months. The Commission presumably has the figure as to what the average sentence was before the guidelines. While listing these two figures would admittedly constitute rough indicators of pre- and post-Guideline practice, we believe that they would nevertheless assist the courts, probation officers, and practitioners in utilizing the Guidelines, especially since the Commission's Annual Reports, which contain most of this valuable information, are not readily available across the country as are the guidelines themselves.

As a final observation on the promulgation of the guidelines, many have expressed concern that the guideline process is compressed on a short time schedule with insufficient opportunity for comment and deliberation, especially when numerous changes are being offered. While the Commission's organic statute is to a certain extent to blame, we believe that the Commission can alleviate this problem to some degree by parsing out various proposals within the calendar year rather than considering everything by the May 1 deadline. For example, the Commission held separate hearings on the organization sanctions in December, and need not wait until May 1 to submit any final proposal to Congress. Theoretically, the Commission can submit any of its proposals as early as January of the calendar year when Congress begins its regular session, 28 U.S.C. 994(p), and those proposals would take effect 6 months later. Thus, the Commission can now

notice in the Federal Register, or shortly after May 1, other proposals for revising the guidelines, solicit and receive comments, and hold hearings throughout the remainder of this calendar year. The Commission can then formulate and refine its final proposal and have it all ready to be sent to Congress in early January 1992 (and effective by July 1992). By spacing out the various proposals, the promulgation process would be more manageable and allow for more focused debate and comments by the public, rather than the current practice of having hearings even before written comments are all submitted. Most federal agencies require written comments to be first submitted to them which are then studied in depth by both the agency and the regulated community; the subsequent hearings are thus more productive for everyone.

Furthermore, it appears to many that the 180-day waiting period is inordinately long. To my knowledge, Congress has never modified or repealed any of the Commission's proposed changes during this period. Consequently, we urge the Commission to recommend to the Congress that the waiting period be shortened, such as 90-days, and correspondingly advance the May 1 deadline to August 1. We note, for example, that Congress required the Federal Election Commission's proposed rules be sent to Congress for only 30 legislative days for its approval, 2 U.S.C. 438(d)(2), a period of time considerably shorter than 180 calendar days and involving a regulatory subject matter of utmost concern to Members of Congress.

## **II. Specific Comments on Certain Proposed Amendments**

There are a few proposed changes which I would like to address, particularly because they illustrate the disparity between the sentences called for in serious crimes and

those imposed for regulatory offenses under the environmental section.

**Proposed Amendment 15: 2D1.8. Renting or Managing a Drug Establishment.**

The Commission proposes two options. The first option is geared toward the underlying controlled substance levels found in 2D1.1, and significantly, caps the offense level to 16 if the "defendant had no role in the underlying controlled substance offense other than renting or allowing the use of [his] premises" for drug use or trafficking. Level 16 (21 to 27 months for first offender) is the same level that is easily reached, and has been reached in several cases under Section 2Q1.3, for minor regulatory environmental offenses. Is it fair that hard-working citizens who place clean building sand or topsoil on their own property be given a level 16 under 2Q1.3 because they failed to get a permit under the Clean Water Act (United States v. Mills; United States v. Pozsgai) and incarcerated the same length of time, or more, as those who rent their property to drug manufacturers or dealers to ply their deadly trade on the rest of society.

This is a particularly egregious disparity when one considers both the underlying offenses and the statutory penalties for each of these two offenses. Congress indicated its views of the seriousness of the crime of renting or allowing property to be used by drug dealers, users, or manufacturers such as crack houses and the like by making the penalty up to 20 years and a fine of \$500,000. 21 U.S.C. 856. This is a Class B Felony, the most serious category of crime next to Class A which allows for life imprisonment. And yet the Commission, concerned about the fairness of sentencing such despicable criminals, is seriously considering limiting an entire category of such offenders to a level 16 just because they "had no role in the underlying controlled substance offense other than renting"

their property to the drug dealers or manufacturers? Quite frankly, I don't understand why the Commission is so overly concerned about carving out a relative safe-harbor for this offense, when the core offense conduct, or heartland case, as envisioned by the Congress is the renting of the property or allowing it to be used, regardless of the property owner's role in the underlying offense. This proposal would essentially cap the punishment for a core offense to only approximately 10 percent of the maximum punishment Congress authorized for this crime (Level 16=21-27 mos./240 mos. maximum). At the same time, Section 2Q1.3 allows individuals to be given a level 16 for essentially minor regulatory violations under the Clean Water Act that are far from the core offense of water pollution as envisioned by Congress, and where the statutory maximum is 3 years rather than 20 years. Thus, first time environmental offenders are given 75 percent of the statutory maximum for non-heartland cases (and indeed, as noted in my prior submission to the Commission regarding the application of Part 2Q, the Justice Department in many cases asks for 100 percent of the statutory maximum because the environmental guidelines dictate such absurd results).

Congress dealt severely with the crime of renting or allowing property to be used for drug dealers because of the vital link that criminal activity plays in the distribution system of illegal drugs in this country. If all the vending machines, 7-11's, and other stores in this country were prohibited from allowing their property to be used to sell Coca-Cola, it would be very difficult for the Coca-Cola Company to get its product to its customers. So too, Congress' weapon in breaking the distribution network of illegal drugs was to provide stiff punishment for those who serve as a vital link in this deadly trade. How can the Commission possibly characterize these core violators of the law as

"peripherally involved defendant[s]"? In any event, what is so "anomalous," as the Commission puts it, about a manager of a crack house getting a greater offense level than would otherwise be indicated by the small quantity of drugs confiscated in a particular drug raid, where there is substantial evidence from a stakeout or informers that the owner of the house, apartment, restaurant, or warehouse allowed his premises to be so used over a long period of time? The Commission, rather than worrying so about hypothetical "anomalous results" in this and similar areas, should instead direct its talents and energies elsewhere where real injustice actually occurs under the guidelines, such as in the environmental area.

There are numerous other proposed offenses which call for increases for certain Specific Offense Characteristics, which, when compared to offense characteristics in the environmental section, further illustrate unwarranted disparity. For example, under 2Q1.2 and 2Q1.3, a full 4 points are added on for environmental violations where there was a violation of a permit or failure to have a permit. Aside from the double counting problems universally recognized (except by the courts) in applying this offense characteristic when it is part of the underlying charge, why is 4 points added for not having a permit (for conduct which is not prohibited, but merely regulated) but only 2 points are added, for example, under Amendment 17, **Sec. 2G2.4 Possession of Material Depicting a Minor Engaged in Sexually Explicit Conduct**, where the minor is under the age of 12? Is the depiction of a 5-year old engaging in explicit sex acts with an adult worth only an additional 2 offense levels, but not having a permit for putting topsoil on your own property worth 4? Indeed, even applying the most stringent punishment this Commission has in mind for 2G2.4, namely, a base offense level of 10 rather than 6, and



two points for depicting a minor under the age of 12, the total would be 12 offense levels.

Yet Congress indicated that the maximum punishment should be 5 years for possessing 3 or more items of child pornography. Under the Commission's proposed guideline, an offender with 8 times this amount (24 magazines) depicting 5-year olds in sexually explicit conduct would receive either a level 8 (if the base offense level of 6 is adopted), or 12 (if the base level chosen is 10). A level 12 translates into 10-16 months, well below the 60 months maximum authorized by law, and more likely would result in probation or a short split sentence if the defendant pleads guilty and gets the two point reduction to reduce the level to 10. As with the managing a drug establishment offense, the conduct posed in this hypothetical is the core offense or heartland case. Again, compare this to the 21-27 month sentence for a non-heartland cases of violating the Clean Water Act where the maximum is 36 months. Does the Commission intend that the courts punish certain property owners who place topsoil and clean building sand on their own property and others for minor environmental offenses more severely than certain drug offenders and those who contribute to child pornography? It certainly seems so.

The proposed and current guidelines are replete with instances where offense characteristics are assigned 1 or 2 points that are in sharp contrast to the 4 offense levels for not having a permit under 2Q1.2 See, e.g., 2K1.1 (2 additional points for trafficking up to 75 pounds of explosives); 2K2.1(b)(2) (2 additional points for illegal trafficking of 7 firearms); 2A3.2(b)(1) (only 1 point added to rape of a minor if victim's abuser was custodian or guardian, such as a parent or teacher). See also current guidelines 2A2.2(b)(3) (2 points for bodily injury); 2A4.1(b)(4) (2 points if kidnap victim is held for more than

30 days); 2D1.1 (2 points if drug trafficker possessed firearms). In some cases, these additional offense levels appear too low; in any event, the 4 points assigned for not having a permit under 2Q1.3(b)(4)(with the potential for an adjustment up to 6 points under Application Note 7) is totally out of line with the Commission's other designation of offense characteristics which are related to the actual harm committed, and not imposed for merely because the conduct was unpermitted-- a characteristic inherent in all criminal conduct.

### **III. Need to Revise 2Q1.2 and 2Q1.3 of the Environmental Guidelines.**

As the Commission is aware, our Foundation is particularly concerned with the clearly flawed guidelines under Part 2Q, in particular 2Q1.3 and its companion 2Q1.2 that result in the Justice Department seeking, and the courts imposing, a level 16 for first offenders who place sand, topsoil, or clean non-toxic, non-hazardous fill on their own property without a permit from the Corps of Engineers under the Clean Water Act.

Our concerns were fully addressed in our request to the Commission dated January 15, 1991, a copy of which (minus most of the exhibits) is attached hereto for your convenience. Our client, John Pozsgai, a first offender, is serving 27 months in federal prison for putting topsoil and clean fill on a few acres of his own property. Ocie and Cary Mills served 21 months for putting 19 loads of clean building sand on a quarter-acre lot on which he planned to build his retirement home. Both were assigned a level 16: 6 points for the base offense of discharging a pollutant without a permit; 6 more for discharging the pollutant over a period of time; and 4 more for not having the permit. The district courts and courts of appeals in both cases rejected arguments that this constitutes double counting. The flaws in these guidelines are widely recognized and

documented. See B. Sharp, L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics Law Reporter 189 (July 11, 1990)(attached hereto). In many cases, DOJ is exploiting the flawed guidelines by seeking mandatory minimum sentences under the guidelines for first offenders that are equal to the statutory maximum.

The letter from the Chairman dated February 7, 1991 rejecting our request for the Commission to reconsider this issue is disappointing in many respects. The primary reason offered was the fact that the Commission apparently decided at its January 3, 1991 meeting not to take up the environmental section. However, the entire purpose of our January 15 request was that the Commission's action was not an informed decision because of the misleading information provided to the Commission by DOJ and EPA representatives about the operation of the guidelines. Furthermore, the letter speculates that since the only reason the judge offered for imposing such a harsh sentence on Mr. Pozsgai was his view that Mr. Pozsgai was a "stubborn violator," (the judge referred to no damage caused to the environment) that were it not for the guidelines, Mr. Pozsgai would have likely received a harsher sentence. This speculation is unwarranted for several reasons. In the first place, the maximum sentence for the worst water polluter is 3 years. If this were a pre-guideline case, the worst sentence Mr. Pozsgai would have received would have been 3 years. Under the parole guidelines then in effect, he would be eligible for parole after 1 year, and would no doubt have received it. Furthermore, "stubbornness" certainly does not seem to be a relevant offender or offense characteristic by the Commission for other crimes. Thus, it appears that the judge was able to exploit the flawed guidelines by using the high offense scores to validate his "stubbornness" reason for imposing the harsh sentence. Finally, the letter conveniently ignores altogether the similar unjust sentencing results in the

Mills case and others, and the cogent critique of the guidelines by Messrs. Sharp and Shen.

Finally, the letter concludes that the Commission is busy enough with revising other guideline provisions to take the environmental section up now. This reason is disappointing for a number of reasons.

First, the Commission has had under consideration a full revision of the environmental guidelines since at least January 30, 1989, over two years ago. See Letter to Chairman Wilkins from Thomas L. Adams, Jr. of EPA, dated February 13, 1989 (attached hereto). A third year of delay is simply intolerable, especially for the 50 or so individuals to be sentenced this year under the guidelines.

Second, the suggested revision we offered, namely eliminating or reducing the "no permit" offense characteristic, one of the two sources of the double counting problem, is relatively easy. Indeed, the Commission can still satisfy the publication requirement and meet the May 1 deadline by putting a brief notice in the Federal Register along the lines suggested in our January 15 letter by March 15, for example. Comments could be received by April 15, and the simple change sent to Congress along with the other proposals to Congress by May 1. Further refinements could then be addressed afterward if deemed necessary, but the time and effort for this revision surely is worth the time the Commission is putting in to consider whether managers of crack houses should get a break.

The February 6 letter from the Chairman is also remarkable for what it does not say. First, there is no dispute to our contention that the guidelines are inherently flawed because the Commission failed to compute the average sentences imposed for environmental offenses before the guidelines were enacted as required by Congress in order

to assess whether stiffer sentences were warranted. 28 U.S.C. 994(m). Second, there is no attempt to point to any reasons why the Congress' preference that it is generally inappropriate for the guidelines to impose incarceration for first-offenders for minor violations. It is one thing for the Commission to determine that contrary to the general rule, in appropriate circumstances, that some jail time may be warranted for minor offenses for first offenders (i.e, 2 or 3 months), but levels of 12, 14, 16 and higher are simply overkill. The 21-27 month sentence imposed on Mr. Mills and Mr. Pozsgai translate to an outrageous pre-guideline sentence of 63 to 81 months. Does the Commission really believe that such sentences are what it intended or believes is just?

Finally, the letter does not dispute our contention that the guidelines impermissibly allow for double counting. Indeed, the Chairman even acknowledged during the January 3 meeting that the environmental guidelines have the potential for impermissible double counting, but suggested that the courts can take care of the problem. Several courts, including courts of appeals, have not taken care of the double counting problem, and it behooves the Commission to revise or clarify the guidelines immediately. At a minimum, a simple policy statement can be, and should be swiftly issued to address the double counting flaw that allows judges to impose sentences (at the urging of DOJ) such as that on Mr. Pozsgai, which, according to the Commission's own data, exceeds the average sentence imposed under the guidelines for a host of serious crimes, such as auto theft, larceny, fraud, counterfeiting, and many drug offenses.

Thank you for the opportunity to present these views. I will be happy to answer any questions you may have.

WASHINGTON LEGAL FOUNDATION

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January 15, 1991

HAND-DELIVER

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

Re: Modification of Part 2Q of the Guidelines

Dear Judge Wilkins:

On Thursday, January 3, 1991, the Commission met to discuss what substantive areas of the sentencing guidelines it would consider for possible review. One of the categories briefly discussed was the environmental section, Part 2Q. Commissioner Paul Maloney from the Justice Department referred to a December 24, 1990 letter to the Commission from DOJ signed by Assistant Attorney General Richard B. Stewart and James M. Strock, Assistant Administrator for Enforcement for EPA suggesting that the Commission should defer consideration of revising Part 2Q, allegedly because there had not been enough case history (approximately 24 cases) to evaluate its implementation. This point was reiterated by Mr. Barry Hartman, Mr. Stewart's deputy, who suggested at the meeting that the Commission should "not shoot in the dark and make changes," noting that approximately 50 sentences would be meted out in calendar year 1991 that would provide the Commission with more information, and that only one circuit court had reviewed a Part 2Q case, a Sixth Circuit case which he argued, and was recently decided.<sup>1</sup>

During the brief discussion which ensued, you and perhaps another Commissioner acknowledged that Part 2Q guidelines impermissibly allow for double counting, but suggested that the courts can handle that problem. Judge MacKinnon also queried Mr. Hartman about the ratio of civil to criminal prosecutions in the environmental area (approximately 10 to 1) and the relevance of that practice to evaluating the guidelines. The Commission, apparently relying on DOJ's representations, nevertheless did not take up the issue of revising Part 2Q or any section thereunder.

While I was in attendance during that part of the meeting, I did not believe it was appropriate at that time to address the Commission, especially since I had not seen the

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<sup>1</sup> Actually, at least three circuits had then reviewed sentences under Part 2Q: the Sixth Circuit (United States v. Bogas), Third Circuit (United States v. Pozsgai), and Eleventh Circuit (United States v. Mills). On January 4, 1991, the day after the Commission's meeting, the First Circuit issued an opinion involving 2Q1.2 in United States v. Wells, bringing the total number of circuits to four. These and other Part 2Q cases will be discussed, infra.

December 24 letter from DOJ.<sup>2</sup> Indeed, it appeared that perhaps none of the Commissioners had seen the letter since the Commission's Staff Director noted at the meeting that it had just arrived that morning. Having now secured and examined a copy of that letter (Attachment 1), I submit that the reasons proffered by DOJ and EPA to delay modification of Part 2Q or any sections thereunder are totally disingenuous as explained below and in the documents attached.

Accordingly, the Washington Legal Foundation urgently requests the Commission to reconsider this vital issue so that it can make a fully informed decision in this matter. In that regard, I am willing to address the Commission at the earliest opportunity possible for 5 minutes or more if necessary to elaborate further on the points discussed herein and to answer any questions or comment on any written or oral statements that might be made by DOJ or EPA officials at that same meeting. It is my understanding that the Commission has scheduled a meeting for January 22, 1991. While I believe that this issue is of such importance that the Commission should revisit this issue before then, the Commission may find the January 22 date to be a more convenient time to address the issue and, if convinced that Part 2Q needs modification, to do so with this cycle of amendments (since only 19 days would have then elapsed since the Commission's January 3 meeting).

#### Draconian Sentences Urged by DOJ and Imposed Under Part 2Q

As you know, our Foundation represents John Pozsgai, a 58-year old Hungarian immigrant and self-employed truck mechanic, who received the longest prison sentence in the history of the United States for any environmental offense: 27 months under U.S.S.G. 2Q1.3, for simply placing topsoil and clean (non-toxic, non-hazardous) fill on a couple acres of his own property, an old junk yard that he actually cleaned up. Not a single fish, bird, or sea lion was killed, harmed, or even threatened. Indeed, the government does not dispute the fact that a tiny stream adjacent to Mr. Pozsgai's property actually runs clearer today than it did before he purchased the property due to his clean-up efforts. Yet, since the EPA and U.S. Army Corps of Engineers determined that part of the property (which is zoned light industrial) technically constituted a marginal "wetland," a permit was allegedly needed under the Clean Water Act to place topsoil (a "pollutant") and other clean fill on the property.

The sentencing judge agreed with both the Probation Officer and U.S. Attorney's suggested application of Section 2Q1.3 of the guidelines: 6 points for the base offense of discharging a non-toxic, non-hazardous pollutant without a permit in violation of 33 U.S.C. 1311, 6 more for discharging the pollutant (under 2Q1.3(b)(1)(A)), and 4 more for not having the permit (under 2Q1.3(b)(4)). This double, indeed triple counting, quickly added up to a level 16 which, for a first time offender like Mr. Pozsgai, dictated a 21- to 27-

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<sup>2</sup> I learned of the Commission meeting by happenstance only the evening before, and did not know what would be on the agenda until the meeting was underway. No notice of the meeting was published in the Federal Register or any trade journal that I am aware of, nor was the agenda made available to the handful of persons who signed in at the desk outside the meeting room. If these are indeed public meetings of the Commission, we believe it is in the public interest for the Commission to notice all of its meetings, as is the practice of other agencies and commissions, indicate which ones are open to the public, summarize the agenda, and indicate whether or not members of the public are allowed to comment at the meeting. This practice would also be consistent with the Commission's otherwise open and helpful communications office.

month prison sentence. The court rejected the double counting arguments, refused requests for downward adjustments within the specific offense characteristics, and refused to depart. Although there was little if any environmental harm, the judge imposed the maximum at the urging of the prosecutor who wanted to use Mr. Pozsgai to send a message to all "private land owners," and because the court felt that Mr. Pozsgai was "stubborn." The 27-month sentence is equivalent to a staggering pre-guideline sentence of 81 months (approximately 7 years) since parole was available (and invariably granted) after serving one-third of the sentence.<sup>3</sup>

Before the guidelines were issued, no one was ever imprisoned for discharging a non-toxic, non-hazardous substance, let alone for such a long period of incarceration. Three months imprisonment for such infractions may be more than necessary to meet the ends of justice; 6 months seems particularly harsh; 12 months is clearly excessive; and anything over 18 months is simply unconscionable. Yet the guidelines as written and as interpreted by DOJ, probation officers, and the courts, mandate at least a level 14, if not a 16, resulting in sentences of up to 27 months for first time offenders such as Mr. Pozsgai whose conduct is far from the core offense or "heartland" case of water pollution.<sup>4</sup>

The Pozsgai case is not an aberration. Ocie Mills and his son Carey were sentenced shortly before Mr. Pozsgai in early 1989 to 21 months in prison under 2Q1.3 for placing 19 loads of clean building sand (technically a "pollutant") on a quarter acre plot on which he had planned to build a retirement home in Florida because part of the property was deemed by EPA to be a wetland (although Florida officials told the Mills' otherwise). United States v. Mills (PCR 88-03100, N.D. Fla.). As in the Pozsgai case, the district court agreed with the prosecutor and probation office that a level 16 was the proper score, mandating a minimum 21-month sentence.

On appeal to the Third Circuit in the Pozsgai case, we argued, inter alia, that the sentencing court misapplied the guidelines by double counting and wrongly applied offense

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<sup>3</sup> Indeed, since some of the filling activity took place before the November 1987 effective date of the guidelines, the judge sentenced Mr. Pozsgai under both the guidelines and the Clean Water Act. The court imposed the maximum sentence under the Clean Water Act of three years for the pre-Guideline counts, a sentence which was essentially ordained given the results suggested by the guidelines. For in order to have some semblance of symmetry between the pre- and post-guideline sentence for essentially the same conduct, the Pozsgai Court could not adopt the Probation Officer's recommendation of a one-year sentence for the pre-Guideline violations (who also determined that this was not a serious offense). Rather, by imposing the maximum three-year sentence (a sentence which one would normally think should be reserved for the worst water polluter rather than for one who caused little if any harm) with parole technically available after one year, the court was able to approximate the guideline sentence of 27 months. Indeed, to be truly symmetrical, the court would need to have imposed at least two consecutive maximum three-year sentences for the pre-guideline counts just to match the guideline sentence.

<sup>4</sup> The 27-month period of incarceration permitted and imposed under a level 16 for a minor regulatory offense is greatly disproportionate to the average sentence meted out under the Guidelines for a first offender (even excluding those cases where no prison sentence was imposed, i.e., probation) for a serious offense such as Burglary/B&E (24 mos.), and for other serious crimes, even counting those offenses committed by criminals with extensive prior criminal history: Larceny (20 mos.), Embezzlement (10 mos.), Fraud (13 mos.), Drug Offenses-Possession (8 mos.); Drug Offenses-Use of Communication Facility (26 mos.); Auto Theft (17 mos.); Forgery/Counterfeiting (16 mos.); Bribery (17 mos.); and Escape (22 mos.). See Table VI, U.S. Sentencing Commission Annual Report 1989 (Attachment 2).



characteristic 2Q1.3(b)(1) governing discharge of a pollutant since comment n.4 indicates that it applies only if there is "actual environmental contamination," hardly the case involving topsoil, sand, and clean fill. Alternatively, we argued that Section 2Q1.3 itself was unlawfully promulgated because the Commission did not undertake the requisite analysis of pre-guideline sentences in this area as required by 28 U.S.C. 994(m); that the environmental guidelines were inconsistent with Congress's intent that the guidelines "reflect the appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense"; and that they violated Congress' overall intent of reducing sentencing disparities and promoting fairness by causing just the opposite. Without any oral argument, the Third Circuit affirmed both the conviction and the sentence without opinion. 897 F.2d 524 (3d Cir. 1990). Rehearing en banc was summarily denied, and the U.S. Supreme Court denied the petition for writ of certiorari. 111 S.Ct. 48 (1990). Mr. Pozsgai began serving his 27-month sentence on November 23, 1990 at Allenwood Prison (which according to DOJ is over capacity). Attached are copies of the briefs in the case filed in the Supreme Court (Attachment 3). The court of appeals briefs, which treat these arguments in greater detail, can be supplied to the Commission if necessary.

The appeal by Ocie Mills and his son who received a 21-month sentence for placing sand on their property fared no better. The Eleventh Circuit affirmed the conviction and sentence in July 1990 without opinion despite strenuous arguments that the guidelines permit double counting. 904 F.2d 713 (11th Cir. 1990). Unfortunately, the Mills' were denied bail pending appeal and consequently, they have just completed serving their unjust sentences (although they remain on supervised release).<sup>5</sup>

Other environmental cases cited in our Supreme Court brief further illustrate the flaws in the environmental guidelines and their application. For example, federal prosecutors and probation officers are requesting the court to impose a statutory maximum penalty of one year for negligent violations of the Clean Water Act, even though the defendant is a first offender, because the guidelines dictate a minimum over one year. *See, e.g., United States v. Fisher*, CR 89-234 (D. Ore. Feb. 12, 1990).<sup>6</sup> This structural problem with Part 2Q that causes minimum guideline sentences to exceed statutory maximums has been thoroughly analyzed and discussed in an article entitled "The (Mis)Application of Sentencing Guidelines To Environmental Crimes," by Benjamin S. Sharp and Leonard H. Shen of Perkins Coie in Washington, D.C., reprinted in *BNA Toxics Law Reporter*, July 11, 1990 at 189 (Attachment 5).

In another case, a judge who is regarded as environmentally sensitive and who, during her confirmation hearings in 1979, told the Senate Judiciary Committee that she

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<sup>5</sup> Both the *Pozsgai* and *Mills* cases have received considerable nationwide media attention, a sampling of which is provided (Attachment 4). We can supply the Commission with a videotape of news coverage of these cases, including NBC's Good Morning America, Cable News Network, and CBS Evening News.

<sup>6</sup> As Commissioner Gelacak rhetorically questioned Assistant Attorney General Stewart in a related context during the recent hearings on organizational sentencing concerning DOJ's proposal for large fines for environmental offenses, "how on earth do we [the Sentencing Commission] maintain any credibility if we establish a guideline sentencing proposal that exceeds present statutory maximums...?" December 13, 1990 Hearings at 120, lines 12-14.

would not hesitate to put white collar criminals in jail, found it particularly difficult to grant the Justice Department's request to send a first offender to jail for over 51 to 63 months for improperly storing toluene (paint thinner), and instead managed to interpret 2Q1.2 in such a way as to impose 6 months of home detention. United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990). The Justice Department appealed to the Sixth Circuit, and at the urging of Mr. Hartman, the sentence was recently overturned. 1990 WESTLAW 188792 (6th Cir. Dec. 3, 1990). The Sixth Circuit, apparently sympathizing with the possible harsh result on resentencing, noted that the district court might try departing from the guidelines. Something is fundamentally wrong with the guidelines and the way that the Justice Department urges their application, where, in order to achieve rational sentencing in this area, departure must be the rule rather than the exception. In any event, uniformity of sentencing in this area is bound to suffer by relying on the vagaries of departure.

#### DOJ/EPA December 24, 1990 Letter

In their joint letter to the Commission dated December 24, 1990, Messrs. Strock and Stewart posited three reasons why the Commission should avoid addressing Part 2Q.

"First, the existing guidelines received a good deal of very close attention from you and other Commissioners when they were initially developed in 1986. The result was a set of provisions which were fundamentally sound. Certainly our work with the guidelines so far have revealed no glaring errors or provisions badly in need of revision."

It is my understanding from discussions with current and former Commission officials, and from examining Commission hearings and records, that the environmental guidelines in fact received very little attention by the Commission. Indeed, the Commission did not, as required by law, carefully examine past sentencing practice to determine the average sentences imposed, nor did the Commission articulate any reasons why a radical departure from past sentencing practice was warranted in this area. The result was certainly not a set of provisions which were "fundamentally sound," but rather one which overzealous EPA and DOJ officials and prosecutors can exploit by seeking a way to impose draconian sentences for essentially minor regulatory offenses for first time offenders, and thereby undermining Congress' and the Commission's goals of uniformity and proportionality in sentencing. It is no accident that at public seminars on environmental enforcement, DOJ officials have promised the regulated community a "reign of terror." Naturally, one cannot expect such officials to acknowledge that the unprecedented sentences sought by DOJ and meted out to Mr. Pozsgai, the Mills', and others are the product of "glaring errors."

The second reason given by DOJ/EPA to postpone review of Part 2Q is that they "have not had sufficient experience" with the application of the guidelines to offer modifications because less than 24 cases have been disposed of under the guidelines, and that they expect, according to Mr. Hartman at the meeting, approximately 50 sentences to be imposed this year. Thus, the letter continues, "[b]y waiting another year, we will likely have more than twice as many guidelines cases as we now have [for a total of approximately 75] on which to base any possible changes."

We submit that the current experience with the guidelines is more than sufficient for the Commission to detect and correct the flaws with the guidelines. It is not necessary nor is it in the public interest to wait to have potentially 50 more Pozsgai-type prison sentences to realize that something is seriously awry with these guidelines and/or their application, although DOJ and EPA would no doubt prefer the Commission to believe the contrary.<sup>7</sup> Indeed, this is a perfect opportunity to make whatever changes the Commission believes is warranted, and then fine tune any of those changes, if necessary, after experiencing another wave of sentences imposed under the modified guidelines.

You have repeatedly and publicly stated that the Commission's duty is to review and revise the guidelines in order to achieve the best possible guidelines. The first signs that something was fundamentally wrong with the environmental guidelines or their application came at least by mid-1989 when I brought to the Commission's attention the unduly harsh and unprecedented sentences meted out in the Pozsgai and Mills cases under 2Q1.3. Some perhaps thought then that the double counting problems experienced in those cases would surely be corrected by the appeals courts (which turned out not to be the case). In any event, the 1989-90 cycle was a good opportunity to correct the problem. By not reviewing Part 2Q then, nor during this 1990-91 cycle, and waiting, as DOJ suggests until the 1991-1992 cycle, the Commission further and unnecessarily postpones correcting obvious problems for three years.

While it is always nice for statisticians to work from ever larger data bases, the Commission should not forget that these guidelines profoundly affect the lives, liberty and livelihood of individuals and their families. If the small number of criminal environmental cases before 1986 was a sufficient data base upon which to devise the guidelines in the first place (according to the EPA, there were only 16 criminal cases in 1985), then surely there are enough post-guideline cases to make an intelligent assessment of the guideline's operation today.

It would be cruel solace indeed for those who have served, are serving, and will likely serve two or more years of hard prison time for minor regulatory offenses to discover much later that the Commission did not intend such harsh results after all, and that had they been properly sentenced, they would have received probation or much shorter prison terms.<sup>8</sup>

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<sup>7</sup> The Justice Department should provide this Commission, and can easily do so, with the Sentencing Memoranda submitted to the court by the prosecutors in these two dozen cases, any defense memoranda, and the actual sentence imposed and the reasons therefor stated by the court. In addition, as for the 50 sentences which DOJ indicates would be imposed this calendar year, DOJ should also provide the Commission a copy of the indictments or information in those cases and indicate whether the defendants have pled guilty or were convicted after trial. See 28 U.S.C. 995(8), (14), (15), (16).

<sup>8</sup> In that regard, we note that Congress mandated 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." 28 U.S.C. 994(o). Congress envisioned that guidelines might be reduced, and instructed the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" to conform to a guideline revised downward. 28 U.S.C. 994(u). If the Commission decides not to review this matter sua sponte, we are prepared to invoke

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The third and final reason for delaying revisions proffered by DOJ/EPA, "even assuming that we had sufficient evidence to undertake a revision," is the alleged shortage of time, particularly because everyone's attention "is focused chiefly upon organizational sentencing guidelines. [DOJ/EPA] believe that the public and the criminal justice system would not be well served by our trying to develop Part 2Q amendments on a compressed schedule." The suggestion that the Commission cannot chew gum and pat its head at the same time insults the Commission and its staff and undermines its duties and responsibilities. Indeed, the fact that the proposed organizational guidelines are being further considered for yet a second year is an argument to initiate public review now rather than uncovering problems a year later that could have been earlier resolved. While organizational sanctions, primarily fines, are a serious issue, it is nonetheless not as a compelling an issue as one that involves substantial deprivation of an individual's liberty and freedom. Furthermore, to the extent that organizational sanctions for environmental offenses are tied into the individual sentencing guidelines in Part 2Q, the issues are intertwined. Additionally, the Commission and DOJ/EPA staff apparently already have done extensive work on revising Part 2Q guidelines.

In any event, there are several suggestions which we are prepared to recommend that would be very easy for the Commission to propose that clarifies the Commission's original intent in promulgating Part 2Q. For example, the double counting problem (which you acknowledged at the January 3 meeting) needs to be addressed because it is not being corrected by the courts. In the Pozsgai and Mills cases alone, approximately 15 district court and court of appeals judges were squarely presented with the issue and saw no problem with it. Thus; 2Q1.3(b)(5) currently states:

- (5) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

This provision can be revised to prevent double counting by simply inserting at the end the following phrase: "but not if the underlying offense charged is a failure to have a permit or is a violation of a permit." A better suggestion would be to eliminate the permit section altogether (or if retained, to reduce the additional points assessed to a more reasonable level such as 1, or at most 2) since most environmental crimes constitute discharges without a permit or are in violation of a permit's conditions.<sup>9</sup> All crimes, for

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<sup>9</sup>(...continued)

28 U.S.C. 994(s) on behalf of Mr. Pozsgai which allows a prisoner to formally petition the Commission to modify the guidelines. Regardless of what mechanism the Commission uses to revise the guidelines, even if they were to be promulgated this cycle, because of the 180-day delay period for its implementation, Mr. Pozsgai by then would have already served almost one year in prison for his offense, a period of time greater than that which would be dictated, we would hope, by any revised guideline. In addition, such revision could be applied or used to adjust, if warranted, many of the 50 sentences that DOJ indicates will be imposed this calendar year, presumably most of them in the earlier part of this year.

<sup>9</sup> Even when the offense does not, strictly speaking, involve a violation of a permit, wildly disparate results obtain. In United States v. Wells, 1991 U.S. App. LEXIS 56 (1st Cir. Jan. 4, 1991), the defendant was tried and convicted of repeatedly discharging zinc from his small business above the effluent limits set by the EPA despite repeated warnings to stop. Section 2Q1.2, the applicable guideline which deals with

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that matter, are "unpermitted" by the state. No one is permitted to rob a bank, for example, yet no aggravating points are added to such malum in se crimes because the offender really and truly intended to violate the law and commit the crime without society's permission. With respect to these traditional crimes, the basic rationale for the Commission's additional points is based chiefly on the levels of harm caused by the conduct. On the other hand, Mr. Pozsgai and others can obtain (and indeed he is currently pursuing administratively an after-the-fact permit) "permits" to place fill on one's property or discharge "pollutants." And as even Mr. Stewart himself candidly recognized, "we aren't talking about bankrobbers here, we are talking about [companies engaged in] productive economic activity." Wall Street Journal, Dec. 26, 1990, at 12, col.1.

Similarly, 2Q1.3(b)(1) -- allowing for 4 to 6 additional points for the discharge of pollutants depending upon whether it was continuous or not -- can be easily revised to prevent double counting. Under the current provision, a repetitive discharge of a gallon of oil a day over three months into a river causes an increase of 6 points, yet a one-time spill of 1,000 gallons (or even millions of gallons as in the Exxon Valdez case) adds only 4 points, a difference in points which are crucial in determining whether a first offender is eligible for probation (offense level 10 or less), or even a split sentence (offense levels 11 and 12, where at least 4 to 5 months must be served in prison), or is required to serve a minimum of 12 months, once a level 13 is reached, (see U.S.S.G. 5C1.1), a level quickly attained for even the most minor of environmental infractions.

The current offense characteristics also impermissibly allow the court to consider multiple counts of the same violation as constituting a repetitive discharge to cause 6 points to be added to the base offense level. Multiple fraud counts, for example, are not punished in that manner. See U.S.S.G. 2F1.1. If a criminal defrauded 40 individuals of \$1,000 each as part of a continuous scheme, the total harm of \$40,000 is used to determine the additional level to add, not some arbitrary number because the fraud, however small, was a continuous or repetitive one. Confusion is further added when the Commission in its comment n.4 to 2Q1.3 assumes that "actual environmental contamination" took place when all that is involved is the discharge of clean fill or some other "pollutant" that is easily dissipated or easily cleaned up.

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<sup>9</sup>(...continued)

hazardous and toxic pollutants, begins with a base level of 8, two points higher than 2Q1.3 dealing with non-toxic pollutants under which Mr. Mills and Mr. Pozsgai were sentenced. Thus, under a rational and proportional system, one would think that polluters of toxic and hazardous substances would be punished more severely than non-toxic polluters. Yet Mr. Wells' sentence of 15 months (an excessive punishment in its own right for a first offender) is well below the 27 months and 21 months given to Mr. Pozsgai and Mr. Mills (whose respective sentences are approximately 100 and 50 percent greater than Mr. Wells' sentence) due primarily to the fact that the 4 additional points for a permit violation (2Q1.2 (b)(4)) was not included in the Wells case. This was so not because the Court refused to double count, but because Mr. Wells did not violate his permit; rather, he knowingly exceeded an effluent limit set by the EPA and promulgated in the Code of Federal Regulations. Yet if his permit had simply contained the same effluent limit as a condition of the permit, he would have been subject to the additional four points.

Furthermore, the base level of 8 for 2Q1.2 or 6 for 2Q1.3, assumes an underlying violation of some reporting or recordkeeping requirement. U.S.S.G. 1A4(f), p.s. Yet no such requirements were violated in the Mills, Pozsgai, Wells, and many other cases, either because there were no such reporting/record-keeping requirements, or, as in the Wells case and similar cases, the company was reporting accurate, albeit unlawfully high, levels of discharges.

A better suggestion would be eliminate 2Q1.2(b)(1) or 2Q1.3(b)(1) altogether or to substitute them with a provision that simply allows the court to impose from 0 to 4 additional points depending upon the harm to the environment (as currently determined in comment 4.).

The collateral issue raised by Judge MacKinnon at the January 3 meeting regarding the availability of civil and administrative sanctions is indeed a very important one. Many regulatory offenses are disposed of by civil and administrative enforcement actions. For the most part, the level of intent needed to trigger a civil violation is sufficient to convict criminally. The discretion by the government as to how to proceed is truly an awesome power that is often abused. In the Pozsgai case, the civil case had just begun when the case was criminalized. In the Mills, Wells, and other cases, the federal authorities did not even bother with civil remedies, perhaps in keeping with a 1987 DOJ directive (Attachment 6) that DOJ attorneys are encouraged to bring criminal cases first to obtain collateral estoppel for later filed civil cases. As Assistant Attorney General Stewart admitted, DOJ prosecutors "don't have coherent guidelines on how to draw the line between criminal and civil" enforcement. Wall Street Journal, supra.

Yet in many cases, infinitely more harmful conduct is handled civilly than criminally, even where the violator was repeatedly warned by EPA of the offending conduct.<sup>10</sup> The point of all of this to demonstrate that unlike bank robbery, arson, and other crimes, there are no civil remedies available to the government to prevent the harmful conduct. The fact that civil remedies are available for regulatory offenses, namely injunctive relief and civil fines, and are used according to DOJ in 10 out of 11 environmental cases, shows that society has decided to use criminal sanctions and incarceration sparingly for these kind of violations. Thus, a more complete data base to use in gauging what the offense levels (and fine levels) should be is not simply culled from the criminal cases for environmental offenses, but from the civil cases as well.

For all of the above reasons, we urge the Commission to reconsider its position on this matter at or before its January 22 meeting.<sup>11</sup> At the very least, it behooves the

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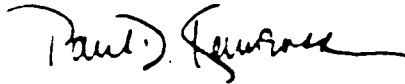
<sup>10</sup> For example, in United States v. BP Oil Corp., (E.D. Pa.), the same U.S. Attorney's Office that prosecuted Mr. Pozsgai found it sufficient to invoke only civil remedies to address an ongoing and knowing water pollution violation far more serious than that committed by Mr. Pozsgai and others. See Oct. 23, 1990 DOJ Press Release (Attachment 7). BP Oil had knowingly violated its permit hundreds of times from 1984 to August, 1990. Similarly, in United States v. Great Lakes Carbon Corp. (E.D. Tex., filed Oct. 12, 1990), DOJ is seeking only civil relief against a polluter "for numerous violations" of the company's permit under the Clean Water Act, including knowing violation of a formal administrative order to stop the pollution. And in United States v. Rhone-Poulenc (S.D. W.Va.-filed Oct. 31, 1990), the civil complaint had to be amended to include violations that occurred after the original complaint was filed.

<sup>11</sup> The Commission need not decide now what, if any, revisions it should make. The public notice requirements of 5 U.S.C. 553(b) as required by 28 U.S.C. 994(x) can be satisfied by providing in the Federal Register "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 U.S.C. 553(b)(3)(emphasis added). Thus, a general notice along the lines that the Commission proposes to revise downward 2Q1.2 and 2Q1.3 by reducing the double counting problems and the high offense levels that result from minor offenses would be sufficient notice to elicit comments. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)(notice need not contain precise proposal agency may ultimately

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Commission to issue a policy statement under 28 U.S.C. 994(a)(2) in the interim to express its view that double counting should not occur in applying Sections 2Q1.2 and 2Q1.3. We are prepared to assist the Commission in any way possible to facilitate its resolution of this issue, including working with Commission staff and DOJ/EPA officials.

Respectfully submitted,



Paul D. Kamenar  
Executive Legal Director

cc: All Commissioners  
John R. Steer, General Counsel  
Richard B. Stewart, Asst. Attorney General, DOJ  
James M. Strock, Asst. Administrator, EPA

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adopt); Forester v. CPSC, 559 F.2d 774 (D.C. Cir. 1977). If the Commission staff already has proposed revision, that would clearly suffice. The point is that while the Commission is not required to make any changes, the advantages of publishing a general notice are clear: while the Commission is satisfying the notice requirement to elicit comments, the Commission and staff can continue its independent review of Part 2Q. If after receiving comment and further study the Commission decides that no changes are warranted at this time, so be it. But the Commission should not precipitously cast aside its option to review this important issue during this cycle when it is relatively easy to keep that option open.

Table VI

**AVERAGE LENGTH OF IMPRISONMENT FOR PRIMARY OFFENSE CATEGORIES;  
AVERAGE LENGTH OF IMPRISONMENT BY PRIOR ADULT CRIMINAL CONVICTIONS\***  
(January 19, 1989 through December 31, 1989)

Comparison of 27 mos. sentence for first-offender of minor infraction of Clean Water Act with other crimes/offenders

PRIMARY OFFENSE	AVERAGE LENGTH OF IMPRISONMENT**									
	TOTAL		PRIOR ADULT CRIMINAL CONVICTIONS							
			0 Convictions		1-2 Convictions		3-4 Convictions		5 or More Convictions	
	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases
TOTAL	57	15,315	51	6,853	56	4,258	65	1,877	73	2,226
Homicide***	123	78	103	35	122	25	101	7	205	11
Kidnapping	191	35	146	8	219	10	225	7	177	10
Robbery	82	816	49	157	65	209	102	171	131	279
Assault	38	151	36	49	37	41	36	26	51	35
Burglary B&E	44	87	24	20	40	25	47	17	62	25
Larceny	20	561	19	159	16	158	17	97	29	147
Embezzlement	10	211	10	156	7	33	16	12	12	10
Offenses	48	24	43	19	14	3	149	2	...	0
Offenses	15	922	13	443	16	241	17	90	23	148
Drug Offenses										
Importation & Distribution	77	8,441	67	4,375	77	2,482	94	900	111	684
Simple Possession****	8	253	8	114	7	71	6	36	13	32
Communication Facility	25	142	24	82	23	40	18	7	46	13
Auto Theft	17	95	18	26	14	33	20	19	20	17
Forgery Counterfeiting	16	452	12	139	12	130	22	81	21	102
Sex Offenses	68	98	56	45	53	26	82	10	114	17
Bribery	17	48	19	38	9	8	12	2	...	0
Escape	22	318	18	37	19	88	21	69	27	125
Firearms	43	945	30	161	27	255	39	203	64	326
Immigration	10	888	7	455	9	219	14	141	16	174
Extortion Racketeering	58	171	45	83	54	41	82	20	112	17
Gambling Lottery	11	35	8	12	10	11	12	5	19	7
Other	26	442	23	230	24	110	32	55	34	47

- \* Of the 21,190 guideline cases 254 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 1,804 cases were excluded due to one or more of the following conditions: missing FPSSIS primary offense category (1,565), missing information on prior adult criminal convictions (1,565), or missing sentencing information (299).
- \*\* The calculation for average prison sentence excludes cases that did not receive a sentence to prison (3,736) and cases that did receive a sentence to prison but the length of the sentence was indeterminable (81). Life sentences were included in the computation of the average (the 38 life sentences were coded as 360 months).
- \*\*\* The "Homicide" category includes 1st degree murder, 2nd degree murder, and manslaughter cases.
- \*\*\*\* Because of enhancements in statutory penalties for simple possession, all offenses sentenced under 21 U.S.C. § 844(a) are not restricted to the previous 12 month statutory maximum. Substantially longer penalties are reflected in the averages provided here.





[Ed. note: During the month of July, articles in the Analysis and Perspective section of Toxics Law Reporter examine the subject of environmental crimes. In this week's issue, Benjamin S. Sharp and Leonard H. Shen analyze sentencing guidelines for environmental crimes. In the last two weeks of the month, Steven L. Humphreys writes on prosecuting the corporate polluter. Last week's article, by Paul G. Nittoly, discussed current trends in the prosecution of environmental offenses (5 TXLR 161).]

## THE (MIS)APPLICATION OF SENTENCING GUIDELINES TO ENVIRONMENTAL CRIMES

By Benjamin S. Sharp and Leonard H. Shen \*

When Congress enacted the Comprehensive Crime Control Act in 1984, few environmental lawyers even noticed the event. But years later, as the U.S. Sentencing Commission established by that statute has generated sentencing guidelines and the courts have begun to apply them to actual cases, it is becoming clear that applying the guidelines will result in sanctions far more severe than those reflected in the policy choices made by Congress for many of the underlying environmental offenses. In addition to inconsistencies between the guidelines and the substantive environmental laws, there are many instances in which the guidelines violate legislative directives to the commission in the enabling statute, the Comprehensive Crime Control Act.

A large part of this problem is attributable to the fact that the sentencing guidelines have crammed a complex environmental regulatory system into a Procrustean bed composed of essentially two core guidelines—neither of which reflects fully the policies of the underlying statutes. The misshapen product of this exercise has been the shifting or even reversal of congressional determinations of the relative seriousness of particular environmental crimes, an emphasis on a few key violation circumstances that bear little relation to the environmental statutes, the conversion of the statutory maximum to a mandatory minimum in a host of situations that would not appear to have been contemplated when the underlying statutes were enacted, and several other discrepancies or even plain legal errors.

While not purporting to review comprehensively the application of the sentencing guidelines in the environmental area, this article concludes that the commission seriously needs to reexamine the guidelines that govern environmental violations and makes several suggestions for revision. The article also offers lines of reasoning by which defendants may challenge application of the guidelines to specific cases as inconsistent with environmental statutes and the enabling legislation.

Beginning in the 1970s, Congress considered several pieces of legislation designed to improve federal sentencing practices. See generally C. Ogletree, Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," 101 *Harv. L. Rev.* 1938, 1944 & n.34 (1988). The most frequent criticism of the existing sentencing practice was that it gave broad discretion to sentencing judges, leading to disparate treatment for similarly situated individuals.

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the U.S. Sentencing Commission as "an independent commission in the judicial branch." 28 U.S.C. §991(a). The commission was tasked to draft sentencing guidelines that would narrow the disparity in sentences imposed on similarly situated offenders for comparable criminal conduct. 28 U.S.C.

§991(b)(1)(B). However, the commission was expected to leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. 18 U.S.C. §3553(b).<sup>1</sup>

Following its creation, the sentencing commission conducted extensive public hearings and a research program analyzing approximately 100,000 federal criminal cases. After receiving considerable public comment on a preliminary draft of the guidelines issued in September 1986, a revised draft was submitted for public comment in January 1987 and became final Nov. 1, 1987.

Because relatively few environmental crimes had reached the sentencing stage before the final guidelines

<sup>1</sup> Case law has construed this provision very narrowly, as limited solely to circumstances that the commission did not consider or mention. See, e.g., *U.S. v. Lira-Barraza*, \_\_\_ F.2d \_\_\_, 1990 WL 17296 (9th Cir. Feb. 28, 1990); see also *U.S. v. Uca*, 867 F.2d 783, 787 ("departures are to be the exception, not the rule"); see generally §5K2.0.

\* Benjamin S. Sharp is a partner and Leonard H. Shen is an associate at Perkins Coie in Washington, D.C.

were released in 1987, the environmental guidelines did not have an experience baseline as did all other guidelines. As a consequence, the commission appears to have filled the experience void with its own policy choices. Yet as is discussed below, the policy decisions ultimately made by the commission seem unconstrained by congressional directives and at odds with policy choices made by Congress when it enacted the underlying environmental statutes.

### The Environmental Guidelines

Seven guidelines deal specifically with the environment. U.S. Sentencing Commission, Guidelines Manual, §§2Q1.1-2Q2.1 (November 1989). Two of these deal with tampering, attempted tampering, or threatened tampering with a public water system; one deals with hazardous or injurious devices on federal lands; one deals with specially protected fish, wildlife and plants; and one deals with knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants. This article does not address these guidelines, which apply to relatively esoteric environmental provisions that are only rarely used.

The vast majority of environmental crimes under the principal statutes are subsumed under §2Q1.2—"Mishandling of hazardous or toxic substances or pesticides; recordkeeping, tampering, and falsification"—and §2Q1.3—"Mishandling of other environmental pollutants; recordkeeping, tampering, and falsification." See Attachment A for these guidelines. Most of the underlying environmental crimes are misdemeanors. See Attachment B for a summary of covered offenses.

As with all types of crime covered by the guidelines, each environmental guideline establishes a numerical "base offense level" for a particular criminal offense and adjusts this level in light of a host of "specific offense characteristics" recited by each guideline.

The resulting number is further adjusted by factors such as whether the victim was known to be particularly vulnerable or was an official, or was physically restrained in the course of the offense, see §3A.1; whether the defendant played an organizing role or was a minimal participant and whether the defendant abused a position of trust or used a special skill that significantly facilitated the offense, see §3B.1; and whether the defendant has clearly demonstrated an acceptance of responsibility, see §3E.1.

The resulting offense level is plotted on a matrix or "Sentencing Table" published by the commission, against a "Criminal History" axis which is derived from the defendant's past criminal record or criminal livelihood. The final sentence is selected by a judge from a range corresponding to the appropriate offense level and criminal history category set forth in that matrix. Absent specified circumstances, courts are not free to depart from the range, and departures are reviewable on appeal by the government. 18 U.S.C. §3742(b).

### Guidelines' Excessive Sentences

One of the most glaring problems with the environmental guidelines is that they result in sentences in

many cases that exceed the maximum allowed by the underlying environmental statute. This not only alters or reverses the congressional determination of the seriousness of the category of offense, but impermissibly reduces the range of sentences required by the Comprehensive Crime Control Act to a single term of imprisonment—the statutory maximum. Furthermore, the guidelines fail to contemplate sentences other than imprisonment for first offenders of the environmental laws. The guidelines thus both violate the sentencing commission's enabling statute and conflict with the underlying environmental laws.

Several categories of environmental crimes are misdemeanors. All Toxic Substances Control Act (TSCA) criminal violations are misdemeanors, with a maximum imprisonment term of one year and a maximum fine of \$25,000 per day of violation. 15 U.S.C. §2615(b). Most Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations are similarly punishable by up to one year imprisonment, although a private applicator may be imprisoned only for a maximum of 30 days. 7 U.S.C. §1361(b). Clean Water Act negligent violations also trigger a one-year imprisonment maximum. 33 U.S.C. §1319(c)(1).

### No Distinction Between Felony, Misdemeanor

Yet because the guidelines fail to distinguish between misdemeanors and felonies, these statutory maximum terms may often be exceeded by a sentence calculated under the guidelines. For example, the shortest guideline sentence available for a base level offense violation of FIFRA by a private pesticide applicator (base level 8 = 2-8 months) is twice the statutory maximum. See §2Q1.2.<sup>3</sup>

Of particular note, a violation of the Clean Water Act has been transformed by application of the guidelines into a much more serious transgression than the statute itself would suggest. The CWA sets a statutory maximum of three years imprisonment for knowing crimes (one year for negligence) that do not rise to the level of a "knowing endangerment." 33 U.S.C. §1319(c)(2).

Despite this statutory maximum, the guidelines' choice of specific offense characteristics will in virtually all cases assure a minimum offense level of 14-18 for any CWA violation, even those involving a nonhazardous pollutant such as fill dirt. This would result in a sentence just within the statutory maximum range for a felony and well over the maximum for a misdemeanor for a defendant with no prior criminal history, and a sentence above the statutory maximum for defendants with any prior history. See Attachment C.

<sup>3</sup> The Application Notes accompanying §2Q1.2 (Note 4) and §2Q1.3 (Note 3) indicate that downward departures may be appropriate for negligent violations. No guidance is provided suggesting how great a departure may be warranted or whether wholesale abandonment of the guidelines for misdemeanors is appropriate. Some courts have likened the notes to legislative history that cannot override the guideline or be resorted to unless there is facial ambiguity in the guideline. See, e.g., *U.S. v. Anderson*, No. 89-10059 (9th Cir. Feb. 8, 1990).

### Four-Level Increase For Permit Violations

For example, specific offense characteristic (b)(4) requires a four-level increase for discharges without a permit or in violation of a permit (in the case of non-hazardous water pollutants) or for disposal without a permit or in violation of a permit (in the case of hazardous water pollutants). Since virtually all violations of the CWA involve discharge in violation of or without a permit, they will automatically result in an effective base level of  $6+4 = 10$ .

Next, characteristic (b)(1) requires a four-level increase for any discharge of a pollutant, which by definition will always be the case whenever there has been a discharge in violation of a permit.<sup>3</sup> (If the discharge is ongoing, continuous, or repetitive—again the likely scenario for CWA violations—there will be a six-level increase.) Finally, many discharges into publicly owned treatment works (POTWs) would qualify as “disruption of a public utility,” requiring an additional four points.

The total offense level for virtually any CWA violation is thus at least 14, and under a substantial proportion of CWA cases, closer to 18 or 20—right at the statutory maximum level. Thus, for example, the court in *U.S. v. Mills*, (N.D. Fla. April 17, 1989), appeal pending, (11th Cir.), sentenced two defendants each to 21 months in prison for filling with dirt a 75' X 300' wetlands, invoking the “ongoing or repetitive release” characteristic of §2Q1.3(b)(1) and the discharge without a permit characteristic of §2Q1.3(b)(4).

### Statutory Maximum Controls

It is true that the guidelines provide that where the guidelines sentence would exceed the statutory maximum, the statutory maximum controls. See 18 U.S.C. §3559(b); §5G1.1 (statutory maximum governs as to an imprisonment term); see also §5E1.2(c)(4) (statutory fine if based on a per day violation will govern instead of the guidelines fine). It is, of course, clear that an independent agency cannot lawfully pre-empt Congress' judgment in the original substantive statute by prescribing a regulatory sentence more severe than the appropriate maximum sentence for particular environmental violations.

But the guidelines effect an analogous result of questionable validity. The sentencing commission has compressed the range of sentences available, turning the penalty into a mandatory minimum (and maximum) for many types of crimes. Although there may be no per se constitutional defect in mandatory minimum sentencing, see, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986), by establishing what amounts to a flat sentence, the guidelines violate the Comprehensive Crime Control Act itself, which requires that the commission establish a sentencing range for each category of offense. See 28 U.S.C. §994(b)(1); see also *Mistretta v. U.S.*, \_\_\_\_\_

<sup>3</sup> Although the guidelines do not define pollutant, the CWA does. A pollutant includes “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. §1362(6).

U.S. \_\_\_\_\_, 109 S. Ct. 647, 656 (1989). Furthermore, for sentences involving imprisonment, Congress mandated that “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.” 28 U.S.C. §994(b)(2). Where the guidelines result in a minimum sentence of one year for misdemeanors or a sentencing range for felonies where the minimum is less than 25% below the maximum, it is clear that the guidelines are inconsistent with their enabling legislation.

### Sentencing First Offenders

This result also violates Congress' mandate that “the commission shall insure that the guidelines reflect the general inappropriateness of imposing a sentence to a term of imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” 28 U.S.C. §994(j). Because very few of the misdemeanor violations of TSCA or FIFRA, or a negligent violation of the CWA, can be considered a “crime of violence or an otherwise serious offense,” the imposition of not only a sentence of imprisonment, but the maximum available sentence, violates the leniency Congress required for a first offender. *Id.*

Finally, as a policy matter, it is troubling that whole categories of environmental crimes have suddenly been transformed into mandatory minimum violations by a commission that was not charged by Congress to rewrite priorities in environmental enforcement. Apart from tending to transform a statutory maximum into a sentencing minimum, the fact that these specific offense characteristics are virtually always triggered in, for example, the CWA context means that a CWA violation per se will be treated much more seriously than another environmental violation—even if Congress assigned a lower statutory maximum to the CWA than, for example, many RCRA permit violations. Compare 33 U.S.C. §1319(c) with 42 U.S.C. §6928(d). Indeed, this uniform aggravation of sentencing for CWA violations disrupts the carefully crafted hierarchy of criminal penalties (with different prison terms for negligent, knowing, and knowing endangerment crimes) established by Congress' 1987 CWA amendments.<sup>4</sup>

### Specific Offense Characteristics

Most guidelines in areas other than the environmental area cover specific crimes (e.g. perjury) and use the

<sup>4</sup> Another example of a shift in or even reversal of Congressional priorities can be found when the guidelines are applied to FIFRA. Violations of FIFRA's proprietary information confidentiality requirements are punishable by three years, 7 U.S.C. §1361(b)(1)(C), by comparison to the one year maximum for most other FIFRA violations. See 7 U.S.C. §1361(b)(1)(A). Yet the guidelines would turn on its head Congress' determination of the relative severity of these offenses, in part because the guidelines fail to provide any enhancement for illegal disclosure of confidential information. Thus, the proprietary information violation would merit only an 8 (the base level under §2Q1.2), whereas most pesticide releases would be base level 8 plus either 4 (for a single release) or 6 (for a continuous release). See Appendix C.

Offense characteristics to differentiate common circumstances surrounding a crime (e.g. causing physical injury to a person or resulting in substantial interference with the administration of justice) as aggravating or mitigating factors. See §2J1.3. By contrast, the environmental guidelines attempt to encompass a dazzling range of offenses under two guidelines that cannot reasonably be tailored to the diversity of crimes to which they apply. The offense characteristics and their Application Notes cannot apply the myriad factual circumstances that may aggravate or mitigate so many offenses. As a consequence, neither the base levels nor the offense characteristics are common to the bulk of the offenses covered. Moreover, the specific offense characteristics used as adjustment factors fail to follow the logic of the underlying environmental statutes. We briefly discuss each characteristic below.

- Single release v. repetitive release

Both §2Q1.2 and §2Q1.3 provide for increasing the base offense level by six levels "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge . . . of a pollutant into the environment," while the base offense level may be increased by only four levels "if the offense otherwise involved a discharge, release, or emission of a pollutant." §2Q1.2(b)(1); §2Q1.3(b)(1).

It certainly makes good policy sense to impose a greater sentence where a continuous or repetitive environmental discharge is occurring. But this guideline ignores the fact that the environmental statutes already provide for separate counts for such discharges, and the criminal fine provisions of both the statutes and the guidelines, see §5E1.2(c), allow per-day fines. Cf. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 316 (4th Cir. 1986) (assessing protracted CWA civil violations at approximately \$5,000 per day), rev'd on other grounds, 108 S. Ct. 376 (1987); *U.S. v. T & S Brass and Bronze Works Inc.*, 681 F. Supp. 314, 322 (D.S.C. 1988) (imposing \$1,000 per day for RCRA civil violation) 3 TXLR 1027; *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1128 (D. Md. 1987) (assessing sequential Clean Air Act violations at \$10,000 per day).

The underlying statutes are thus already finely tuned to increase the ultimate penalty in accordance with the continuous or repetitive nature of a discharge. But the guidelines now double-count a multiple-discharge violation by increasing the offense level for each individual violation as well as allowing sentencing for multiple counts. See §5G1.2. Because many CAA and CWA discharge violations involve dozens or even hundreds of days of effluent or air emission releases, increasing the penalty will be called for in most circumstances under the guidelines—despite the fact that Congress, when it established the availability of per-day violation fines in the environmental laws, already determined the appropriate degree of enhancement to be charged for repetitive violations.

- Likelihood of death or serious injury

§2Q1.2 and §2Q1.3 provide for an increase of nine and 11 levels, respectively, where the offense "resulted in a substantial likelihood of death or serious bodily injury." At the outset it should be noted that few environmental violations, even criminal ones, rise to the level of creating a substantial likelihood of death or serious bodily injury. For example, in the 13-year history of TSCA Section 8(e), 15 U.S.C. §2607(e), which requires reporting of information which reasonably supports the conclusion that a substantial risk of injury to health or the environment is posed by a chemical, no criminal charges have ever been brought by the Environmental Protection Agency under this provision. Nonetheless, it makes good policy sense to punish with particular severity environmental violations that create the greatest health and safety threat—even it means reserving one of five specific offense characteristics for one of the least likely circumstances of an environmental crime.

The problem lies in the fact that different offense increases are provided for hazardous (increase of nine) when compared to nonhazardous pollutant violations (increase of 11) which result in a likelihood of such serious injury. The net result is that the same total offense level (17) is available for a violation that results in serious injury, regardless of whether the violation involved a hazardous or a nonhazardous pollutant. The commission apparently contemplated that the harm would be the same regardless of the hazardous nature of its source, and hence the same sentence would be appropriate.

This also may be a reasonable policy decision. If it is, the question arises why it is not applied uniformly to violations that fall short of a likelihood of death or serious bodily injury. Why should the same environmental injury which happens to fall short of creating death or serious bodily injury not trigger the same penalty, regardless of whether it is caused by a hazardous or a nonhazardous pollutant? Why make a policy distinction between hazardous and nonhazardous and apply it only to a few isolated cases, and not apply it to the bulk of environmental crimes?

The guidelines' failure to address this issue at best raises questions about how seriously the commission takes its own distinction between hazardous and nonhazardous materials—and at worst creates an unwarranted inequity in treatment between those who cause lesser environmental harm as a result of a "hazardous" substance discharge and those who have mishandled "nonhazardous" pollutants but with substantial harmful result.

- Disruption of public utilities, community evacuation, or substantial cleanup expenditures

Both §2Q1.2(b)(3) and §2Q1.3(b)(3) require an increase of 4 levels if an offense "resulted in disruption of public utilities or evacuation of a community, or if

cleanup required a substantial expenditure." But the wholesale equating of a widespread community evacuation with a "substantial" cleanup makes little sense when the environmental harm or threat present in a widespread evacuation is compared to even a minimal hazardous waste site cleanup. Even the initial investigation of a non-National Priorities List site may often cost several hundred thousand dollars. If such an expenditure is considered "substantial"—a reasonable construction given the guidelines' complete absence of explanation of the term—even a minor problem of surface soil contamination would be comparable to situations requiring a public evacuation.

Furthermore, it is ambiguous whether a cleanup funded by a defendant triggers this element; if so, there is a strong incentive for a defendant not to undertake mitigation efforts, since the prison term will be the same regardless of whether it is the defendant or the government who performs cleanup. It is true that, for a few environmental crimes not subject to a "per day" fine calculation, a defendant's cleanup efforts will likely reduce the "pecuniary gain" from the crime and hence reduce the fine imposed. See §5E1.2(c)(4). But few defendants would choose to expend cleanup monies in the hope of reducing their fines, if the certain price is an increase of 4 offense levels—which translates into several months or more of extra imprisonment.<sup>3</sup>

- Disposal without or in violation of a permit

Section 2Q1.2(b)(4) provides for an increase of 4 levels if the offense "involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Section 2Q1.3(b)(4) provides for the same increase if the offense involved "a discharge without a permit or in violation of a permit."

The language and the statutory citations accompanying these provisions suggest that §2Q1.2 was intended to govern RCRA permit violations, and §2Q1.3 was intended to govern CWA permit violations that do not involve hazardous pollutants.<sup>4</sup> But while it may make sense to create an aggravating offense characteristic based on failure to obtain or comply with a permit where RCRA statutory penalties are relatively stringent (two year and five year offenses, 42 U.S.C. §6928(d)), there is no reason to apply this uniformly to CWA offenses. The CWA statutory penalties (one year v. three year offenses, 33 U.S.C. §1319(c)) are differentiated based solely on intent. Yet no offense characteristic addresses that factor; instead, both CWA misdemeanors and CWA felonies, which virtually always involve a permit violation, are uniformly treated with the (b)(4) aggravating factor.

<sup>3</sup> Again there is a discrepancy between the guideline and the Application Note which, unlike the guideline, suggests that only "public" cleanup expenses are covered. At least one prosecutor has asserted that private cleanup costs trigger this provision.

<sup>4</sup> The conclusion is not stated in the guidelines; it is deduced from the fact that §2Q1.2(b)(4) refers to "treatment, storage, or disposal"—key RCRA terms—and cites to RCRA, 42 U.S.C. §6928(d), whereas §2Q1.3(b)(4) refers to "discharge" without a permit—the key CWA term—and cites to the CWA, 33 U.S.C. §1319(c).

In sum, there is no apparent correlation between the widely ranging statutory provisions of the CWA and RCRA and the sentences that result from application of the guidelines. Nor does the guidelines' distinction between RCRA and CWA nonhazardous violations have any basis in the underlying statutes, apart from the general fact that some RCRA permit violations (those not involving used oil) have greater sentences than some CWA permit violations (those that do not involve a knowing violation).

To some degree, the Application Notes to these guidelines provide additional discretion for "departures" from the guidelines that can reduce the inequities produced or match the sentences more closely to those suggested by the substantive statutes. But why create a system whose basic components require constant tinkering in order to correct their inherent inconsistencies with environmental laws? Furthermore, is it appropriate to give certain circumstances the prima facie applicable status of a specific offense characteristic, while giving other circumstances—including the important factor of whether conduct was negligent rather than knowing—the status of "departures" which a court must justify and which are not subject to specific numerical boundaries? See, e.g., §2Q1.2, Application Note 4 ("In cases involving negligent conduct, a downward departure may be warranted"); §2Q1.3, Application Note 8 (where defendant has violated an administrative order, "an upward departure may be warranted").

#### Distinction Unsound

The guidelines' inconsistency with the environmental statutes lies not just in the specific offense characteristics, but even in their fundamental, overarching framework. As already noted, the guidelines create a general distinction between hazardous and nonhazardous pollutants, with a greater offense level for hazardous pollutants. See "Background" note to §2Q1.3 ("The section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.")

To some degree, this distinction tracks that of the environmental statutes themselves, some of which—the Comprehensive Environmental Response, Compensation, and Liability Act and RCRA are examples—limit their reach to listed or readily identifiable "hazardous" wastes or substances. The sentencing commission appar-

<sup>5</sup> While this distinction is the clear intent of the two guideline provisions, §2Q1.2 fails to cite the correct CERCLA provision in identifying the statutory list of hazardous substances. See Commentary to §2Q1.2, "Statutory Provisions" (citing 42 U.S.C. §9603(b), (c), (d)). The correct citation should be 42 U.S.C. §9602. Although Application Note 3 does mention the CERCLA hazardous substances list, the failure to cite §9602 in the "Statutory provisions" section at least creates an ambiguity whether a hazardous substance which is not hazardous under any of the other cited statutes would be governed by §2Q1.2 rather than §2Q1.3.

A further example of unnecessary ambiguity arises from the guidelines' inconsistent and incomplete citation of the environmental statutory provisions. For example, §2Q1.2 cites to both the "prohibited acts" sections of TSCA and FIFRA, and those statutes' generic penalty provisions, but cites only to the generic penalty provisions of

assumed that Congress, by enacting laws which specifically and only with hazardous substances, was making a policy determination that such substances were a greater threat to society than nonhazardous substances, and therefore any violation involving such substances would per se be worthy of a greater penalty.

The problem with applying this distinction in the sentencing context is that Congress has gone one step beyond the gross distinction between hazardous and nonhazardous pollutants, and actually enacted laws governing certain nonhazardous substances and assigned specific criminal penalty ranges for violations of those laws. Parts of RCRA, the CWA, and the CAA, for example, clearly govern nonhazardous substances.

Therefore, if the sentencing commission is seeking to embody policy decisions about the seriousness of an offense, it should look to the specific penalties provided in the environmental statutes themselves, not to the precursor, blunderbuss distinction between "hazardous" and "nonhazardous" pollutants that may have governed when Congress was simply trying to determine what types of substances would be covered by an emerging statute. It is that statutory penalty attributable to a specific nonhazardous pollutant offense which should govern, not a generic distinction between hazardous and nonhazardous substances.

#### Congress' Policy On Penalty Ranges

Looking, then, to the specific penalty ranges dictated by Congress for nonhazardous pollutants, we discover that Congress intended to make the same penalty available for nonhazardous violations as for hazardous substance violations. The same penalty provisions with the same penalty ranges apply to both hazardous and nonhazardous substances in these statutes. See, e.g., 33 U.S.C. §1319(c); 42 U.S.C. §6928(d); 42 U.S.C. §7413. It is clear that Congress did not differentiate between, for example, a discharge of soil into waters in excess of Total Suspended Solids limits in an effluent permit, and a discharge of benzene in violation of a similar provision in the same permit. The hazardous/nonhazardous distinction between §2Q1.2 and §2Q1.3 is unsupported by the statutes.

Furthermore, by making a hazardous/nonhazardous distinction which is not apparent in the underlying statutes, the guidelines tend to level out sentences among different types of statutes. For example, TSCA and FIFRA violations with a maximum prison term of one year, CAA violations with a maximum term of three years, and RCRA violations with a maximum term of five years are all governed by §2Q1.2 and the same base offense level.

the CWA, CAA, and Safe Drinking Water Act. Similarly, §2Q1.3 cites to both the substantive provisions and the generic penalty provisions for unlawful obstruction of a navigable waterway, but cites only the generic penalty provisions of the CWA and CAA. The commission should amend the statutory citations for both guidelines either to include substantive provisions and their penalty provisions for all relevant statutes, or to include only the generic penalty provisions of these statutes.

The leveling effect is only slightly mitigated by the specific offense characteristics, since only two of those characteristics—the one providing for a 4-level increase for permit violations, see §2Q1.2(b)(4), and the one providing for a 2-level decrease for "simple recordkeeping or reporting violations only," see §2Q1.2(b)(6)—tend to apply differentially and in the right direction among the different environmental statutes.<sup>4</sup>

#### Conclusion

The structural and specific problems only briefly discussed in this article are certain to generate real-life horror stories as the growing number of criminal cases in the pipeline reach the point of sentencing under the guidelines. Indeed, problems such as the "mandatory minimum" effect of the guidelines may support sound judicial challenges to such sentences, as violations of the Comprehensive Crime Control Act's mandates of a sentencing range or of leniency for first-time offenders. In any event, the sentencing commission should act quickly to review the guidelines with closer attention to the diversity of offenses and the policy choices reflected in statutory maximum sentences provided by the underlying environmental statutes.

At least three general reforms of the environmental guidelines are suggested by our discussion. The first should be to create a base offense level and specific offense characteristics which will only rarely, if ever, range above the statutory maximum provided by the underlying statutes—and to provide for the leniency Congress intended to give first offenders. It is reasonable to assume that when Congress allowed "up to" X years imprisonment for a particular type of violation, it intended the range of sentences from zero months to the maximum to be employed, depending on a review of all the circumstances of the particular case. A similar intent to establish a range of penalties is unequivocally expressed by the Comprehensive Crime Control Act itself. Any guideline which results in top-loading the sentences at or near the statutory maximum does violence to the intent of both statutes.

The second reform should be to base the specific offense characteristics on policy concerns reflected by the environmental statutes, not the few crude concerns identified in the guidelines. Some preliminary guidance can perhaps be gleaned from EPA's civil penalty settlement policy documents, both the generic Civil Penalty Settlement Policy and the statute-specific (or even the program-specific) settlement policies issued by EPA. These guidance documents identify some of the factors that the agency will look to in setting the civil penalty for a particular environmental violation. The policies' attention to the violator's prior compliance history and

<sup>4</sup> §2Q1.2(b)(4) tends to increase the sentence for RCRA permit violations above the sentence equally applicable to TSCA and FIFRA violations, and thus brings the sentence closer to the five-year maximum allowed by RCRA. §2Q1.2(b)(6) tends to decrease the sentence for TSCA and FIFRA violations, many of which will fall into the "simple recordkeeping or reporting" category, and thus brings the sentence closer to the one-year maximum allowed by those statutes.

degree of willfulness, for example, find little counterpart in the sentencing guidelines, which look rather narrowly only to the defendant's actual criminal history.

Third, the commission should seriously consider increasing the number of guidelines that deal specifically with environmental crimes. Perhaps the fundamental problem with the guidelines is that they attempt to squeeze the enormously complex regime of multi-media environmental laws into essentially two narrow guidelines. Important distinctions between the various statutes must be addressed through the clumsy use of specific offense characteristics and Application Notes which provide either too little or too much discretion to vary the final sentence according to a limited few parameters. But no matter how well-chosen the base offense level or the specific offense characteristics, it is unlikely that any two guidelines and their satellite corollaries can do justice to the infinite permutation of violations possible under the many environmental laws. The creation of one

guideline for each substantive statute, or for each medium polluted, or some demarcation other than a simple hazardous/nonhazardous distinction, may bring a court closer to the mark set by Congress.

Ultimately, the lodestar of any reform should be to track faithfully the policies and structures of the environmental laws. Unless a fundamental consistency with the underlying statutes is assured, the commission will continue to invite courts faced with flagrantly inequitable results to depart as a matter of course from the guidelines' factors; to disregard the guidelines entirely; or worse, to twist the often ambiguous and skeletal language of the guidelines in a way never intended by the commission so as to reach a court's desired result. By forcing courts to choose between perpetrating injustice and creating such twisted law, the guidelines may encourage judges to seize back and abuse the very discretion intended to be taken from them.

## APPENDIX A. SENTENCING GUIDELINES

### PART Q. OFFENSES INVOLVING THE ENVIRONMENT

#### §2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: 24

#### Commentary

Statutory Provisions: 33 U.S.C. §1319(c)(3); 42 U.S.C. §6928(e).

#### Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note: Effective November 1, 1987.

#### §2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

(a) Base Offense level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

#### Commentary

Statutory Provisions: 7 U.S.C. §§136j-136l; 15 U.S.C. §§2614 and 2615; 33 U.S.C. §§1319(c)(1), (2), 1517(b), 1321(b)(5); 42 U.S.C. §§300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§1350, 1816(a), 1822(b).

#### Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false

information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. "Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.

3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. §1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. §9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.

4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

5. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

6. Subsection (b)(2) applies to offense where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

7. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

8. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.

9. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

**Background:** This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

**Historical Note:** Effective November 1, 1987.

### §2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) If the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

#### Commentary

**Statutory Provisions:** 33 U.S.C. §§403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. §7413.

**Application Notes:**

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly



construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.

3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.

5. Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.

7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.

8. Where a Defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

## CHAPTER FIVE — DETERMINING THE SENTENCE

### Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing 18 U.S.C. §3553(a).

Historical Note: Effective November 1, 1987.

## PART A — SENTENCING TABLE

### Commentary

#### Application Notes:

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A. The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270).

The Sentencing Table used to determine the guideline range follows:

## SENTENCING TABLE

(In months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	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 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
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
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
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
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 - 265	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
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

**APPENDIX B.  
ENVIRONMENTAL CRIMES  
SUBJECT TO SENTENCING GUIDELINES SECTIONS 2Q1.2 and 2Q1.3**

**VIOLATIONS SUBJECT TO SECTION 2Q1.2:**

***Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361.***

- Registrant, applicant, or producer who knowingly violates FIFRA may receive up to \$50,000 fine and/or one year imprisonment.
- Commercial applicator of a registered pesticide or any person not described above who knowingly violates FIFRA may receive up to \$25,000 fine and/or one year imprisonment.
- Private applicator who knowingly violates FIFRA may receive up to \$1,000 fine and/or 30 days imprisonment.
- Any person who, with intent to defraud, uses or reveals confidential formula information acquired under FIFRA may receive up to \$10,000 fine and/or three years imprisonment.

***Toxic Substances Control Act, 15 U.S.C. §2615.***

- Any person who knowingly or willfully violates TSCA may receive up to \$25,000 fine per day of violation and/or one year imprisonment.

***Clean Water Act, 33 U.S.C. §1319(c)(1), (2).***

• Any person who negligently violates CWA or negligently introduces into a sewer system or publicly owned treatment system (POTW) any pollutant which such person knew or reasonably should have known could cause personal injury or property damage, and which causes such POTW to violate any effluent limitation or permit condition, shall receive a fine of not less than \$2,500 nor more than \$25,000 per day of violation, and/or imprisonment for up to one year. A second or further violation of this provision may result in a fine of up to \$50,000 per day of violation, and/or imprisonment of up to two years.

• Any person who knowingly violates the CWA or knowingly introduces into a sewer system or POTW a pollutant under the terms described above shall be fined not less than \$5,000 nor more than \$50,000 per day of violation, and/or be imprisoned for up to three years. A second or further violation of this provision may result in a fine of up to \$100,000 per day of violation and/or imprisonment of up to 6 years.

• Any person in charge of a vessel or of an onshore facility who fails to notify the United States of a discharge of oil or a hazardous substance from such vessel or facility may be fined up to \$10,000 and/or imprisoned for up to one year.

***Deepwater Port Act, 33 U.S.C. §1517(b).***

- Any person in charge of a vessel or a deepwater port who fails to notify the Secretary of Transportation as soon as he has knowledge of a discharge of oil may receive up to \$10,000 in fines and/or up to one year imprisonment.

***Safe Drinking Water Act, 42 U.S.C. §300h-2.***

- Any person who willfully violates the underground injection control laws promulgated pursuant to the SDWA may be imprisoned for up to three years, and/or fined in accordance with Title 18 of the U.S. Code.

***Resource Conservation and Recovery Act, 42 U.S.C. §6928(e).***

• Any person who knowingly violates RCRA by transporting or causing to be transported any hazardous waste without a permit, or by knowingly treating, storing, or disposing of any hazardous waste without a permit or in knowing violation of a permit, may receive a fine of up to \$50,000 per day of violation and/or up to five years imprisonment.

• Any person who knowingly violates any other provision of RCRA may receive a fine of up to \$50,000 per day of violation and/or up to two years imprisonment.

• A second or further violation of RCRA may result in a fine and/or imprisonment term up to double the maximum appropriate for a first violation.

***Clean Air Act, 42 U.S.C. §7413.***

• Any person who knowingly makes any false statement, representation, or certification in any document filed or required to be maintained by the CAA or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device required to be maintained by the CAA may be fined up to \$10,000 and/or imprisoned up to six months.

• Any person who commits any other knowing violation of the CAA may be fined up to \$25,000 per day of violation and/or imprisoned up to one year. A second or further conviction under this provision may result in a fine and/or term of imprisonment up to double the maximum appropriate for a first violation.

**Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9603(b).**

• Any person in charge of a vessel or facility from which a hazardous substance is released (other than a federally permitted release) under certain circumstances and who fails to notify the United States of such release shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years. The term of imprisonment may range up to five years for a second or subsequent conviction.

• Any facility owner/operator or transporter of hazardous substances to a facility who knowingly fails to notify the United States of the existence of such facility, the amount and type of hazardous substances found there, and any known, suspected or likely releases from such facility, shall be fined up to \$10,000 and/or imprisoned for up to one year.

• Any person who knowingly destroys, mutilates, erases, conceals, or otherwise renders unavailable or falsifies any records with respect to hazardous substances at a facility shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years (or up to five years for a second or subsequent violation).

**Outer Continental Shelf Lands Act, 43 U.S.C. §1350, §1822(b).**

• Any person who knowingly and willfully violates the OCSLA, any lease or regulation issued under the OCSLA, makes any false statement in any document filed or required to be maintained, falsifies or tampers with any monitoring device, or reveals any confidential data under the OCSLA may be fined up to \$100,000 per day of violation and/or imprisoned up to ten years.

• Any person in charge of a vessel or offshore facility which is involved in an oil pollution incident and who knowingly fails to notify the United States may be fined up to \$10,000 and/or imprisoned up to one year.

**VIOLATIONS SUBJECT TO SECTION 201.3:**

**Rivers and Harbors Act, 33 U.S.C. §406, §411.**

• Any person who wrongfully constructs bridges, piers, or otherwise obstructs a navigable waterway shall receive a fine not less than \$500 and not more than \$2,500, and/or be imprisoned up to one year.

• Any person who deposits refuse in a navigable waterway, takes possession of or uses or injures any harbor or river improvements, or obstructs a navigable waterway with a vessel, loose timber, or craft shall receive a fine not less than \$500 and not more than \$2,500, and/or be imprisoned not less than thirty days nor more than one year.

**Clean Water Act, 33 U.S.C. §1319(c), and Clean Air Act, 42 U.S.C. §7413**

• For violations involving a nonhazardous or nontoxic pollutant: same maximum fines and imprisonment terms noted supra under, §2Q1.2.

**Ocean Dumping Act, 33 U.S.C. §1415(b).**

• Any person who knowingly violates the Ocean Dumping Act may be fined up to \$50,000 and/or imprisoned for up to one year.

**Act to Prevent Pollution from Ships, 33 U.S.C. §1908.**

• Any person who knowingly violates the Act or the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (the "MARPOL Protocol") may be fined up to \$50,000 and/or imprisoned up to five years.

**APPENDIX C.  
EXAMPLES OF ENVIRONMENTAL SENTENCING INEQUITIES**

<u>Statutory Provision</u>	<u>Statutory Penalty</u>	<u>Sentencing Guideline Provision for Typical Offense</u>	<u>Guideline Penalty</u>	<u>Inequitable Result</u>
1. FIFRA 7 U.S.C. §1361(b)(2) (private pesticide applicator)	Up to 30 days	2Q1.2(a) base offense	8 2 - 8 months	Guidelines <u>always</u> impose statutory maximum.
2. CWA 33 U.S.C. §1319(c)(1) (negligent discharge of pollutant)	Up to 1 year	2Q1.3(a) base offense	6	Guidelines <u>always</u> impose statutory maximum.
		2Q1.3(b)(1)(B) discharge	4	
		2Q1.3(b)4 permit	4	
			14 15 - 21 months	

3. CWA 33 U.S.C. §1319(c)(2) (negligent discharge of pollutant)	Up to 3 years	2Q1.3(a) base offense	6	33 - 41 months	Guidelines typically impose statutory maximum.
		2Q1.3(b)(1)(B) continuous discharge	6		
		2Q1.3(b)(3) disruption of facility	4		
		2Q1.3(b)(4) permit	4		
			<u>20</u>		
4. Violation of MARPOL Protocol 33 U.S.C. §1908 (discharge of pollution from ship)	Up to 5 years	2Q1.2(a) base offense	8	10 - 16 months	Guidelines typically impose <u>less</u> for this felony
		2Q1.2(b)(1)(B) discharge	4		
			<u>12</u>		
5. FIFRA 7 U.S.C. §1361(b)(3) (disclosure of confidential pesticide information)	Up to 3 years	2Q1.2(a) base offense	8	0 - 6 months	Guidelines typically impose <u>less</u> for this felony violation than sentence for FIFRA misdemeanor.
		2Q1.2(b)(6) simple record-keeping	- 2		
			<u>6</u>		

## SUMMARY OF DEVELOPMENTS

### ENVIRONMENTAL EXPOSURE

#### Agent Orange

#### GOVERNMENT, INDUSTRY MANIPULATED RESULTS OF HERBICIDE STUDIES, FORMER OFFICIAL SAYS

A former top U.S. Navy official who ordered extensive spraying of the defoliant Agent Orange during the Vietnam War told a House subcommittee June 26 that the government and the chemical industry manipulated the results of scientific studies and suppressed evidence of adverse health effects of the dioxin-containing herbicide.

Retired Admiral Elmo R. Zumwalt Jr., who completed his own review of the scientific literature on Agent Orange in May as a special assistant to Veterans Affairs Secretary Edward J. Derwinski, asserted in his testimony that there is "credible evidence" linking certain cancers and other illnesses with the defoliant.

However, Zumwalt said, "government and industry officials credited with examining such linkage intentionally manipulated or withheld compelling information on the adverse health effects associated with exposure to the toxic contaminants contained in Agent Orange."

Efforts "to distort the record" on the herbicide "were so appallingly egregious that they continue to needlessly muddle the debate on the human health effects of toxic dioxins," Zumwalt said in prepared testimony before the House Government Operations Subcommittee on Human Resources and Intergovernmental Operations.

Determining the relationship between Agent Orange exposure and health effects such as cancer and other disorders is critical because of demands from veterans from the Vietnam War for compensation for a host of diseases which veterans' groups say are caused by Agent Orange.

At the hearing, Zumwalt presented the results of a review of studies on Agent Orange and other dioxin-con-

taining herbicides which he conducted along with a panel of scientific experts assembled specifically for that purpose. According to Zumwalt's report, 28 health problems, including a number of cancers, neurological defects, and immune system disorders, are related to Agent Orange exposure.

In part because of Zumwalt's review, the Department of Veterans Affairs has ruled that it will consider as service-related and therefore eligible for compensation two cancers for Vietnam veterans: non-Hodgkin's lymphoma and soft-tissue sarcoma.

In making that decision, Derwinski, the Veterans Affairs secretary, indicated that it was "as least as likely as not" that Agent Orange exposure was related to the illnesses, although the department has still not said there was a causal relationship between the defoliant and the cancers.

#### Conventional Propaganda

In testimony before the subcommittee that was highly critical of both government and industry studies that for years were used to deny compensation to veterans, Zumwalt recalled that he had suspected that the Hodgkin's disease and non-Hodgkin's lymphoma from which his son suffered and later died was related to his exposure to Agent Orange in Vietnam.

Yet, at the time, "the conventional propaganda" of the government held that there was insufficient evidence to support a linkage, he said. Zumwalt noted, however, that there is now "a clear consensus" among epidemiologists, toxicologists, and immunologists that substances found in Agent Orange, including the dioxin 2,3,7,8-TCDD, "are extremely toxic to animals" and, by extrapolation, to humans.

Among the studies Zumwalt reviewed were two conducted by the federal Centers for Disease Control. The first, called the Agent Orange Validation Study, began

## REVIEW & OUTLOOK

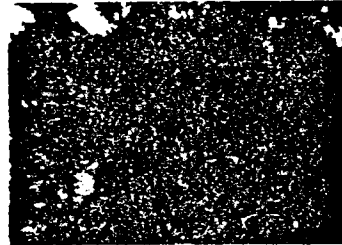
### Property Busters

Fans of "Ghostbusters" will recall that the movie featured a pompous bully from the Environmental Protection Agency. Well, life is imitating art in Morrisville, Pa., where a flabbergasted truck mechanic is discovering how little regard the EPA has for property rights. Somehow only Bill Murray could muster the bemused astonishment needed for this role.

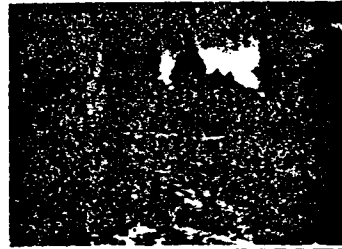
John Pozsgai is a 57-year-old self-employed mechanic who bought and tried to improve what amounted to an illegal dump next to his home. For his trouble, he's earned a criminal sentence of three years in prison and a \$202,000 fine for fouling U.S. "wetlands." If his experience is the shape of environmental law enforcement to come, Mr. Pozsgai can be forgiven for wondering why he ever fled Communist Hungary in 1956.

Mr. Pozsgai set off on his crime spree when he bought a nearby lot to expand his back-yard truck-repair business. The 14-acre lot would remind no one of the Everglades. It's bordered by a tire shop, lumberyard and four-lane expressway, and for 20 years was used by neighbors as an unofficial dump site. Its only endangered species were 7,000 old tires, rusting cars and assorted junk. Mr. Pozsgai proceeded to clear the mess and spread a layer of clean landfill

Protected Wetlands



Clean Water Violation



eagerly deposited by area contractors, as the nearby photos attest.

Somehow his enterprise offended the EPA's enforcers, apparently energized by George Bush's "no net loss of wetlands" campaign pledge. Most Americans probably figure that means protecting Cape Cod or the great blue heron. And indeed the

Pozsgai parcel was not even listed on the U.S. National Wetland Inventory Map. But the EPA judged that Mr. Pozsgai's vacant lot contained a stream—dry for most of the year—that somehow crossed the expressway and ran into a glorified ditch known as the Pennsylvania Canal. The EPA also cited as evidence the presence of skunk cabbage, a common weed, and sweet gum, a common tree. By this definition of "wetlands," just about any large American rain puddle will qualify as protected.

The Feds began to harass Mr. Pozsgai to get a permit for his property improvement, though Mr. Pozsgai claims state officials told him he could go ahead without one. The doughty Feds even staked out the property with a video camera to tape trucks dumping dirt. After the Feds got a restraining order, Mr. Pozsgai obliged by putting up barricades, but a few uninformed truck drivers still dumped their un-hazardous dirt—providing more evidence against the evil emigre.

The Justice Department then charged him with 40 violations of the Clean Water Act, though the act never even uses the word "wetlands." The act merely bans the polluting of "navigable waters" of the U.S. The bar against polluting "wetlands" is a bu-

reaucrat's interpretation of this typically ambiguous congressional law. The jury that convicted Mr. Pozsgai can be forgiven if it was as confused as the prosecutors.

At the sentencing, U.S. Attorney Seth Weber invoked President Bush's campaign pledge and claimed, "A message must be sent to the private landowners, the corporations and developers of this country." Presumably that message is that property owners who offend the government's environmental zealots will end up as indicted felons. Drug dealers can plea bargain, but "landowners" go directly to jail. In a similar case in Pensacola, Fla., a man and his son have been convicted for cleaning out a drainage ditch. Mr. Pozsgai would be in the slammer already if his case hadn't been appealed by the Washington Legal Foundation, a public-interest group. An appellate ruling may come as soon as Friday.

We've thought for some time that environmentalism and property rights are on a collision course. A free society should have room for both, but that's impossible so long as EPA Administrator William Reilly and his crusaders think individual rights have to be sacrificed to their view of the public good. John Pozsgai knows what that means.

# Forbes

JANUARY 22, 1990

### Dangerous criminal nabbed!

Who is the most notorious environmental criminal in the U.S.? Would you believe a Hungarian immigrant named John Pozsgai? Pozsgai, who owns a small truck repair shop, was convicted in late 1988 of violating the Clean Water Act. His sentence: three years in the slammer and a \$202,000 fine, the stiffest penalty ever for an environmental violation. His crime? Filling in 5 acres of a 14-acre parcel he owns in Morrisville, Pa., near Trenton, without a permit.

Pozsgai, 58, came to the U.S. in the

aftermath of the 1956 Hungarian uprising. In 1987 he bought the 14-acre tract so he could expand his business. The property had been used as a dump for years, so Pozsgai began cleaning it up, hauling away more than 7,000 used tires and other debris. He also began filling in the land with clean fill and topsoil.

Unfortunately, Pozsgai's property had been classified as federal wetlands because of a small stream that runs along its edge in wet weather. And he got repeated warnings from local and federal environmental authorities that he could not fill in his

land without the proper permits. Pozsgai contends that a series of engineers he hired could not figure out how to file the necessary forms.

The sentence was the maximum allowed, unheard of in a case that involved no hazardous chemicals and no prior convictions, according to the Washington Legal Foundation, which has taken up Pozsgai's case. Pozsgai knowingly and repeatedly violated the law, say the feds, and now must pay the price.

The wetland outlaw's appeal is scheduled to be heard this month.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D C 20460

FEB 13 1989

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE MONITORING

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

Dear Judge Wilkins:

Among the federal regulatory agencies, few have assigned more resources and importance in working closely with the U.S. Sentencing Commission in the development of sentencing guidelines, first for individual defendants, and then with regard to organizational defendants, than the Environmental Protection Agency. Former Administrator Lee Thomas not only personally followed the Agency's efforts in this regard, but last October also conveyed to the Commission, through correspondence, his personal comments on the draft organizational guidelines. In addition, the Deputy Assistant Administrator for Criminal Enforcement, Paul R. Thomson, Jr., testified to the full Commission in December 1988. The Office of Criminal Enforcement Counsel has also recently chaired several meetings and provided extensive data for research personnel of the Commission who are examining how business entities have been penalized for environmental violations.


It is in light of this record of positive support and cooperation between the Commission and the Agency that I convey our concern about the manner by which the Commission has undertaken to enact the proposed revision of Part Q, Offenses Involving the Environment, of the Sentencing Guidelines.

Our concern is that the Sentencing Commission did not inform my office nor consult with my staff on a matter of such obvious interest to the Agency as a revision of the sentencing guidelines for environmental offenses. In October 1988, the Office of Criminal Enforcement Counsel understood, apparently mistakenly, as result of communications with the Commission staff that the Commission for the foreseeable future had abandoned its pursuit of any substantial revision of Part Q. It was with considerable surprise that we learned on January 30, 1989 that a full revision of Part Q was under active consideration and had

been developed to the point of being presented to the full Commission within two weeks for possible publication in the Federal Register. This information and a copy of the draft revision was not provided to the EPA by the Sentencing Commission, but through the Environmental Crimes Section of the Land and Natural Resources Division of the Department of Justice. It was indeed perplexing that the Commission (as indicated by the enclosed Commission letter of January 3, 1989) provided a draft of the revision to the Department of Justice for its review and comment in early December, but the Agency did not receive the draft revision until January 30, 1989. In the legislation creating the U.S. Sentencing Commission, Congress specifically directed that in "fulfilling its duties and exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system", 28 U.S.C. § 994(o).

To avoid a reoccurrence of this situation and to foster a continuing close working relationship, we would request that the Agency be consulted at the earliest possible date in the formulation process of any Guideline revisions that would impact on environmental criminal enforcement.

Sincerely,



Thomas L. Adams, Jr.  
Assistant Administrator

Enclosure

cc: Commissioner Nagel



Statement of

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on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission  
Washington, D.C.

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My name is Barry J. Portman, and I am the Federal Public Defender for the Northern District of California. I appear today to present the views of the Federal Public and Community Defenders.

There are presently more than 40 Federal Public and Community Defenders organizations in the United States. Federal Public and Community Defender Organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We appear before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal court. We represent persons charged with frequently-prosecuted federal crimes, like drug distribution, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders have, in short, a great deal of experience with the guidelines. Based upon that experience, we are pleased to offer our comments on the proposed amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.

Before turning to specific proposed amendments, we have several general observations. First, we are concerned that the Commission, apparently inadvertently, is changing the nature of the guidelines from charge-offense with real offense elements, to real offense.

As the Commission itself has indicated, in drafting the initial set of guidelines

one of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).<sup>1</sup>

The Commission's first effort to draft a set of guidelines incorporated a pure real offense system. The Commission found, however, that a real offense system was impractical and "risked return to wide disparity in sentencing practice".<sup>2</sup> The Commission then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".<sup>3</sup>

Several of the proposed amendments would alter the present system by converting a guideline to a real offense guideline. We believe that this approach is wrong. The Commission, for good reasons, has rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to make a fundamental alteration of the system, the Commission should tackle the issue head-on and across-the-board. The problems

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<sup>1</sup>U.S.S.G. Ch. 1, Pt. A(4)(a), at 1.4.

<sup>2</sup>Id. at 1.5.

<sup>3</sup>Id.

that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.

We are not endorsing a real offense system. Indeed, we have strong reservations about a system in which the charge that the government has proved beyond a reasonable doubt would serve only to set a maximum and otherwise would be virtually irrelevant to determining punishment. Rather, we are suggesting that a major alteration of the guideline system ought to be undertaken directly and comprehensively, not inadvertently and on an ad hoc basis.

A second area of concern to us involves responding to an enactment that increases a statutory maximum. Congressional action to increase a maximum for an offense should not automatically result in a general increase in the offense levels of the guideline applicable to that offense. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely.

Our final area of concern involves the sufficiency of the material available to explain and justify what the Commission is proposing. Some explanations in the "Reason for Amendment" sections do little more than restate the proposed amendment. Others make vague, generalized statements that do not identify the problem being addressed and the rationale for the solution to the

problem. Staff memoranda can be helpful, but they are not accessible to all parties who are interested in guideline changes. They are, moreover, of inconsistent quality. Data presented, for example, may not support the conclusion reached.

A major deficiency in all of the supporting material, whether the explanations in the "Reason for Amendment" sections or the staff memoranda, is the failure to present data about, and analyze the impact of the proposal on, federal prison population. As of the end of last month, there were 60,772 inmates in federal prison facilities with a capacity to hold 38,172, according to the Federal Bureau of Prisons. Federal prisons today are operating at 160% of capacity.

Congress has mandated that the Commission, in formulating guidelines, "take into account the nature and capacity of the penal, correctional, and other facilities and services available."<sup>4</sup> Congress further provided that "the sentencing guidelines . . . shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."<sup>5</sup> Congress intended that the Commission use prison impact data as a part of its decision-making process.<sup>6</sup> Good faith compliance with the Congressional mandate

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<sup>4</sup>18 U.S.C. § 994(g).

<sup>5</sup>Id.

<sup>6</sup>See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983) ("The purpose of the requirement is . . . to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated.").

would seem to require that prison impact data be available early in the amendment cycle. Deciding to amend a guideline and then generating data to show the impact of the amendment on federal prisons does not comply with the letter or spirit of the Congressional mandate. Generating the data just before voting to approve an amendment might comply with the letter, but does not comply with the spirit, of the Congressional mandate.

#### Amendment 7 -- § 2B3.1 (Robbery)

The Commission has asked for comments on three proposed amendments to the robbery guideline. Proposed amendment 7(A) would increase the enhancement of subsection (b)(1) from 2 levels to 4 levels. Proposed amendment 7(B) would increase the weapon enhancement of subsection (b)(2) by one to 4 levels. Proposed amendment 7(C) would add a special instruction increasing the offense level if the defendant committed one additional robbery (2-level increase), 2 additional robberies (3-level increase), 3 or 4 additional robberies (4-level increase), or 5 or more additional robberies (5-level increase). We oppose all three of these proposals.

#### Amendment 7(A)

The Commission is proposing to increase the enhancement for subsection (b)(1) in order "to more adequately reflect the seriousness of this offense." The available evidence, however, indicates that current sentences, rather than being too low, are too high. In bank robbery cases sentenced between January 19, 1989

and June 30, 1990, courts sentenced below or at the bottom of the guideline range in 41.9% of the cases (below = 11.6%; bottom = 30.3%), and sentenced above or at the top of the guideline range in only 27.2% of the cases (above = 4.8%; top = 22.4%).<sup>7</sup> For cases sentenced under the guideline in effect starting November 1, 1989, the difference is even greater: Courts sentenced below or at the bottom of the range in 51.6% of the cases (below = 8.1%; bottom = 43.5%), and sentenced above or at the top of the range in 24.2% of the cases (above = 4.8%; top = 19.4%).<sup>8</sup> If subsection (b)(1) is to be modified to reflect more adequately the seriousness of bank robbery, the enhancement should be reduced, not increased.

Although the Commission seems to be concerned only with bank robbery,<sup>9</sup> subsection (b)(1) also covers post offices. The Commission has presented no data whatsoever about sentences for robberies involving post offices, so there is no factual basis for concluding that the enhancement of subsection (b)(1) inadequately reflects the seriousness of robbery of a post office.

Amendment 7(B)

The Commission's prime concern with the present weapon enhancement appears to be with prosecutorial handling of violations of 18 U.S.C. § 924(c). The Commission states that

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<sup>7</sup>See A. Purdy, Report of the Bank Robbery Working Group, at Appendix A (Dec. 6, 1990).

<sup>8</sup>See *id.* at Appendix B.

<sup>9</sup>The "Reason for Amendment" makes available "the Commission's study on bank robbery".

it is clear from the cases sentenced that, notwithstanding the clear intent of the Justice Department's 'Thornburgh Memorandum' on plea bargaining, prosecutors are not consistently charging 924(c) when a weapon is possessed during a bank robbery. Therefore, the Commission faces a policy question whether it should act to eliminate or limit the resulting disparity.

The Commission, however, has no data about why prosecutors are not charging under section 924(c). A failure to charge may be based upon a variety of reasons, from a weak case to a perception that the penalty is sufficient without a mandatory 5 year consecutive term. Before making any change, the Commission should collect and analyze data about the reasons for failing to utilize section 924(c).

The Commission has also suggested that the weapon enhancement should be increased in order "to more closely accommodate Congress' view of the seriousness of committing a felony while possessing a weapon". The Commission does not provide any evidence that the present enhancement fails to accommodate Congress' view about severity. The available evidence does not indicate that sentences in bank robbery cases where a weapon is used or possessed are inadequate. Commission data show that, in bank robbery cases under 18 U.S.C. § 2113(a) sentenced from January 1, 1989 through June 30, 1990, courts sentenced below or at the bottom of the guideline range in 39.1% of the cases (below = 8.6%; bottom = 30.5%), and above or at the top of the range in 32.2% of the cases (above =



5.8%; top = 26.4%).<sup>10</sup> For cases sentenced after the November 1, 1989 amendment, the data is even more striking: Courts sentenced below or at the bottom of the range in 43.4% of the cases (below = 6.7%; bottom = 36.7%), and above or at the top of the range in 30.0% of the cases (above = 6.7%; top = 23.3%).<sup>11</sup>

Amendment 7(C)

The Commission, in proposed amendment 7(C), seeks to address its concern that

the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guideline practice, and that variations in plea bargaining practices in different U.S. Attorney's offices with respect to dismissing or not pursuing provable counts of bank robbery may result in unwarranted disparity.<sup>12</sup>

The Commission apparently uses "may" because there is no data that indicate that sentences in multiple robbery cases are lower under the guidelines than under pre-guideline practice or that plea bargaining practices have resulted in unwarranted disparity.

There is, moreover, no evidence that the failure to account for uncharged or dismissed robberies is perceived by courts as resulting in sentences that are too low. The Commission's data is,

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<sup>10</sup> See A. Purdy, Report of the Bank Robbery Working Group, at Appendix D (Dec. 6, 1990). For cases under 18 U.S.C. § 2113(d), courts sentenced below or at the bottom of the range in 34.7% of the cases (below = 2.8%; bottom = 31.9%) and above or at the top of the range in 27.7% of the cases (above = 8.3%; top = 19.4%). Id.

<sup>11</sup> Id. at Appendix E.

<sup>12</sup> Emphasis added.

at best, inconclusive. For example, while the upward departure rate for defendants with uncharged or dismissed robberies is roughly twice that for defendants without uncharged or dismissed robberies, so is the downward departure rate.<sup>13</sup>

The special instruction is unnecessary because § 4A1.3, which recommends a departure if the defendant's criminal history score is inadequate, enables the court to account for dismissed or uncharged robberies. Further, the special instruction is a move towards a real offense system of sentencing, a system that the Commission has rejected as impractical and risking "return to wide disparity in sentencing practice."<sup>14</sup> If the Commission wants to move to a real offense system, it should amend chapter 1, part A(4)(a) and §

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<sup>13</sup>See A. Purdy, Report of the Bank Robbery Working Group, at Appendix H.

The Commission staff memorandum concludes that "on balance it appears that in cases in which robberies were committed, but not reflected in the guideline range either because the charges were dismissed or not brought, the judges tended to sentence the defendant more harshly relative to the applicable guideline range-- as compared to cases in which the guideline range was relatively higher because all robberies were accounted for by conviction." *Id.* at 20. The memorandum notes that "of those cases involving dismissed or uncharged bank robberies the sentences fell less often at the bottom of the guideline range than cases in which all robberies resulted in conviction (28.5% of cases with dismissed or uncharged counts versus 45.1% of cases with all robberies accounted for by convictions)". *Id.*

Appendix H of the staff memorandum, however, indicates that sentences below, or at the bottom of, the guideline range occurred in 58% of the cases with all robberies accounted for by convictions (below = 12.9%; bottom = 45.1%), and in 54.6% of the cases with uncharged or dismissed robberies (below = 26.1%; bottom 28.5%). Appendix H also discloses that sentences above, or at the top of, the guideline range occurred in 20.4% of the cases with all robberies accounted for by convictions (above = 4.3%; top = 16.1%), and in 21.4% of the cases with uncharged or dismissed robberies (above = 9.5%; top = 11.9%).

<sup>14</sup>See U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

1B1.2. The Commission should not, ad hoc and without further study, move toward a system in which the charge that the government must prove beyond a reasonable doubt is irrelevant to determining the sentence (other than setting a maximum).

**Amendment 8 -- § 2B3.2 (Extortion by Force  
or Threat of Injury or Serious Damage)**

The Commission has three proposed amendments and one request for comment. Proposed amendment 8(A) would amend subsection (b)(1) to increase the floor amount from \$2,500 to \$10,000 and to require use of the robbery loss table instead of the burglary loss table. Proposed amendment 8(A) would, in addition, add a new paragraph to subsection (b) to require a 2-level increase if the offense involved a threat of death, bodily injury, or kidnapping and a 4-level increase if such a threat were directed at "numerous" victims.<sup>15</sup> Proposed amendment 8(B) would amend present subsection (b)(2) requiring an enhancement "if the offense involved preparation to carry out a threat of death, serious bodily injury, or kidnapping, or if the participant(s) demonstrated the ability to carry out such threat; or the offense involved product tampering or attempted product tampering". The proposed enhancement is 3 to 5 levels. Proposed amendment 8(C) would amend subsection (b) by adding three new paragraphs enhancing the offense level if the offense "was part of a pattern of conduct involving [organized

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<sup>15</sup>The Commission has also bracketed language that would require an increase to level 24 if the offense level following the 4-level increase is less than 24.

crime] [organized criminal activity]"; "was part of a larger pattern of extortion over time or extended to more victims than taken into account in the count(s) of conviction"; or "was to the family of the victim and such threat lasted for a period of time". Finally, the Commission, in proposed amendment 8(D), seeks comment about whether the amount calculated under subsection (b)(1) should represent more than the greater of the amount demanded or obtained.

Amendment 8(A)

The purpose of proposed amendment 8(A) is to treat extortion by force or threat the same as robbery.<sup>16</sup> We do not believe that extortion should be treated as equivalent in seriousness to robbery. The Commission has presented no data comparing the fact patterns in extortion and robbery cases. The typical robbery involves an immediate threat to the victim. The typical extortion does not, enabling the victim to seek assistance from law enforcement authorities. Extortion, moreover, can arise from an attempt to collect debts. The defendant in such cases, unlike robbery defendants, can have a plausible claim of right to the victim's property.

We believe that it would be premature to add the two proposed enhancements based upon the nature of the threat. The Commission has presented no data indicating how often cases involving threats of death, serious bodily injury, or kidnapping, and cases involving such threats to "numerous" persons, arise -- and how sentencing courts deal with those cases under the present guideline. The

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<sup>16</sup>See proposed amendment 8(A), reason for amendment.

proposed enhancement for threats to "numerous" victims, moreover, is ambiguous. How many people does it take to be "numerous"? The failure to define the key term used in the enhancement is likely to lead to unjustifiably disparate results in application of the proposed enhancement.

Amendment 8(B)

The Commission has not stated a purpose for proposed amendment 8(B)<sup>17</sup> and has not presented any data suggesting that the proposed enhancement is necessary. We do not know the frequency with which cases involving preparation, demonstrated ability, or product tampering occur and how sentencing courts deal with them under the present guideline. We therefore believe it would be premature to adopt proposed amendment 8(B).

Amendment 8(C)

The Commission has not stated a purpose for proposed amendment 8(C) and has not presented any data that indicates that the proposed enhancements are necessary. Proposed subsection (b)(6), dealing with ["organized crime"] ["organized criminal activity"], does not define what is meant by those terms. Proposed subsection (b)(8), which applies if the offense "was to the family of the victim" and the threat "lasted for a period of time", does not define what is meant by a "period of time". The failure to define a key term used is likely to lead to unjustifiably disparate results in application of the proposed enhancement.

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<sup>17</sup>The "Reason for Amendment" section of proposed amendment 8(B) simply describes what the enhancement is.

Amendment 8(D)

The Commission solicits comment about whether the amount calculated under subsection (b)(1) should represent more than the greater of the amount demanded or obtained.<sup>18</sup> We do not believe that any change is necessary. There is no evidence to suggest that the present formulation understates the seriousness of the offense. Any modification of the enhancement along the lines outlined by the Commission will be complex, for the actual loss to the victim may not be simple to calculate. For example, if a victim purchases a home security system, the expenditure is not a complete loss to the victim if the victim continues to use the system.

**Amendment 11 -- § 2D1.1 (Unlawful Manufacturing,  
Importing, Exporting, or Trafficking  
(Including Possession with Intent to Commit these Offenses)),  
§ 3B1.2 (Mitigating Role)**

The Commission requests comment about whether the guidelines rely too heavily on drug quantity to determine punishment, particularly for less culpable aiders and abettors. We believe that basing the offense level primarily on quantity in drug cases results in an offense level for a minimal or minor participant that is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect the defendant's lesser role.

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<sup>18</sup>It is unclear from the Commission's description of the proposal whether the "other losses" are to be another alternative or are to be added to the greater of the amount demanded or obtained.

Once a drug offense reaches a certain scale, no significant purpose is served by making the offense level of a minimal or minor participant dependent upon quantity. As a former Assistant United States Attorney has noted, "many drug defendant appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the king pins who dominate the drug business."<sup>19</sup>

We recommend that the Commission address the problem directly along lines outlined in the January 3, 1991 letter sent to Chairman Wilkins by Thomas W. Hillier, II, the chair of the legislative subcommittee of the Federal Public and Community Defenders.

**Amendment 13 -- § 2D1.1 (Unlawful Manufacturing,  
Importing, Exporting, or Trafficking  
(Including Possession with Intent to Commit these Offenses))**

The rationale behind the new special instruction, which enhances the offense level if the controlled substance is d-methamphetamine, is to implement section 2701 of the Crime Control Act of 1990. We do not believe that the Commission's solution responds to what Congress intended and that, given the technical problems involved, Congress should be asked for clarification.

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<sup>19</sup>Young, Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability, 3 Fed. Sent. R. 63 (1990).

Methamphetamine, according to the DEA, "exists in free base form and in salt form, generally the hydrochloride salt."<sup>20</sup> While there are some cases involving the free base form, "usually such cases are lab cases in which the perpetrators were arrested before they had the opportunity to completely finish the manufacturing process."<sup>21</sup> The vast majority of cases involve the salt form of methamphetamine. Methamphetamine salts are smokable and exist in powder and crystal form. However, "a powder cannot be differentiated from a crystal."<sup>22</sup>

Section 2701 of the Crime Control Act of 1990 directs that the drug guidelines be amended "for offenses involving smokable crystal methamphetamine". The Congressional purpose seems to have been to enhance the offense level for "ice". Ice is created by dissolving d-methamphetamine in water or another solvent and then slowly recrystallizing it, a process that results in methamphetamine of relatively high purity. Ice is marketed principally in Hawaii and California.

The Congressional mandate is ambiguous. The language of section 2701, read literally, would seem to call for an enhancement for virtually every offense involving methamphetamine because the type of methamphetamine generally sold illegally is both

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<sup>20</sup>Memorandum from Dennis F. Hoffman to Paul L. Maloney at 1 (Dec. 14, 1990), an attachment to Memorandum to Chairman Wilkins et al from Phyllis J. Newton entitled "Miscellaneous Proposed Drug Amendments" (Dec. 26, 1990).

<sup>21</sup>Id.

<sup>22</sup>Id.



crystalline and smokable. The Congressional intention, however, is to target a type of d-methamphetamine known as ice. The Commission's proposal -- to enhance the offense level for all d-methamphetamine cases -- is broader than what Congress intended.

Given the technical problems involved in identifying the precise substance that Congress intended to result in an enhancement ("ice"), we recommend that the Commission ask Congress to clarify the statutory directive.

**Amendment 15 -- § 2D1.8 (Renting or Managing a Drug Establishment)**

The base offense level under § 2D1.8 presently is 16, regardless of the nature or quantity of the substance involved. The Commission has proposed two options for calculating the base offense level in order to eliminate anomalous results produced by the present guideline. We believe that option one should be adopted.

Under option one, the base offense level is determined by the drug quantity table of § 2D1.1 -- i.e., by the quantity and type of drug involved. The base offense level for a defendant whose only role is to rent or allow the use of a premises is 4 levels less than the offense level from § 2D1.1, and is capped at level 16. In addition, new commentary would indicate that the mitigating role adjustment of § 3B1.2 does not apply to such a defendant. Option two links the offense level directly to quantity and type of drug involved, and requires a minimum level of 16.

Option two simply perpetuates the anomaly identified by the Commission in its statement of the reason for the amendment. A defendant who distributes less than 250 grams of marijuana gets an offense level of 6 under § 2D1.1, while a defendant convicted letting his apartment be used for the sale of the same quantity of marijuana gets an offense level of 16 under the option 2 amendment to § 2D1.8.

Option one eliminates all of the anomalous results that the present guideline can produce and, in addition, addresses directly the problem created by overdependence upon quantity for determining the offense level of minimal and minor participants.<sup>23</sup>

**Amendment 21 -- new § 2K1.1 (Unlawfully Trafficking in, Receiving, or Transporting Explosive Materials; Improper Storage and Failure to Report Theft of Explosive Material)**

The Commission proposes to combine present §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6 into a single guideline designated § 2K1.1. The Commission has indicated five objectives for proposed amendment 21 -- (1) to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law"; (2) to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline to the same statute"; (3) to "reduce departures and potential sentencing disparity by relying more heavily on

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<sup>23</sup>See letter to Chairman Wilkins from Thomas W. Hillier, II, at 1-2 (Jan. 3, 1991).

specific offense characteristics and real offense conduct and less on the statute of conviction"; (4) to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel"; and (5) to "avoid the need to revisit firearms and explosive materials guidelines".

We do not believe that any useful purpose would be served by this comprehensive rewriting of the explosive materials guidelines. There has not been a sufficient number of cases involving these guidelines to warrant such an extensive revision. The Commission staff memorandum reports on only 22 single-guideline cases under § 2K1.3 and 7 single-guideline cases under § 2K1.6; the memorandum does not report any cases under §§ 2K1.1 and 2K1.2.<sup>24</sup>

With regard to the Commission's first objective, the Commission has not identified what concerns of judges, probation officers, and practitioners are being addressed. Consequently, we cannot evaluate this objective.

The Commission's second objective is to eliminate "duplication and confusion in the application of the current guidelines". The statutory provisions notes indicate an overlap with regard to 18 U.S.C. 842(j) and (k).<sup>25</sup> While there is duplication, there should

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<sup>24</sup>See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

<sup>25</sup>The statutory provision note to § 2K1.2 lists 18 U.S.C. § 842(j), and the statutory provisions note to § 2K1.3 lists 18 U.S.C. § 842(k). The statutory provisions note of § 2K1.3 lists 18 U.S.C. § 844(b), which sets forth misdemeanor penalties for violating 18 U.S.C. § 842(j) and (k). Thus, statutory provision notes indicate that §§ 2K1.2 and 2K1.3 apply to 18 U.S.C. § 842(j)

be no confusion because the Commission has promulgated a guideline to deal with such situations -- § 1B1.2 ("Applicable Guidelines"). That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted". Thus, whether §2K1.2 or § 2K1.3 applies to a defendant convicted under 18 U.S.C. § 842(j), for example, will turn on what conduct is charged in the indictment". If the Commission wishes to clarify the matter, an amendment to the application notes or statutory provisions notes would seem to be preferable to a comprehensive revision of the explosives guidelines.

With regard to the Commission's third objective (to "reduce departures and potential sentencing disparity"), the Commission staff memorandum reports on only 29 single-guideline cases under §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6.<sup>26</sup> There is, therefore, insufficient data upon which to base a conclusion that departures are a significant problem.

The Commission's fourth objective, simplifying "application of the guidelines by making the explosive materials and firearms guidelines more parallel", would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater

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and that §§ 2K1.1 and 2K1.3 apply to 18 U.S.C. § 842(k).

<sup>26</sup>See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 21.

The Commission's final objective, avoiding the "need to revisit" the explosive materials guidelines", is laudable but based upon an assumption that there is a need to visit those guidelines in the first place. So far, nothing has been presented to justify such an assumption.

**Amendment 22 -- new § 2K2.1  
(Prohibited Transactions Involving Firearms)**

The Commission proposes to combine present §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.5 into a single guideline designated § 2K2.1. The proposed new guideline uses a "real offense" approach. Thus, proposed subsections (a)(2), (3), and (4) apply if a defendant is a "prohibited person" described in 18 U.S.C. 922(g), even if the defendant is not convicted under that provision.<sup>27</sup> The proposed new guideline also increases offense levels. For example, the base offense level for a defendant with a dishonorable discharge from the Air Force (a prohibited person as described in 18 U.S.C. § 922(g)) who is convicted under that provision of shipping a .22 caliber rifle to his wife, is 12 under present § 2K2.1(a)(2). The base offense level for the same offense under proposed § 2K2.1(a)(4) is [14-16] (the level is 20 under proposed §

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<sup>27</sup>See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at 13-15.

2K2.1(a)(3) if the defendant has a prior conviction of specified offenses, such as possession of marijuana with intent to distribute).<sup>28</sup> In addition, the defendant's base offense level would be enhanced [1-2] levels under proposed §2K2.1(b)(8) because of defendant's status as a prohibited person.<sup>29</sup>

We do not believe that any useful purpose would be served by comprehensively rewriting the firearms guidelines at this time. The Commission, effective November 1, 1989, extensively revised §§ 2K2.1, 2K2.2, and 2K2.3, increasing offense levels.<sup>30</sup> There has not been a sufficient number of cases involving the revised guidelines to warrant an extensive revision.<sup>31</sup> The limited data

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<sup>28</sup>See *id.* at 28-32.

<sup>29</sup>The proposed new guideline has double counting problems. If the defendant is in fact a prohibited person described in 18 U.S.C. § 922(g), the applicable base offense level depends upon whether the defendant has any prior convictions for specified types of offenses. With 2 such prior convictions, the base offense level is 24; with one such prior conviction, the base offense level is 20; and with no such prior conviction, the base offense level is [14-16] (proposed § 2K2.1(a)(2), (3), (4)). A prior offense counted in determining the base offense level, however, is also counted in determining the criminal history score. Moreover, the enhancement of proposed subsection (b)(8) is applicable only to prohibited persons.

<sup>30</sup>U.S.S.G. App. C at c.97 (amend. no. 189).

<sup>31</sup>There have been 59 single-guideline cases under the version of § 2K2.1 that took effect November 1, 1989; 17 single-guideline cases under the version of § 2K2.2 that took effect November 1, 1989; 29 single-guideline cases under the version of § 2K2.3 that took effect November 1, 1989; and 6 single-guideline cases under the version of § 2K2.5 that took effect November 1, 1989. See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A; appendix G, table II-A; appendix K; appendix L.

available, however, indicate that courts do not believe that the present guideline, as amended November 1, 1989, results in inadequate sentences.<sup>32</sup>

The Commission has indicated that amendment 22 has 5 objectives. They are, first, to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law". The Commission has not identified what those concerns are, however, so we cannot evaluate this objective.

A second objective identified by the Commission is to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline

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<sup>32</sup>For § 2K2.1, in the 59 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (6.8% of the cases) and at the bottom of the range in 25 cases (42.4% of the cases), and was above the range in 3 cases (5.1% of the cases) and at the top of the range in 14 cases (23.7% of the cases). Id. at appendix D, table I-A.

For § 2K2.2, in the 17 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range other than for substantial assistance in 4 cases (23.5 % of the cases) and at the bottom of the range in 8 cases (47% of the cases), and above the range in one case (5.9% of the cases) and at the top of the range in no cases. Id. at appendix G, table II-A.

For § 2K2.3, in the 29 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (13.8% of the cases) and at the bottom of the range in 11 cases (37.9% of the cases), and above the range in 3 cases (10.3% of the cases) and at the top of the range in 3 cases (10.3%). Id. at appendix K.

For § 2K2.5, in the 6 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was at the bottom of the guideline range in 5 cases (83.3% of the cases) and above the top of the range in one case (16.7% of the cases). Id. at appendix L.

to the same statute". The statutory provisions notes to the present guidelines do not indicate that the latter problem exists.<sup>33</sup> It is not evident, moreover, that the proposal is less confusing and has fewer cross references than the present guidelines.

The Commission's third objective is to "reduce departures and potential sentencing disparity by relying more heavily on specific offense characteristics and real offense conduct and less on the statute of conviction". There are only 111 cases under the November 1, 1989 version of §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.4 -- inadequate data upon which to base a conclusion that departures are a significant problem. The data available on § 2K2.1, the most plentiful data available, fail to indicate that departures are a problem.<sup>34</sup>

The Commission, moreover, deliberately chose a guideline system that is offense of conviction based, with limited real

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<sup>33</sup>Even if there were some overlap in the coverage of certain offenses, there is no indication that § 1B1.2 ("Applicable Guidelines"), the guideline that the Commission promulgated to deal with such situations, is inadequate. That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted".

<sup>34</sup>The downward departure rate under § 2K2.1 is 6.8%, and the upward departure rate is 5.1%. *Id.*

The data available for the other three guidelines involved are so limited as to make the departure rates meaningless. There are 29 cases under § 2K2.3; the downward departure rate is 13.8% and the upward departure rate is 10.3%. *Id.* at appendix K. There are 17 cases under § 2K2.2; the downward departure rate is 35.3% and the upward departure rate is 5.9%. *Id.* at appendix G, table II-A. There are 6 cases under § 2K2.5; the downward departure rate is 0% and the upward departure rate is 16.7%. *Id.* at appendix L.



offense characteristics, out of a concern that a real-offense system "risked return to wide disparity in sentencing practices".<sup>35</sup> It is not clear why it is necessary to rely on real offense conduct to a greater extent than the guidelines do at present. Greater reliance on real offense conduct is not needed in order to get adequately high offense levels. The data indicate that, under the November 1, 1989 version of § 2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) -- suggesting that the offense levels under the guideline are too high.<sup>36</sup>

The Commission's fourth objective is to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel". This objective would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 22.

The Commission's final objective is to "avoid the need to revisit firearms and explosive materials guidelines". Nothing indicates that the Commission failed substantially to achieve this goal with the November 1, 1989 amendment.

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<sup>35</sup>U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

<sup>36</sup>See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A.

**Amendment 29(C) -- § 4A1.2 (Definitions and Instructions  
for Computing Criminal History)**

The Commission proposes to add a new subsection to § 4A1.2 that would deal with prior sentences that are being appealed. The new subsection would direct counting such sentences unless execution of the sentence has been stayed pending appeal. The Commission proposes two options for dealing with sentences stayed pending appeal. The difference between the two options is whether to apply subsection (d) of § 4A1.1. Subsection (d) calls for adding 2 criminal history points "if the defendant committed the instant offense while under any criminal justice sentence". Under option one, subsection (d) would apply to sentences stayed pending appeal; under option two, subsection (d) would not apply.

The options address a problem that we do not expect to arise very often. In our judgment, option two is better because option one presents an insurmountable problem of application.

Option one is premised upon the assumption that the sentencing court can readily ascertain whether the defendant would have been "under any criminal justice sentence" at the time of the subsequent offense. That assumption, in our view, is incorrect. Suppose, for example, that a defendant is sentenced under the old federal law to a term of 18 months, appeals the conviction, and commits a second offense 16 months later. Would subsection (d) apply? No definite answer is possible. Subsection (d) would apply if defendant were on parole at the time of the later offense, because defendant would have been in the custody of the Attorney General at

the time of that offense. Subsection (d) would not apply, however, if defendant were not paroled, because defendant (by virtue of the good time rules) would have been discharged from custody and therefore not "under any criminal justice sentence" at the time of the later offense -- unless the defendant would have misbehaved in prison and forfeited all good time allowance.

Federal sentences will not be the only ones causing this problem. The problem will also arise with state sentences because state laws vary widely concerning good time, parole, and discharge from custody. Option one does not have the application problem.

**Amendment 30 -- § 4A1.1 (Criminal History Category)**

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score, treat as one sentence "prior sentences imposed in related cases". Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."

The Commission has proposed three options for modifying the treatment of cases consolidated for trial or sentencing. Under all three options, sentences would not be considered related if they were for sentences separated by an intervening arrest. We see no reason to modify the related cases rule. None of the options will improve the ability of the criminal history score to predict the

likelihood of future criminal behavior, the function of the criminal history score.

The concern about the related cases rule may result from a failure to appreciate the purpose served by the criminal history score and what that score is intended to measure. The criminal history score is not intended to, and does not, measure simply the extent of a defendant's previous convictions. Rather, the criminal history score is intended to measure the likelihood of future criminal conduct.<sup>37</sup> Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence", and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.<sup>38</sup>

The criminal history score is based primarily upon the U.S. Parole Commission's salient factor score,<sup>39</sup> and the Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future

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<sup>37</sup>See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

<sup>38</sup>Only one point is added for the latter factor if two points are added for the former.

<sup>39</sup>U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

criminal behavior.<sup>40</sup> Sentencing Commission data indicates that the Sentencing Commission was correct in its belief.<sup>41</sup>

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days applies is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., called for a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing a punishment experience is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

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<sup>40</sup>Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

<sup>41</sup>See U.S. Sentencing Com'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

The Commission has presented no data indicating that the present rule results in sentences that are inadequate. Instead, the available data suggest that the present rule calls for appropriate sentences.<sup>42</sup> Moreover, the Commission has presented no data to indicate that any of the three options will improve the predictive power of the criminal history score.

The Commission's three options yield strange results. For example, defendant A served 15 years for murder and was released from prison three years ago. Defendant B served concurrent 14

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<sup>42</sup>The Commission staff memorandum reports that, based on "a 25% sample of monitoring cases", 17.3% of the upward departures for inadequacy of the criminal history score were due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing. See Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990). That data is interesting but not particularly relevant because it does not represent the rate of departure. What is missing is the total number of cases in which a court might have departed. Only with that number can the departure rate be calculated.

Another staff memorandum suggests that the departure rate is much lower than the overall upward departure rate. A Commission staff memorandum reports that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 cases fell within criminal history category VI. J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). That memorandum further indicates that there were 52 departures involving defendants in criminal history category VI. (Commission data show 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000.) Id. Assuming that the percentage of upward departures due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing is constant for all criminal history categories at 17.3% (the figure calculated in Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990)), then the departure rate for criminal history category VI due to the consolidated for trial or sentencing rule is 0.4% (9 departures -- 17.3% of 52 -- in 2,141 cases). The overall upward departure rate is nine times that rate (3.5%). U.S. Sentencing Com'n, Annual Report 1989, at table B-6.

month terms for two embezzlements and was also released from prison three years ago. All three options result in defendant B getting more criminal history points than defendant A, who gets 3 criminal history points. If defendant B's offenses were separated by an intervening arrest, defendant B gets 6 points under all three options. If there is no intervening arrest, defendant B gets 4 or 5 points under option 1,<sup>43</sup> and 4 points under option 3.<sup>44</sup>

**Amendment 31 -- Chapter 5, part A (Sentencing Table)**

The Commission has proposed three options for establishing a new criminal history category VII for defendants with high criminal history scores. Option one calls for category VII to cover 15 or more criminal history points. Option two calls for category VII to cover 20 or more criminal history points. Option three calls for category VII to cover 16-18 criminal history points; for scores of 19 or more, the court could use category VII or depart. The Commission seeks comment about whether there should be a new category and, if so, which option should be adopted. In addition, the Commission seeks comment about how to deal with career offenders if a new category VII is established.

We believe that there is no need to add a new criminal history category. When sentencing defendants in criminal history category

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<sup>43</sup>The number of points depends upon what the Commission determines with regard to the number of points to add under proposed new subsection (f).

<sup>44</sup>Option 2 applies only if there is an intervening arrest.

VI, courts currently depart upward under § 4A1.3 very infrequently. Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.<sup>45</sup> Commission data show that, out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI.<sup>46</sup> The data further indicate that there were 52 departures involving defendants in criminal history category VI, a departure rate of 2.4%.<sup>47</sup> The data, therefore, do not support a conclusion that there is a need for a new criminal history category.<sup>48</sup>

Finally, none of the options will enhance the predictive power of the criminal history score. The criminal history categories are based upon predicting the likelihood of future criminal conduct,<sup>49</sup>

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<sup>45</sup>See J. Meyer, Report on Criminal History Categories "0" and "VII", at 4 (Nov. 20, 1990) ("in most cases, inadequacy of Category VI penalties was cited as only one rationale for the departure") (discussing reported cases).

<sup>46</sup>Id. at 3.

<sup>47</sup>Id. Commission data shows 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

<sup>48</sup>Commission staff speculates that "it seems plausible to infer that some courts might have refrained from departing beyond category VI in the past because of the uncertainty of structuring a departure beyond the sentencing table". Id. at 8. No evidence (letters or calls from judges or probation officers, for example) is presented to support such speculation. It is more plausible to conclude from the data that courts are departing whenever they believe departure appropriate. There should be little uncertainty about structuring a departure from category VI; the only constraint upon a court's ability to depart from category VI is that the departure be reasonable.

<sup>49</sup>See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987).



and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior."<sup>50</sup> There is no evidence that a new category VII will enhance the predictive power of the criminal history score.

**Amendment 33 -- § 5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment)**

The Commission proposes to rewrite this guideline completely. Proposed subsection (a) would require consecutive terms if the defendant committed the offense while "serving a term of imprisonment (including work release, furlough, or escape status)", after sentencing for, but before starting service of, such a term of imprisonment, or while "on bail or other release status". Proposed subsection (b) would require the sentence for a new offense to be imposed "to result in a combined sentence equal to the total punishment that would have been imposed under § 5G1.2 . . . had all the sentences been imposed at the same time", if (1) subsection (a) is inapplicable and the new offense constitutes part of the same course of conduct as the offense whose term is undischarged, or (2) the prior undischarged term was imposed under the Sentencing Reform Act.

The Commission has set forth three options for subsection (c), which would deal with "any other case". Option one would require concurrent terms, with commentary recommending a departure for

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<sup>50</sup>Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990).

"anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishment for multiple offenses". Option two, labelled a policy statement, would recommend consecutive sentences "to the extent necessary to result in a total combined term of imprisonment [for the new and the old offenses] . . . so that a reasonable incremental punishment is imposed" for the new offense. Option three would require consecutive terms, with commentary recommending a departure for "anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishments, but not more than necessary to comply with the purposes of sentencing for multiple offenses".

We believe that proposed subsections (a) and (b), except for expanding the guideline to require consecutive sentences if the offense was committed while defendant was on bail or other release status, improve the present guideline. That part of proposed subsection (a) should not be promulgated. The Commission has offered no justification for the expansion. In light of § 2J1.7 (commission of offense while on release), it is unclear why this guideline should cover offenses committed while on bail. It is also unclear how the policy of this guideline (consecutive sentences) could be effectuated when federal and state offenses are involved and the federal sentence is imposed first.

With regard to proposed subsection (c), we believe that option one is best. Option one is consistent with the goals of the Sentencing Reform Act and gives the court flexibility in dealing

with cases not adequately covered by the general rule. In the great majority of instances, concurrent sentences will be sufficient to impose additional punishment and therefore are consistent with the statutory directive that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing (18 U.S.C. § 3553(a)). The sentence for the later offense will reflect that the defendant committed that offense while serving a sentence for a previous offense (because of chapter 4's criminal history rules).

If the court believes that a consecutive sentence might not result in incremental punishment (e.g., where the earlier sentence is very long), the court has 2 ways to adjust the sentence for the later offense in order to result in greater punishment -- (1) depart under § 4A1.3 (adequacy of criminal history category), or (2) depart by making part or all of the sentence for the later offense consecutive to the sentence for the earlier offense. The risk with consecutive sentences is excessively long sentences. The court's ability to adjust for an excessively long sentence is limited to departing to make the sentences concurrent.

We believe that option two would be the next best approach. The principal criticisms of option two are that it requires additional work by the sentencing court and that its policy cannot be effectuated because state sentencing laws vary in the determinacy of sentences. While option two may require additional calculations by the sentencing court, the additional work is not significant other than in a few cases. Option two addresses the

concern about fashioning a sentencing order that accounts for the variety of determinacy among the sentencing laws of the states -- the order can direct that the federal term begin on the earlier of a date certain or release from state custody.

We believe that it would be unwise for the Commission to adopt option three because option three would result in sentences that in most instances will be excessive. Option three, therefore, is inconsistent with the mandate of 28 U.S.C. § 994(1)(1) that the guidelines "reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses committed in the same course of conduct . . . and multiple offenses committed at different times", as well as with the statutory directive of 18 U.S.C. § 3553(a) that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

**Amendment 34(C) -- new § 5H1.11 (Military, Civic, Charitable,  
or Public Service; Employment-Related Contributions;  
Record of Prior Good Works (Policy Statement))**

We do not support promulgating a proposed policy statement that would recommend against consideration of a defendant's previous worthwhile contributions to the betterment of the community. Such a recommendation flies in the face not only of many, many years of judicial practice, but also of the goal of the Sentencing Reform Act to eliminate unjustifiable disparity in punishment. Two defendants with similar criminal history scores who commit similar offenses are not deserving of the same

punishment if one of them has, for example, donated bone marrow to save the life of a child with cancer or has for several years spent two weekends a month volunteering service to a hospice.

**Amendment 35 -- § 5K1.1 (Substantial Assistance to Authorities  
(Policy Statement))**

The Commission's proposed amendments to this policy statement would (1) revise application note 1 to suggest departure in the absence of a government motion "in an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion"; and (2) add a subsection stating that, when the sentencing court determines the extent of a § 5K1.1 departure, "substantial weight should be given to the government's evaluation of the extent and value" of the assistance. The Commission's purpose in amending the application note is to "reinforce the view of the Eleventh Circuit that the Commission has adequately considered the mitigating circumstance of substantial assistance".

We do not believe that the proposed amendment should be promulgated.

Although § 5K1.1 is a policy statement and therefore merely a recommendation of the Commission, courts for the most part have followed the recommendation and require a government motion. They have sought to ameliorate the risk of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith.

Congress in 18 U.S.C. § 3553(e) mandated a government motion only for a departure below a statutory minimum. Congress in 28 U.S.C. § 994(n) mandated that the guidelines call for "a lower sentence than would otherwise be imposed" if the defendant substantially assisted authorities; section 994(n) does not mandate a government motion for such a departure. There is no statutory requirement of a government motion, therefore, if the departure is below the guidelines but not below a statutory minimum. As Judge Clark recently pointed out,

there appears to be no logical reason why the prerequisite nature of a government motion under § 3553(e) should be mechanically transposed onto departures from the guidelines authorized pursuant to 28 U.S.C.A. § 994(n). It is far more logical to interpret § 3553(e) as an exception to the general rule set out in § 994(n).<sup>51</sup>

Requiring a government motion risks unfairness to a defendant who has significantly aided law enforcement authorities. For example, a defendant may have significantly aided law enforcement authorities, but the prosecutor wants additional assistance. The defendant may decline out of fear of retaliation or because he or she has no further information to provide. In some districts, moreover, a special committee of assistant U.S. Attorneys, rather than the assistant prosecuting the case, must authorize a § 5K1.1

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<sup>51</sup>United States v. Chotas, 913 F.2d 897, 903 (11th Cir. 1990) (Clark, J., specially concurring in part and dissenting in part).

motion, and the committee may not authorize the motion even though the assistant who tried the case wants the motion filed.

The Commission is moving in the wrong direction. A reduction for substantial assistance should be available whenever the court determines that defendant has significantly aided authorities -- even if the government has not moved for the reduction. The Commission's revised commentary, by calling for a finding of prosecutorial bad faith, sets forth a very narrow exception.<sup>52</sup> The question involved, however, may not be whether the prosecutor is acting in bad faith, but whether the defendant's assistance was significant, or whether the defendant can render even further significant assistance. The Commission's approach permits the prosecutor, who is a party to the dispute, to resolve the dispute.

Finally, the Commission's lacks the authority to "reinforce the view of the Eleventh Circuit that the Commission has adequately considered the mitigating circumstance of substantial assistance". The departure standard is statutory. Under 18 U.S.C. § 3553(b), "the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the

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<sup>52</sup>There is a drafting problem with the last sentence of revised application note 1. The sentence begins "in an extraordinary case", suggesting that an ordinary case of bad faith does not suffice for a departure without a government motion. The Commission may have intended the phrase, "where the government in bad faith breaches an agreement to file the requisite motion", to define what constitutes an "extraordinary case", unintentionally omitting a comma after "case".

Sentencing Commission in formulating the guidelines". Subsection (a)(4) of section 3553 refers to "the kinds of sentence and the sentencing range . . . as set forth in the guidelines that are issued by the Sentencing Commission".

The statutory departure standard directs that whether a factor is adequately accounted for is to be determined solely on the basis of the guidelines -- not on the basis of policy statements. Thus, even if the Commission could foreclose judicial consideration of a departure, the Commission could not do so by means of a policy statement.

The Commission, however, does not have the authority to preclude a court from departing. The statutory standard commits the departure determination to a sentencing court, not to the Commission. Whether the guidelines adequately account for a factor present in a particular case is a determination that only a sentencing court is in a position to make. As the Commission has put it, "the controlling decision as to whether and to what extent departure is warranted can only be made by the courts."<sup>53</sup>

**Amendment 37(B) -- § 1B1.2 (Applicable Guidelines)**

The Commission has requested comment about whether the proviso of subsection (a) of this guideline should be amended in order to

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<sup>53</sup>U.S.S.G. § 5K2.0, p.s. (para. 1). Until November 1, 1990, the sentence read that the controlling decision "can only be made by the court at the time of sentencing". The change to "the courts" was "clarifying". See U.S.S.G. App. C at c.201 (amend. 358).



provide expressly that a stipulation to a more serious offense that accompanies a plea of guilty or nolo contendere must be part of a formal plea agreement. We believe that § 1B1.2(a) as presently drafted, although not a model of clarity, requires that the stipulation be part of the plea agreement.

The proviso, when parsed, authorizes the use of a chapter 2 guideline other than the guideline applicable to the offense of conviction "in the case of conviction by plea . . . containing a stipulation that specifically establishes a more serious offense than the offense of conviction . . . ." The Commission's commentary does not specifically address the matter, but seems to assume that the stipulation will be part of the plea agreement.<sup>54</sup>

The Commission views the proviso as a "limited exception" to the general rule that the court is to use the chapter 2 guideline applicable to the offense of conviction.<sup>55</sup> If the proviso is to be limited, the source of the stipulation that triggers the proviso should also be limited. Requiring the stipulation to be part of the plea agreement not only provides a clear-cut, objective rule, but the formality of a written agreement insures that the defendant

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<sup>54</sup>Application note 1 discusses the proviso, explaining that the proviso has "a practical basis". The final paragraph of application note 1 states that "as with any plea agreement, the court must first determine that the agreement is acceptable . . . . The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable."

<sup>55</sup>Application note 1 in two places -- the first sentence of the second paragraph and the last sentence of the final paragraph -- calls the proviso a "limited exception" to the general rule.

has knowingly and intelligently made a stipulation that will adversely affect the defendant.

**Amendment 37(C) -- § 1B1.8 (Use of Certain Information)**

We support the proposed new application notes. This guideline deals with self-incriminating information provided by a defendant under a cooperation agreement with the prosecutor in which "the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant". Subsection (a) directs that self-incriminating information so provided "shall not be used in determining the applicable guideline range, except to the extent provided in the agreement". The phrase "determining the applicable guideline range" precludes the sentencing court from using the information when calculating the cooperating defendant's offense level and criminal history score.

The guideline appears to have been derived from 18 U.S.C. part V (immunity of witnesses).<sup>56</sup> The rationale for the guideline is that a defendant who cooperates with the government "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose."<sup>57</sup>

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<sup>56</sup>See U.S.S.G. § 1B1.8, comment. (n.4). 18 U.S.C. § 6002 provides that "no testimony or information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case".

<sup>57</sup>U.S.S.G. § 1B1.8, comment. (n.1).

The scope of the protection offered by this guideline turns on the phrase "self-incriminating information provided pursuant to the [cooperation] agreement . . . shall not be used in determining the applicable guideline range . . . ." <sup>58</sup> The principal ambiguity arises when a defendant who has provided self-incriminating information to the prosecutor also provides that information to the probation officer during a presentence investigation. The issue is whether that information is "provided pursuant to the [cooperation] agreement".

A narrow interpretation of that phrase would permit the sentencing court to use that information. Even under such an interpretation, the sentencing court could not use that information if the cooperation agreement requires the defendant to disclose the self-incriminating information to the probation officer.

A narrow interpretation of the phrase sharply limits the protection offered by this guideline and frustrates the purpose of this guideline (protecting defendants who cooperate with the government). <sup>59</sup> A narrow interpretation, moreover, can readily be gotten around in the cooperation agreement, so to insist upon a narrow interpretation seems empty formalism.

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<sup>58</sup>The operative language is "such information shall not be used in determining the applicable guideline range" (emphasis added). The referent for "such information" is a phrase in the previous clause of the sentence, "self-incriminating information provided pursuant to the [cooperation] agreement".

<sup>59</sup>See U.S.S.G. § 1B1.8, comment. (n.1).

In our opinion, the new application notes simply would make clear that the Commission intends a broad interpretation of the guideline. We support such a clarification.



# AMERICAN BAR ASSOCIATION

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## STATEMENT OF

PAUL D. BORMAN, CHAIRPERSON  
U.S. SENTENCING GUIDELINES COMMITTEE  
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE  
AMERICAN BAR ASSOCIATION

BEFORE THE  
U.S. SENTENCING COMMISSION

CONCERNING  
PROPOSED 1991 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.  
MARCH 5, 1991

Mr. Chairman and Members of the Commission:

My name is Paul D. Borman. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the ABA Criminal Justice Section Committee on the United States Sentencing Guidelines. Our Committee is made up of attorneys from every aspect of the criminal justice system -- prosecution, defense, judicial and academic. The Committee has had the benefit of two extended discussions of the 1991 proposals -- most recently on Thursday, February 28.

As many of you remember, our ABA Committee has testified before the Commission on numerous occasions, concerning the process by which the Commission promulgates guidelines, the substance of many guidelines, and the overall role of the Commission. Most recently, we testified about organizational sanctions. We appreciate the Commission's willingness to both listen to and give serious consideration to our positions. We believe that the dialogue between the ABA and the Sentencing Commission has developed into a mutual respect on both sides which significantly benefits the criminal justice system.

The saga of the United States Sentencing Guidelines has been followed with great interest by the ABA both because sentencing guidelines have a critical impact on every federal court conviction, and because the ABA has developed sentencing standards by which we evaluate your Guideline proposals.

Today marks the formal beginning of yet another chapter in the epic saga of the Federal Sentencing Guidelines.

We strongly urge the Commission to spend a major part of its time and budget in setting up multiple Guideline training programs all around the country.

We urge that each and every one of you and your staff go forth and teach, and to learn from the foot soldiers in the criminal justice system. Sitting here and writing more amendments, or "clarifications", as many of them are called, is part of the problem. Venturing forth will help solve problems and avoid creating more problems. General Schwarzkoff didn't run the war sitting in the Pentagon in Washington.

We all recognize that the Guidelines by their nature cannot be kept simple. But that does not justify making the Guidelines even more complex, so that as soon as some people come close to understanding them -- SHAZAM! -- out comes a new set of amendments and clarifications.

This is the most important message that the organized bar can offer you this morning. And the following recent New Yorker cartoon, as amended, probably conveys the message better than my testimony so far.

Now to the 1991 amendment process:

First, we want to compliment the Commission for making better efforts in these areas:

1. Providing additional time for comments-- 45 days between publication and the public hearing, and 60 days for the entire comment period. We continue to seek the 90 day period proposed in last year's testimony.
2. Providing background reports tied to specific proposed amendments.
3. Asking, early on, for comments on matter's that are going to be on the Commission's agenda in the coming year.
4. Urging Congress to not enact additional mandatory minimum sentences.

At the same time we have searched in vain for the required comprehensive PRISON IMPACT STATEMENT -- that the Congress mandated the Commission to prepare. The Commission should not send out any additional proposals without first fulfilling this prerequisite.

Further, we want to urge the Commission to study in depth certain key aspects of the Guideline program that our experience has shown requires examination.

1. The importance and impact of offender characteristics, including prior unadjudicated crimes.
2. Mitigating Roles. This ties in with Amendment 11 and the study that Commissioner Carnes is undertaking.

With regard to the proposed 1991 amendments, we firmly believe that the Commission's credibility as an expert agency depends upon the openness of its decision making process and the extent to which the Commission's actions are grounded in empirical research, and its adherence to its enabling



would propose increased sentences in an era of dangerously overcrowded prisons without carefully weighing the impact each such proposal would have on prison populations.

At the same time, some of the most important proposals put forward by the Commission are unaccompanied by reports. For example, in amendment 9B, the Commission proposes to raise an offense level by up to eight level without providing adequate reason for the change and without providing any supporting data. Merely providing "a more appropriate sanction" does not set forth an adequate "Reason for".

Further, there are crucial structural issues underlying many of the amendments that are not addressed in the staff reports. For example, amendments 14 and 22 would entail significant shifts in the balance between real offense and charge offense sentencing, thus altering one of the bedrock policy choices of the initial guidelines. Meanwhile amendments, 1, 2 and 5 raise the question of how the Commission should respond to various expressions of congressional intent.

Yet neither the real offense issue nor the congressional intent issue is the subject of the Commission's own comprehensive staff report, despite their overarching importance. Either the Commission is proposing to act without considering the far reaching implications of its actions, or the Commission has itself considered these structural issues but proposes to act without affording the bench and bar an opportunity to comment intelligently upon them. Neither scenario is appropriate.

Carruther's proposals on Alternatives to Incarceration, Commissioner Carnes' working group on Mitigating Roles, and Commissioner Nagel's working group on Plea Bargaining. I believe that the mutuality of our interests in the federal criminal justice system will produce greater benefits as we work together early on, concerning the 1992 cycle.

At this point, I would be pleased to answer your questions.

#### COMMENTS ON SPECIFIC PROPOSED AMENDMENTS

Item 1. The 1990 crime bill increased the maximum offense level for certain sexual offenses. At the same time, the Congress directed the Commission to Study the sexual offense guidelines and determine if increased offense levels were appropriate. Now, before completing its mandated study, the Commission proposes to increase offense levels for these crimes.

This raises the broad question of how the Commission should respond to declarations of congressional sentencing policy. As noted in the body of our testimony, we believe that a comprehensive examination of this question is warranted.

Sometimes Congress is explicit: if it directs the Commission to set the base offense level for a crime at 22, the Commission is duty bound to comply. At other times, Congress is ambiguous: if a new law increases the maximum penalty for an offense, it may not always be necessary or wise for the Commission to increase the corresponding offense levels. Such legislation may be understood to provide greater scope for the court to depart upward from a guideline range that already provides adequate punishment for the heartland case.

Both options propose specific offense characteristics which would move the guidelines away from a modified charge offense system to a real offense system by permitting punishment for unrelated conduct that has not been proved beyond a reasonable doubt. This structural revision deserves far more consideration and analysis than it receives in the explanation accompanying this amendment.

logical for the Commission to ascertain the underlying cause of the prosecutorial disparity. One possibility is that some prosecutors find the operation of section 924 to be too harsh in individual cases. If this is so, a guideline amendment that would make the operation of the guideline uniformly harsh is plainly unwise.

The primary "Reason for" advanced is that U.S. Attorneys are not following the "Thornburgh Memorandum". The Commission should bring this matter to the attention of the Justice Department rather than act to supervise the Justice Department. The Supreme Court in Mistretta placed the Commission in the Judicial Branch, not in the Executive Branch. Further, the standard that the U.S. Attorneys must utilize in charging an offense, what is readily provable; one wonders how the Commission can arbitrarily second guess them on their decision-making.

Item 8. The explanation accompanying this amendment would make the extortion guideline equivalent to the armed robbery guideline, but does not say why this is just. Extortion typically involves the threat of future harm while robbery involves the threat of immediate harm. The explanation is also deficient in that it fails to justify the proposed offense level "floor" of 24, nor does it explain why a specific offense characteristic is needed for the few cases of product tampering.)

Item 8C proposes several specific offense characteristics that are either vague (what does the phrase "organized crime" mean?) or, as far as can be discerned from the absence of supporting data, unnecessary. Here again, the proposed amendments raise more questions than they answer. Of particular concern is the uncertain relationship between these specific offense characteristics and the "relevant conduct" and "role in the offense" guidelines.

Item 9B. This amendment proposes to double the punishment that a defendant will receive for a particular crime, but the only explanation offered for such a dramatic change is that it will "provide a more appropriate sanction" for the crime. By what criteria, did the Commission determine what constitutes an "appropriate sanction".

Item 11. The ABA appreciates the Commission's willingness to publish this request for comment, because it involves an aspect of the guidelines that we find most troubling: the unduly harsh punishment imposed on very low-level drug dealers under the structure of the current drug guidelines.

Pursuant to the Commission's request for a specific proposal, we suggest that a guideline be structured to provide an offense ceiling for the minor and minimal participants convicted of drug offenses. For example, a minimal participant

Item 19. This proposed amendment seems to respond to a very rare fact pattern, and therefore is best addressed through departure. Placing such "fixes" within the guideline, as in option one, leads to the increase bulk and complexity of the guidelines. No specific "Reason for" is set forth.

Item 21. The report accompanying this guideline suggests that majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. As in the bank robbery amendment, we commend the process by which the Commission proposes the amendment, but question whether the process has supported the outcome.

We believe that a significant in-depth study is warranted before implementation of this wholesale revision of firearms and explosives offenses. After reading the staff report, one is led to conclude that this proposal is based primarily upon the wishes to the ATF, and a single letter from a federal district judge.

Item 22. This proposed amendment would contain a series of alternative base offense levels, depending upon the court's assessment of the defendant's conduct under a preponderance of the evidence standard. This structure replaces several different guidelines, a structure which requires a defendant to be convicted of certain conduct before he is assigned to a particular guideline.

This shift to real offense sentencing may or may not be appropriate, but it appears to have been adopted without adequate consideration of the real offense issue, and is therefore objectionable for the reasons set forth in response to Item 14.

Item 23B. One part of the amendment would treat a foreign conviction as an aggravator, even if that country had failed to provide due process. This is inconsistent with § 4A1.2(h). It should be allowed only as a possible basis for departure.

In response to Item 16, we pointed out that it was difficult to offer informed comment on a proposed amendment that includes a four level range of possible offense levels. In this item, the Commission asks for such comment with respect to a fourteen level range. If the Commission has no basis for choosing an offense level between six and twenty for this conduct, it has no rational basis for this proposed amendment.

Item 25. Is there supporting data to justify raising the base level to make prison mandatory for at least part of the sentence.

Item 28. This new guideline carries a BOL of nine, higher than the BOL (8) for failure to report monetary

The Commission is not the Supreme Court of Sentencing.

We believe that the Commission should do a study of the case law in the area relating to burdens of proof and going forward, and the issue of due process.

Item 37C. This will likely result in a shut-off in any and all information provided by Defendants. Is the limitation of the protection provided the Defendant worth this result?

Item 37F. The issue of tying in of a gun not directly used in a narcotics offense with marginal, unknowing conspirators deserves study as part of Commissioner Carnes study.



# Department of Justice

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STATEMENT

OF

JOE B. BROWN  
UNITED STATES ATTORNEY  
MIDDLE DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

MARCH 5, 1991

Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. The amendments cover a number of important guideline areas, and we commend the Commission for considering many of the concerns we raised with you early in this amendment cycle.

I would like to highlight a few of the most important proposed guideline amendments in my statement today. First, in the areas of criminal history, firearms, and the reentry of aliens, the proposed amendments will significantly improve the guidelines from a law enforcement standpoint, and we urge the Commission to promulgate final amendments along the lines proposed. However, the Department believes that the amendments affecting financial institution fraud and substantial assistance either do not go far enough or create new problems.

#### CRIMINAL HISTORY

##### Category VII (Amendment 31)

The Commission has proposed a new criminal history Category VII to provide increased sentences for offenders with particularly extensive criminal backgrounds. We strongly believe that this new criminal history category is needed to provide adequate sentences for the most serious recidivists. Under the current guidelines defendants with criminal history scores of 13 or more are all included in Category VI. Unless the sentencing judge departs from the guidelines on the basis of criminal history, a defendant with a criminal history score of 18, for example, would

receive the same sentence for a particular offense as a defendant with a score of 13. Of course, a judge is not bound to depart from the guidelines, even when sentencing a defendant with a substantial criminal history score, and defendants with extremely diverse backgrounds may be sentenced alike. We urge the Commission to include an additional criminal history category in order to recognize distinctions that so far have been ignored.

The Commission has proposed three alternative approaches to creating a new Category VII. We favor the third, which provides that Category VI would include cases with 13 to 15 criminal history points and Category VII would include those with 16 to 18 points. Option three follows the pattern established for Categories III, IV, and V, each of which incorporates a three-point spread in criminal history points. Option three also specifies that courts may either sentence defendants with more than 18 criminal history points within the range prescribed for Category VII or depart upward.

Option three best addresses the need for an additional criminal history category by focusing on those offenders whose criminal history scores exceed the current cap of 13 by just several points. In addition, by authorizing upward departures, this option provides flexibility for judges sentencing defendants with even higher criminal history scores.



Related Cases (Amendment 30)

We also urge the Commission to adopt an amendment to address the problem of criminal history scoring for prior cases consolidated for trial or sentencing. The current criminal history guidelines artificially count such sentences for unrelated offenses as a single sentence.<sup>1</sup> The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results.

The Commission has proposed to address these concerns by presenting three options, all of which would exclude from consideration as "related offenses" those which resulted from separate arrests. The Department favors the adoption of option two but believes that any of the options would improve the current guidelines' treatment of related sentences.

Option two states that prior sentences are not considered related if they were for offenses that were separated by an intervening arrest or if they were not the type of offenses that would have been subject to grouping under the guidelines on groups of closely related counts. Of the three options published for comment, we believe this one most closely reflects the Commission's prior judgments about what types of cases are related for purposes of increasing or decreasing penalties. The multiple-count rules are now familiar to all components of the criminal justice system,

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<sup>1</sup> United States Sentencing Commission, Guidelines Manual, §4A1.2(a)(2) and Application Note 3.

and extending their use to criminal history scoring should not prove overly burdensome. By contrast, the other options inject new and unfamiliar rules into the determination. If the Commission believes that further refinements are needed to address the issue of "double recidivists" -- i.e., those who committed offenses in the past following incarceration -- the guidelines could be amended to provide an addition to the criminal history score on this basis.

FIREARMS (Amendment 22)

The Commission has proposed a number of significant guideline revisions regarding firearms offenses. The proposed amendment consolidates four existing guideline sections into one comprehensive guideline on firearms offenses. In general, we believe that this proposal would substantially improve the firearms guidelines and contribute significantly to the deterrence of firearms-related crime.

While amendment 22 makes numerous changes, several stand out as being prominent from a law enforcement perspective. First, the proposal would improve proportionality in sentencing by creating several categories of sentences for offenders who have been convicted of violent felonies or drug offenses but who are not armed career criminals within the meaning of section 924(e) of title 18, United States Code. This statute imposes a mandatory minimum 15 years' imprisonment for the unlawful receipt, possession, or transportation of firearms by convicted felons who have three previous convictions for violent felonies or serious drug offenses. The Commission addressed this statutory requirement

in guideline §4B1.4 last year. However, because of the operation of the armed career criminal provision, offenders with one or two prior violent or drug offenses are sentenced at substantially lower levels than those with three prior convictions of this type. The armed career criminal provision produces a sharp cliff that can be smoothed by provisions aimed at offenders who are on their way to becoming armed career criminals but have not yet arrived.

The Commission should fill in the gaps created by Congress, which we believe rightly recognized that felons with serious drug or violent crime backgrounds require substantial punishment for unlawfully receiving or possessing firearms. The Commission has included several alternative offense levels for these intermediate armed career criminals. Since offenders with three prior violent or serious drug felonies are sentenced at level 33 and Category IV or higher (guideline §4B1.4), then the proposed offense levels of 20 and 24 for those with one or two qualifying prior convictions, respectively, are the proper choices to implement concerns of proportionality.

The proposed firearms amendments would also increase the base offense level for the receipt, possession, or transportation of firearms by convicted felons and other prohibited persons from offense level 12 to either 14, 15, or 16. For a defendant who used or possessed the firearms solely for lawful sporting purposes or collection, the offense level would be decreased to 6, 7, or 8, according to the proposal. We welcome the proposed increase in offense level for convicted felons and other prohibited persons who

unlawfully receive, possess, or transport firearms. The current level is not sufficient from a punishment and deterrence standpoint, particularly in light of the "sporting purpose" reduction. Congress has set the maximum statutory penalty for this offense at 10 years for convicted felons and most other categories of prohibited persons.<sup>2</sup> Moreover, there are lawful means available for a convicted felon to possess firearms. For example, convictions which are expunged or set aside do not generally trigger the federal prohibition against receipt or possession of guns.<sup>3</sup> In addition, a convicted felon may seek relief from federal firearms disabilities in accordance with federal law.<sup>4</sup> A convicted felon who does not successfully pursue these methods to possess firearms lawfully is, in our view, deserving of punishment when he or she violates the law. Any increase in the offense level would improve the guidelines; an increase to level 16 would send an important message to convicted felons who fail to heed the firearms laws.

We also approve the Commission's proposed change to the "sporting purpose" reduction that makes this reduction unavailable when the firearm was obtained for lawful purposes but has subsequently been possessed otherwise. The fact that a felon had initially obtained a gun for hunting should not qualify him for the

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<sup>2</sup> 18 U.S.C. 922(g) and 924(a)(2).

<sup>3</sup> 18 U.S.C. 921(a)(20).

<sup>4</sup> 18 U.S.C. 925(c).

substantial "sporting purpose" reduction if he later decides to use the gun in crime.

Finally, we applaud the Commission's proposed addition of a firearms table to the guideline so that firearms receipt and possession offenses that involve more than two guns are punished more severely than those that involve only one or two. The current guidelines incorporate such a table only for gun trafficking offenses, but not gun possession offenses. A convicted felon who unlawfully possesses a stash of firearms should receive a stiffer sentence than one who possesses a single gun.

We urge the Commission to adopt these changes proposed in the published firearms amendments. There are many other significant improvements in this amendment that the Commission should also adopt. In several instances we believe that further refinements to the proposal are needed. However, these concern relatively minor points, and we would be pleased to work with the Commission to detail these refinements. In light of the level of violent crime in our country, the firearms proposals will prove to be one of the most important amendments the Commission considers in this amendment cycle. The proposed revisions could go far in addressing this serious law enforcement problem.

REENTRY OF DEPORTED ALIENS (Amendment 23)

The Department strongly supports the Commission's amendment of guideline §2L1.2 to reflect the substantial increase in 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.<sup>5</sup> 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 15 years if the defendant was deported after conviction of an "aggravated felony."<sup>6</sup> The term "aggravated felony" includes murder, drug trafficking, and illicit trafficking in firearms or destructive devices.<sup>7</sup> An increased penalty of this magnitude -- two years to 15 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.

We recommend that the new specific offense characteristic designated as guideline §2L1.2(b)(2) increase the applicable guideline by 20 levels for all prior "aggravated felony" violations. While this is a steep specific offense increase, as a practical matter, we do not think it is too harsh. In the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so. In the exceptional situation involving an illegal alien drug dealer who has some sympathetic reason to reside here illegally, the court may depart downward. A large number of United States Attorneys have brought the need for this guideline amendment to our attention, and we consider it an urgent Departmental priority. A

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<sup>5</sup> 8 U.S.C. 1326(b).

<sup>6</sup> 8 U.S.C. 1326(b).

<sup>7</sup> 8 U.S.C. 1101(a)(43).

very substantial increase in the offense level is needed to deal with this type of offender.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendments 4, 5, and 6)

The Department's most significant problem with the proposed amendments to the guidelines concerns fraud involving financial institutions. During the past several years, Congress has dramatically increased the penalties for financial institution fraud by making the maximum terms of imprisonment for major bank fraud and embezzlement offenses as much as 15 times greater than they were in 1988, sending what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration.<sup>8</sup>

As recently as this past November in the Crime Control Act of 1990, Congress made significant increases in the penalties for financial fraud. In section 2504 of that Act, Congress increased the maximum terms of imprisonment from 20 to 30 years for violations of 10 major title 18 bank fraud and embezzlement offenses.<sup>9</sup> In addition, in section 2507 Congress directed the Sentencing Commission to provide in the guidelines that a defendant convicted of violating, or conspiring to violate, one of these bank

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<sup>8</sup> See, Crime Control Act of 1990, Pub. L. 101-647, §§ 2504, 2507, 104 Stat. 4789 (1990); Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, §§961(a), 962(e)(1), 103 Stat. 1199 (1989).

<sup>9</sup> Title 18, United States Code, sections 215(a); 656; 657; 1005; 1006; 1007; 1014; 1341; 1343 and 1344.

fraud statutes, as well as a newly enacted bank fraud statute,<sup>10</sup> who derived significant personal benefit (more than \$1,000,000 in "gross receipts"), be assigned not less than offense level 24.

In section 2510 of the Crime Control Act, Congress enacted a new statute<sup>11</sup> aimed at "financial crime kingpins" which provides for a mandatory minimum penalty of 10 years and up to life imprisonment for those individuals who organized and exercised authority over the most serious fraudulent activity and received substantial personal gain.

These amendments send a forceful message that Congress considers fraud offenses involving financial institutions a more serious matter than in the past and that greater punishment is in order for such offenses than for most other fraud offenses. However, the Sentencing Commission's response to the Crime Control Act amendments is limited and, in the Department's view, inadequate to properly reflect the intent of Congress with respect to these increased penalty levels.

First, with respect to increasing the maximum bank fraud and embezzlement penalties from 20 to 30 years, the Commission proposes to amend guidelines §§2B1.1 and 2F1.1 to expand the dollar loss tables for theft and fraud offenses by adding four offense levels for cases in which the amount of the loss ranges from more than

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<sup>10</sup> 18 U.S.C. 1032 relating to concealment of assets from a conservator, receiver, or liquidating agent of a financial institution.

<sup>11</sup> 18 U.S.C. 225.



\$160 million to over one billion dollars. While we have no objection to this approach which will provide higher guideline sentences in the rare and most extraordinary cases with such high losses, it does not affect the majority of cases in the "heartland" in which the losses, while they may be substantial, are often much lower than \$160 million.

The current guidelines are structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties.<sup>12</sup> We believe that in raising the maximum penalties for major bank fraud offenses six-fold and more, Congress intended that the sentences be increased over the entire range of offense levels, including those at the lower and middle levels. In order to respond to the Congressional concerns about financial fraud addressed in the penalty increases in the Crime Control Act and FIRREA, we urge the Commission, as we did last year, to revise the guidelines applicable to the amended statutes to provide appropriate enhancements relating to financial institutions for all offense levels. We recommend that the Commission amend the guidelines to provide in new specific offense characteristics that if the theft and fraud offenses affected a financial institution, the offense levels should be increased by at least several levels in addition to other enhancements already in these guidelines.

Second, the Commission proposes to amend the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to require that the offense level be raised to level 24 if a defendant is convicted of

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<sup>12</sup> See Background Commentary to §2F1.1.

violating, or conspiring to violate, any of 11 fraud offenses affecting a financial institution and "derives more than \$1,000,000 in gross receipts from the offense". However, Congress has directed that level 24 serve as the minimum sentence, and that such defendants be assigned no less than offense level 24. These guidelines should be amended further to provide for increases above offense level 24.

Third, the Commission has proposed to address the financial crime kingpin statute by amending the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to apply the offense level applicable to the underlying theft and fraud offenses, apply specified adjustments, and then raise the guideline sentence to ten years if the sentence is less than ten years. This approach is wholly inadequate to implement the requirements of the statute. The Commission has created a guideline sentence which will amount to a maximum of 10 years in most cases, while Congress enacted 10 years as the mandatory minimum sentence. The 10 year mandatory minimum should not be the guideline maximum. The statute also provides that the sentence may be life imprisonment, while the proposed guideline amendment makes no provision for any sentence approaching life imprisonment. It is also unclear how the amount of "gross receipts" received by a defendant would relate to the amount of loss to the institution.

Because the financial crime kingpin legislation was modeled after the "Continuing Criminal Enterprise" drug statute in section 848 of title 21 and its provisions are completely analogous, we

strongly recommend that the Commission adopt a financial crime kingpin guideline using the same approach. A base offense level tied to the ten-year statutory minimum would be appropriate because the same rationale as under the drug kingpin statute applies, that a conviction under the statute establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity.

In summary, we strongly urge the Commission to revise the guidelines relevant to the statutes amended in the Crime Control Act in order to respond to the Congressional determination that defendants convicted of fraud affecting a financial institution in the majority of fraud cases be subject to substantially greater punishments.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 35)

The Commission has proposed an amendment to policy statement §5K1.1 to make clear that a motion by the government is necessary before a court may depart below the applicable guideline range based on a defendant's substantial assistance to the authorities. The amendment would also state in the commentary that a court could depart downward in the absence of a government motion where the government in bad faith breaches an agreement to file the requisite motion.

While we support the Commission's clarification of this policy statement, we recommend that the proposed statement regarding bad faith be deleted from the commentary. We believe this language is ill-advised because it introduces questions of bad faith into what

has usually been a relationship of trust between prosecutor and defense counsel. It will also create the possibility of routine allegations by the defense of bad faith by the prosecutor.

If the Commission decides to retain the bad faith language, then the Department strongly urges the Commission not to adopt any changes whatsoever to the language of policy statement §5K1.1.

#### CONCLUSION

The Department plans to provide the Commission with its views on all of the proposed guideline amendments in the coming weeks. There are a number of additional areas in which we will urge the Commission to take final action in accordance with its proposals. For example, the proposed amendments in the areas of money laundering and restitution represent a substantial improvement in the guidelines. We will be pleased to assist the Commission in finalizing the many important guideline amendments it has proposed.