UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

March 27, 1989

MEMORANDUM:

TO: *Commissioners*
Staff Director
Legal, Research, Drafting & Hotline Staff

FROM: *Paul K. Martin*

SUBJECT: *Public Comment; Editorial*

Two items for your attention: first, public comment from an Assistant United States Attorney in Vermont on §3E1.1, the Obstruction of Justice adjustment. Second, a recent editorial from the Arizona Republic in which the Commission's guidelines are held up as a model for the states.

Attachments

U.S. Department of Justice

United States Attorney
District of Vermont

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802/951-6725
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March 9, 1989

United States Sentencing Commission
Guidelines Comment
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Comment

Gentlemen:

Please be advised that I have recently been contacted by Gary Peters of your offices relative to our letter concerning Guideline Section 3E1.1 dated 2/16/89. Our letter briefly posed a question concerning the applicability of a three point increment for obstruction of justice when, at a later date, the individual involved also accepts responsibility for his acts. A brief outline of the facts in a case recently handled by our office will highlight the dilemma.

In a recent narcotics case, police officers executing a search warrant, had to forcibly enter the dwelling in which the defendant was storing quantities of cocaine. As the police officers entered the dwelling they were aware of the fact that the defendant attempted to and did in fact, destroy a small amount of the cached narcotics. Almost immediately thereafter the defendant agreed to cooperate with authorities and in fact led them to the source of the cocaine. The defendant later pled guilty and completely admitted his complicity in narcotics trafficking.

At the time of his sentencing, based upon the Guidelines as they existed in February of 1989, the Court felt that because of the defendant's activities in destroying evidence, he thus obstructed justice and deserved to receive an additional three points to his base offense level. The Court further reasoned that one who obstructed justice, based upon the existing

Guidelines and commentary, could hardly receive any credit for having accepted responsibility.

Mr. Peters advises that proposed amendment number 234 would, in fact, advise Courts that there are times when both the penalty for obstruction of justice and the decrease in offense level for acceptance of responsibility, would be appropriate. If this proposed amendment were to be accepted, it would, in fact, allow a Court to, in our opinion, properly treat the situation as described above. That is, an individual would be penalized for an attempt to obstruct justice, however, this penalty would not permeate later efforts to not only to accept responsibility but also aid law enforcement. Such a result would be to the best interest of both the sentencing Court and law enforcement.

Thanking you in advance for your attention to this matter, I remain

Very truly yours,

GEORGE J. TERWILLIGER, III
United States Attorney

By:
CHARLES A. CARUSO
Assistant U.S. Attorney

CAC/kmc

THE ARIZONA REPUBLIC
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Where The Spirit Of The Lord Is, There Is Liberty — II Corinthians 3:17

EDITORIALS

MANDATORY SENTENCING

Prison building binge

BEFORE concluding that carpenters and masons can stay ahead of the curve on prison overcrowding, Arizona legislators ought to look hard at the consequences so far of mandatory sentencing.

No one can prove that mandatory sentencing has led to the overcrowding, but mandatory sentences and the jump in overcrowding did coincide. This leads many people, including Corrections Director Sam Lewis and us, to suspect a connection.

But let us back up. Mandatory sentencing was an attempt to correct flagrant disparities. Under the old system, one judge might give a first-time offender a long stretch in the penitentiary, whereas a more lenient judge would punish an identical offense with a fine and probation.

Sentencing was so arbitrary that it seriously eroded confidence in the criminal justice system, and the Legislature, reflecting a general dissatisfaction with the way things were, finally rebelled. If judges would not mete out uniform punishment, the thinking went, the Legislature would do it for them.

But our choices need not be that limited. We do not have to tolerate either haphazard sentencing and horrible inequities, or mandatory sentencing that leads — or so it is suspected — to prison overcrowding. Arizona could adopt a modified version of the guidelines established by the U.S. Sentencing Commission and recently upheld by the U.S. Supreme Court.

These guidelines take into account both "offense behavior" (use of a firearm, injury of the victim, and the like) and "offender characteristics" (previous record, payment of restitution, and such). They provide a narrow range of punishment, with maximum sentences exceeding minimum sentences by no more than 25 percent or six months, whichever is greater. And they abolish parole and drastically reduce time off for good behavior, so that the offender serves virtually all of the sentence imposed.

The effect of the guidelines will be dramatic. In the recent John Walker spy case, to take an example, the defendant was sentenced to life imprisonment. In reality, however, he will be eligible for parole in only 10 years.

The sentencing guidelines would have made the illusory punishment real. For selling classified information to a foreign government, Walker would have gotten the same life sentence, but he would never have been eligible for parole. Moreover, the same sentence would apply in any similar case of espionage. As explained by sentencing commission chairman William W. Wilkins Jr., the new arrangement "feeds everybody out of the same spoon."

Here, then, is a system that ought to satisfy both sides in the continuing dispute over mandatory sentencing in Arizona. It offers uniform punishment commensurate with the offense committed, but is free of the excessive inducements to plea-bargaining that undercut Arizona's attempts at mandatory punishment.

Moreover, a system of predictable punishments, rather than the former "lottery" system, also might discourage crime and thus avert the impending prison building binge.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
19613 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8042 (FTS)
215-597-8042 (COMM)

April 13, 1989

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

Dear Chairman Wilkins:

I appreciate your invitation to comment on the proposed amendments to the sentencing guidelines which were published as Part II of the March 3, 1989, edition of the Federal Register. As Chairman of the Committee on Criminal Law and Probation Administration of the Judicial Conference, I prefer not to make comments on normative questions such as whether a given guideline should be higher or lower. I do feel at liberty, however, to comment on proposed amendments which may implicate additional (and perhaps unnecessary) work for U.S. Probation Officers and/or Judges and those which may create confusion or create inconsistencies in treatment within the guidelines. With that disclaimer, I comment on the following proposed amendments:

Amendment #10: Section 1B1.2(a)

The amendment adds subsections (c) and (d). Subsection (d) provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Although the drafted language of the amendment to the guideline appears tenable, I have two comments about the commentary to this proposal.

In determining the sentence for a conspiracy, proposed Note 5 advises, "Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy." The commentary indicates that the guidelines should be applied only to the object offense(s) alleged in the conspiracy for which the court "were it sitting as a trier of fact" would convict the defendant. The commentary concludes with, "Note, however, if the object offenses specified in the conspiracy count would be grouped together under 3D1.2(d)...", it is not necessary to engage in the foregoing analysis because 1B1.3(a)(2) governs consideration of the defendant's conduct.

The instruction that the court sit as a trier of fact to determine for which object offenses the defendant could be convicted suggests that a reasonable doubt standard of proof is applicable; the "Additional Explanatory Statement" on page 9 of the amendments actually states that "it appears that this decision should be governed by a reasonable doubt standard." Since this explanation is not part of the commentary and would not appear in the guidelines, the reasonable doubt standard is only inferred by the amendment.

The same commentary note instructs that if the object offenses could be grouped under 3D1.2(d), the foregoing analysis does not apply. Rather, relevant conduct at "1B1.3(a)(2) governs consideration of the defendant's conduct." The evidentiary standard for such consideration is "reliable information," generally interpreted as preponderance of evidence. Thus, the commentary to this amendment establishes a dichotomy in which there is a mixing of the standards of proof when applying the guidelines to conspiracies. For certain conspiracies, such as a robbery conspiracy, the evidentiary standard is beyond a reasonable doubt, while the standard for other crimes, such as a drug distribution conspiracy, is a preponderance of the evidence. The rationale for this dichotomy is unstated. I am concerned that dual standards of proof in this guideline commentary will establish an inconsistency in the treatment of conspiracies and will generate litigation.

My second comment pertains to my anticipation that the procedural solutions proposed by the commentary and explanatory statement will be burdensome to the courts. The explanatory statement suggests that the courts may choose to employ a special verdict procedure or judicial fact finding to ascertain the basis for the conspiracy conviction. However, the special verdict procedure is disfavored in many circuits. Seq. United States v. Desmond, 670 F2d 414, 418 (3d Cir. 1982). Moreover, imposing a fact finding burden on the judge in so many jury trials may itself be burdensome. Since the

majority of cases reach disposition through the guilty plea process, it might be necessary to initiate similar fact finding procedures in a formal proceeding for conspiracy cases arising from guilty pleas, a formidable prospect for the courts.

Amendment #50: Robbery Guideline

My comment regarding the robbery amendment is restricted to the proposal that the Commission amend the guideline "to explicitly take into account other robberies of which the defendant has not been convicted." Two amendments are presented as options, both of which would create a specific offense characteristic that could increase the offense level based upon unconvicted robberies. I point out that to adopt any amendment in which behavior on unconvicted robberies is factored into the guideline would be inconsistent with the provisions of relevant conduct [1B1.3(a)(1)] as it is currently written. Incorporation of such an amendment would result in confusion unless the relevant conduct guideline were also amended to allow consideration of conduct stemming from unadjudicated robberies or similar offenses covered by 1B1.3(a)(1).

While, as noted at the outset, I take no position on normative matters, it strikes me that the Commission may be well advised to obtain more experience with the guidelines, and receive views from District Courts which have only recently begun to impose guideline sentences, before deciding, on the basis of observations from a few sources, substantially to increase or decrease guideline ranges because they seem too high or too low.

Amendment #82: The Weight of LSD

In this amendment, the Commission seeks comment as to whether the guidelines or commentary should exclude the weight of the LSD carrier (sugar, paper, etc.) for guideline purposes. The provisions of the Anti-Drug Abuse Act of 1986 provide that if a mixture of a compound contains any detectable amount of a controlled substance, the entire mixture is considered in measuring the quantity. The pertinent question appears to be whether the "carrier" of LSD constitutes a mixture. It would appear that the carrier for LSD is tantamount to packaging rather than a mixture or compound which affects purity. As a consequence, we endorse the exclusion of the weight of the carrier. This change would clarify problems in determining the proper weight or measure of LSD while maintaining consistency with the provisions of the Anti-Drug Abuse Act pertaining to quantity and purity. Consistency with other provisions of the Act strikes me as most desirable.

Amendment #159: Smuggling, Transporting, or Harboring an Unlawful Alien

This comment is informed by observations from numerous U.S. Probation Officers, particularly in the southwestern region of the country. While the proposed amendment has merit, according to these officers there is a deficiency in specific offense characteristics for smuggling or transporting unlawful aliens. When unlawful aliens are smuggled via vehicle, a high speed chase with border patrol officials is not infrequent, a phenomenon that endangers not only the unlawful aliens but also the general public traveling on highways and roads. There are also instances in which unlawful aliens are concealed in circumstances particularly dangerous to human life. One notable case entailed numerous unlawful aliens who died in a locked boxcar in Texas that had been abandoned by the smugglers. Another consideration is whether large scale smuggling activities should be a consideration. Should a defendant transporting three unlawful aliens in the trunk of his car receive the same offense level as a defendant transporting forty in a truck?

In the past, the elements of high speed chases, endangerment, and large scale smuggling rings often resulted in higher sentences. Under the current guideline, the court must depart to achieve the desired punishment in these instances.

Since the guidelines were initially published, many officers working in the southwest have been puzzled by the absence of important specific offense characteristics in this guideline. While the Commission is considering an amendment to guideline section 2L1.1, we ask that the Commission look at the common elements of these offenses and develop additional specific offense characteristics so they may be formally incorporated into the guideline.

Amendment #243: Career Offender

The Commission reports that the career offender guideline has been criticized on a number of grounds and the criticisms are listed as encompassing seven general issues as follows: (1) Sentences based only on the statutory maximum ignore significant variations in the seriousness of the actual offense conduct and therefore (a) are unjust and (b) provide no marginal deterrence; (2) the sentence is frequently excessive in relation to the seriousness of the actual offense conduct; (3) the sentence is too heavily dependent on the charge of conviction for the instant offense and prior offenses...; (4) the distinction between the criminal records of offenders with a criminal history category VI and those who are career offenders is insufficient to warrant such large differences in the resulting

sentence; (5) the sentences are longer than are needed for incapacitation, and therefore waste prison space, which is in short supply and could be better used for other offenders; (6) prisons are not equipped to house the aged offenders who will be incarcerated as a result of this guideline; and (7) acceptance of responsibility has no impact on the guideline range, thus discouraging guilty pleas. Three proposed options to amend the career offender guideline are presented. Without commenting on the relative merits of the three options, I point out that none of these proposed options address the seven general issues raised by the critics.

Amendment #246: Criminal Livelihood

As the Commission is aware, this guideline has been troublesome in that as it is presently constructed, the guideline would likely be applied to defendants at the lower end of the economic scale with greater frequency than others since "a substantial portion of his income" is attained more rapidly. The proposed amendment is an attempt to ameliorate this problem; however, the proposal may not have completely addressed the problems with this provision.

The new provision would read, "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13..." The phrase "engaged as a livelihood" is defined as (1) income from criminal conduct within 12 months that exceeded 2,000 times the minimum wage (currently $6,700) and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that 12 month period."

In evaluating the merits of this amendment, it would have been helpful if the Commission had provided the reason or rationale for the selection of 2,000 times the minimum wage as the standard.

Any defendant who is gainfully employed can argue that his employment is his "primary occupation," irrespective of the amount of the ill-gotten gains. However, an unemployed defendant cannot, to his prejudice. One example would be the welfare mother convicted of food stamp fraud. The Commission may want to consider how to clarify "primary occupation."

Finally, I observe that the construction of the guideline reflects a narrow interpretation of the statute as it captures only the "small fry" defendant. Large scale drug dealers or those individuals involved in organized crime are untouched by this provision as their offense levels frequently exceed level 13. The

Commission might consider redrafting this provision in a more expansive fashion to allow for enhancement of a sentence for those deriving their livelihood from crime at all levels of the guidelines.

Amendment #258: The Cost of Imprisonment

As you will recall, I testified before the U.S. Sentencing Commission on March 22, 1988, and addressed the cost of imprisonment and supervision. It was my contention that current law on fine penalties would appear sufficient to enable the court to levy substantial fines in all cases where there is an ability to pay. Requiring essentially two fine calculations, one for the guideline fine and on for the costs of incarceration/supervision, seemed superfluous. My position on this subject remains unchanged.

I offer the following proposal to streamline the fine determination process:

1. Delete 5E4.2(i) in its entirety and move it to:

2. Section 5E4.2(d) amended as follows:

   (d) In determining the amount of the fine, the Court shall consider:

   7) The costs to the government of any imprisonment, probation, or supervised release ordered.

   8) Any other pertinent equitable considerations (formerly as (d)(7)).

This amendment would provide for one calculation of the fine encompassing all of the considerations required by the Commission.

Sincerely,

Edward R. Becker

U.S. Department of Justice

United States Attorney
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March 9, 1989

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Thanking you in advance for your attention to this matter, I remain

Very truly yours,

GEORGE J. TERWILLIGER, III
United States Attorney

By:
CHARLES A. CARUSO
Assistant U.S. Attorney

CAC/kmc

United States Department of Justice

DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON 20530

APR 14 1989

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

Dear Billy:

Enclosed are comments of the Department of Justice regarding proposed amendments of the sentencing guidelines. These comments are in addition to those we provided by way of written and oral statements to the Commission for purposes of the public hearing held April 7, 1989.

The comments generally address only those proposed amendments that are troubling to us. The package of comments includes many prepared by the Criminal Division, as well as some prepared by the Antitrust, Civil Rights, Land and Natural Resources, and Tax Divisions. In addition, the comments include a number submitted to me by United States Attorney Joe B. Brown for the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee. Although some of the enclosed comments indicate specific views of one of the Divisions or the Subcommittee, I have endorsed them for submission to the Commission, and they should be taken as Department views.

I look forward to Tuesday's meeting.

Sincerely,

Stephen A. Saltzburg
Deputy Assistant Attorney General

Enclosures

AMENDMENT 3

Amendment 3 would set up an intermediate stage between serious bodily harm and bodily harm. We support this amendment since it would provide a specific guideline for the intermediate level and avoid requiring a departure. All departures are an open invitation to appeal.

AMENDMENT 10

Amendment 10 proposes that stipulations of additional offenses be treated as counts of conviction, and that a conspiracy conviction be counted as a conviction of each object of the conspiracy. The reason for the amendment is that some defendants are arguing under the rule of lenity that where a conspiracy alleges several objects, a guilty verdict is counted as being a conviction of the least object of the conspiracy. The District of Arizona uses a special verdict form to allow the jury to communicate which objects it is finding the defendant guilty of, but most districts do not use such special verdicts. It is felt that the procedure often gives a jury another opportunity to err. On the other hand, some attendees felt uncomfortable allowing the judge to serve as factfinder after a verdict. The committee consensus was that the Amendment is acceptable, but that the commentary raises more questions than it settles. The commentary portion in the third paragraph of page 9 which reads,

> "a guideline requiring courts to treat a multiple-objective conspiracy conviction as though the defendant had been convicted of separate conspiracies to commit each objective is unreasonable. In such cases should be omitted.

Amendment 12. Guideline §1B1.3. Relevant Conduct

Amendment 12 proposes a significant change to the relevant conduct guideline, §1B1.3, regarding conspiracies and offenses involving actions undertaken by more than one person. The proposed change would be made through amendment of an application note. Currently, the note states that the relevant conduct standard for conspiracy convictions includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. Under the amendment the same rules would apply to any offense "undertaken in concert with others, whether or not charged as a conspiracy."

The proposed standard is first set out as conduct of others in furtherance of the execution of the offense that was reasonably foreseeable by the defendant. However, the proposal further defines the new standard through an example relating to an off-loader of one drug shipment in a conspiracy masterminded by others, who also import drugs in several other shipments. The proposal states that the off-loader is not responsible for the other shipments "in which he played no part and from which he was to receive no benefit because those acts were not in furtherance of the execution of the offense that [the defendant] undertook with [the others]."

We point out first that the proposal is unclear. The first standard relates to reasonably foreseeable conduct in furtherance of the execution of "the offense." It is not clear to which offense this refers. For purposes of the example, it appears that "the offense" means the portion of the overall conspiracy in which the defendant was directly involved, as measured by the actions in which he played a part or received a benefit. However, the statement of the rule in the beginning of the discussion does not state this in general terms, and it is not obvious how the example applies to other fact settings or what reasonably foreseeable conduct of others is attributable to the defendant. For example, if two persons conspire to rob three separate banks but one of the conspirators is actually involved in only one of the robberies and receives no benefit from the others, what is the scope of his responsibility for the foreseeable actions of the other conspirator? Is he responsible only for the foreseeable actions of the other conspirator in the one robbery in which the former participates, as in the off-loading example, or is that example inapplicable because this offender actually conspired as to the entire scope of the three robberies? We can expect considerable litigation on these points if the proposed language is adopted.

More importantly, however, we have reservations about a narrowed relevant conduct standard potentially applicable to all joint offenders. We agree with the view that not all joint offenders should be punished alike and that their sentences need not always reflect the full scope of the conspiracy or joint

offense. However, we are wary about applying any reduced standard across-the-board because of a possible adverse impact on sentencing high-level conspirators. In this regard our concerns are similar to those expressed by the Antitrust Division in the attached discussion of this amendment. We believe that a narrowed relevant conduct standard should apply only to low-level participants in a joint offense. We agree, however, with the like treatment of conspiracies and other joint offenses, which the amendment proposes.

Our concerns can be illustrated by the following. In a large drug conspiracy the proposal may call into question the conduct considered relevant vis-a-vis the "lieutenants" one or two levels below the kingpin. While the narrowed language may not affect the very highest-level conspirator, who benefits from all of the actions of others, the next lower level or two -- who should also be accountable for the entire scope of the conspiracy foreseeable to them -- may unjustly benefit from the narrowed rule. For example, a drug kingpin may designate one person to carry out wholesale distributions in New York, another in Philadelphia, and a third in Washington, D.C., with each playing no part in and receiving no benefit from the others' conduct. However, all know about the full scope of the conspiracy. Under the proposed language the three "lieutenants" may successfully argue that they should be held accountable only for the distributions in their designated cities because the offenses they undertook with the kingpin were limited to their assigned territories.

We propose applying a narrower relevant conduct standard only to a joint offender or conspirator who qualifies as a "minimal participant" under §3B1.2. Such a participant's involvement would be reduced by the greater of 4 levels (as now provided) or the number of levels necessary to reach an offense level commensurate with such a participant's actual involvement in the conspiracy or other joint undertaking. The measurement of actual involvement would be determined on the basis of the quantity of drugs, the amount of loss involved in a fraud or theft, or some other quantifiable measure of the type used to group offenses under §3D1.2(d). This proposal would fairly address the concern that not all participants in a joint offense should be punished based on the full extent of the conduct by others and that the current guideline on mitigating role does not reflect an adequate reduction in some cases. However, tampering with the current relevant conduct standard as it may affect high-level conspirators or co-defendants is a move we urge the Commission not to make at present.

Amendment 12. Guideline §1B1.3. Relevant Conduct

The Commission proposes to expand Application Note 1 of the Commentary to §1B1.3 in an effort to clarify what conduct is relevant to sentencing a defendant whose offense was undertaken in concert with others, whether or not the offense is charged as a conspiracy. Because nearly all of the Antitrust Division's prosecutions involve conspiracies, it is of central importance for us to have a clear understanding of the scope of relevant conspiracy conduct for sentencing purposes under the Guidelines.

The Commission's proposed amendment states that relevant conspiracy conduct "includes conduct of others in furtherance of the execution of the offense that was reasonably forseeable by the defendant." This new language does not differ markedly from the comparable language in the existing Commentary, but one of the new examples indicates that it is intended to be interpreted in a somewhat more restrictive manner--that a defendant also must have taken some part in or received some benefit from the actions of his co-conspirators in order for their conduct to be relevant in his sentencing. With respect to its hypothetical marihuana importation conspiracy, the Commission states that Defendant C, who has been hired to off-load a single shipment of marihuana by big-time drug dealers A and B, should only be liable for off-loading the single shipment of marihuana because "he played no part" and "was to receive no benefit" from prior or subsequent shipments and "because those acts were not in furtherance of the execution of the offense that he undertook with Defendants A and B." This example fails to establish the relationship between "furtherance of the offense/reasonable forseeability" and "took no part/received no benefit." Does Defendant C's limited liability turn on his being unaware that A and B were involved in a much larger conspiracy of which C's shipment was a part, or is it his lack of hands-on participation in or benefit from other shipments, or is it both? Whatever the explanation, there is nothing in the newly enunciated relevant conduct standard to support the played-no-part/received-no-benefit gloss in the marihuana example.

It appears that the Commission has primarily drug-dealing conspiracies in mind here, and that the purpose of this amendment is to provide in the Guidelines (rather than as departures) for sentencing low-level, small-volume carriers--even those who have some awareness of a broad scheme--to terms that are considerably less than would be required by the volume associated with a huge conspiracy. However, its approach will affect sentencing in all conspiracy cases, and not necessarily for the better. This issue will come

up all the time in antitrust prosecutions. The relevant "volume of commerce" directly drives the Chapter 2 antitrust guideline. Section 2R1.1 states that "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." Suppose, for example, that Company A is involved in a single, overall unlawful conspiracy to rig bids for a commodity purchased by county governments throughout a particular state. Individual defendant X is responsible for A's government sales in the eastern half of the state and is directly involved in rigging those bids with the representatives of other firms. Individual defendant Y is responsible for A's government sales in the western half of the state and is direclty involved in rigging bids there. X knows (or has reason to believe) that bid rigging is occurring throughout the state and that Y is rigging bids for Company A too, but X and Y never communicate between themselves and X never has anything to do with bids made in the western half of the state, nor does he directly benefit from this activity. Under §2R1.1 and §1B1.3, is X responsible for Company A's volume of commerce of bids rigged in the eastern half of the state only, or statewide?

The Antitrust Division has taken the position that X is responsible for A's entire volume of commerce statewide because that is the volume of commerce "done by his principal" (see §2R1.1) that was affected by the violation and because the bids in Y's half of the state were in furtherance of the conspiracy (see §1B1.3) for which X was convicted and were at least reasonably forseeable by him. We have had different reactions to our interpretation of X's relevant volume of commerce from different courts and probation offices.

The Antitrust Division believes that the "conduct in furtherance/reasonably forseeable" standard currently set out in the Commentary to §1B1.3 in general is an appropriate standard for determining relevant conduct for sentencing purposes, one that is consistent with existing conspiracy law and relatively easy to apply. If, in the example given by the Commission, Defendant C is unaware of the scope of the criminal conspiracy that he has become involved with in off-loading the single shipment of marihuana, the Guidelines as they currently exist would not hold him responsible for all other shipments. However, if C was fully aware of the scope of the enterprise that he was joining, he should be held responsible, at least to some extent, for the conduct of other members of the conspiracy as well. Under the Guidelines, C would receive a 4 level decrease in his offense level under §3B1.2(a) as a minimal participant in the offense and could be sentenced at the bottom

of the guideline range, and a court could conceivably grant C a downward departure as well.

Adding a "played no part/received no benefit" gloss to the concept of "conduct in furtherance of the offense" could lead to significant litigation in many conspiracy prosecutions as defendants attempt to convince a court that they were too remotely connected to specific conduct to be sentenced for it. This certainly would be the case in Antitrust Division prosecutions. We are concerned that this gloss may be inconsistent with the Commission's careful setting of base offense level and specific offense charateristic adjustments in §2R1.1, and could undercut antitrust deterrence.

Amendments 32 and 33. Guideline §2B1.1. Larceny, Embezzlement, and Other Forms of Theft

Amendments 32 and 33 propose revision of the table applicable to the enhancement based on the amount of loss involved in a theft. While both are improvement over the table in the current guideline, we prefer amendment 33. Amendment 33 provides for an increase in the offense level at a faster rate than amendment 32 standing alone. However, we believe that even amendment 33 should be improved. Enhancements should be provided past level 16 for losses greater than $5,000,000.

Amendments 39 and 40. §2B2.1. Burglary of a Residence

Amendments 39 and 40 revise the loss table applicable to burglary, §2B2.1. Amendment 39 eliminates minor gaps in the current table but does not actually revise the current offense levels. Amendment 40 increases the offense levels applicable to burglaries resulting in losses of more than $800,000. Amendment 40 is preferable to amendment 39 in increasing offense levels at a slightly faster rate for large-scale burglaries.

Amendments 47 and 48. §2B3.1. Robbery

These amendments revise the loss table applicable to the robbery guideline. For the reasons set forth in our comments comparing amendments 39 and 40, we prefer amendment 48 to 47.

AMENDMENT 50

Amendment 50 deals with bank robbery. Bank robbery is an issue that has generated a number of comments to members of the Subcommittee. Our belief that the Guidelines a currently written are too low is borne out by the January 12 report to the Commission Research and Development Program by Mr. Baer, Chairman of the United States Parole Commission. From that study, the Parole Commission concluded that 57% of the robbery cases currently under the Guidelines would end up serving less time than they would have under the old parole guideline rangel. Of the 21 cases making up this study, it appeared that one received a more severe sentence than he would have under the old parole guidelines, 7 received the same sentence and 13 received a lesser sentence. The Subcommittee's recommendation is that the basic offense level for robbery under Guideline 2B3.1 be raised substantially from the basic offense level of 18. Two levels would be the minimum.

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

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

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

We would also strongly recommend that a specific offense characteristic be put into the Guidelines for those individuals who use a fake or simulated firearm or explosive device. The fear engendered by victims is the same whether the firearm or explosive device is real or fake. In many cases, what appears to be a real firearm or explosive device will be displayed but it may be difficult to establish, even by a preponderance of the evidence, that what was displayed was in fact real. The defendant will normally, of course, claim that it was not real where he is not caught in actual possession of the weapon., A 2 level increase for use of a simulated or fake firearm or explosive device would be entirely appropriate. This would recognize the fear caused to the victims and would also recognize that there is an increased risk in general when even a fake is possessed or displayed. With these additional adjustments, we would also recommend that the cumulative adjustment from Subsections (2) and (3) not be limited but in fact be given full force and effect.

Amendment 66. Guideline §2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Amendment 66 amends the bribery guideline to address the fact that there is currently no enhancement for repeated instances of bribery that do not result in conviction. It also proposes an amendment of the multiple count rules to include the bribery and gratuity guidelines among those subject to grouping under §3D1.2(d) based on aggregate harm. We agree that the bribery and gratuity guidelines should be enhanced for multiple instances that do not result in conviction. However, we disagree with reaching this result by treating unrelated bribery and gratuity offenses according to the aggregate harm approach applicable to fraud.

We note that the first part of the proposal is simply to provide a two-level enhancement if the offense involved more than one bribe or gratuity. This approach is an improvement over the current guideline. However, it does not distinguish between one additional bribery offense and more than one. We favor the approach contained in Option 2 of Amendment 50, pertaining to robbery. There, additional robberies that are part of the same course of conduct or common scheme or plan as the offense of conviction would result in increases of two to five offense levels, depending upon the number of robberies involved. The same type of enhancement could apply to offenses involving bribes and gratuities.

The last part of Amendment 66 amends the multiple count rules to include bribery and gratuity offenses among those subject to grouping based on aggregate harm. First, we note that double counting may result regarding additional bribery or gratuity offenses not resulting in a count of conviction if both the type of enhancement noted above and the amendment of the multiple count rules as proposed were to apply. The bribery and gratuity guidelines themselves would provide an enhancement for additional bribes or gratuities. In addition, the broad, relevant conduct rules applicable to offenses subject to grouping under the aggregate harm theory of §3D1.2(d) would count the uncharged bribes or gratuities if they were part of the same course of conduct or common scheme or plan.

More importantly, we oppose the notion of grouping separate counts of conviction for bribery and gratuity offenses according to the aggregate harm theory of §3D1.2(d). As is true for robbery, the amount of money involved in a bribe or gratuity is generally fortuitous. In our view two unrelated bribes reflected in separate counts of conviction should result in a higher offense level than a single bribe involving an amount equal to the total of the two unrelated bribes. An offender who commits several unrelated bribes is more culpable than one who bribes an official who happens to have a high price. However, the

amendment of the multiple count rules as proposed would provide the same sentence for both offenders.

AMENDMENT 66

Amendment 66 deals with public corruption and Hobbs cases. Another area of considerable concern to the Subcommittee are those violations involving the Hobbs Act, particularly offenses committed under the color of official right. The current Guideline 2C1.1 sets a base level of 10 but then applies the greater of either the value of the bribe or an 8 level increase by an official holding a high level decision making or sensitive position or an elected official. We believe that these two offense characteristics should be added together to arrive at a substantially higher violation for those officials who have used their position to secure substantial sums of money. Offenses involving color of official right are extremely serious since they erode the public confidence in its elected and appointed officials. This erosion of confidence justifies severe punishment. Many of the United States Attorneys who have had experience under the guidelines with the Hobbs Act have pointed out that the current sentences often run well under two years real time. The base level for this offense also needs to be raised at least two levels.

Amendment 82. Guideline §2D1.1. Unlawful Manufacturing, Importing, Exporting, Trafficking

The Commission has asked for comments regarding whether the weight of a carrier substance should be included when determining the weight of LSD. For the following reasons, the weight of the carrier substance should be included when determining the weight of LSD.

First, a plain reading of the statute indicates that Congress intended the weight of the carrier substance to be included, a view supported by two court decisions, United States v. McGeehan, 824 F.2d 667 (8th Cir. 1987) and United States v. Bishop, No. Cr. 88-3005 (N.D. Iowa 1989). Congress did not provide that only a pure drug or a mixture was subject to the weight requirements but also included the term substance. Unlike PCP, which statutorily is separated into pure PCP and a mixture or substance containing PCP, LSD is treated solely under the "mixture or substance" language. Obviously, if Congress had wanted to distinguish pure LSD it could have done so, just as it did with PCP.

Second, if the LSD carrier were excluded for guideline application purposes, there would be large gaps in the sentencing scheme created by the mandatory minimum sentences applicable to specified quantities. That is, if the Commission determined to exclude the carrier under the guidelines but the courts included it for purposes of applying mandatory sentences, the mandatory sentences would override the guidelines for all but the smallest quantities of a mixture or substance containing LSD. There would be no graduated sentences for many amounts subject to the mandatory sentences.

Third, in determining the sentence for a substance such as cocaine, a kilogram is treated as a kilogram, without regard to its purity. Hence, a person is penalized without regard to a dosage unit calculation. Likewise, the possession of LSD should be penalized for whatever form the LSD takes, without regard to dosage units.

Finally, as a practical concern, some laboratories relied upon for drug analysis are not equipped to separate LSD from the carrier substance for purposes of weighing it.

While we recognize that weighing the carrier substance can substantially affect the sentence, this is the result desired by Congress. It may be that the drug sentencing scheme in the Controlled Substances Act should be reconsidered to determine if statutory amendments reflecting a dosage unit approach would be in order. In the interim, however, Congress has indicated a preference for a "mixture or substance" approach that, with only two exceptions, does not consider purity.

Amendment 83. Guideline § 2D1.1. Unlawful Manufacturing, Importing, Exporting, Trafficking

The Commission has asked for comments regarding the relationship of marijuana plants to marijuana in cases involving fewer than 100 marijuana plants. We note that under section 6479 of the Anti-Drug Abuse Act of 1988, all the amendments relating to marijuana plants provide a ratio of one plant to one kilogram, including the amendment of 21 U.S.C. §841(b)(1)(D) for 50 plants. This provision establishes a reduced sentence for marijuana offenses involving 50 kilograms or less. Previously, the reduced sentence did not apply to 100 or more plants, regardless of weight. In the Anti-Drug Abuse Act this 100-plant exception to the reduced sentence was lowered to 50 or more plants.

We believe that the Commission should apply the one-plant-to-one-kilogram ratio to all cases, including those involving fewer than 100 plants. Our primary concern is that application of any other ratio would lead to a gap in sentences as the amount involved reaches the 100-plant level. To avoid this problem and to ensure a steady, even progression to the 100-plant level, we believe the same relationship should apply. Additionally, if another relationship is to be used, we are at a loss as to what the justification would be for that particular relationship and how it would conform to the one-to-one relationship mandated by Congress.

AMENDMENT 92

Amendment 92 deals with school-yard and related violations. As set forth in Maurice O. Ellsworth's letter of March 24, 1989, the Subcommittee supports this amendment with the exception that we would recommend a 2 level enhancement on a floor level of 15 for those offenses near a school or other specified locations but which do not involve persons under 18.

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APR 4 8 13 AM '89

March 31, 1989

TO: JOE BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE
CHAIRMAN, SENTENCING GUIDELINES SUBCOMMITTEE

FR: MAURICE O. ELLSWORTH
UNITED STATES ATTORNEY
DISTRICT OF IDAHO

RE: SENTENCING GUIDELINES COMMENTS FOR THE
SENTENCING GUIDELINES COMMITTEE

My comments on the proposed sentencing guidelines amendments assigned to me at the Subcommittee meeting March 23, 1989 are as follows:

No. 92. I have reviewed the proposed Section 2D1.2 drafted by the Commission in response to the Congressional directive contained in the Omnibus Anti-Drug Abuse Act of 1988. Clearly the intent of Congress was to significantly enhance the penalties, essentially creating a mandatory minimum, for individuals convicted of certain drug offenses involving pregnant individuals, persons under 18 years of age, or which take place near various schools, colleges, etc., as well as playgrounds, youth centers, swimming pools, and video arcades. The proposed change, rather than artificially doubling or tripling the quantity of drugs and then referencing the drug quantity table in the guidelines, simply enhances the offense level from Section 2D1.1, and more important, in my opinion, puts a floor level on such an offense.

If the offense involves a person under age 18, it adds two points to the offense level and provides for a level of not lower than 26. If the offense involves a pregnant individual or occurs within 1,000 feet of a school or other designated location but does not involve anyone under age 18, one point is added to the offense level and a level of not lower than 13 is provided for.

The above approach suggested by the Commission is in the form of a proposed Section 2D1.2. It addresses the apparent congressional intent. However, adding only one to the Section 2D1.1 offense level when the offense occurs near a school or other specified location, but does not involve a person under age 18, seems to be an insufficient enhancement. The level 13 floor provided in (a)(2) will result in incarceration but I would suggest a two level enhancement and a floor level of 15 rather than 13.

No. 159, Section 2L1.1, Smuggling, Transporting or Harboring an Unlawful Alien.

I concur in the proposed amendment.

No. 160, Section 2L1.2, Unlawfully Entering or Remaining in the United States.

Attached is a copy of a letter I previously wrote identifying a problem in this District. Illegal aliens, even those with prior criminal records, virtually always get the two level reduction for acceptance of responsibility in this District. As a result, a defendant, even one with a serious prior criminal record, ends up with a sentence of less than the statutory maximum unless an upward departure is made. There are not enough criminal history categories to adequately address the prior record. I suggest adding a criminal history category VII such as that discussed in Option 1 under the career offender proposal (No. 243, page 137) of the proposed amendments. The addition of a new category would allow the maximum statutory sentence for an immigration violation by a defendant with a prior criminal record notwithstanding a two-point acceptance of responsibility reduction.

The Commission's suggested addition of a new specific offense characteristic in the proposed (b)(1) would give the option of adding 2, 3 or 4 levels. This proposal would address the problem identified above. However, insufficient criminal history categories to address a defendant's record is a problem in areas other than immigration offenses. Additional criminal history categories would be appropriate in these situations as well. The suggested remedy of recommending an upward departure in immigration and other offenses is inadequate for the simple reason that some judges are absolutely unwilling to make upward departures. An adequate guidelines sentence in these situations is critical.

Amendment 96. Guideline § 2D1.5. Continuing Criminal Enterprise

The Commission has asked for comments regarding the base offense level for a continuing criminal enterprise (CCE) offense in light of an increase in the minimum sentence from 10 years to 20 years. The Commission is considering a base level of 37 or 38.

We believe that the base offense level should at least be 38, given that the new minimum sentence is 240 months. If the offense level were 37, 240 months would be in the upper half of the range for a person with a low criminal history score. This is an undue restriction on the judge, especially in light of the seriousness of a CCE violation. When enacted in 1970, CCE was considered the premier drug enforcement statute, and its importance was recently reinforced by the 1988 drug act wherein the mandatory minimum sentence was raised to 20 years. The guideline for CCE offenses should allow a judge to impose a sentence well beyond the minimum 240 months.

Amendment 97. §2D1.6. Use of a Communications Facility in Committing Drug Offenses

This amendment proposes revision of the guideline for the offense of using a communications facility to facilitate a drug offense (telephone count). Currently, the guideline calls for a base offense level of 12. The amendment proposes two alternatives. The first is to apply the greater of either level 12 or three levels below the offense level from the drug distribution table applicable to the controlled substance offense committed, caused, or facilitated. The second approach is to apply the greater of level 12 or the offense level from the drug distribution table. We believe that the current guideline should be amended to reflect the quantity of drugs involved in the offense and that the second approach is preferable to the first.

We favor amendment 97 because it would reflect the seriousness of the offense and have the effect in some cases of discouraging the inappropriate use of telephone counts when a count of distribution or possession with intent to distribute is readily provable. In this regard, it would help implement the memorandum of the Attorney General on plea bargaining. However, we believe that the amendment should not provide for an offense level that is three levels lower than that applicable to the corresponding distribution count. The explanation accompanying the proposal states that the guideline generally applicable to attempts and incomplete conspiracies provides for an offense level three levels below that for the underlying offense, §2X1.1. However, the conspiracy guideline applicable to drug offenses provides for application of the guideline for the underlying offense with no reduction, even (under the current guideline) if the conspiracy is incomplete, §2D1.4. We believe that telephone offenses are generally analogous to conspiracies or attempts to commit an underlying drug offense and that the offense level applicable to that offense should control.

Amendment 102. §2D2.3. Operating or Directing the Operation of a Common Carrier under the Influence of Alcohol or Drugs

Amendment 102 responds to an amendment in the Anti-Drug Abuse Act of 1988 regarding the offense of operating a common carrier under the influence of alcohol or drugs, 18 U.S.C. §342. The maximum penalty for the offense was increased in the Anti-Drug Abuse Act of 1988 from five years to fifteen years. Because of the potential seriousness of this offense, we believe the guidelines should be amended to assure adequate sentences.

The Commission proposes leaving the base offense level at 8 unless death or serious bodily injury results. This offense level is too low. In our view it is inadequate to respond to the new fifteen-year maximum only by providing greater sentences if death or serious bodily injury results. The risk of serious harm is always present when this offense occurs, whether or not death or serious bodily injury actually results. A base offense level of 8 would result in a sentence of only two to eight months for a first offender, and a reduction for acceptance of responsibility could mean straight probation. Offense level 8 applied to this offense when the prior five-year maximum controlled. Therefore, we believe the base offense level should be increased at least to level 10.

The statute provides a specific direction to the Commission for cases in which death or serious bodily injury results. An offense level not less than 26 is mandated if death results and 21 if serious bodily injury results. We believe that if these minimum levels of enhancement under the statute are adopted by the Commission, there should be a specific offense characteristic applicable to the number of victims. The bracketed material proposed for a new subsection b would be a reasonable solution to the need to account for more than one victim where there is only one count of conviction.

Amendment 103. Guideline § 2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

Amendment 103 adds an application note to clarify the treatment of certain conduct (i.e., RICO predicate acts) for which the defendant has been previously sentenced. The amendment states that where such a previously imposed sentence resulted from a conviction prior to the last overt act of the RICO offense, the prior sentence should be treated as part of the defendant's criminal history (under § 4A1.2(a)(1)) and not as a part of the RICO offense. This means that a RICO predicate which has resulted in a prior conviction and sentence should not be counted in computing the RICO offense level; the prior conviction would only be used to increase the defendant's criminal history category.

The problem with this amendment is that it will reduce the offense level of a RICO violation where a RICO predicate has resulted in a prior conviction and sentence. We see no reason why such a RICO predicate should not be counted both as part of the RICO offense and as part of the defendant's criminal history. While the Sentencing Commission apparently believes that including the prior conviction in both computations is an unwarranted "double banging," the purpose of the RICO statute is precisely to deal with serious, repeat criminal offenders who commit multiple offenses as part of a pattern. Defendants have often challenged RICO prosecutions on double jeopardy grounds where RICO prosecutions have incorporated previously prosecuted offenses as part of a RICO pattern. These challenges have been repeatedly rejected by the courts, which have discerned Congressional intent to allow separate prosecution and punishment of predicate offenses and a subsequent RICO offense based in large part on those predicate offenses. See, e.g., United States v. Persico, 832 F.2d 705 (2d Cir. 1987) ("Congress intended to permit conduct resulting in prior convictions to be used as predicate acts of racketeering activity to establish subsequent RICO convictions").

In light of the clear Congressional intent and repeated judicial approval of RICO prosecutions utilizing offenses which have resulted in prior convictions, there is no legitimate reason to exclude these prior convictions from the computation of the RICO offense level. The punishment of these crimes in the context of a criminal pattern and in relation to a criminal enterprise warrants their being included in the RICO offense level and as part of the criminal history. The Commission's apparent reason for the amendment is to treat RICO consistently

Amendments 115 and 116. §2F1.1. Fraud and Deceit

These amendments provide revisions of the loss table applicable to fraud. Both amendments are preferable to the current table in that they increase applicable offense levels based on dollar loss at a faster rate than under the current table. However, amendment 116 is preferable to 115 (standing alone) in rising faster for frauds of more than $70,000. A faster rate of increase is needed because under the current table, for example, a fraud of $200,001 is treated in the same manner as a fraud of $500,000.

Either revision should be adjusted to provide for increases in the offense level for frauds of more than $5,000,000. Particularly in defense procurement fraud significantly higher figures are not unusual. However, our concerns are not limited to defense procurement. Other large-scale frauds and insider trading offenses, also subject to the fraud loss table, can represent losses in excess of $5,000,000, which should not require a departure from the guidelines to reflect the extent of loss.

Amendment 117. §2F1.1. Fraud and Deceit

Amendment 117 amends a specific offense characteristic applicable to fraud that establishes a floor of 10 for the offense level if the offense involved any of the following factors: (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization or a government agency; or (D) violation of any judicial or administrative order. The proposed amendment makes this minimum offense level of 10 inapplicable to categories (A) and (B). We oppose this amendment.

The stated reason for this amendment is to bring about consistency between the fraud guideline and certain other guidelines, including that relating to theft. We believe that if such consistency is needed, it can be achieved by adding an appropriate floor to the other guidelines rather than deleting it from the fraud guideline for factors (A) and (B). The dollar loss in a fraud is not an adequate measure in many cases of the defendant's culpability or the degree of planning reflected in the offense. It is often difficult to establish the monetary extent of a fraud or loss because of the need to find victims and the fact that defendants often move from one location to another to carry out their fraudulent activities. The floor of 10 is important in relatively small-scale cases, such as "boiler-room" operations, where, despite the inability to prove the full extent of the fraud, it is obvious that the offense involved considerable planning. A scheme to defraud more than one victim is also important in this regard in punishing small-scale frauds. Both of these factors go to the defendant's intent and are a valid basis for distinguishing among frauds.

Amendment 130. Guideline 2H1.4 Interference With Civil Rights Under Color of Law

This amendment, appropriately in our view, increases the base offense level from 2 to 6 and recognizes a statutory change for an enhanced penalty where bodily injury results from the offense.

The only problem with the proposed amendment is that it appears inadvertently to have omitted several words from the Commentary, which were undoubtedly meant to be included. The affected portions of the Commission's amendments are set out verbatim below and our suggested additions thereto are underlined:

1. "The Commentary to §2H1.4 captioned 'Application Notes' is amended in Note 1 by deleting '2 plus' and inserting in lieu thereof 'means 6 levels above the offense level for any underlying criminal conduct. See the discussion' <u>in the COmmentary to §2H1.1</u>."

2. "The Commentary to §2H1.4 captioned 'Background' is amended by deleting 'except where death results, in which case the maximum term of imprisonment authorized is life imprisonment' and inserting in lieu thereof 'if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results,' by deleting 'Given this one-year statutory maximum' and inserting in lieu thereof 'A', by inserting 'one year' immediately following 'near the,' and by inserting 'or bodily <u>injury</u>' immediately following 'resulting in death.'"

It is submitted that these proposed minor additions to the Commission's amendments are appropriate and comport with the Commission's intent.

Amendment 142. Guideline §2J1.7. Commission of Offense While on Release

Amendment 142 revises the guideline applicable to offenses committed while on release, the subject of 18 U.S.C. §3147. We agree that the present guideline should be amended in light of its treatment of section 3147 as a separate offense instead of a sentence enhancement. This issue was discussed in the Prosecutors Handbook on Sentencing Guidelines at pp. 94-95, in which the Criminal Division criticized the separate-offense theory for section 3147.

While we agree with the restructuring of the guideline to provide a sentence enhancement for an offense committed while on release, we disagree with applying an enhancement that does not depend on the seriousness of the offense. The current guideline, although structurally flawed, provides for a 2, 4, or 6-level enhancement (in addition to the base offense level of 6), depending upon the maximum punishment applicable to the offense committed while on release. We believe this approach should be used in the proposed amendment. We note that under the statute the maximum term of imprisonment applicable to the enhancement for committing an offense while on release depends upon whether the offense is a felony (in which case the additional term is up to ten years) or a misdemeanor (in which case it is only one year). An across-the-board increase of only two levels, regardless of the seriousness of the offense committed while on release, as proposed by one of the options, would provide an insignificant increase in sentence for many felonies. While it is true that the guideline applicable to the offense committed while on release takes seriousness into account, this fact ignores the scheme enacted by Congress, which mandates an additional sentence that varies with the seriousness of the underlying offense. If, however, the Commission does not believe that the enhancement under §2J1.7 should vary with the nature of the offense, we urge the Commission to adopt an enhancement that is no less than 4 levels.

We also strongly object to the proposed language for Application Note 2, which states that in order to avoid double counting the court must ensure that the total punishment is in accord with the guideline range for the offense committed while on release. The note also provides that the total punishment for the underlying offense and the enhancement for its commission while on release should fall within the range for the underlying offense. This approach negates the effect of 18 U.S.C. §3147 requiring an additional sentence for the fact that the offense was committed while on release. The court should first determine the appropriate sentence for the underlying offense, as if it had not been committed while on release, and then apply the enhancement from §2J1.7. A specific instruction should be provided to this effect; otherwise, two defendants could receive the same

punishment, despite the fact that one committed the offense while on release while the other did not.

Amendments 147 and 148. §§2K1.3 and 2K1.4. Unlawfully Trafficking in, Receiving, or Transporting Explosives; Arson; Property Damage by Use of Explosives

Amendments 147 and 148 are supposed to clarify the guidelines applicable to explosives trafficking and arson offenses by specifying that if more than one of the specific offense characteristics applies, the one providing the greatest enhancement level is to be used. Currently, the instruction reads: "If any of the following applies, use the greatest." We oppose the amendment because of its implication that if only one of the specific offense characteristics in subsection b applies, there is to be no enhancement. We believe the instruction as it presently reads is clearer and that the amendment will only create confusion.

Amendment 150. §2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

We oppose this amendment for the reasons set forth in the discussion of Amendments 147 and 148. This proposed revision is present in other guideline amendments we have not specifically identified. However, we oppose its adoption in general.

AMENDMENT 153

The Subcommittee proposes the following Guideline § 2K2.3 for possession of a destructive device in a federal building or certain airport facilities.

PROPOSED GUIDELINE

§ 2K2.3 Possession of a Destructive Device in Federal Building or Certain Airport Facilities

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

If any of the following applies, use the greatest:

(1) If the defendant willfully and intentionally created a substantial risk of death or serious bodily injury, increase by 9 levels.

(2) If defendant recklessly endangered the safety of another, increase by 7 levels.

(3) If the destructive device was designed for remote or timed detonation, increase by 11 levels.

(4) If the destructive device was intentionally packaged in material that could not be detected by a magnotometer, increase by 11 levels.

(5) If the defendant was a convicted felon, increase 7 levels.

COMMENTARY

Statutory Provisions: 18 U.S.C. § 844(g)

Application Notes:

1. "Destructive device" means any article described in 18 U.S.C. § 921(a)(4)(A) and (C) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices).

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

Amendment 154. §§2K2.1, 2K2.2, 2K2.3. Firearms

This amendment restructures the firearms guidelines. These guidelines under the proposed amendments should be substantially strengthened. First, a base offense level of only 12 in proposed guideline §2K2.1 is too low for offenses that carry a maximum term of imprisonment of 10 years. These include possession-related offenses for convicted felons and the possession of National Firearms Act (NFA) weapons, such as machineguns and short-barrelled shotguns and rifles. Offense level 12 provides only a three-year sentence for an offender in the highest criminal history category. While this is an improvement over the current guideline relating to convicted felons (but is the same for NFA violations), the base offense level should be increased to at least 16 for any firearms offense subject to a 10-year maximum penalty. Level 16 provides a maximum sentence of close to five years for an offender in the highest criminal history category. Such an offense level would leave room for enhancement because of an applicable specific offense characteristic.

Second, the enhancement for mufflers and silencers in proposed §2K2.1(b)(3) should be expanded to all unlawfully possessed NFA firearms, as the term is defined in 26 U.S.C. §5845. (The proposed guideline would have to be restructured to avoid double counting for convictions under the NFA or 18 U.S.C. §922(o).) Under the proposal the receipt of a machinegun or sawed-off shotgun by a convicted felon being sentenced under 18 U.S.C. §924 is subject to no greater guideline sentence than the receipt by a felon of an ordinary rifle. We believe that since Congress has isolated particular weapons defined in the National Firearms Act for special treatment and required the registration of such weapons, an enhancement should apply. In our view there is no basis to distinguish only firearms mufflers or silencers for this special treatment. The NFA includes machineguns, sawed-off shotguns and rifles, cane-guns, and destructive devices. Violation of the NFA relating to all such weapons, as well as others specified, would be subject to a maximum term of imprisonment of 10 years.

In proposed §2K2.2, regarding firearms trafficking, the base offense level should be at least 16 if the defendant is convicted of a felony carrying a 10-year maximum. For example, subsection (b)(4) provides a 2-level enhancement for selling a firearm to a person the seller knows or has reasonable cause to believe is a convicted felon. If the firearm involved was a non-NFA weapon, this enhancement would apply to a base offense level of 6, and the total would be only 8, allowing the imposition of probation for offenders in low criminal history categories and a maximum of only two years for offenders in the highest category. This is far too low for a serious weapons violation carrying a 10-year maximum sentence. It retains the same modest 2-level increase included in the current guideline and does not reflect the increase in the maximum sentence from five years as enacted

by the Anti-Drug Abuse Act of 1988. Such a violation -- knowingly selling a firearm to a convicted felon -- should not be treated as a regulatory violation. We also note that this enhancement would apply "if more than one of the following [enhancements] applies ...." This language should be changed to "if any of the following applies ..." in order to assure its applicability if only one of the enhancements in subsection (b)(4) applies.

Under proposed §2K2.2 option 2 is preferable to option 1 in providing increases for trafficking offenses based on the number of firearms involved. However, we believe it should provide for an additional category of 100 or more firearms with a 7-level increase. For the reasons set forth above, the enhancement in proposed §2K2.2(b)(3) should apply to all NFA weapons.

Proposed §2K2.3 concerns receiving, transporting, or shipping a firearm with intent to commit another offense or with the knowledge that it will be used in committing another offense. These offenses are punishable by a maximum of 10 years' imprisonment. The proposed guideline cross-references the greater of the offense level from the attempt and conspiracy guideline (relating to the offense the defendant intended or knew was to be committed) or one of the other firearms guidelines. If the intended offense does not carry a high offense level, (e.g., a distribution of a small quantity of controlled substances), the cross-reference to the other firearms guidelines will not assure an appropriate sentence. For example, the applicable offense level from the trafficking guideline may be as low as 6. Proposed §2K2.3 should be revised to incorporate a floor, such as level 16, as proposed above for other firearms offenses carrying a 10-year maximum.

Amendment 159. §2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien.

The proposed amendment makes a change to the alien smuggling guideline for a defendant who had been deported prior to the instant offense. The purpose of this amendment is to conform to a proposed revision of guideline §2L1.2, regarding unlawfully entering or remaining in the United States. As indicated in the written statement to the Commission of Assistant Attorney General Dennis on the proposed guideline amendments, the proposed revision of §2L1.2 is inadequate to meet the increased statutory penalties applicable to the reentry offense. The conforming amendment to §2L1.1, therefore, also should be increased accordingly.

We also have a greater concern with amendment 159: it fails to amend the present guideline to take into account several important factors, including the number of aliens smuggled or transported, bodily injury resulting from the offense, and the use of weapons. Enclosed is material we previously submitted to Commission staff explaining the need for these amendments and proposing specific guideline language for §§2L1.1, 2L2.1 (trafficking in evidence of citizenship), and 2L2.3 (trafficking in a United States passport. We urge the Commission to adopt the changes incorporated in our recommended guidelines.

U.S. Department of Justice

RAP:VP:vp
#890001893

Washington, D.C. 20530

JAN 5 1989

Peter Hoffman
Technical Advisor
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Peter:

Enclosed are draft guidelines regarding immigration offenses. We believe that the enhancements relating to the number of aliens involved in the offense, the use or possession of weapons, and bodily injury are important aggravators that should be included in a revised guideline.

We have also consulted with our pornography experts and have concluded that a guideline for "cable-porn," 18 U.S.C. §1468 (§7523 of the Anti-Drug Abuse Act of 1988), should be similar to the draft guideline we recently submitted to you on "dial-a-porn." That is, the base offense level for cable-porn should be 6, and there should be a 2-level increase for material that describes sadomasochistic conduct or that contains other depictions of violence. There is no need in the cable-porn guideline for the dial-a-porn specific offense characteristic relating to receipt of the communication by a person under 18 years of age.

If you have any questions or would like to discuss the draft guidelines, please contact Vicki Portney (633-4182) or me (633-3202).

Sincerely,

Roger A. Pauley

Roger A. Pauley
Sentencing Coordinator
Criminal Division

DRAFT

PROPOSED SUBMISSION TO SENTENCING COMMISSION ON IMMIGRATION OFFENSES

I. INTRODUCTION

The Department of Justice understands that the Sentencing Commission is currently considering amendments to specific sentencing guidelines, as part of the Commission's ongoing effort to develop comprehensive guidelines which fully and fairly reflect the realities of criminal law enforcement. The Department welcomes the opportunity to contribute to this effort by proposing the following amendments to the Sentencing Guidelines for immigration offenses. These proposed revisions are based upon experience gained by the Department over the course of the past year, experience which suggests that amendment of several immigration offense guidelines is now needed.

II. DISCUSSION

A. Proposed Amendment to Section 2L1.1 of the Sentencing Guidelines -- Alien Smuggling

At the outset, we recommend several changes to the sentencing guideline which applies to alien smuggling offenses. See 8 U.S.C. § 1324. The Department submits that the current alien smuggling guideline, which appears at Section 2L1.1 of the Sentencing Guidelines, does not fully consider three recurring, aggravating factors found in these cases. First, this guideline does not provide for any enhancement of the offense level based upon the number of unlawful aliens involved in the offense. Instead, the guideline simply deals with this issue through a

general commentary which suggests that an upward departure may be appropriate in cases involving large numbers of aliens.

In our view a guideline commentary, while useful, does not fully address this issue. Commentaries of this type are merely permissive. Therefore they do not completely reflect law enforcement realities. We believe that the number of aliens smuggled is always a relevant, aggravating factor to be considered at sentencing. Since the number of aliens involved in an offense is an important consideration in every case, the guidelines should establish uniform standards which can be applied in this area. Indeed, without such standards the guidelines may invite disparate treatment of defendants, since courts may often differ in the importance which they choose to attach to this factor. Therefore, in order to ensure that the number of aliens smuggled is consistently treated as an aggravating factor in these cases, we propose that Section 2L1.1 be amended to include a new subsection (3). This new subsection (3) would establish a graduated scale, which would provide uniformly harsher sentences for large-scale alien smugglers. In arriving at this scale, we have based these enhancements on the experience gained by United States Attorneys' offices in various border states. Thus, the enhancement levels reflected in this proposed guideline represent the most commonly observed distinctions in the size of various alien smuggling operations.

In addition, we propose two other amendments to Section 2L1.1, which address several aggravating factors found in a small

but significant number of alien smuggling cases. These factors are the use of dangerous weapons by alien smugglers and the inhumane treatment of aliens by smugglers. The use of weapons and harsh or inhumane treatment present a grave risk of harm both to law enforcement officials and to the aliens being transported. The Department believes that specific sentencing enhancements directed at these aggravating factors are essential to ensure that sentences adequately reflect the gravity of this misconduct. Accordingly, we recommend that Section 2L1.1 also contain new subsections (4) and (5), which would provide specific enhancements for defendants who use weapons or physically harm individuals in the course of smuggling aliens. It should be noted that these proposed subsections are modelled after similar guideline provisions which are currently in effect. See Sentencing Guidelines, §§ 2A2.2 (Assault) and 2B3.1 (Robbery).

Finally, we propose two technical amendments to the commentary for Section 2L1.1. First, we submit that Application Note 8 should be revised to ensure that courts still retain the discretion to make sentencing departures in smuggling cases involving extremely large numbers of aliens, inhumane treatment which does not result in physical injury, or other aggravating circumstances. In addition, a new Application Note 9 should be added to this guideline, which would define some of the terms included in the amended guideline.

B. Proposed Amendments to Sections 2L2.1 and 2L2.3 of the Guidelines -- Document Trafficking

The Department also wishes to propose amendments to Sections 2L2.1 and 2L2.3 of the Sentencing Guidelines. These two guidelines relate to offenses involving illegal trafficking in passports, visas, entry documents or citizenship papers. See 18 U.S.C. §§ 1425-27, 1542, 1544, and 1546. Experience has shown that these offenses typically are related to alien smuggling violations. Once aliens illegally enter this country, they frequently turn to document "brokers" to obtain fraudulent documentation which will permit them to remain in the United States. Thus, these alien smuggling and document trafficking offenses simply represent two aspects of the same illegal trade.

For this reason, the Department submits that these offenses should receive uniform treatment under the sentencing guidelines. Indeed, we note that the Commission has recently taken steps to promote uniformity in this area by recommending that the base offense level for document trafficking offenses be made consistent with that prescribed for alien smuggling. In order to further promote uniform treatment of these related crimes, we recommend that a graduated scale, like that which we have proposed for alien smuggling, also be added to Sections 2L2.1 and 2L2.3 of the guidelines. Including such a graduated scale in these two guidelines would have two positive consequences. First, it would continue to ensure that

smuggling and document trafficking offenses were treated in a similar fashion. In addition, these amendments would permit courts to impose consistently harsher sentences on those who most clearly merit punishment -- the large scale traffickers.

III. CONCLUSION

Experience gained over the past year has shown that the current Sentencing Guidelines in the immigration field can be improved in several respects. Accordingly, the Department of Justice has prepared the following proposed amendments to the Immigration Sentencing Guidelines for consideration by the Sentencing Commission. In order to assist the Commission we have identified our proposed amendments by underscoring them. We trust that this submission will be of assistance to the Commission in weighing the need for further amendment of these guidelines.

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PART L - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

1. IMMIGRATION

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

(1) If the defendant committed the offense other than for profit, and without knowledge that the alien was excludable under 8 U.S.C. §§1182(a)(27), (28), (29), decrease by 3 levels.

(2) If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.

(3) If the offense committed by the defendant involved the smuggling, transportation or harboring of multiple aliens, increase in accordance with the following table:

Number of Unlawful Aliens Involved in Offense	Offense Level
5-10	2
11-30	4
31 or more	6

(4) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(5) If any person sustained bodily injury, increase the offense level according to the seriousness of the injury:

	Degree of Bodily Injury	Increased in Level
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6

Provided, however, that the cumulative adjustments from (4) and (5) shall not exceed 9 levels.

COMMENTARY

Statutory Provisions: 8 U.S.C. §§1324(a), 1327.

Application Notes:

1. "For profit" means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation.

2. "Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense" includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.

3. If the defendant was convicted under 8 U.S.C. §1328, apply the applicable guideline from Part G (see Statutory Index) rather than this guideline.

4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.

5. For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting or harboring of others.

6. For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the enhancement at §2L1.1(b)(1) does not apply to such a defendant.

7. 8 U.S.C. §§1182(a)(28) and (a)(29) concern certain aliens who are excludable because they are subversives.

8. The Commission has not considered offenses involving extremely large numbers of aliens, dangerous or inhumane treatment which does not result in bodily injury, or the risks to safety caused by smugglers' efforts to flee and avoid apprehension. An upward departure should be considered in those circumstances.

9. "Firearm," "dangerous weapon," "brandished" and "otherwise used" are defined in the Commentary to §1B1.1 (Application Notes).

* * * *

§2L2.1 Trafficking in Evidence of Citizenship or Documents Authorizing Entry

(a) Base Offense Level: 9 (October, 1988 proposed revision)

(b) Specific Offense Characteristic

(1) If the defendant committed the offense other than for profit, decrease by 3 levels. (October, 1988 proposed revision)

(2) If the offense committed by the defendant involved multiple documents evidencing citizenship or authorizing entry, increase in accordance with the following table:

Number of documents	Offense Level
5-10	2
11-30	4
31 or more	6

COMMENTARY

Statutory Provisions: 18 U.S.C. §§1425-1427, 1546.

Application Note:

1. "For profit" means for financial gain or commercial advantage

2. The Commission has not considered offenses involving extremely large numbers of documents. An upward departure should be considered in those circumstances.

* * *

§2L2.3. Trafficking in a United States Passport

(a) Base Offense Level: 9 (October, 1988 proposed revision)

(b) Specific Offense Characteristic

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(1) If the defendant committed the offense other than for profit, decrease by 3 levels. (October, 1988 proposed revision)

(2) If the offense committed by the defendant involved multiple passports, increase in accordance with the following table:

Number of Passports	Offense Level
5-10	2
11-30	4
31 or more	6

Commentary

Statutory Provisions: 18 U.S.C. §§ 1542, 1544.

Application Note:

1. "For profit" means for financial gain or commercial advantage.

2. The Commission has not considered offenses involving extremely large numbers of passports. An upward departure should be considered in those circumstances.

Amendment 169. Guideline §2P1.1. Escape, Instigating or Assisting Escape

In addition to the views expressed in the written statement to the Commission of Assistant Attorney General Dennis on the proposed guideline amendments, we believe the Commission should consider the following with respect to the escape guideline. We recommend the addition of at least a 3-level enhancement if the escape is from a sentence being served for a crime of violence or a drug offense. The nature of the underlying offense and the need to protect the public from further crimes of the defendant fully justify an enhancement for individuals escaping from such sentences, whether from secure or nonsecure facilities. Furthermore, if the defendant commits an offense while on escape status, an enhancement should be provided for this additional offense.

Amendment 176. Guideline §2Q1.6 Hazardous or Injurious Devices on Federal Lands

AMMENDMENT: The proposed guideline adds a new guideline to cover a new offense created by §6254 (f) of the Omnibus Anti-Drug Abuse Act of 1988. 18 U.S.C. §1864. The new offense generally addresses the use of spring guns and similar booby traps on federal lands in order to further violations of the Controlled Substances Act or "with reckless disregard to the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk." 18 U.S.C. §(a)(3).

COMMENT: We believe that the penalty under guideline §2Q1.6(a)(3) should equal the offense level in §2A2.2 (aggravated assault) (base level 15). By way of comparison guideline §2Q1.1 Knowing Endangerment has a base level of 24, and guideline ¶2Q1.4 Tampering with a Public Water System has a base level of 18. Therefore base level 15 is not excessive.

Amendment 182. Guideline §2S1.1. Laundering of Monetary Instruments

In proposed amendment 182 the Commission seeks comment on two options for incorporating into the guidelines a statutory amendment to 18 U.S.C. §1956(a)(1)(A), which creates a new provision, 18 U.S.C. §1956(a)(1)(A)(ii), proscribing money laundering with the intent to violate 26 U.S.C. §7201 (attempted tax evasion) or 26 U.S.C. §7206 (false returns). The first option treats a conviction under subparagraph (A)(ii) the same as a conviction under subparagraph (A)(i) (i.e., base offense level 23). The second option would treat a conviction falling under the new provision the same as a conviction for tax evasion and apply the tax evasion guideline, §2T1.1.

We strongly support the first option, which plainly implements the legislative intent in incorporating the new tax-related money laundering provision as part of the money laundering statutory scheme in 18 U.S.C. §1956. The maximum penalty under this provision is 20 years; this penalty applies to money laundering offenses committed with either the intent to violate the tax laws or to promote the carrying on of specified unlawful activity. To treat the new provision less seriously for sentencing purposes than the other portions of the same statutory provision would undermine the legislative effort to enhance the effectiveness of the money laundering statutes and to subject tax-related money laundering to a higher maximum penalty than pure tax offenses.

It is important to understand that the effect of option 2 would be not to punish an offender for the money laundering portion of his offense. Two tax evaders would receive the same punishment, despite the fact that one also engaged in and was convicted of money laundering. A failure to punish money laundering committed with an intent to violate the tax laws in accordance with the money laundering guidelines that otherwise apply would amount to a failure to implement the recent amendment of 18 U.S.C. §1956 for tax-related money laundering.

Amendment 186 Guideline §2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

This amendment proposes adding to the Commentary to §2S1.3 captioned "Statutory Provisions" a reference to "26 U.S.C. §7203 (if a willful violation of 26 U.S.C. §6050I)." The purpose of the amendment is to conform the guideline to a revision of the relevant statute.

We support this proposed amendment. (See our comments to Proposed Amendment 194.)

Amendment 187. Guideline §2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

This amendment relates to the guideline on reporting requirements for monetary transactions. The proposed amendment deals mainly with the commentary to §2S1.3. We are concerned, however, that there is a flaw in the existing guideline which should be corrected. Specifically, an offense level of 13 applies if the defendant (A) structured transactions to evade reporting requirements; (B) made false statements to conceal or disguise the activity; or (C) reasonably should have believed that the funds were the proceeds of criminal activity. Otherwise, the base offense level is only 5. If a defendant failed to file forms, as distinguished from making false statements, to conceal or disguise activity, it appears that he would be subject only to an offense level of 5. Such an offense may involve the failure to file, for example, the Currency and Monetary Instrument Report to conceal the sending of money out of the United States. In our view failing to file statements to conceal or disguise activity should not be punished less severely than filing false statements. This is not simply negligent conduct. Thus, §2S1.3(a)(1)(B) should be expanded to cover a failure to file a required report to conceal or disguise the activity.

It is unclear in our view what activity should be subject to the low offense level of 5 under the current guideline. The proposed amendment of the commentary states: "A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources." We do not believe that this language captures the essence of the less serious offenses that the Commission believes should have a base offense level of 5. The fact that the defendant reasonably believed the funds at issue emanated from legitimate sources is not enough if the defendant, having engaged in a legitimate business, violated reporting requirements in order to understate his income for tax purposes or otherwise to conceal the true extent of his business. Therefore, we recommend deleting the second quoted sentence from the proposed commentary amendment.

Finally, we note that the existing guideline contains another anomaly. There is a 5-level enhancement if the defendant knew or believed that the funds were criminally derived. The proposed commentary explains that this 5-level enhancement is in addition to the enhanced base offense level of 13 if the defendant reasonably should have believed that the funds were the proceeds of criminal activity. If the defendant actually knew that the funds were criminally derived, the government should not have to prove in addition that such knowledge was reasonable in

order for offense level 18 under the guideline to apply. If a subjective test is met -- the defendant's actual knowledge -- there should be no need to meet an objective test as well. However, in cases where the actual knowledge of the defendant as to the criminal roots of the funds cannot be shown, an objective standard -- that he should have believed the funds were the proceeds of criminal activity -- should apply.

Amendment 188. Guideline §2T1.1 Tax Evasion

Proposed Amendment 188 (and related Amendments 196 and 199) generally deals with the determination of the so-called tax loss (we would rename this term "criminal tax deficiency" and redefine it -- see our response to Request for Comments 205). In general, it provides that the tax loss is to be determined by the same rules applicable in determining any other sentencing factor and that in determining the total tax loss attributable to the offense, all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The stated reason for the amendment is to clarify the determination of tax loss and to make this instruction consistent among §§2T1.1-2T1.3.

We do not believe that this amendment does anything to clarify the determination of what is the "total tax loss attributable to the offense." The language of the proposed amendment (i.e., "unless the evidence demonstrates that the conduct is clearly unrelated") and the language in §1B1.3(a)(2) (i.e., "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction") is vague and not particularly helpful insofar as tax offenses are concerned. For example, undoubtedly, in a continuing fraudulent tax shelter scheme, all of the conduct would be considered in determining the tax loss. Similarly, where an individual fails to report income in two successive years from the same business, undoubtedly this would be considered clearly related and part of the same course of conduct or common scheme or plan. However, if an individual fails to report income from one business in one year and another business in another year, it might be argued that this is not clearly related. Nor is it necessarily clear that in the case of an individual who fails to file a tax return in one year and several years later attempts to evade his tax for several years, the tax loss from all years would be included in the determination of tax loss. The possible combinations of individuals, entities, types of tax offenses, and years involved in tax violations are infinite and a "presumption" that all conduct violating the tax laws is to be considered in determining the tax loss provides courts with no guidance in dealing with all the various possible combinations. In short, we believe that this language will only generate litigation and delay what should otherwise be a rather summary proceeding.

We believe that all tax offenses, regardless of the individuals, entities, statutory violations, or years involved, can be classified as part of the same course of conduct. At bottom, any such violation evidences a disregard of the taxing statutes of the United States. Courts presently consider all such conduct now, even where prosecution might be foreclosed for some reason like the running of the statute of limitations. This insures that the punishment imposed is commensurate with the defendant's actions and prior history. Indeed, Section 3553 of Title 18 provides that in imposing sentence, the court shall

consider the nature and circumstances of the offense and the history and characteristics of the defendant to insure that the sentence reflects the seriousness of the offense; promotes respect for the law; affords adequate deterrence to criminal conduct; and protects the public from further crimes of the defendant. Consequently, we believe that the Guidelines should provide that all conduct constituting a willful (i.e., criminal) violation of the tax laws should be considered in determining the tax loss if that conduct has not been considered before in a prior sentencing.

In light of the foregoing, we propose the following:

1. As proposed, amend §2T1.1 by deleting "When more than one tax year is involved, the tax losses are to be added." If, however, our recommendation for replacing the term "tax loss" with the phrase "criminal tax deficiency" and making corresponding changes in the Guidelines and commentary (see our response to Request for Comments 205) is not accepted, then we do not believe that this language (i.e., "When more than one tax year is involved, the tax losses are to be added.") should be deleted. Indeed, in the event our recommendation is not accepted, we believe that this language should also be inserted in §§2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7 and 2T1.9. This will avoid all confusion concerning whether losses resulting from more than one year are to be added whether or not the defendant is convicted of multiple counts.
2. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 2 in its entirety and replacing with new language (see our response to Request for Comments 205).
3. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 3 in its entirety and replacing with "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan."
4. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 4 and renumbering Notes 5 and 6 as Notes 4 and 5, respectively (see our response to Requests for Comments 205).

Amendment 189 Guideline §2T1.1 Tax Evasion

This amendment proposes to delete interest from the calculation of tax loss in §2T1.1. A similar amendment is proposed for §2T1.6 (see Proposed Amendment 202).

We do not oppose the deletion of interest from the calculation of tax loss (which we would rename "criminal tax deficiency" and redefine -- see our response to Request for Comments 205). While we do not believe that the calculation of interest would be particularly difficult, we believe that including an interest calculation would result in more contests over the exact amount of tax evaded and also could lead to much litigation over the speed with which the government investigated the violation and filed charges. However, we submit that in many cases the interest figure will not be insubstantial and, in most cases, the deletion of interest will decrease the offense level by one level.

Consequently, to compensate for the deletion of interest, we propose that the Tax Table (§2T4.1) be increased by one level at all levels. We recognize that the Commission is proposing an increase in the offense levels for various portions of the Tax Table (§2T4.1), but those increases do not affect amounts below $70,000 and the vast majority of tax cases fall at this figure or below (for example, according to Internal Revenue Statistics, somewhere around 75% of the convictions returned in FY '87 for General Enforcement Program cases involved amounts less than $70,000).

We recognize that the Commission is attempting to make the Tax Table consistent with the theft and fraud loss table (see Proposed Amendment 115). We do not, however, believe that these two tables must necessarily be consistent. In fact, we view the threatened loss of revenue resulting from tax violations as more serious than the loss of revenue from fraud or theft. The tax laws affect nearly every citizen in the country and, potentially, everyone has the opportunity to commit an offense against the revenue. The same cannot be said for federal theft or fraud offenses. Moreover, the federal government has limited resources and cannot possibly investigate or prosecute every tax violation. Indeed, an extremely small number of criminal tax violations are actually prosecuted. Consequently, the need for deterrence is extremely high. Imposing sentences for tax violations which are more severe than sentences for theft or fraud violations is justified by the difference in the nature of the offenses and by the heightened need in the tax area to have sentences send a clear message that tax violations will be handled severely. Deterrence is the primary purpose for the criminal tax enforcement program in this country. All taxpayers are potential defendants so the need to secure voluntary compliance by limited examples of strong deterrence is acute.

Amendment 190 Guideline §2T1.1 Tax Evasion

This proposed amendment would change the specific offense characteristic found in §2T1.1(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment.

Amendment 191 Guideline §2T1.1 Tax Evasion

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment.

Amendment 192 Guideline §2T1.1 Tax Evasion

This amendment is designed to correct a clerical error by deleting the term "Tax Table" wherever it appears in the Comentary to §2T1.1 captioned "Background" and replacing it with "Sentencing Table."

We support this proposed amendment.

Amendment 193 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This proposed amendment would change the specific offense characteristic found in §2T1.2(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment. (See our response to Proposed Amendment 190).

Amendment 194 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

In essence, this amendment proposes to add a cross reference to §2T1.2, providing that if the defendant is convicted of a willful violation of 26 U.S.C. §6050I, the court should apply §2S1.3 (Failure to Report Monetary Transctions) in lieu of Guideline §2T1.2.

As the Commission notes, this change was made necessary by the Omnibus Anti-Drug Abuse Act of 1988, which amended Section 7203 of the Internal Revenue Code of 1986 to provide for a maximum term of imprisonment of five years for a person willfully violating a provision of 26 U.S.C. 6050I, rather than the one-year maximum prison term for other violations of Section 7203. Section 6050I requires the filing of reports of certain types of monetary transactions. To deal with this increased penalty for failure to file certain internal revenue forms, the Commission proposes to have the court sentence under §2S1.3. We have no problem with that approach. But we do perceive a potential loophole in §2S1.3. That guideline sets the base offense level at 13 if the defendant (1) structured transactions to evade reporting requirement; (2) made false statements to conceal or disguise the activity; or (3) reasonably should have believed that the funds were the proceeds of criminal activity. In all other situations, the base offense level is 5. Thus, if the government can show that a defendant knew of the reporting requirement and knew that the transaction was covered by the reporting requirement, but willfully failed to file the necessary report, the base offense level will be 5 if there is no proof that the defendant structured transactions, made false statements, or reasonably should have believed that the funds were the proceeds of criminal activity. If such a defendant's violation is a failure to file the report required by Section 6050I of the Internal Revenue Code of 1986, he would be sentenced no more severely under §2S1.3 than he would under §2T1.2. This anomaly can be avoided if §2S1.3 is amended to provide that any willful failure to comply with reporting requirements will be punished at a base offense level of 13, whether the result of structured transactions or not.

Amendment 195 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191)

Amendment 196 Guideline §2T1.2 Willful Failure to File Return, Supply Information, or Pay Tax

This amendment is intended to clarify the definition of tax loss in §2T1.2. It does so by adding a note in the Commentary to §2T1.2 captioned "Application Notes."

Instead of the language proposed by the Commission, we propose the following language for the new application note: "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan." (See our response to Proposed Amendment 188.)

Amendment 197 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This proposed amendment would change the specific offense characteristic found in §2T1.3(b)(1) dealing with income from criminal activity. In essence, it would provide for a two level enhancement whenever the defendant failed to report or correctly identify the source of $10,000 in income from criminal activity in any year, rather than only when there was a failure to report or correctly identify the source of $10,000 income per year from criminal activity.

We fully support this proposed amendment. (See our response to Proposed Amendment 190).

Amendment 198 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191.)

Amendment 199 Guideline §2T1.3 Fraud and False Statements Under Penalty of Perjury

This amendment is intended to clarify the definition of tax loss in §2T1.3. It does so by adding a note in the Commentary to §2T1.3 captioned "Application Notes."

Instead of the language proposed by the Commission, we propose the following language for the new application note: "In determining the criminal tax deficiency (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan." (See our response to Proposed Amendment 188 and 196.)

Amendment 200 Guideline §2T1.4 Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

We support this amendment designed to correct a clerical error. We point out, however, that in explaining the reason for the amendment, the Commission states that if proposed amendment is 199 adopted, this amendment is withdrawn as unnecessary. We believe that the Commission meant to say that this amendment was withdrawn as unnecessary if proposed amendment 201 is adopted.

Amendment 201 Guideline §2T1.4 Aiding, Assisting, Procuing, Counseling, or Advising Tax Fraud

This proposed amendment is intended to clarify the meaning of the term "sophisticated means." It does so by stating that the term means "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion (sic) case."

We are not sure that this language does much to clarify the meaning of the term. No guidance is given for a court to use in deciding what is a "routine tax evasion case" and when conduct is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." In any event, we doubt that this is the sort of concept which can be carefully defined and that its resolution must, of necessity, be made on a case-by-case basis. Accordingly, we do not oppose the proposed amendment. (See our response to Proposed Amendment 191.)

Amendment 202 Guideline §2T1.6 Failing to Collect or Truthfully Account for and Pay Over Tax

This amendment proposes to delete the phrase "plus interest" from §2T1.6.

We support this proposed amendment if the corresponding changes which we suggest in our response to Proposed Amendment 189 are adopted.

Amendment 203 Guideline §2T1.9 Conspiracy to Impair, Impede or Defeat Tax

This proposed amendment is designed to correct a clerical error by replacing the phrase "either of the following adjustments" with the phrase "more than one."

Because more than two adjustments are involved, we support the proposed amendment.

Amendment 204 Guideline §2T1.9 Conspiracy to Impair, Impede or Defeat Tax

The purpose of this Proposed Amendment is to clarify Application Notes 2 and 3.

We agree that Application Notes 2, 3, and 4 should be deleted. We support the proposed new language for Application Note 3. However, for the language proposed by the Commission for the new Application Note 2, we would substitute the following language: "The base offense level is the offense level corresponding to the criminal tax deficiency if that offense level is greater than 10. Otherwise, the base offense level is 10." (See our response to Requests for Comments 205.)

Request for Comments 205. Chapter Two, Part T, Subpart 1

In Request for Comments 205, the Commission states that if the calculation of interest is deleted from §2T1.1 (amendment 189), the offense levels for sections 2T1.1, 2T1.3, and 2T1.4 will be similar and will all depend upon the level of the "tax loss" Consequently, the Commission seeks comment on whether the term "tax loss" should be standardized and, if so, on how this might best be accomplished. The Commission also seeks comment on how this term might be clarified and on whether the offense level for §2T1.2 should be more similar to, or the same as, §2T1.1.

Currently, §2T1.1 provides, in pertinent part, that "[f]or purposes of this guideline, the 'tax loss' is the greater of: (A) the total amount of the tax that the taxpayer evaded or attempted to evade, including interest to the date of filing of an indictment or information; and (B) the 'tax loss' as defined in §2T1.3." Section 2T1.3 defines the "tax loss" as "28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent." This definition of "tax loss" is also incorporated in §2T1.4.

If the calculation of interest is deleted from §2T1.1, we believe there will be few, if any, cases where the amount of the tax evaded will be greater than 28 percent (34 percent in the case of a corporation) of the amount by which the greater of gross income or taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. Therefore, it makes no sense to retain part (A) of the definition of "tax loss" in §2T1.1. If the amount of tax evaded or attempted to be evaded is eliminated as a basis for determining "tax loss" in §2T1.1, then the definition of "tax loss" in §§2T1.1, 2T1.3, and 2T1.4 will be the same.

We believe that the best way to accomplish the objective of standardizing the term "tax loss" is to define "tax loss" in §2T1.1 and then simply reference that definition in the remaining sections of Part T, Subpart 1 where the base offense level calculation depends upon a determination of "tax loss." This would include referencing the definition of "tax loss" contained in §2T1.1 in §§2T1.2, 2T1.3, 2T1.4, and 2T1.9.

The base offense level for §2T1.2 (Willful Failure to File Return, Supply Information, or Pay Tax) (26 U.S.C. 7203) is currently set at one level less than the level from the Tax Table (§2T4.1) corresponding to the tax loss. The tax loss is defined as the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any one year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000. As the definition of tax loss in §2T1.2 is already keyed, in part, to the amount of tax evaded, no great change is worked by having the base offense level of §2T1.2 depend upon the definition of tax loss in §2T1.1.

The floor currently provided by the "not less than 10 percent" language can be retained simply by providing a minimum

base offense level when there is no ascertainable tax loss. Similarly, keying the definition of tax loss in §2T1.9 (Conspiracy to Impair, Impede, or Defeat Tax) (18 U.S.C. 371) to the definition in §2T1.1 will not be a serious break with the current version of §2T1.9, which, in part, now defines that tax loss as the tax loss defined in §2T1.1 or §2T1.2, as applicable.

We believe that the term "tax loss" is best clarified by replacing it with the phrase "criminal tax deficiency." There is some confusion among those most likely to be involved in applying the guidelines in Part T, Subpart 1 concerning whether purely civil items (e.g., understatements due to an honest dispute over a taxing provision) might be used in calculating the base offense level. Using the phrase "criminal tax deficiency" (and explaining the meaning of that phrase in the Application Notes) should dispel all confusion and make it clear that only items resulting in an understatement of tax which are due to willful actions are to be used in determining the base offense level.

Despite the fact that we believe that the same definition of "tax loss" ("criminal tax deficiency") should be used throughout the sections of Part T, Subpart 1 where the base offense level calculation depends upon a determination of "tax loss," we think that the Guidelines in Part T, Subpart 1 should still differentiate between offenses by assigning differing base offense levels to different offenses. We would accomplish this by providing that the base offense level for §2T1.1 is one level greater than the level from §2T4.1 (Tax Table) corresponding to the "criminal tax deficiency;" the base offense level for §§2T1.3 and 2T1.4 is the level from §2T4.1 (Tax Table) corresponding to the "criminal tax deficiency;" and, the base offense level for §2T1.2 is one level less than the level from §2T4.1 (Tax Table) corresponding to the deficiency. Currently, the Guidelines set the base offense level for §2T1.2 at one level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss. Consequently, our proposal in this regard works no change in the approach now taken by the Guidelines insofar as §2T1.2 is concerned. Setting the base offense level for §2T1.1 at one level greater than the level from §2T4.1 (Tax Table) corresponding to the "tax loss" ("criminal tax deficiency") is justified by the fact that §2T1.1 is the Guideline for sentencing the most serious violations of the Internal Revenue Code (26 U.S.C. 7201) and will better reflect the different maximum sentences provided by Section 7201 (five years' imprisonment) and by Section 7206 (three years' imprisonment), to which Guidelines §§2T1.3 and 2T1.4 relate.

In light of the foregoing, we propose the following:

1. Paragraph (a) of §2T1.1 be deleted and be replaced with the following:

   "(a) Base Offense Level: One level greater than the level from §2T4.1 (Tax Table) corresponding to the criminal tax deficiency.

"For purposes of this guideline, the 'criminal tax deficiency' is: (1) 28 percent (34 percent in the case of a corporation) of the greater of gross or taxable income which has been understated, reduced, or unreported as a result of a willful violation of the tax laws by the defendant, plus 100 percent of the amount of any false claims of credit against tax; or (2) 100 percent of the total amount of unpaid taxes in a case involving willful evasion of payment or willful failure to pay.

"The 'criminal tax deficiency' shall not include any amount which has been used previously in determining the 'criminal tax deficiency' in a prior case; or, as to amounts owing from tax years prior to the effective date of these Guidelines, an amount previously considered in imposing a sentence in any criminal tax case. Such prior convictions, however, are properly considered in computing criminal history under §4A1.2.

"The 'criminal tax deficiency' shall otherwise include an amount falling in one of the above categories which can be established to have resulted from a willful violation of the tax laws. The term "tax laws" includes, in addition to a violation of a provision of Title 26, U.S.C., a violation of 18 U.S.C. 2 or 371 relating to an attempt or conspiracy to commit a violation of Title 26 or to impede the IRS and/or the Department of the Treasury in the performance of its duties."

2. Amend the Commentary to §2T1.1 captioned "Application Notes" by deleting Note 2 in its entirety and replacing it with the following:

"The basic theory behind the concept of 'criminal tax deficiency' is that a violator is to be sentenced based on tax losses to the Government resulting from a criminal violation of the tax laws by the taxpayer, not just any tax deficiency. What the IRS internally calculates as the 'criminal computations' in a given criminal investigation for all years under investigation would be in a majority of cases the basis for determining the 'criminal tax deficiency' for the prosecution period. However, the 'criminal tax deficiency' is not limited to amounts contained in any particular investigative report (e.g., Special Agent's Report or Revenue Agent's Report), but rather includes any deficiency established to have been willful.

"It may very well be that an act of evasion, false statement, or the like may not be provable beyond a reasonable doubt but only by a preponderance of the evidence. Hence, the 'criminal tax deficiency' could embrace any tax loss caused by a criminal violation even

though it was not covered by the activity to which the defendant pleaded guilty or even the activity covered by the indictment. The court may consider nonindictment years where the violation is established to have been willful. However, it is contemplated that in the majority of cases the scope of the 'criminal tax deficiency' would not extend beyond the violations revealed in the investigation which led to the indictment and in any additional background information, including information from other investigations, involving the defendant. It is not the intent of the Commission to require either the Internal Revenue Service or the Probation Department to conduct additional investigation in a typical tax case to ascertain if there is a greater deficiency beyond that revealed by the investigation which led to the indictment."

3. Amend the Commentary to §2T1.1 captioned "Application Note" by deleting Notes 3 and 4 in their entirety and thereafter renumber Notes 5 and 6 as Notes 4 and 5, respectively (see our response to Proposed Amendment 188).
4. In paragraph (a)(1) of §2T1.2, delete the words "tax loss" and replace with "criminal tax deficiency."
5. Delete paragraph (a)(2) of §2T1.2 in its entirety and the language following and replace it with:

   "(a)(2) 5, if no criminal tax deficiency is ascertainable.

   "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency'as defined in §2T1.1."

6. In paragraph (a)(1) of §2T1.3 delete "tax loss, if the offense was committed in order to facilitate evasion of a tax;" and replace with "criminal tax deficiency;"
7. In paragraph (a)(2) of §2T1.3 delete the language following "6, otherwise." and replace it with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1"
8. In paragraph (a)(1) of §2T1.4 delete the words "resulting tax loss, if any" and replace with "criminal tax deficiency;"
9. In paragraph (a)(2) of §2T1.4, delete the language following "6, otherwise." and replace it with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1"
10. In §2T1.9, delete the language of (a)(1) and replace with "Level from §2T1.4 (Tax Table) corresponding to

the criminal tax deficiency; or".

11. In paragraph (a)(2) of §2T1.9, delete the language following "10." and replace with "For purposes of this guideline, the 'criminal tax deficiency' is the 'criminal tax deficiency' as defined in §2T1.1".

Amendment 220. Guideline §3A1.2. Official Victim

One of the changes made by amendment 220 is to include within the official victim guideline certain assaults against law enforcement or corrections officers committed during the course of an offense or immediate flight therefrom. This amendment includes conduct not expressly included in the current guideline. The amendment is particularly important in light of another change to the current language narrowing the applicability of the guideline to situations in which the "offense of conviction" rather than the "crime" was motivated by the victim's official status.

The proposed enhancement for assaults against law enforcement and corrections officers applies to conduct committed during the course of the offense or immediate flight therefrom and includes assaults committed "in a manner creating a substantial risk of serious bodily injury." This proposed amendment could be improved by: (1) broadening its application beyond assaults committed during the course of an offense or immediate flight therefrom to include assaults committed in connection with an arrest for the offense; and (2) applying the enhancement to assaults which create a substantial risk of bodily injury, even if not serious. As to the first issue, if a defendant commits an offense and during the course of an arrest assaults the arresting officer, the defendant should be sentenced more severely than one who does not commit an assault. This enhancement should apply whether or not the defendant is immediately arrested for the offense. As to our second suggestion, if during the course of a bank robbery a defendant knocks a law enforcement officer to the floor and injures him but not seriously, the assault should enhance the applicable offense level. The nature of the conduct may be similar to conduct that risks serious bodily injury and should be similarly punished in this context. Prosecutors would be involved in needless litigation over whether an assault created a risk of serious bodily injury or lesser forms of bodily injury if the proposed language were adopted.

In this regard, we object to proposed application note 5 to the extent it limits the application of the proposed guideline amendment to assaults that are proximate in time to the offense and excludes the risk of less-than-serious bodily injury. We believe that the proposed amendment language for new subsection (b) should be revised to read: "during the course of the offense, immediate flight therefrom, or in connection with apprehension for the offense, the defendant ...." In addition, the word "serious" should be deleted from the guideline amendment.

Amendment 234. Guideline §3E1.1. Acceptance of Responsibility

Amendment 234 deletes application note 4 from the commentary to the acceptance-of-responsibility guideline. This application note states that an adjustment for acceptance of responsibility "is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice ... regardless of other factors." The amendment would instead provide language to the effect that the adjustment for acceptance of responsibility ordinarily would not apply when §3C1.1 (willfully obstructing or impeding proceedings) applies, but that in extraordinary cases both the acceptance and obstruction adjustments may apply.

We object to the deletion of the current application note and the insertion of the proposed language. We are at a loss to imagine any set of facts in which both the acceptance and obstruction adjustments could logically apply. The proposed language is an invitation to judges to view the acceptance guideline as applicable to nearly every case and improperly to reduce sentences for acceptance of responsibility. We believe that the acceptance guideline may currently be routinely over-applied and that steps need to be taken to narrow its applicability. A clear statement barring the application of the acceptance guideline as in current application note 4 simplifies application of the guidelines and reduces potential litigation.

AMENDMENT 243

Amendment 243 deals with career offenders. On the issue of career criminals, the Subcommittee was bothered by the current definitions in 4B1.2(3) which define prior felony covictions. This current definition as applied to the career criminal and criminal history scores seems, at times, to produce an arbitrary result.

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

However, the Subcommittee strongly recommends that a 2 level adjustment for acceptance of responsibility be permitted under the career offender provision. Otherwise, the prosecutors will have no incentive to induce a plea of guilty without engaging in wholesale departures which should not be encouraged.

The Subcommittee also strongly disapproved the senior citizen provision which would have resulted in lower guidelines for defendants who were at age 50 or above. Based on our experience, we simply do not see this as being viable particularly when the Commission has stated that normally, age is not a factor to be considered. 5H1.1

AMENDMENT 260

Amendment 260 deals with guidelines to allow home detention. The Subcommittee was unenthusiastic about substituting home detention for incarceration. We felt that home detention would be publicly perceived as a rich man's punishment and would diminish the impact of even short incarceration on white collar criminals. Home detention, if used at all, should be a substitute for a half-way house or work release but not for true incarceration. If home detention were used, we would recommend a ratio of two days home detention for one day of other forms of restraint.

Amendment 260. Guideline §5C2.1. Home Detention

The Commission is seeking comments on home detention.

The Antitrust Division recommends that the Department oppose the use of home detention for white collar criminals such as antitrust offenders. Although white collar criminals often do not receive long prison sentences, the probabilty of even relatively short terms of incarceration in a penal institution is a powerful deterrent to antitrust and similar offenses. Being sentenced to 3 or 4 months of home detention would not be an effective deterrent. In addition to having the comforts of perhaps a very comfortable home, a defendant may be able effectively to run his business out of the house, further minimizing the penalty. Moreover, home detention for white collar criminals would send the wrong signal to society at large that these sorts of offenses are not taken seriously by the federal government and that well-to-do white collar criminals receive favorable treatment from the criminal justice system.

Amendment 265. §5G.1.2. Sentencing on Multiple Counts of Conviction

Amendment 265 proposes adding to the commentary on §5G1.2 a statement to the effect that the rules on sentencing multiple counts of conviction apply to multiple counts of conviction whether (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The treatment of counts contained in separate indictments sentenced at the same time was not previously clarified by the guidelines, and we believe the existing provisions do not require consolidation of counts of separate indictments under the multiple count rules of Chapter Three. The amendment would expressly reject this theory.

We agree that counts of separate indictments should often be sentenced as though they were counts of the same indictment if sentenced at the same time or consolidated for sentencing, but only if under the joinder rules the counts of the separate indictments could have been charged in the same indictment (leaving venue issues aside). Under these rules two or more offense may be charged in the same indictment or information if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rules 8, Fed.R.Cr.P. See also Rule 14, Fed. R. Cr. P. on relief from prejudicial joinder. That is, if the government could have charged the counts in one indictment (venue questions aside) but did not, it makes sense to sentence the counts as though they had been joined. However, if the rules do not permit joinder of offenses for reasons relating to the differing nature of the offenses and in essence force the government to carry out separate proceedings, then the same separate treatment should apply to sentencing. This approach would decrease the incentive for prosecutors to proceed on separate indictments purely for sentencing purposes but would not unfairly affect the government where it is put to the test twice under the Criminal Rules.

While we agree that the above would be a fair treatment for purposes of the present sentencing of counts of separate convictions, we would not want this approach adversely to affect criminal history or career offender calculations when separate convictions result in consolidated sentencing. That is, we do not believe that the separate convictions should be treated as one prior conviction or sentence because one sentencing proceeding occurs under the above proposal. We believe an amendment of the criminal history guideline §4A1.2(a)(2), defining "prior sentence" is necessary in this regard. Without a clear statement that prior convictions consolidated for sentencing are to be treated for purpose of criminal history and career offender provisions as separate prior sentences, we would oppose any

change to §5G1.2 treating sentences for separate convictions as multiple counts of the same conviction.

Amendment 267. §5G1.3. Conviction on Counts Related to Unexpired Sentences

This amendment proposes deleting current guideline §5G1.3, which provides that if at the time of sentencing the defendant is serving an unexpired sentence, then the sentence for the instant offense is to run consecutively to the unexpired sentence, unless one or more of the instant offenses arose out of the same transactions or occurrences as the unexpired sentence. In the latter case the instant sentence is to run concurrently with the unexpired one, except if otherwise required by law. In its place would be a guideline not covering the above situation involving unexpired sentences at the time of sentencing for the instant offense but rather the limited situation of an instant offense committed while the defendant was serving a term of imprisonment. The proposed guideline would require consecutive sentencing for the instant offense in this case. The judge would have discretion in all other cases to determine whether a sentence should be consecutive to or concurrent with a sentence previously imposed.

We believe the rule on consecutive sentencing should be much broader than the proposed amendment and broader than the existing rule provides. It should provide that a new sentence of imprisonment shall be consecutive to one previously imposed, whether the defendant is currently serving such sentence or has not begun serving it. The general presumption under 18 U.S.C. §3584 is that multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently. If the court is silent on the issue, the terms are to run consecutively. The one exception is that terms may not run consecutively for an attempt and for another offense that was the sole object of the attempt. In our view the guidelines should implement this presumption, particularly in light of our recommendation regarding amendment 265. That is, if our recommendation is adopted that separate proceedings sentenced at the same time should be subject to the multiple count rules if the separate offenses could have been joined in one indictment, then most cases meeting the joinder criteria will likely result in a consolidated sentencing proceeding, given the benefit to the defendant such treatment provides. However, where the separate indictments are not consolidated for sentencing, then the offenses presumably are unrelated or are not of a same or similar character. In this situation the sentences should be consecutive because of the separate nature of the offenses and the fact that more than one proceeding was involved all the way through sentencing.

It is possible that some cases may not reflect this intended scheme. For example, even though counts under two indictments may be eligible under our proposal regarding §5G1.2 for consolidated sentencing, for some reason the indictments may have been handled in separate sentencing proceedings. Moreover, the prior sentence may relate to a State offense. To protect against

unfair results in this situation, the Commission could provide that the rule requiring consecutive sentences for separate sentencing proceedings does not apply if the instant offense arose out of the same acts or transactions as the offenses previously sentenced.

We propose that §5G1.3 be amended to read as follows: "Multiple terms of imprisonment imposed at different times shall run consecutively unless they are imposed for offenses involving the same act or transaction."

AMENDMENT 271

Amendment 271 deals with terrorism. The Subcommittee believes that this term needs to be defined. We would recommend that the Sentencing Commissicnconsult with the Department of Justice Criminal Division in order to adopt a working definition of "terroristic action." We do not know of an accepted definition of the term.

Suggested New Amendment. Guideline §3D1.2(d). Grouping of Counts.

Section 3D1.2(d) was substantially amended as of June 15, 1988. The phrase "same general type of offense" was edited out. This concept is important in applying §3D1.2(d), and is still interpreted in the Commentary, see Application Note 6. Currently, there is no language in the guideline that carries the "same general type of offense" concept. Some editing should be done here.

NEW CRIMINAL HISTORY CATEGORY

The Subcommittee believes that a criminal history category VII should be adopted for all offenses. This new category VII would be that listed as Option 1 of Proposed Amendment 243. We believe this should be applied across the board.

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

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

The Subcommittee is worried that using this rule, many judges defer accepting any part of a plea until the pre-sentence report is completed. This leaves the government in an awkward position for a couple of months until the PSI is completed. A defendant can withdraw his plea at any time for no real reason during this period. We recommend that the court be advised to accept the plea itself at the time it is offered and only defer accepting the plea agreement until later. One the plea itself is accepted, the defendant will have to show good cause to withdraw his plea. Should the court reject the plea, the defendant would have good cause to withdraw, but would not have two months or more to think about withdrawing for any reason that was not fair and just.

SETTING LEVELS WHERE THERE IS A MINIMUM MANDATORY SENTENCE

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

Amendment 273. Guideline §6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

This amendment is intended to clarify the Commentary to §6B1.2 to make clear that a plea agreement that departs from the Guidelines may be accepted only where the departure is in accordance with the law governing departures rather than in instances where a departure is merely consistent with the purposes of sentencing.

To achieve this result, the Commission proposes to state in the Commentary that any departure in a plea agreement must be authorized by 18 U.S.C. § 3553(b). That section requires that sentences be imposed within the appropriate guidelines range "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."

There may be some question whether one departure that the Department is likely to seek--the departure for substantial assistance to authorities under §5K1.1-- is covered by § 3553(b). The Commission notes in the Commentary to that section that the substantial assistance departure is authorized by 18 U.S.C. § 3553(e) (where it is below a statutory minimum) and (generally) by 28 U.S.C. § 994(n).

There is a semantic issue here that really need not be resolved. In any case, the Commission's proposed insertion to the Commentary to §6B1.2 should be revised to read: "(i.e., that such departure is authorized by 18 U.S.C. §§ 3553(b), (e) or 28 U.S.C. § 994(n)). See generally Chapter 1, Part A(4)(b)(Departures).".

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, D.C. 20534

March 14, 1989

Mr. William Wilkins
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue N.W.
Washington, D.C. 20004

Dear Chairman Wilkins:

I am writing in response to the changes proposed to the Sentencing Guidelines relating to the conviction of current or former law enforcement officials for introducing contraband into correctional institutions.

We support sentencing enhancements for either currently employed or former law enforcement officers who are convicted of introduction of contraband into correctional institutions or attempting to introduce contraband into correctional institutions. Any enhancements of this nature should include either currently employed or former federal, state, or local law enforcement officers, including correctional officers or employees of the Department of Justice. These individuals, by virtue of their current or previous employment, have access to otherwise confidential security procedures at correctional facilities, and are thus in a position to use that knowledge to more effectively circumvent institution security operations. Further, as current or former law enforcement officers, these individuals have been placed in positions of public trust, and misuse of these positions or the information gained from occupying these positions represents a serious violation of that trust. Such actions, in addition to their direct implications, erode public confidence in law enforcement agencies and their efforts. Finally, current or former law enforcement officers, more than offenders from other fields of work, are in a position to more fully appreciate the impact on the safety of both staff and inmates of introduction of contraband into a correctional facility.

Based on the above, we endorse a two level increase in the Sentencing Guidelines for current or former federal, state, or local law enforcement officers, including correctional officers, other correctional employees, and other employees of the Department of Justice.

I appreciate the opportunity to comment on the proposed revisions. If you need additional information, please let me know.

Sincerely,

J. Michael Quinlan
Director

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

April 11, 1989

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

Re: Proposed rule Changes:
Use of home detention and cost of incarceration.

Dear Chairman Wilkins:

I would like to take this opportunity to comment on two proposals recently published in the Federal Register.

First, I would like to comment on the use of home detention as an alternative to imprisonment (Section 5F5.2). The current Sentencing Commission policy should be changed to allow home detention as a substitute for imprisonment under intermittent confinement or community confinement. Experience of the U.S. Parole Commission with home detention, combined with electronic monitoring, has shown that home detention is not only cost effective but it results in greater offender accountability than typically occurs when an offender is placed in a halfway house. Our experience has shown that it is easier to monitor the whereabouts of an offender in home detention than is often the case in a halfway house.

Further, home detention should be substituted on an exact day for day ratio since it is comparable in punishment, if not more so. Based on our findings in this area, home detention under the restrictions of a strict curfew, is viewed as punishment by offenders. It is seen by the offender as at least on the same level of punishment as halfway house placement.

I do not recommend that the tool of electronic monitoring be an absolute requirement for home detention. While the use of electronic monitors to enforce a curfew should be the rule rather than the exception, there may be unusual circumstances where the use of electronic monitors is unnecessary, impractical, or prohibitively expensive.

In my opinion home detention provides a more positive environment than will be experienced in a halfway house; at a much lower cost; and protection to the public will be enhanced.

Second, I would like to comment on the feasibility of requiring offenders to pay for the cost of incarceration. I believe prisoners should pay for the costs of their confinement. As outlined in Section 7301 of the Omnibus Anti-drug Abuse Act of 1988, the Sentencing Commission should study the feasibility of allowing prisoners unable to pay fines the opportunity to work at paid employment to reimburse the government for the cost of incarceration. In addition, emphasis should be placed on allowing prisoners to work in the community during confinement to pay these costs. A number of states are experimenting with innovative approaches to community corrections. The Sentencing Commission should be a leader in this regard. It is possible to design community corrections programs that are nearly self-sufficient, which maintain accountability without endangering the public, and are viewed as punishment by the offender and the general public. The burden on the taxpayer for maintaining and expanding the Federal Prison System threatens to be overwhelming. A means of reducing this burden should be explored wherever feasible.

I look forward to the discussion of these issues at the Commission meeting in April.

Sincerely,

Benjamin F. Baer
Chairman

CC: ALL COMMISSIONERS

U.S. Department of Justice

United States Attorney

Southern District of Texas

3300 Federal Building and U.S. Courthouse
515 Rusk Avenue
Houston, Texas 77002

Post Office Box 61129
Houston, Texas 77208

April 12, 1989

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

Re: Proposed Amended Sentencing Guidelines for Title 8, United States Code, Section 1326

Dear Judge Wilkins:

As you are aware, Section 7345 of the Omnibus Anti-Drug Abuse Act of 1988 amended 8 U.S.C. § 1326 and set up a three-part sentencing structure. For an alien who re-enters after a prior deportation and does not have any prior convictions, the maximum penalty remains two years; for a defendant who was deported after a conviction of a felony and returned to the United States, the maximum penalty is five years imprisonment; and for a person who was convicted of an aggravated felony (which includes any drug trafficking crime), the maximum penalty is fifteen years imprisonment. The Sentencing Commission has proposed amendments to the current guidelines to accommodate these new statutory changes.

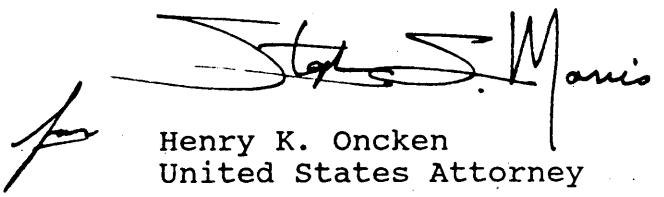
The proposed amendments which relate to those aliens who return and have no prior convictions or have a plain felony conviction seem appropriate. The suggested "specific offense characteristics" would raise the offense level another four levels which would reflect the seriousness of the offense. The proposed enhancement for those defendants convicted of an "aggravated felony" does not seem to be adequate however. The proposed guidelines suggest that in the case of an illegally re-entering defendant previously convicted of an aggravated felony "an upward departure <u>should</u> be considered." We are concerned that the proposal does not provide adequate deterrence to re-entering aliens, especially for those defendants who have been convicted of prior drug offenses because the enhancement does not set a definite, stern term of imprisonment that an alien <u>knows</u> will be imposed if he returns illegally.

The proposal to have the court "consider" an upward departure in the case of these aggravated felons we believe would not provide sufficient deterrence. It would lead to highly variable sentences from district to district and in many cases it might lead to a sentence that is not lengthy enough to be deemed a deterrent to other returning drug dealers. It should be noted that the returning aliens often are part of an organization that has members both in the United States and in other countries. News between members of the organization people does travel. If we intend to provide both specific and general deterrence to those who are considering re-entry after deportation, a special offense characteristic level which would raise the offense level to 24 would provide such a deterrent. The time of incarceration then would range between five and twelve years. This would provide the kind of deterrence that we believe would be effective and commensurate with the seriousness of the offense.

In sum, we hope the Commission will raise the offense level so that returning drug dealers will realize that their actions will result in long-term incarceration, rather than a brief stop on their way back to dealing drugs in the United States.

Thank you for your cooperation.

Very truly yours,



Henry K. Oncken
United States Attorney

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

April 11, 1989

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

Re: Proposed rule Changes:
Use of home detention and cost of incarceration.

Dear Chairman Wilkins:

I would like to take this opportunity to comment on two proposals recently published in the Federal Register.

First, I would like to comment on the use of home detention as an alternative to imprisonment (Section 5F5.2). The current Sentencing Commission policy should be changed to allow home detention as a substitute for imprisonment under intermittent confinement or community confinement. Experience of the U.S. Parole Commission with home detention, combined with electronic monitoring, has shown that home detention is not only cost effective but it results in greater offender accountability than typically occurs when an offender is placed in a halfway house. Our experience has shown that it is easier to monitor the whereabouts of an offender in home detention than is often the case in a halfway house.

Further, home detention should be substituted on an exact day for day ratio since it is comparable in punishment, if not more so. Based on our findings in this area, home detention under the restrictions of a strict curfew, is viewed as punishment by offenders. It is seen by the offender as at least on the same level of punishment as halfway house placement.

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In my opinion home detention provides a more positive environment than will be experienced in a halfway house; at a much lower cost; and protection to the public will be enhanced.

Second, I would like to comment on the feasibility of requiring offenders to pay for the cost of incarceration. I believe prisoners should pay for the costs of their confinement. As outlined in Section 7301 of the Omnibus Anti-drug Abuse Act of 1988, the Sentencing Commission should study the feasibility of allowing prisoners unable to pay fines the opportunity to work at paid employment to reimburse the government for the cost of incarceration. In addition, emphasis should be placed on allowing prisoners to work in the community during confinement to pay these costs. A number of states are experimenting with innovative approaches to community corrections. The Sentencing Commission should be a leader in this regard. It is possible to design community corrections programs that are nearly self-sufficient, which maintain accountability without endangering the public, and are viewed as punishment by the offender and the general public. The burden on the taxpayer for maintaining and expanding the Federal Prison System threatens to be overwhelming. A means of reducing this burden should be explored wherever feasible.

I look forward to the discussion of these issues at the Commission meeting in April.

Sincerely,

Benjamin F. Baer
Chairman

CC: ALL COMMISSIONERS

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

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
CECILIA M. MICHEL

(FTS) 777-1755
(612) 348-1755

March 13, 1989

United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, D.C. 20004

Attn: Public Comment

Dear Sentencing Commission:

I am an Assistant Federal Public Defender and although I could fill several pages of comments concerning the existing and proposed amendments to the Sentencing Guidelines, after having reviewed the proposed amendments I wish to draw your attention to another possible adjustment in Chapter 2 which would seem consistent with others that have been proposed.

Section 2J1.6 deals with failure to appear by a defendant. The specific offense characteristics increase the base offense level in relation to the possible punishment connected with the underlying offense. In general, I would suggest that the terms of years referenced in 2J1.6(b)(1), (2), and (3) would be adjusted to comport with the new terms of years applicable to the definitions of categories (A) through (E) crimes. I also suggest the increases in the base offense level might well be adjusted downward in some circumstances.

My other suggestion is that some consideration be given to a change in the specific offense characteristic to provide that when the failure to appear is in relation to a sentence which has already been imposed. The increase be based on the actual sentence. It is illogical and inconsistent with the apparent purpose of the specific offense characteristics to base the increase in the base offense level by the <u>possible</u> punishment when the <u>actual</u> punishment is already known. There are obviously many examples of two, three or four year sentences for offenses which carry maximum punishments of 20 years or more.

I believe such an adjustment would be consistent with the efforts being made to adjust the escape offense guideline and the direction apparently taken in connection with the Section 2J1.7 modifications.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/ls

2J1.6
(no amendment proposed)

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

DANIEL M. SCOTT
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(FTS) 777-1755
(612) 348-1755

March 13, 1989

United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, D.C. 20004

Attn: Public Comment

Dear Sentencing Commission:

I am an Assistant Federal Public Defender and although I could fill several pages of comments concerning the existing and proposed amendments to the Sentencing Guidelines, after having reviewed the proposed amendments I wish to draw your attention to another possible adjustment in Chapter 2 which would seem consistent with others that have been proposed.

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Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/ls

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FRED WARREN BENNETT
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March 27, 1989

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Comment

Re: Proposed Amendment No. 243
-Section 4B1.1 (Career Offender)

Gentlemen:

As the Federal Public Defender for the District of Maryland, I am writing this letter to support the adoption of proposed Amendment No. 243 to Section 4B1.1 (Career Offender) of the Sentencing Guidelines.

I support a revision of the Career Offender guideline, and of the three options presented in the proposed amendments, I am writing to support Option 1 as being the most just. Option 2 represents a middle ground. I would hope that the Sentencing Commission would summarily reject Option 3 which would have the effect of setting a sentence for a Career Offender at the statutory maximum. Option 3 is draconian, gives a judge no discretion and totally ignores significant variations in the seriousness of the actual offense conduct.

The District of Maryland has been applying the Sentencing Guidelines since November 1, 1987, and my Office has had considerable experience dealing with the Career Offender provision. Although the United States District for the District of Maryland struck down the Sentencing Guidelines as unconstitutional in United States v. Bolding, 683 F.Supp. 1003 (D. Md. 1988)(en banc), the order in the Bolding case was stayed and judges in our District have been applying the Guidelines in all cases involving criminal conduct allegedly occurring after November 1, 1987.

My criticism of the present Career Offender guideline, Section 4B1.1, mirrors many of the complaints reported to the Sentencing Commission. These criticisms include:

1. Sentences for defendants in the Career Offender category, which are based at or near the statutory maximum, totally ignore significant variations in both the seriousness of the actual offense conduct and the prior criminal history of the offender. Thus, Career Offender guideline sentences are frequently unjust and provide no marginal deterrence.

2. A sentence for a Career Offender under the Guidelines is frequently excessive when compared to the actual seriousness of the offense conduct.

3. The sentence for a Career Offender too heavily depends on the charge of conviction for the instant offense and prior offenses. Thus, differences in plea negotiation practices among state courts (for prior convictions) and differences in plea negotiation practices among federal prosecutors (in regards to charge bargaining and the "offense of conviction") can affect whether the Career Offender provision applies at all in a given case.

4. The distinction between the criminal records of defendants with a criminal history category of VI and those who are in a Career Offender status is insufficient in most cases to warrant such large differences in the final sentence.

5. The sentences are longer than needed for either deterrence or incapacitation with a resulting waste in prison space.

6. The Career Offender provisions actually discourage guilty pleas because a person who is found to be a Career Offender cannot receive a two point downward adjustment for Acceptance of Responsibility. I see no rational reason as to why any other offender (including a defendant in the Criminal Livelihood Section 4B1.3 category) can qualify for a two (2) point downward adjustment for Acceptance of Responsibility, but not a Career Offender.

An actual case that I recently handled demonstrates the serious problems with the present Career Offender guideline. In the case styled United States of America v. Frank Dowling, Criminal No. K-88-0296 in the United States District Court for the District of Maryland, Mr. Dowling was convicted of possession with intent to distribute PCP under 21 U.S.C. § 841(a)(1). The facts show that Mr. Dowling acted as a "mule" or "courier" for a drug distributor and that Mr. Dowling drove from the District of Maryland into the District of Columbia to obtain a one ounce bottle of liquid PCP which sold for $250.00. Mr. Dowling was to receive $25 for acting as the "courier" and a "dipper" of the PCP. Mr. Dowling was arrested in the District of Maryland after an automobile accident occurred and he plead guilty to the felony of possession with intent to distribute PCP.

The base offense level for the crime of possession with intent to distribute one liquid ounce of PCP is 18. The offense level was raised to 32 because Mr. Dowling qualified as a Career Offender. Thus, Mr. Dowling's offense level was raised 14 levels based on the following convictions which qualified for Career Offender purposes:

1. A 1975 conviction for attempted arson in Baltimore, Maryland.

2. A 1982 conviction for assault and battery in Baltimore City, Maryland.

3. A 1985 conviction for assault and battery in Baltimore, Maryland.

All three convictions were based on guilty pleas and there is no question but that the attempted arson is a predicate offense. However, the two convictions for assault and battery qualified for Career Offender criminal history purposes even though they were misdemeanors under Maryland state law (and common law misdemeanors at that, i.e., the conviction carried no fixed penalty) because these

convictions were for state crimes which could be punishable by a term exceeding one year.

In light of the fact that Mr. Dowling qualified as a Career Offender, the offense level was raised from 18 to 32 and the guideline range went from 57-71 months (offense level 18, criminal history VI) to a guideline range of 210-262 months. Thus, because Mr. Dowling qualified as a "Career Offender" on a case involving his acting as a courier for the transportation of a one ounce bottle of liquid PCP purchased for $250, the possible guideline sentence was a minimum of 210 months. With all due respect, neither the actual offense conduct (possession with intent to distribute $250 worth of PCP in a case in which the defendant acted as a courier) nor the defendant's prior record (one actual state felony and two state misdemeanor convictions, all resulting from guilty pleas based on plea bargains) should have subjected Mr. Dowling to such a lengthy sentence.

The defendant actually received a sentence of 108 months under the Sentencing Guidelines. Although the defendant received this sentence based on his cooperation (a downward departure under Section 5K1.1 for cooperation) and because of other factors in the case, the main point that I wish to make from all of this is that I never should have had to start negotiating a disposition in this case with a beginning guideline range of 210-262 months.

It is interesting to note that under the Commission's proposed amendment, Option 1, the sentencing range for a Career Offender at the same offense level that applied to Mr. Dowling, offense level 18, would be 88-110 months. Mr. Dowling, who ultimately received a sentence of 108 months, fits precisely within the sentencing range proposed for a person with a criminal history of category VII (Career Offender) under Option 1 of the proposed amendment to Section 4B1.1.

In summary, I agree with the criticisms of the present Career Offender guideline which are set forth in the

proposed amendment. Based on the reasons set forth in the criticism of the present Career Offender guideline, and based on the reasons set forth herein, I would respectfully request that the Sentencing Commission amend Section 4B1.1 by setting a new criminal history category VII and by adopting Option 1.

I would also respectfully suggest that the Sentencing Commission give favorable consideration to a further amendment to Section 4B1.1 by including a new subsection that allows, consistent with the January 15, 1988, amendment to the Criminal Livelihood Section, 4B1.3, for a two point downward adjustment for Acceptance of Responsibility if Section 3E1.1 applies.

Thank you for your attention to this matter.

Sincerely,

Fred Warren Bennett

FRED WARREN BENNETT
Federal Public Defender

FWB/jek

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March 29, 1989

201.1

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Comment

Re: Proposed Amendment No. 82/Request for Comment--Calculation of the Weight of LSD for Guideline Purposes

Gentlemen:

As the Federal Public Defender for the District of Maryland, I am writing this letter in connection with proposed Amendment No. 82 and your request for public comment in regards to the calculation of the weight of LSD for guideline purposes.

I support an amendment to the Guidelines or Commentary to exclude the weight of the "carrier" in LSD cases for guideline purposes.

The District of Maryland has been applying the Sentencing Guidelines since November 1, 1987, and my Office has had first-hand experience dealing with LSD cases. Although the United States District Court for the District of Maryland struck down the Sentencing Guidelines as unconstitutional in United States v. Bolding, 683 F.Supp. 1003 (D. Md. 1988)(en banc), the Order in the Bolding case was stayed and judges in our District have been applying the Guidelines in all cases involving criminal conduct allegedly occurring after November 1, 1987.

The question has arisen in litigation in this District as to whether the carrier on which LSD is placed should be considered as part of the mixture and therefore weighed. Although the matter is currently on appeal in a Sentencing Guideline case presently pending before the Fourth Circuit, there is District Court authority for the proposition that blotter paper may be included in calculating the weight of LSD. See United States v. Bishop, ____ F.Supp. _____ 1989

WL 8731 (N.D. Iowa). It would appear that based upon a review of 21 U.S.C. § 841(a)(1) and the Sentencing Guidelines, a court could reasonably conclude that the carrier on which LSD is placed should be considered as part of the mixture and therefore weighed.

However, when including the weight of the "carrier" in LSD cases for Sentencing Guideline purposes, the offense level becomes artificially high in relation to the street value of the LSD and the corresponding street value of other drugs such as heroin or cocaine, at the same offense level in the Guidelines.

An actual case that recently concluded in the District of Maryland vividly shows the unjust results that occur when the carrier on which LSD is placed is considered to be part of the mixture and therefore weighed for Sentencing Guideline purposes. In the case styled United States of America v. Brian Daly, Criminal No. HM-88-0140 in the United States District Court for the District of Maryland, Mr. Daly plead guilty on a Criminal Information to conspiracy to distribute and possess with intent to distribute LSD. Although a plea agreement was reached, the Government and defense counsel disagreed as to the base offense level for guideline purposes. The paper impregnated with LSD seized by law enforcement agents weighed 755.09 grams. The crystal LSD from which the paper was produced weighed 2.33 grams. The Government contended that the base offense level was 36 since in excess of 100 grams of a mixture or substance containing a detectible amount of LSD was seized. The defense contended that the base offense level should have been no higher than 26 since the paper was prepared from between 1 and 3.9 grams of crystal LSD.

The defendant, who was married and had two young children, had no prior criminal record other than a misdemeanor conviction and he fell in criminal history I. The sentencing range for conspiracy to distribute LSD with a base offense level of 36 is 188-235 months, whereas the sentencing range for the same amount of drugs (not including

the blotter paper) with a base offense level of 26 is 63-78 months. Obviously, this is a tremendous difference to begin with as a starting point in plea negotiations.

The undisputed evidence in the Daly case showed that the defendant was negotiating to sell the 2.33 grams of LSD for $12,000 to DEA agents posing in an undercover capacity as drug dealers. The Government agreed the actual street value of the LSD seized was approximately $12,000. The wholesale value of the LSD in the Daly case is substantially less than what the equivalent wholesale values would be for heroin or cocaine involving quantities that would qualify for a base offense level of 36 (which is the base offense level for the LSD if the weight of the "carrier", i.e., the blotter paper, is included). As part of the information provided to the Probation Office in the Daly case, a determination was made as to the street value of heroin and cocaine for equivalent amounts of heroin or cocaine at a base offense level of 36. According to Mr. John Wall, an agent of the Drug Enforcement Administration who has qualified as an expert witness in drug cases on numerous occasions in the District of Maryland, as of February 1988 (when Mr. Daly was arrested) a base offense level of 36 applied to a person involved in the distribution or possession with intent to distribute 10 kilograms (or more) of heroin or 50 kilograms (or more) of cocaine. According to Mr. Wall, the wholesale value for 10 kilograms of 70-80% pure heroin as of December 1987 (the closest time available to the offense date in the Daly case) would have been anywhere between $1,250,000-$1,600,000, based on a wholesale value of $125,000-$160,000 per kilo for 70-80% pure heroin.

For 50 kilograms of cocaine the wholesale price in Baltimore, Maryland as of December 1987 would have been anywhere between $1,750,000 and $2,500,000 based on a price of $35,000-$50,000 per kilogram for 85% pure cocaine.

These various wholesale street values for heroin and cocaine clearly indicate that a base offense level of 36 should be targeted only for extremely high level drug

dealers and not cases involving LSD transactions having a street value of $12,000.

Indeed, in viewing the Daly case from the standpoint of wholesale street value, the distribution of $12,000 worth of LSD should have been equivalent to the distribution of around 300 grams of cocaine since as of December 1987, 300 grams of cocaine would have sold for between $10,500-$15,000 in Baltimore, Maryland. Similarly, as to heroin, the distribution of $12,000 worth of LSD would be equivalent to the distribution of around 80 grams of heroin at a wholesale value of $10,000-$12,800. As to both heroin and cocaine valued between $10,500-$15,000 the equivalent base offense level would be 22, or 41-51 months of imprisonment for a person with a criminal history category of I.

Thus, by taking into account the "street value" as opposed to drug quantity there is a 14 level difference (difference between base offense level of 36 and base offense level of 22) for drug quantities when heroin and cocaine are compared to LSD.

In short, a base offense level of 36 on 2.33 grams of LSD (not including the weight of the blotter paper) with a street value of $12,000 is grossly excessive in terms of the sentencing range (188-235 months) when compared with the sentencing range for an equivalent street value amount of heroin or cocaine (base offense level of 22, carrying 41-51 months of imprisonment for a person with a criminal history category of I).

Moreover, as the Commission recognizes in seeking public comment in connection with proposed Amendment No. 82, the base offense level for the same amount of liquid LSD can be at three different levels depending upon whether or not the carrier is a sugar cube or the LSD is carried on blotter paper, or whether the LSD is in liquid form. As the Commission points out, a person selling 100 doses of LSD would have an offense level of 32, or 26, or 12 depending on whether the LSD was on a sugar cube, blotter paper, or in a

liquid form. It is absurd to suggest that the length of a defendant's sentence should depend upon in large part whether the defendant had the presence of mind to possess or sell LSD in liquid form as opposed to possessing or selling the LSD on a sugar cube.

Based on the reasons set forth in this letter and the unjust consequences that occurred in the Daly case as a result of including the weight of the carrier on which the LSD was placed, I would respectfully request that the Commission amend the Sentencing Guidelines or add in the commentary that in regards to LSD cases the weight of the "carrier" should be excluded in determining the offense level based on the quantity of the drug.

Thank you for your consideration in this matter.

Sincerely,

Fred Warren Bennett

FRED WARREN BENNETT
Federal Public Defender

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March 31, 1989

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

ATTENTION: PUBLIC COMMENT

Re: Proposed Amendment No. 50
Section 2B3.1 (Robbery)

Dear Commissioners:

As the Federal Public Defender for the District of Maryland, I am writing this letter in opposition to Proposed Amendment 50 (Robbery) of the Sentencing Guidelines.

I think the Commission is correct when it states that its data on post-Mistretta practice "are very preliminary, and do not yet provide a reliable basis for evaluating the working of the current guideline." I believe action on this proposed amendment should be deferred until the availability of more comprehensive data. To amend this guideline based upon the comments of some Assistant United States Attorneys and District Judges would be to effect a substantive change with a negative impact on defendants solely because of the complaints of a few individuals. I believe the more wise course of action would be to analyze current practice and then, based upon knowledge and insight, proceed with appropriate amendments.

The balance of Proposed Amendment 50 is a statistical summary of "the typical bank robbery encountered in the federal system," understood in terms of time served pre-guidelines. These figures are compared with the presently existing guidelines. In fact, it is the experience of my Office that there is no typical bank robbery in the federal system.

After drug offenses I believe my Office represents more clients charged with bank robbery than any other felony. Those bank robberies that are armed offenses seem to be sentenced under the guidelines consistently with pre-guideline sentences. This is due in large part because of the treatment under the guidelines for the use of a weapon during the commission of a robbery. In addition, it is the routine practice of the United States Attorney's Office for the District of Maryland to charge as a separate offense, in connection with any armed bank robbery, the use of a handgun during the commission of that bank robbery, under 18 U.S.C. § 924(c). Conviction on this court alone results in a minimum mandatory consecutive imprisonment of sixty (60) months. Even without this count of conviction, the basic offense is sufficiently aggravated by the presence of a handgun that appropriate punishment is achieved.

In the unarmed bank robbery situation, it is the experience of my Office that such a variety of defendants have committed this crime that what appeared to be artificially low sentences under the guidelines are, in reality, accurate representations of criminal conduct. For example, my Office currently represents a defendant charged with bank robbery who has been analyzed to be boarder line competent for purposes of proceeding to disposition of this case. The robbery was attempted with a demand note. Upon handing the note to the teller, the teller engaged the defendant in conversation. The teller asked the defendant if she really wanted to rob the bank; the defendant answered that she thought she did. While the discussion was on-going, law enforcement authorities arrived and apprehended the defendant. In another case our client began crying during the bank robbery and was apprehended shortly thereafter. In the third case, as the defendant exited the bank after procuring money during an unarmed bank robbery, he noticed a police car coincidentally driving around the corner. He ran over to the car, threw his hands in the air and confessed to robbing the bank.

Each of these examples, which are among many other examples and not isolated instances, are cases which do not warrant excessive punishment. The sentences arrived at under the guidelines are sentences which may be imposed without adjustment to those guidelines. Thus, it is the

experience of my Office that the guidelines do, in fact, accurately represent just sentences for bank robberies. In those cases where greater punishment is warranted, a trial judge is certainly free to depart upward under section 4A1.3 (adequacy of criminal history), section 5K2.0, or section 1B1.4. Indeed, section 1B1.4 has been recognized as an independent basis for upward departures. United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989).

To summarize, I agree with the commission that it does not yet possess sufficient data on which to predicate an amendment to section 2B3.1 in connection with bank robberies. Because it is the experience of my Office that guideline sentences for bank robbery are not inconsistent with pre-guidelines practice or with the demands of justice, I oppose any amendment to section 2B3.1 at this time. Amendments to the guidelines should be based on reason and information, not upon the reaction of some people. For all the Commission knows, the Assistant United States Attorneys who have suggested an amendment may be reacting against pre-guidelines sentences and not accurately describing an inconsistent current practice.

I hope the Commission would seek to defer consideration of this amendment at this time, and await further information.

Thank you for your attention to this matter.

Sincerely,

FRED WARREN BENNETT
Federal Public Defender

FWB/mkn

JESSE HELMS
NORTH CAROLINA

United States Senate

WASHINGTON, DC 20510

April 10, 1989

The Honorable William W. Wilkins, Jr.
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am very concerned about the proposed amendments to the sentencing guidelines as published in the Federal Register of March 3. The proposed pornography related amendments have such low base sentencing levels that smut dealers' penalties will be scarcely more than a slap on the wrist. Similarly, the mandatory minimum sentence for possession of crack cocaine under the proposed amendments essentially is likely to become the maximum sentence to be applied in the vast majority of cases.

Congress elevated the Dial-a-Porn offense (Obscene Telephone Communication) to a felony, and also increased the minimum penalty for possession of crack, to emphasize the gravity of these crimes. Yet most of the proposed guideline amendments as drafted do not reflect this intent.

I sponsored the original Dial-a-Porn amendment in the Senate. I also worked very closely with the Administration to ensure that the pornography-related measures were included in the drug bill. Therefore, I believe the prescribed sentence under guideline amendment Number 127, concerning Dial-a-Porn, and the proposed amendment concerning the Broadcast of Obscene Material (No. 128) is inordinately lenient. This base level 6 sentencing scheme can be satisfied by merely placing the offender on probation. Such negligible punishment is totally at odds with Congress's intent in passing these measures.

The Commission's proposed amendment regarding the Distribution of Obscene Material (No. 126) also appears too lenient. The base sentencing level of 6 for a first offense can be increased to level 11 for those engaged in the business of selling obscene material. However, further increases in the sentence would not be allowed unless the

materials seized as part of the case exceeded $100,000 in value--a very unlikely occurrence in pornography cases. In practice, therefore, the proposed guideline amendment will most often result in a maximum sentencing level of 11 which, with a 2 level reduction for the "acceptance of responsibility" factor in the guidelines, ultimately ends up being a mere 4-10 month sentence. This result under the proposed guidelines stands in stark contrast to the law which provides up to 5 years in jail for a first offense.

Yet another problem with the pornography-related amendments is that fines tied to the base sentencing levels are too low. An individual receiving a base level 6 sentence under the Dial-a-Porn statute could be assessed a fine of just $500 to $5,000. These fines should be higher in light of Congress's intent to increase the severity of punishment for these crimes. Moreover, the alternative guideline fines based upon gain and loss simply will not be applicable in most cases. The guidelines, therefore, fail to provide an effective deterrent in the form of a monetary sanction.

Finally, the proposed guideline amendment concerning a mandatory minimum sentence for possession of crack cocaine (No. 101), like the pornography amendments, does not accurately reflect Congress's intent on this offense. The proposed amendment essentially establishes the mandatory minimum as the sentence to be applied in most cases.

The legislative amendment I sponsored in the Senate, which was enacted into law as part of the Anti-Drug Abuse Act of 1988, authorizes a 5-20 year sentence for a first offense of possessing 5 grams of crack. Yet under the proposed guidelines, an individual with no criminal history would not receive the maximum 20-year sentence even if he was caught with more than <u>500</u> grams. On the other hand, individuals falling within the worst criminal history category would not receive the maximum sentence even if they are caught with more than 50 grams of crack. In fact, such hardened criminals are not assured of receiving the maximum sentence unless they are caught with more than 150 grams in their possession.

The failure of the proposed amendments to invoke the maximum sentence in the presence of such high quantities of crack is egregious. I--and other members of Congress

supporting the law--went to great lengths to demonstrate that just 5 grams of crack (50 vials) constitutes a serious offense even if an individual has no prior criminal record. The Commission should heed Congress's intent to exact singularly severe penalties for crack-related offenses.

I know of your strong commitment to strengthening the criminal justice system to ensure that justice is meted out. Indeed, that is why I am bringing my concerns to your attention. I strongly urge that you in your capacity as Chairman of the Sentencing Commission consider higher base levels, more extensive offense characteristics, and other measures necessary to strengthen the proposed amendments to the sentencing guidelines so that perpetrators of these crimes will receive the tough sentences Congress intended.

Kindest regards.

Sincerely,

Jesse Helms

JESSE HELMS:sjc

JRS

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

April 25, 1989

The Honorable Thomas J. Bliley, Jr.
Congress of the United States
House of Representatives
Washington, D.C. 20515

Dear Congressman Bliley:

I greatly appreciated your letter of April 13, 1989, expressing your concern with the proposed amendments to the sentencing guidelines regarding obscenity. Your letter was circulated among the entire Commission, and your concerns were thoroughly considered at the public meeting of the Commission April 18 and 19, 1989.

I am pleased to relate to you that the Commission adopted an amendment that ensures more appropriate punishment for "Dial-a-Porn" offenses. Specifically, the Commission proposes to double the base offense level of punishment to level 12 (10 to 16 months imprisonment) and provide for an increase of four levels (thus totaling level 16, or 21 to 24 months imprisonment) where the communication was received by a minor. The proposal regarding the broadcast of obscene material was also amended in a similar manner. As amended, the guideline provides a base punishment level of 12, with a four-level increase when the broadcast was made during a time period when minors are likely to be exposed to the broadcast.

The Commission also considered a revised amendment to the guideline which addresses the offense of distribution of obscene material. A number of the Commissioners, including myself, voted to increase the guideline offense level for these offenses; however, due to concerns regarding the authority of the Commission to substantively amend the existing guideline without having issued proper notice under the Administrative Procedure Act, the Commission decided that it should not include such an amendment in

the amendment package the Commission will submit to Congress by May 1. The Commission plans to further consider the guideline addressing the distribution of obscene material in the future in order to better ensure that it reflects the appropriate punishment level for these serious offenses.

Your interest in the work of the Commission is greatly appreciated, and we look forward to working with you on these and other matters in the future.

With highest personal regards and best wishes, I am,

Sincerely,

Billy Wilkins

William W. Wilkins, Jr.
Chairman

THOMAS J. BLILEY, JR.
3d DISTRICT, VIRGINIA

MEMBER OF:
COMMITTEE ON ENERGY AND COMMERCE
COMMITTEE ON DISTRICT OF COLUMBIA
SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

WASHINGTON OFFICE
213 CANNON OFFICE BUILDING
(202) 225-2815

DISTRICT OFFICE
SUITE 101
4914 FITZHUGH AVENUE
RICHMOND, VA 23230
(804) 771-2809

Congress of the United States
House of Representatives
Washington, DC 20515

April 13, 1989

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

Dear Mr. Chairman:

As a Member of Congress interested in restricting the use and distribution of sexually explicit materials, I would like to comment on the section of the sentencing guidelines relating to obscenity.

I understand there can be difficulty in extrapolating from the penalty laid out by law Congress' perception of the severity of each offense. I am concerned, however, about an apparent indifference regarding obscenity crimes reflected in the sentencing guidelines.

When Congress has voted on decency issues, which it did as recently as last year, both Houses have been virtually unanimous in placing prohibitions or strong restrictions on obscene and indecent materials. This reflects the public's feeling that pornography harms society, particularly children. We have heard numerous horror stories of the effects of pornography on adults and children, and those who spread its corruption should not be treated lightly.

Therefore, it troubles me that the base offense level for obscenity crimes should be so low. I noted with dismay that the base level for eavesdropping (§2H3.1) is 9, while the level proposed for intentionally corrupting a minor through telephone pornography is only 8. I realize these levels are not the subject of proposed amendment in the March 3, 1989 Federal Register, but they need to be reevaluated.

Moreover, I sense there has been some misunderstanding of Section 223(b) of Title 47, which relates to dial-a-porn.

From December 1983 until April 1988, the law stated that the commercial transmission of obscenity and indecency to minors over the telephone was prohibited. There was no restriction on adults receiving these messages. In April of

last year, this law was changed and these transmissions became illegal altogether, regardless of the age of the recipient.

The proposed amendment to the guidelines (#127) provides that:

> "[2] If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

It is appropriate to increase the offense level should a dial-a-porn transmission be made to a minor. In fact, given the higher levels proposed for child exploitation and child pornography, I would expect the increase to be greater than two levels. However, it troubles me that the guidelines should add as mitigating circumstances actions (such as credit card payment) which Congress rejected as ineffective in protecting minors.

In addition, I am mystified over the phrase "or relied on such action by a telephone company." I don't call that a mitigating circumstance; I call that passing the buck.

I urge the Commission to review these comments and those made by groups like Morality in Media. I know many of my colleagues in Congress share my concern that the law enforcement community in general finds obscenity crimes more trouble than they are worth to prosecute. Such an attitude should not be reinforced by slap-on-the-wrist sentences.

Thank you for your consideration of these suggestions.

Sincerely,

Tom Bliley

Thomas J. Bliley, Jr.
Member of Congress

TJBj/maw

Breyer

UNITED STATES SENTENCING COMMISSION
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004
(202) 662-8800

Commissioner called John Steer 3/8

March 3, 1989

MEMORANDUM

TO: *Commissioners*
Staff Director

FROM: *Billy Wilkins*

RE: *Home Detention*

Attached for your review is a letter from Representative Kastenmeier concerning home detention and my proposed response on behalf of the Commission. If you have any comments on the reply letter, please direct them to John Steer as soon as possible.

Attachments

ONE HUNDRED FIRST CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2137 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

MAJORITY—225-3951
MINORITY—225-6906

February 27, 1989

The Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Judge Wilkins:

As Chairman of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, I would like to call to the attention of the Sentencing Commission a provision in the recently enacted Omnibus Anti-Drug Abuse Act of 1988 that I believe requires the Commission to reconsider its policy with respect to the use of home confinement as an alternative to imprisonment.

Section 7305 of the Act provides that home confinement may be utilized as a condition of parole, probation or supervised release, but may only be imposed "as an alternative to incarceration." This limiting clause was inserted in the bill at my insistence during the informal conference that preceded passage of the legislation. At the time, I expressed the view that home confinement should not be imposed to make a probationary sentence more burdensome, but rather should be used to sanction an individual who would otherwise be incarcerated. My position was accepted by my colleagues and is embodied in the new law.

I am aware that the current guidelines adopt a contrary approach to home confinement. Section 5C2.1(e) establishes a schedule of substitute punishments, but the relevant commentary states that "[h]ome detention may not be substituted for imprisonment." Home confinement may be imposed as a condition of probation or supervised release (§5F5.2), but it is not a form of "community confinement" (§5F5.1). Were it a form of community confinement, home detention could be imposed as an alternative to incarceration in accordance with the schedule of substitute punishments set forth in §5C2.1(e).

Recent experience in state corrections systems demonstrates that home confinement is an effective, punitive sanction, especially when enforced by electronic monitoring. Federal judges should be authorized to employe this sanction in appropriate cases without departing from the guidelines. I urge the Commission to

revise its home confinement policy in light of the recent legislation.

With warm regards,

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Intellectual Property and the
Administration of Justice

RWK:scs

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

DRAFT

March 3, 1989

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Intellectual Property and the
Administration of Justice
House Committee on the Judiciary
2137 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Chairman:

Thank you for your recent letter regarding the appropriate use of home confinement and the effect of Section 7305 of the Omnibus Anti-Drug Abuse Act of 1988.

During the past several months the Commission has been carefully analyzing this legislation and preparing amendments to the sentencing guidelines called for by the Act. Although this particular section was not one on which the Commission was consulted during the drafting of the bill, we have identified it as one of the issues related to the Act which the Commission intends to address.

Toward that end, the Commission has published for comment in the March 3, 1989, Federal Register a group of proposed amendments, a number of which address issues raised by the Act. For your information, I am enclosing a set of these proposals. In the case of home confinement, and several other complex issues, the Commission has not yet developed proposed amendment language but has outlined specific issues on which it invites comment. The item on home confinement/detention reads as follows:

§5F5.2 (Home Detention)

260. Use of Home Detention as an Alternative to Imprisonment: Section 7305 of the Omnibus Anti-Drug Abuse Act of 1988 provides that home detention may be imposed as a condition of probation, parole and supervised release, but only as an alternative to incarceration. The guidelines do not permit home detention to be imposed as a substitute for imprisonment (see §5C2.1(e) and Application Note 5 of the Commentary to §5C2.1). The Commission

DRAFT

> *seeks public comment on the question of whether the policy reflected in the existing guidelines should or should not be revised to accommodate the provision in §7305 in light of the existing guideline distinction between home detention, community or intermittent confinement, and imprisonment. Comment would also be welcomed on the question of whether home detention, if substituted for imprisonment, should be done so as an exact equivalent (i.e., one day for one day), or if some different ratio is appropriate, and whether electronic monitoring should be required to supplement probation officer enforcement of this condition. Finally, comment is invited on the question of whether home confinement should be limited to certain categories of offenses and offenders.*

As the above indicates, members of the Commission have identified a number of concerns relating to this issue which they hope will be addressed in the public comment. First, the Commission is examining the effect of the statutory change in relation to the existing guideline. While it may at first appear that the current guideline language precludes home confinement in the very situations the statute makes it available, there is a limited area in the guidelines sentencing table where this is not the case. Specifically, if the minimum term of imprisonment specified in the guideline range from the sentencing table is zero months (e.g., the guideline range is 0-6 months), the court may impose a condition requiring a period of confinement, but confinement is not required by the guidelines. In such a case, if a court nevertheless determined it appropriate to impose a condition of confinement, it could order, consistent with Section 7305 and the guidelines, that the confinement be in the form of home detention, rather than another form of incarceration. Similarly, if the minimum term of imprisonment in the guideline range is at least one but not more than six months, the court must satisfy the minimum term by confinement (which under the present guidelines may not be in the form of home detention) but it may, consistent with the guidelines and the amended statute, require that any part of the difference between the minimum and the maximum in the guideline range also be served in confinement, and that additional confinement period could be in the form of home detention.

I emphasize that the Commission has not made any decision to maintain the guideline in its current form, but simply wish to point out that we do believe it is possible, albeit in a limited class of cases, to comply with Section 7305 without departing from the guideline range.

Secondly, the Commission has sought recommendations for amendment language on the use of home confinement that would recognize the existing guideline

distinctions among types of confinement and, to the maximum extent possible, be compatible with them. The present guideline distinctions among home detention, community or intermittent confinement, and imprisonment were developed with consideration for the purposes of sentencing stated in the Sentencing Reform Act (see 18 U.S.C. §3553(a)), the central objective of reducing unwarranted sentencing disparity, and other important concerns, including prison impact. If the guidelines were to be revised to permit, without limitation, the substitution of home confinement for incarceration, that would reintroduce wide sentencing disparities and would often not be consistent with the purposes of sentencing. Related to these concerns, the Commission has asked for comment on the appropriate equivalencies between home detention and other forms of confinement and on whether certain categories of offenses and offenders should be excluded under the guidelines from consideration for home confinement.

Finally, a number of Commissioners, including myself, believe that home detention must be coupled with electronic monitoring or an equivalent means of intensive supervision in order for it to be an effective, meaningful sanction. As I have recently confirmed with the Probation Division of the Administrative Office of the United States Courts, electronic monitoring currently is little used in the federal criminal justice system as a means of probation supervision. That reality, and the lack of financial and other resources to support its broader use, was a principal factor in the Commission's previous decision regarding the limited use of home detention as a sanction. Similarly, members of the Commission remain concerned that there needs to be a demonstrated funding commitment by Congress to support electronic monitoring in order for home confinement to be more widely employed as a meaningful sentencing option.

Be assured that the Commission appreciates your strong interest in this area, and we look forward to working with you and others interested in this important issue to see that home confinement is integrated into the federal sentencing system in the most appropriate and effective manner. I have shared a copy of your letter with each member of the Commission in order that your concerns can be considered along with other public comment we hope to receive on this matter in the coming weeks.

With highest personal regards and best wishes,

Sincerely,

William W. Wilkins, Jr.
Chairman

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

April 13, 1989

MEMORANDUM:

TO: *Commissioners*
Staff Director

FROM: *Paul K. Martin*

SUBJECT: *Late Breaking Public Comment*

As the end of the public comment period approaches, the Commission has received a number of substantive letters regarding various guideline amendments. For your review, I circulate public comment from the following individuals:

Michael J. Norton - U.S. Attorney, Denver
Benjamin Bull - Citizens for Decency Through Law
Jon O. Newman - 2nd Circuit, Court of Appeals
Bob Latta - Chief USPO, Los Angeles
Jesse Helms - U.S. Senate, North Carolina
Paul Borman - Federal Defender, Detroit
Joe Russoniello - U.S. Attorney, San Francisco
William K.S. Wang - Professor, Hastings College of Law
Henry Oncken - U.S. Attorney, Houston
Ben Baer - Chairman, U.S. Parole Commission

Attachments

U.S. Department of Justice

United States Attorney
District of Colorado

Byron G. Rogers Federal Building
Twelfth Floor, Drawer 3615
1961 Stout Street
Denver, Colorado 80294

Criminal Division
303/844-2081
FTS/564-2081
Civil Division
303/844-2064
FTS/564-2064
Collections
303/844-5938
FTS/564-5938

March 23, 1989

Honorable William Wilkins
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Dear Chairman Wilkins:

This letter is in support of a change in the guidelines treatment of Title 8, United States Code, Section 1326, reentry of an alien subsequent to deportation. I understand that Mr. Peter Hoffman of your staff has discussed this matter with the Immigration and Naturalization Service, therefore, I am adding my support to the increased guideline range for illegal aliens convicted of an aggravated felony.

This upgrade would add greater credibility to the 1988 Anti-Drug Abuse Act and would give greater deterrence in this particular area.

I commend the Commission for the almost incredible amount of work and patience invested in the guidelines and thank you for the consideration to this issue from the Immigration and Naturalization Service.

Very truly yours,

Acting for

MICHAEL J. NORTON
United States Attorney

MJN:dc

cc: Joe Brown
U.S. Attorney
Nashville, TN

CDL

April 6, 1989

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

Dear Sir:

I serve as General Counsel of Citizens for Decency through Law, Inc., a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity and regulating pornography. Since 1957, CDL has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

Because the proposed sentencing guidelines for pornography offenses are so lenient they will be ineffective in dealing with this organized-crime controlled industry, we oppose the proposed amendments.

Citizens for Decency through Law, Inc., assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CDL provided expert testimony in Congress. Memoranda of law authored by CDL's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CDL has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CDL currently represents a 4-year-old victim of dial-a-porn in a $10-million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CDL has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributers. These supporters were instrumental in motivating Congress to pass the above legislation.

The proposed sentencing guideline amendments, No. 126 (distributing obscene matter), No. 127 (obscene telephone

communications) and No. 128 (broadcast obscenity), would be completely ineffective in deterring and punishing violators of these statutes. By taking the teeth out of these criminal laws, the amendments would in one fell swoop negate the years of work that went into this legislation -- by the Attorney General's Commission on Pornography, by citizen and community leaders, and by many members of the Senate and House of Representatives. Most importantly, the amendments would frustrate the will of Congress, which overwhelmingly passed the Child Protection Act in response to demonstrated and serious national problems.

IMPORTING, MAILING OR TRANSPORTING OBSCENE MATTER

The base offense level of 6 for "Importing, Mailing, or Transporting Obscene Matter," is ridiculously low for what always has been considered a very serious offense. These laws have traditionally been aimed at preventing huge interstate shipments of obscene material. And it is the consensus of law enforcement officials nationwide that there is no major interstate distributor of hard-core pornography who is not affiliated with or directly controlled by organized crime. (See generally Attorney General's Commission on Pornography Final Report, Vol. II at 1037-1238). Organized crime is not likely to be deterred from engaging in an $8 billion annual industry by a sentence of six months probation. Most states have higher penalties for transporting obscene material into the state than for selling it within, and virtually all of those states punish the crime more severely than under these proposed guidelines.

Additionally, making the penalty dependent on the volume of obscene materials transported along with whether transported for "pecuniary gain," forces the government to prove for purposes of sentencing two elements not relevant to whether the statute has been violated. This is inadvisable, for in a very real way this has the effect of amending the statute. So too with the proposed increased penalties if the material depicts sado-masochism or violence. Sado-masochism is not an element of the test for obscenity. The Congress has not determined that sado-masochistic obscenity is more heinous than other forms of obscenity; neither should this commission. All obscenity is heinous, and should be treated more seriously than by these proposed guidelines.

OBSCENE TELEPHONE COMMUNICATIONS FOR A COMMERCIAL PURPOSE

Interestingly, where the transportation of obscene material penalties are increased if for "pecuniary gain," the

penalty for telephone obscenity remains Level 6 even though the entire telephone pornography industry is engaged in the business for pecuniary gain. If pecuniary gain is important in transporting obscene materials so that the penalty can become much higher than Level 6, why is the penalty for obscene telephone communications not higher?

Again, the problem is that this commission apparently does not believe obscene telephone messages to be a serious problem, despite the clear concern expressed by Congress for the victims of telephone pornography, most frequently children. The increase by a mere two levels for dissemination to a minor is outrageous considering the documented harms associated with this activity, including those suffered by our client in the above-mentioned case. The exemption if the defendant took "reasonable action" to prevent access by minors or relied on such action by the phone company is equally outrageous, and almost certainly broad enough that no one will be sentenced according to this provision. And again, there is an unnecessary and unwarranted increase in levels if the material is sado-masochistic. Why is a description of orgasms achieved by sex with animals, or through defecation and urination, treated less severely than descriptions of someone being spanked in conjunction with sexual activity?

The telephone pornography business is a multi-million dollar industry that will not be affected in the least by laws which carry such impotent penalties.

BROADCASTING OBSCENE MATERIAL

In the broadcast medium, along with telephone pornography, we have the greatest possibility that children will be in the initial audience -- much more so than with material sold in sexually oriented businesses. Those who are responsible for disseminating harmful, illegal and obscene sex scenes in such a reckless manner must be dealt with harshly, certainly more harshly than under these proposed amendments. Also, the broadcasting industry is obviously engaged in business for pecuniary gain, yet in this area again, that does not seem to affect the commission's thinking -- the punishment remains at Level 6. And as discussed previously, CDL does not support separate categories of penalties based on the type of illegal obscenity being disseminated.

CONCLUSION

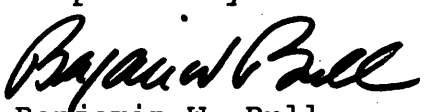
CDL urges this commission to reconsider its proposed guidelines in the above-discussed areas, and increase considerably the penalties for violations of these important federal laws. Passing these proposed amendments as currently written will have two primary effects:

(1) federal prosecutors will not seek to enforce these laws, knowing that the penalties are so weak as to not have any effect on the illegal activities; and

(2) no distributor of obscenity, no company that sells telephone sex messages, and no broadcaster of pornography will alter their behavior in an attempt to comply with the law, but will view any potential penalties as minor and incidental costs of doing business.

The law will be unenforced by prosecutors and ignored by the industry. Hence, the victimization of women and children by pornographers will continue unabated. The Child Protection Act might as well never have been passed.

Respectfully submitted,



Benjamin W. Bull
General Counsel

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

April 4, 1989

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

Dear Billy:

I hope the enclosed statement will be of use to the Commission.

Sincerely,

Jon O. Newman
U. S. Circuit Judge

Encl.

Statement of United States Circuit Judge Jon O. Newman
to the
United States Sentencing Commission
Concerning Pending Sentencing Guideline Revisions

The following comments are submitted with respect to the sentencing guideline revisions proposed for submission to Congress by May 1, 1989:

Proposal 267: The proposed revision of the guideline for consecutive sentences is highly desirable to avoid substantial injustice. As the Commission acknowledges, the existing guideline, § 5G1.3, rests on an erroneous interpretation of 18 U.S.C. § 3584(a). That statute creates a rule of interpretation for sentences that fail to specify whether sentences are concurrent or consecutive; if the sentences are imposed at different times, the sentences are to run consecutively unless the court orders the sentences to be concurrent. However, as the Commission now recognizes, the statute provides no rule to guide the sentencing judge in making the decision whether to make the sentences consecutive or concurrent. The existing § 5G1.3 requires consecutive sentences, subject only to an exception in the event the second crime arose out of the same transaction as the first crime. That is an extremely harsh rule. It is not required by section 3584(a), and it is not sound policy. The Commission has recognized that sentences imposed for different crimes charged in several counts of the same indictment should not be completely cumulated, but instead should be subjected to the refined analysis of the multiple count guideline. See Sentencing Guidelines, Part D. The Commission is therefore on sound ground in proposing to delete the existing § 5G1.3.

The proposed revision of § 5G1.3 is commendable but obviously of limited application. It provides for a consecutive sentence if the second offense occurred while the defendant was serving a prior unexpired sentence. Left unanswered is the more frequent situation where the second crime was committed while the defendant was not serving a prior sentence. One appropriate solution might be to have the sentencing judge select a sentence for the second crime that, when aggregated with the combined effective term of the prior sentences, produces a total sentence equal to the sentence that would be indicated under the multiple count guideline. It might be useful, however, not to specify this approach as a mandatory guideline but only as a suggested approach. The reason for caution is that a requirement of using the multiple count guideline may confront a sentencing judge with difficult problems of calculation in cases where the prior crimes are state offenses for which the federal guidelines offer inadequate guidance. In many situations, the prior sentence may be slight, and the federal judge can achieve an appropriate sentence by imposing a guideline sentence concurrently. Consecutiveness is a blunt instrument, and care should be taken not to require its use as a general rule because of the many unforeseen situations in which its use would plainly be contrary to the sentencing objectives of the Sentencing Reform Act of 1984.

Proposal 3 (and related Proposals 17, 19, 25, 29, 51, and 54): This is an ill-advised change that risks imposing upon sentencing judges needless fact-finding tasks without any commensurate benefit in

more equitable sentencing. The Commission's current guidelines already go too far in the direction of unnecessary precision by requiring sentencing judges to distinguish among three degrees of injury. The virtue of the "interpolation" rule is that a judge need not precisely determine whether an injury was level one or two, or level two or three; the judge may "depart" and use an intermediate value, thereby avoiding precise fact-finding and the risk of reversal for having used the wrong level. If interpolation is eliminated as a departure and intermediate levels are substituted, the judge will now be obliged to determine as a fact which of five categories most accurately describes the injury. This is a pointless inquiry.

The better solution would be to authorize the judge to increase the base offense level by an increment within a range of two to six levels depending on the judge's assessment of the seriousness of the injury. If that approach is not acceptable, it would be far preferable to retain the present interpolation/departure approach.

Proposal 10: The proposed addition of paragraph 5 to the Notes on 21B1.2(a) sets forth an example that does not illustrate the guideline. The guideline is to be applied, according to paragraph 5, "if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." The illustration is an instance where the evidence is insufficient to support a separate conviction. Though a judge would not convict in that situation, the example should be of an instance where the judge, as fact-finder, deems the evidence not persuasive of guilt beyond a reasonable doubt.

More important than the inadequacy of the Note, however, is the inadvisability of adopting any language, such as now proposed for § 1B1.2(d), which, unless clarified, risks imposing upon sentencing judges the obligation to make discrete factual determinations as to whether the defendant is guilty of conspiring to achieve each object of the conspiracy. With some indictments, that would impose upon the judge a formidable and time-consuming task. Some flexibility should be added to § 1B1.2(d) or to the commentary to make it clear that a judge need not perform this fact-finding as to all objects of a conspiracy upon a determination that the sentence as determined without such fact-finding adequately serves the purposes of the Sentencing Reform Act.

Proposal 12: This well-intentioned proposal poses a distinct risk of creating considerable uncertainty as to what the Commission intends because the proposal appears to be inconsistent with the law of conspiracy. The problem arises in the second example of proposed § 1B1.3, which states that as to a defendant who conspires to import marihuana, relevant conduct does not include subsequent shipments from which he received no benefit and in which he played no part "because those acts were not in furtherance of the execution of the offense that he undetook with Defendants A and B." Yet, if these shipments were really not in furtherance of the offense, then they were not within the scope of the conspiracy of which C may be convicted. However, C is liable, under conspiracy (and joint venture) law for subsequent shipments that were within the scope of the conspiracy even if he received no benefit from them and played no part in them. Thus, to

state flatly that the described shipments were "not in furtherance of the execution of the offense" runs counter to substantive law. The Commission can probably accomplish its purpose by revising the guideline to make clear that it is endeavoring to describe only what is relevant conduct for purposes of the guidelines and not trying to describe what is culpable conduct for purposes of a determination of guilt.

April 4, 1989

JESSE HELMS
NORTH CAROLINA

United States Senate

WASHINGTON, DC 20510

April 10, 1989

The Honorable William W. Wilkins, Jr.
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am very concerned about the proposed amendments to the sentencing guidelines as published in the Federal Register of March 3. The proposed pornography related amendments have such low base sentencing levels that smut dealers' penalties will be scarcely more than a slap on the wrist. Similarly, the mandatory minimum sentence for possession of crack cocaine under the proposed amendments essentially is likely to become the maximum sentence to be applied in the vast majority of cases.

Congress elevated the Dial-a-Porn offense (Obscene Telephone Communication) to a felony, and also increased the minimum penalty for possession of crack, to emphasize the gravity of these crimes. Yet most of the proposed guideline amendments as drafted do not reflect this intent.

I sponsored the original Dial-a-Porn amendment in the Senate. I also worked very closely with the Administration to ensure that the pornography-related measures were included in the drug bill. Therefore, I believe the prescribed sentence under guideline amendment Number 127, concerning Dial-a-Porn, and the proposed amendment concerning the Broadcast of Obscene Material (No. 128) is inordinately lenient. This base level 6 sentencing scheme can be satisfied by merely placing the offender on probation. Such negligible punishment is totally at odds with Congress's intent in passing these measures.

The Commission's proposed amendment regarding the Distribution of Obscene Material (No. 126) also appears too lenient. The base sentencing level of 6 for a first offense can be increased to level 11 for those engaged in the business of selling obscene material. However, further increases in the sentence would not be allowed unless the

materials seized as part of the case exceeded $100,000 in value--a very unlikely occurrence in pornography cases. In practice, therefore, the proposed guideline amendment will most often result in a maximum sentencing level of 11 which, with a 2 level reduction for the "acceptance of responsibility" factor in the guidelines, ultimately ends up being a mere 4-10 month sentence. This result under the proposed guidelines stands in stark contrast to the law which provides up to 5 years in jail for a first offense.

Yet another problem with the pornography-related amendments is that fines tied to the base sentencing levels are too low. An individual receiving a base level 6 sentence under the Dial-a-Porn statute could be assessed a fine of just $500 to $5,000. These fines should be higher in light of Congress's intent to increase the severity of punishment for these crimes. Moreover, the alternative guideline fines based upon gain and loss simply will not be applicable in most cases. The guidelines, therefore, fail to provide an effective deterrent in the form of a monetary sanction.

Finally, the proposed guideline amendment concerning a mandatory minimum sentence for possession of crack cocaine (No. 101), like the pornography amendments, does not accurately reflect Congress's intent on this offense. The proposed amendment essentially establishes the mandatory minimum as the sentence to be applied in most cases.

The legislative amendment I sponsored in the Senate, which was enacted into law as part of the Anti-Drug Abuse Act of 1988, authorizes a 5-20 year sentence for a first offense of possessing 5 grams of crack. Yet under the proposed guidelines, an individual with no criminal history would not receive the maximum 20-year sentence even if he was caught with more than **500** grams. On the other hand, individuals falling within the worst criminal history category would not receive the maximum sentence even if they are caught with more than 50 grams of crack. In fact, such hardened criminals are not assured of receiving the maximum sentence unless they are caught with more than 150 grams in their possession.

The failure of the proposed amendments to invoke the maximum sentence in the presence of such high quantities of crack is egregious. I--and other members of Congress

supporting the law--went to great lengths to demonstrate that just 5 grams of crack (50 vials) constitutes a serious offense even if an individual has no prior criminal record. The Commission should heed Congress's intent to exact singularly severe penalties for crack-related offenses.

I know of your strong commitment to strengthening the criminal justice system to ensure that justice is meted out. Indeed, that is why I am bringing my concerns to your attention. I strongly urge that you in your capacity as Chairman of the Sentencing Commission consider higher base levels, more extensive offense characteristics, and other measures necessary to strengthen the proposed amendments to the sentencing guidelines so that perpetrators of these crimes will receive the tough sentences Congress intended.

Kindest regards.

Sincerely,

Jesse Helms

JESSE HELMS:sjc

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April 10, 1989

Judge William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvanie Avenue
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I write on behalf of the Federal Defense Lawyers of Michigan to present our comments on some of the Commission's proposed Guideline amendments.

We appreciate the opportunity to address our concerns to the Commission. At the same time, we believe that it is too early in the life of the Guidelines for the Commission to embark on this substantial revision without having the benefit of adequate empirical research on the initial workings of the Guidelines. We concur with the comments of Commissioner Block, reported in the recent Federal Sentencing Reporter:

> Certainly, before we go much further in amending the existing guidelines, we ought to have a more comprehensive picture of how our initial efforts to regulate the process have actually fared.

Further, the Guidelines state at 1.4 and 1.12 that they will build upon data that can provide "a firm empirical basis for revision". That data does not yet exist.

At the same time, because the Commission has proceeded to propose amendments, we present the following comments:

1. As to #169 -- Offense Levels for Certain Escapes -- we concur with the Bureau of Prisons' recommendation that decreases the Base Offense Level (BOL) for an escape from a non-secure custody, e.g., halfway house. This reduction is justified for two reasons:

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Deborah J. Gaskin
Chief Defender

a. the Guidelines have drastically increased the sanctions for escapes from halfway houses as contrasted with past Federal sentencing practices; and

b. the nature of the offense does not support such a high (13) BOL.

Finally, we do not believe that the nature of the original offense of incarceration should be determinative of whether the individual receives the lower BOL.

2. Re §5F2 -- House Detention -- we believe that the Commission should conform the Guidelines to the provision of the Omnibus Anti-Drug Abuse Act of 1988 which states that house probation may be used as an alternative to incarcera-tion.

3. Re §5G1.2 -- Sentencing on Multiple Counts of Conviction -- we believe that the change from "may be imposed" to "are to be imposed" is not justified, and further that it conflicts with the enabling legislation for the Guidelines.

4. Re §5K1.1 -- Substantial Assistance to Authorities -- we oppose the change from "made a good faith effort" to "provided". We believe that its original language protects both the government and the defendant in this on-going plea process, whereas the proposed amendment destroys the necessary protection for the defendant who makes every possible effort to assist the authorities.

5. Re §5K1.2 -- Refusal to Assist -- we believe that the change in the commentary can be utilized by the government or the probation officer to prevent a defendant from receiving a reduction for acceptance of responsibility unless he assists authorities.

This drastic change rewrites §3E1.1, Acceptance of Responsibility, by adding as a precondition that the defendant must assist authorities, e.g., act as an undercover informant, in order to receive his two point reduction under §3E1.1. This amendment should be withdrawn en toto to preserve the intent and integrity of §3E1.1.

6. Item 50 -- increases in the offense level for robbery. We oppose the proposed increases because:

a. the Commission lacks adequate empirical data and sufficient comments to support this significant upward move;

b. the reality is that Guideline sentences, without significant good time, are more harsh than prior federal sentences -- we are not comparing apples and apples.

7. §4B1.1 (Career Offender) -- we support Option 1 as an initiative toward creating a flexibility in sentencing career offenders. We note with interest the proposal presented by the American Bar Association that would make "the career offender designation a basis for departure, given the tremen-dous variations among the underlying prior convictions that define a career offender."

Finally, we wholeheartedly support the ABA's forthcoming proposal for an advisory committee of practitioners to "provide the Commission with the on-going views of criminal law practitioners on Guideline application and amendment issues."

We look forward to working with the Commission to improve the Federal criminal justice system.

Sincerely,

Paul D. Borman/ccm

Paul D. Borman
Chief Federal Defender

PDB:cjm

cc: Winston S. Moore
Staff Director

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURT HOUSE
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April 6, 1989

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

Re: Comment on Proposed Change for Home Detention

Dear Judge Wilkins:

I write to comment on the Commission's proposed change to allow imposition of Home Detention as an alternative to incarceration.

In January 1988, we began operation of one of two pilot projects (the other being in Miami) to study the use of electronic monitoring. These pilot projects were established by joint agreement of the Parole Commission, the Bureau of Prisons and the Probation System. In this project, selected inmates have had their parole advanced up to six months and have been released directly from the institution to an approved residence rather than being released, as inmates, through a community treatment center. Participants in the project are subject to curfew restrictions which confines them to their homes, other than for work, counseling or other activities deemed appropriate to their adjustment in the community as approved by the probation officer. Curfew compliance has been enforced by probation officer's utilizing a contractually-provided electronic monitoring system which is funded by the Bureau of Prisons. To date, approximately 90 parolees have completed or, are currently in, the project in Los Angeles. While some initial problems were encountered with equipment, these difficulties have been resolved by the vendor. Although this 18-month pilot project is not yet completed, our experience has led to the following conclusions:

- Home Detention is enforceable through intensive supervision with the use of electronic monitoring systems;
- Home Detention is a cost effective alternative to incarceration;
- Electronic monitoring systems have progressed technologically to provide a sufficient level of reliability to warrant careful expansion toward nationwide operation;

° Home Detention effectively restricts liberty while providing a structured re-entry into the community which maximizes community protection.

With this experience as the preface for my comments on the proposed policy change, I advocate a change in sentencing guidelines to allow Home Detention to be imposed as a condition of probation or supervised release as an alternative to incarceration. Home Detention, in my view, is particularly appropriate for home confinement since it provides restriction of liberty in a program of equal or greater structure than a community treatment center at a reduced cost. Home Detention has the added advantage of commencing direct supervision by a probation officer to effectuate a case plan to address individual problems immediately following sentencing. Home Detention could also be utilized for intermittent confinement in which the probationer could be restricted in the home on weekends but allowed free movement in the community during the week.

The use of Home Detention as a substitute for imprisonment is quite plausible but may require stricter guidelines. Although I would advocate a ratio of two days of Home Detention to one day of imprisonment, the use of Home Detention in some cases may deprecate the required and justified punishment of a prison sentence. Some consideration should probably be given to the types of cases which might be precluded from home confinement substitution for imprisonment, such as crimes of violence and drug trafficking. A preclusion might also be considered for the use of Home Detention to substitute for imprisonment in cases where the Court pursues a departure below guidelines.

Other than the possible exclusions noted above, I would not suggest that any categories of offenders be limited from participation in home confinement as a condition of probation or supervised release. The most serious offenders, who might otherwise be placed in a community treatment center, should be the highest priority for placement in Home Detention which provides the kind of intensive supervision or structure which can best serve the needs of individual treatment and community protection.

Finally, I cannot envision the imposition of Home Detention without the aid of electronic monitoring systems to enforce curfew compliance. The intensity of staff attention necessary to enforce compliance without electronic monitoring systems is unfeasable and cost prohibitive. If Home Detention is to satisfy any punishment or custodial objectives, resources must be provided to appropriately ensure compliance.

Home Detention with electronic monitoring offers not only a cost effective alternative to incarceration, but also an important new tool for intensive, structured supervision of offenders in the community. Based upon our experience, we are committed to further development of this new program alternative and encourage your support for its expanded use in the Federal Criminal Justice System. If I can supply any additional information which would be helpful to the Commission from the experience of our pilot project, please do not hesitate to contact me.

Very truly yours,

ROBERT M. LATTA
Chief U. S. Probation Officer

RML:jk

cc: Honorable Benjamin F. Baer, Chairman
United States Parole Commission
5550 Friendship Boulevard
Chevy Chase, Maryland 20815

Donald L. Chamlee, Chief
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March 31, 1989

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

Re: Upgrading the Sentencing Classification Level for Certain Alien "Aggravated Felons"

Dear Judge Wilkins:

I am writing to lend my support to the Immigration and Naturalization Service's efforts to get the Sentencing Commission to upgrade the sentencing classification level for certain "aggravated felons." In the Service's view, such an upgrade is necessary to more fully carry out the Congressional intent in this area as expressed in the recently enacted Anti-Drug Abuse Act of 1988 (ADAA). I have been advised that INS Headquarters has already discussed this matter with Peter Hoffman of the Commission's staff.

One of the many provisions within the ADAA that directly impacts upon the mission of the Immigration & Naturalization Service is the enhancement of criminal penalties under Title 8, United States Code, Section 1326. Subtitle J, Title VII, of the ADAA (attached), is designed to return credibility to the Immigration and Nationality Act regarding criminal aliens in general and "aggravated felons" in particular. In accordance, the spirit of the law and the manner in which the INS will implement it are designed to accomplish three things:

1. to effectively remove "aggravated felon" criminal aliens from the streets of America through mandatory detention;

2. to facilitate an expeditious order of deportation by shifting the onus from the United States to the "aggravated felon" alien in administrative proceedings. A "conclusive presumption" of deportability now attaches to an alien convicted of murder or narcotics trafficking, as well as an attempt or conspiracy to commit either of these offenses; and

3. to create a meaningful deterrent for "aggravated felons" re-entering the United States through enhancement of the criminal penalties. The legislative intent regarding this provision is found in a statement by Senator Lawton Chiles when he first introduced the measure in the First Session of the 100th Congress:

> This provision is intended to strengthen immigration law by creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States. In addition, this criminal offense will give law enforcement authorities a broader arena for prosecuting the drug offenders as current tax fraud and mail fraud violations provide.

While implementation procedures for points one and two of this three-pronged approach are fairly well developed, the INS has an immediate problem regarding point three. The fifteen year enhancement on reentry was originally designed as a mandatory minimum sentence. This was deleted, however, in the informal conference between the House and Senate. At present, the Congressional intent of the measure is severly hampered by the very low level attached to this violation in the Federal Sentencing Guidelines. To rectify this situation, an upgrading of the sentencing classification for these alien offenders to a level 24 would be appropriate in that "aggravated felons" would then receive from five and one-half to ten and one-half years "real time." This would provide the meaningful deterrent for alien aggravated felons intended by Congress.

Thank you for your attention to this most important matter.

Very truly yours,

JOSEPH P. RUSSONIELLO
United States Attorney

Enclosure

(1) by inserting "(A)" before "crime"; and

(2) by inserting after the semicolon the following: "or (B) is convicted of an aggravated felony at any time after entry;".

(b) APPLICABILITY.—The amendments made by subsection (a) shall apply to any alien who has been convicted, on or after the date of the enactment of this Act, of an aggravated felony.

SEC. 7345. CRIMINAL PENALTIES FOR REENTRY OF CERTAIN DEPORTED ALIENS.

(a) IN GENERAL.—Section 276 (8 U.S.C. 1326) is amended—

(1) by striking out "Any alien" and inserting in lieu thereof "(a) Subject to subsection (b), any alien"; and

(2) by adding at the end thereof the following new subsection:

"(b) Notwithstanding subsection (a), in the case of any alien described in such subsection—

"(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 5 years, or both; or

"(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.".

(b) APPLICABILITY.—The amendments made by subsection (a) shall apply to any alien who enters, attempts to enter, or is found in, the United States on or after the date of the enactment of this Act.

SEC. 7346. CRIMINAL PENALTIES FOR AIDING OR ASSISTING CERTAIN ALIENS TO ENTER THE UNITED STATES.

(a) IN GENERAL.—Section 277 (8 U.S.C. 1327) is amended by inserting "(9), (10), (23) (insofar as an alien excludable under any such paragraph has in addition been convicted of an aggravated felony)," immediately after "212(a)".

(b) APPLICABILITY.—The amendment made by subsection (a) shall apply to any aid or assistance which occurs on or after the date of the enactment of this Act.

(c) CONFORMING AMENDMENTS.—(1) The section heading for such section is amended by striking out "SUBVERSIVE ALIEN" and inserting in lieu thereof "CERTAIN ALIENS".

(2) The table of contents of such Act is amended by amending the item relating to section 277 to read as follows:

"Sec. 277. Aiding or assisting certain aliens to enter the United States.".

UNIVERSITY OF CALIFORNIA

HASTINGS COLLEGE OF THE LAW

WILLIAM K.S. WANG
Professor of Law

March 15, 1989

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

Dear Commissioner Wilkins:

I understand that the Commission has invited public comment on the fraud guidelines.

Although I have no remarks on the level of the guidelines, I do wish to address the issue whether stock market insider trading is a victimless crime, as some commentators have suggested.

Each stock market insider trade has specific victims. The outstanding number of shares of a company generally remains constant between the insider trade and public dissemination of the information on which the insider acted. With an insider purchase of an existing issue of securities, the insider has more of that issue at dissemination; someone else must have less. That someone is worse off because of the insider trade. With an insider sale of an existing issue of securities, the insider has less of that issue at dissemination; someone else must have more. That someone is worse off because of the insider trade. In a 1981 law review article, I called this phenomenon "the law of conservation of securities" and labelled those harmed by it "trade victims." Enclosed is an excerpt from that article, Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?, 54 S. Cal. L. Rev. 1217, 1234-40 (1981).

Those who trade on insider information clearly benefit financially. To assume that such a benefit has no corresponding cost is contrary to common sense. To paraphrase Milton Friedman, there is no such thing as a free insider trade.

Respectfully,

William Wang

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TRADING ON MATERIAL NONPUBLIC INFORMATION ON IMPERSONAL STOCK MARKETS: WHO IS HARMED, AND WHO CAN SUE WHOM UNDER SEC RULE 10b-5?

WILLIAM K.S. WANG*

TABLE OF CONTENTS

* Professor, Hastings College of the Law. B.A. 1967, Amherst College. J.D. 1971, Yale Law School. Member, California Bar. This Article was written primarily while the author was a professor of law at the University of San Diego.

Roger Blanc, Esq., and Professors Joseph Bishop, Louis Loss, Grant Morris, Mike Navin, and David Ratner made helpful comments on portions of the drafts of this Article. The author is especially grateful to Professor Homer Kripke for thoroughly reviewing the manuscript and suggesting numerous improvements, and to Professor Lawrence Alexander for acting as a sounding board throughout the writing of this Article. Valuable research assistance was provided by Gerald Sims, Edwin F. McPherson, and Cheryl Peterson.

better off.[62] Members of the same type class, however, are unsympathetic figures. Along with the inside trader, they are either buying into a windfall gain or selling into a windfall avoidance of loss. On the other hand, members of the opposite type class are selling into a fortuitous avoidance of gain or buying into a fortuitous loss. The price change induced by the inside trade decreases the extent of these various undeserved fortuities. Arguably, this is beneficial.[63]

C. Harm to Specific Individuals Caused by the Nondisclosure

1. *Moral or Legal Causation*

A stock market inside trader fails to disclose the nonpublic information to both the party in privity and the world. As noted in Part III(B) above, the typical inside trade harms neither the party in privity nor the overwhelming majority of investors. Normally, the inside trader is a total stranger to the party in privity and other investors. If the inside trader were to disclose to a stranger who would be unharmed by the trade, the inside trader would be acting like a Good Samaritan.[64] If the inside trader had disclosed to the party in privity, the latter would have traded at a different price or not at all. Had the inside trader decided to be a quasi-Samaritan and disseminated the secret information to the investing public, the universe would have been dramatically different. In the case of favorable information, the price would have been higher. Sellers would have benefited, and buyers would have been harmed. Many individuals would have abstained from selling once they knew the good news. With adverse news, the price would have dropped. Buyers would have been better off, and sellers would have been harmed. Many investors would have abstained from buying once they knew the bad news.

If the inside trader does not engage in any quasi-Samaritan disclosure, the question is whether he has morally or legally harmed all those who would have been better off had he disclosed. This is the issue of

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62. *See* Manne, *In Defense of Insider Trading,* 44 Harv. Bus. Rev. 113 (1966), *reprinted in* R. Posner & A. Scott, Economics of Corporation Law and Securities Regulation 130, 132 (1980). *Cf.* Stromfeld v. Great Atl. & Pac. Tea Co., 484 F. Supp. 1264, 1270, 496 F. Supp. 1084, 1086 (S.D.N.Y. 1980) (amended complaint) (If the price of A & P common stock was artificially depressed by defendants' section 10(b) and 13(d) violations, plaintiff buyers actually benefited by paying less for the stock than it was actually worth.).

63. *See* text accompanying notes 28-31 *supra*. *But see* note 32 and accompanying text *supra* (suggesting that inside trading would not have a significant effect on stock prices).

64. Henceforth, such an obligation to disclose will be referred to as a "quasi-Samaritan" duty.

whether an inside trade has helped or harmed a specialist/market-maker. Suppose that the inside trader bought 100 shares from a specialist, thereby reducing the latter's inventory from 1100 shares to 1000, and that the specialist kept his prices absolutely stable. Purchases and sales cancel each other, so that at the time of disclosure of the good news the specialist's inventory was 1000 shares.

The following are two scenarios that might have happened *absent* the inside trade. Because the specialist wanted to decrease his inventory to 1000 and because there was no inside trade resulting in that reduction, the specialist lowered his prices. His inventory could have been 800 at the time of disclosure of the good news. Alternatively, after the specialist lowered his prices, his inventory could have initially decreased to 800; but before disclosure he could have compensated for the excess decrease by raising his prices, and his inventory could have unexpectedly risen to 1300 by the time of disclosure.

In the first case, the inside trade has made the specialist considerably worse off. Indeed, the harm to the specialist exceeds the gain to the inside trader. In the second case, the inside trade has made the specialist better off. This hypothetical situation is quite simple; in reality the specialist will have altered his prices many times between the time of the inside trade and the time of the public disclosure.

The problem is that the inside trade changes the specialist/market-maker's inventory. This change in inventory may create a pattern of price quotations different from the one that would have existed absent the trade. Such an altered pattern will create different reactions by the public and by competing specialists and market-makers. To determine the effect of this new price pattern on the intermediary in privity with an inside trader, it is necessary to recreate the pattern that would have prevailed absent the inside trade and to ascertain the consequence of that pattern on the intermediary's inventory. Unfortunately, this is impossible. Therefore, a specialist/market-maker cannot demonstrate harm from an inside trade.

4. *The Law of Conservation of Securities*

Despite the suggestions of some commentators that market participants are generally not harmed by inside trading,[56] each act of inside trading

56. Financial Indus. Fund, Inc. v. McDonnell Douglas Corp., 315 F. Supp. 42, 44 (1970); *rev'd on other grounds,* 474 F.2d 514 (1973), *cert. denied,* 414 U.S. 874 (1973); 3 A. BROMBERG & L. LOWENFELS, *supra* note 2, § 8.7(2), at 217 & nn.75-76 ("[Inside] trading causes no damage", Bromberg makes almost the opposite statement later on the same page, however: "Except for

does in fact harm other individuals.[57] With a purchase of an existing issue of securities, someone has less of that issue; with a sale of an existing issue, someone ultimately acquires more of that issue. This phenomenon is labeled "The Law of Conservation of Securities." This law has three corollaries:

1. When someone trades on nonpublic information, the group of all other investors suffers a net loss. (Some members of this group gain, others lose; but the losses will exceed gains.)

2. The group's net loss is equivalent to the inside trader's gain.

3. To the extent that some outside investors gain from an inside trade, those harmed by the trade will lose more than the inside trader's gain.

5. *Who Bears the Net Loss Caused by an Inside Trade*

The Law of Conservation of Securities could work in one or both of two ways. The inside trade could induce opposite trade transactions that otherwise would not have occurred, or preempt trades of the same type that otherwise would have occurred. Thus, there are at least two categories of people harmed by an inside trade: those who would not have made bad purchases or sales but for the inside trade; and those who would have made good purchases or sales but for the inside trade.[58]

a. *Induced adverse trades*: An inside purchase could be a but for cause of many different transactions. Sellers in these induced transac-

what insiders as a group take out, the net effect on the market . . . is zero."); Dooley, *supra* note 39, at 33, 36, 55, 68; Note, *Damages to Uninformed Traders for Insider Trading on Impersonal Exchanges,* 74 COLUM. L. REV. 299, 310, 316, 317 (1974) [hereinafter cited as *Damages to Uninformed Traders*]; Note, *Civil Liability Under Section 10b and Rule 10b-5: A Suggestion for Replacing the Doctrine of Privity,* 74 YALE L.J. 658, 675-76, 679 (1965). *Cf.* H. MANNE, *supra* note 20, at 93-104 (outsiders as a group do not necessarily suffer a net loss as a result of insider trading); Ratner, *Federal and State Roles in the Regulation of Insider Trading,* 31 BUS. LAW. 947, 966-67 (1976) (Mundheim discussion following article) (market participants generally not harmed); W. PAINTER, *supra* note 2, § 5.10, at 249 ("[I]n a perfectly functioning econometric model, investors . . . might realize that insider trading does not really "hurt" them directly . . ."), 195 ("open market investors are not even hypothetically harmed by insider trading in a monetary sense, assuming of course that the insider trading does not somehow induce public trading by its effect on the market price . . . .").

57. Comment, *Insider Trading Without Disclosure—Theory of Liability,* 28 OHIO ST. L.J. 472, 477 (1967); Note, *Insider's Liability Under Rule 10b-5 for the Illegal Purchase of Actively Traded Securities,* 78 YALE L.J. 864, 872 (1969). *See* Scott, *supra* note 39, at 807, 809.

58. *See* H. MANNE, *supra* note 20, at 103; Whitney, *Section 10b-5: From Cady, Roberts to Texas Gulf: Matters of Disclosure,* 21 BUS. LAW. 193, 201 (1965); Note, *supra* note 57, at 872 n.45.

tions are adversely affected because they miss the increase in value after the public announcement of good news. Similarly, an inside sale could be a but for cause of transactions in which buyers suffer a windfall loss when the bad news is announced.

There are many ways by which an inside trade could directly or indirectly induce transactions that otherwise would not have occurred. If the party in privity had a limit order, there is a remote possibility that the order would not have been executed but for the inside trade. The most common way by which an inside trade induces transactions, however, is by altering the behavior of a specialist or market-maker. Whether or not the party in privity is a specialist/market-maker, the inside trade probably affects an intermediary's inventory. If the inside trader is in privity with the specialist/market-maker, the intermediary's inventory is directly affected. Even if the inside trader deals with a public investor, a trade has probably been diverted from a specialist or market-maker. This direct or indirect change in the intermediary's inventory may precipitate a different pattern of price quotations and transactions by him. In transactions that otherwise would not have occurred, either the buyer or seller is harmed—depending upon whether the nonpublic information is good or bad.

Although it is unlikely, the additional volume or price movement caused by a large inside trade conceivably might attract trend-riding speculators and create an avalanche effect that would harm all those who sold into good news or bought into bad news.

b. *Preempted traders*: Instead of inducing opposite trade transactions, an inside trade may preempt trades of the same type.[59] When an inside trade directly or indirectly changes a specialist/market-maker's inventory, the new pattern of quotations may either induce new transactions or deter ones that would otherwise have occurred. For example, if an inside trade increases a market-maker's inventory, he may lower his price quotations to encourage purchases from him and deter sales to him. If an inside trade decreases the market-maker's inventory, he may increase his prices to encourage sales to him and deter purchases from him.

c. *The practical difficulty of identifying those harmed by an inside trade*: The foregoing analysis demonstrates that after an inside trade,

59. H. MANNE, *supra* note 20, at 103; Whitney, *supra* note 58, at 201; Note, *supra* note 57, at 872 n.45.

the universe is different than it would have been in the absence of the trade. In practice, however, it is virtually impossible to recreate the universe that would have existed had there been no inside trade.

If the party in privity, *P*, is a specialist/market-maker, *S/M*, his inventory is directly affected by the trade. If *P* is a member of the public, a *S/M*'s inventory is indirectly affected by the trade for one of the following reasons: (1) *P* would otherwise have traded with a *S/M*; (2) *P* would have traded with *X*, who instead traded with a *S/M*; (3) *P* would have traded with *X*, who instead traded with *Y*, who would have traded with a *S/M*, and so on.

It is impossible to determine how the inside trade's direct or indirect effect on an intermediary's inventory altered the intermediary's price quotations, and how these in turn affected the behavior of public investors. The following diagram illustrates the problem (the arrows indicate the direction of the stock transfers):

1. *T* (an inside trader) ⟷ (trades with) *P* (directly or indirectly affecting the inventory of *S/M*)

2. *S/M* alters his price quotations and either:
   a. *S/M* (sells) → *B*$_1$, *B*$_2$ . . . (preempting *X*$_1$, *X*$_2$ . . . who otherwise would have sold) (who otherwise would not have bought)

   OR

   b. *S/M* (buys) ← *S*$_1$, *S*$_2$ . . . (preempting *Y*$_1$, *Y*$_2$ . . . who otherwise would have bought) (who otherwise would not have sold)

It is therefore extremely difficult to allocate an inside trade's harm between intermediaries, outside marginal buyers or sellers, and outside marginal nonbuyers and nonsellers.

Such difficulty is not confined to securities markets. Suppose *A* owns a small car rental agency and secretly learns that a certain make of car has a serious defect. *A* owns five cars of this make and sells all of them to a large used car dealer, who still owns these cars at the time the defect is made public and prices drop. It is possible that in both the universe in which *A* sold the five cars and the one in which he did not, the dealer would have the same inventory at the time of the public

announcement of the defect. In the first universe, prior to the announcement, the dealer may have lowered his prices or raised them less than he otherwise would have. These lower prices may have attracted purchasers or deterred sellers or both. Thus, in the first universe, some members of the public may find themselves owning defective cars who would not have owned them in the second universe.

Recreating the hypothetical second universe, however, is almost impossible. Both the used car dealer and his purchasers will give self-serving testimony. Regardless how low the level of his inventory was at the time of the announcement, the dealer will claim that his inventory would have been even lower had *A* not sold him the five cars. Regardless how high the prices actually charged by the dealer were during the period between *A*'s sale and the public announcement, outside buyers will claim that *A*'s sale caused the dealer to charge lower prices than otherwise, and that but for these lower prices, the outsiders would not have bought. Outside nonsellers will claim that *A*'s sale caused the dealer to charge lower prices than otherwise, and that but for these lower prices, the nonsellers would have sold. In summary, the Law of Conservation of Securities indicates that although an inside trade does harm specific individuals, identifying them is almost impossible.[60]

60. In unusual situations, it may be possible to identify the probable victims of an inside transaction in a publicly traded stock. When the stock is very thinly traded, transactions may be so isolated that a plaintiff could argue persuasively that, but for defendant's trade, plaintiff would have had a smaller (or larger) holding of the stock. In addition, institutions and block-trading firms dealing in large amounts of shares occasionally may operate in what is in effect a separate market with isolated transactions. In this block-trading market, a plaintiff might be able to demonstrate that but for the defendant's trade the plaintiff would have had a smaller (or larger) holding of stock. *Cf.* ALI CODE, *supra* note 2, § 1702(b), Comment (4) (observing that many institutional trades are negotiated "offboard" and "crossed" on the floor, and that such trades would fall within the Federal Securities Code provision covering nonfortuitous transactions not effected in a stock market).

Calls are options to buy stock; puts are options to sell. Both types of options are issued or written by private individuals who obligate themselves to buy or sell at a certain price. An option trade based on nonpublic information also harms specific individuals. If a person buys a call based on inside information, the purchase either preempts another purchase or elicits the writing of a new call by someone (not necessarily the party in privity) who would not have done so otherwise.

In the first case, the person whose purchase is preempted is harmed. In the second case, the person who writes the additional call is worse off unless he purchases additional shares to "cover" the call. If the writer's call is "covered," the option buyer (on inside information) in effect has bought shares with the option writer acting as intermediary. The option writer is not harmed, but the inside trader's de facto purchase is subject to the Law of Conservation of Securities. Either the stock purchase preempts another buyer or it attracts a seller of the stock.

The analysis of puts is similar. When a person buys a put based on inside information, the purchase either preempts another option purchase or causes a new put to be written by someone. The writer of the new put may or may not cover himself by short selling the stock.

When a person trades in puts or calls based on nonpublic information, the harm is especially difficult to trace. It may fall on: (1) a person who has been induced to write an option, (2) a preempted would-be option purchaser, (3) someone who would not have traded the stock but for a stock trade by the option writer, or (4) someone who would have traded the stock but for a stock trade by the option writer. For a simpler discussion of insider purchases of calls omitting the "crowding out" complication, see H. MANNE, *supra* note 20, at 90-91.

For a general discussion of option trading, see SEC, *Report of the Special Study of the Options Market* (Committee Print for the use of the House Committee on Interstate and Foreign Commerce, 1979), Securities Exchange Act Release No. 15569, ch. II (Feb. 15, 1979); G. GASTINEAU, THE STOCK OPTIONS MANUAL (2d ed. 1979); OPTION TRADING (L. Merrifield, chairman, 1974) (PLI Course Handbook No. 146); Johnson, *Is It Better To Go Naked in the Street? A Primer on the Options Market*, 55 NOTRE DAME LAW 7 (1979); Lipton, *The Special Study of the Options Markets: Its Findings and Recommendations*, 7 SEC. REG. L.J. 299, 305-07 (1980).

6. *Price Change Effects on Those Trading About the Same Time as the Inside Trade*

If a substantial purchase or sale based on nonpublic information causes the specialist or market-maker to change his price quotations, those engaging in the same type of transaction at approximately the same time as the inside trade (the "same type" class) will either pay more or receive less than they otherwise would. For example, after selling to an inside trader, a specialist or market-maker might increase price quotations; after buying from an inside trader, a specialist or market-maker might decrease his prices. On organized stock exchanges, changes in specialist price quotations would affect the prices of brokers "trading in the crowd" around the specialist's booth. In short, if an inside purchase increases the market price, those purchasing at about the same time will pay more. If an inside sale decreases the market price, those selling at about the same time will receive less.[61]

Although the members of the same type class are unquestionably worse off, those with whom they transact (the "opposite type" class) are

61. This phenomenon is sometimes called loss causation, as distinguished from transaction causation. *Cf.* Falls v. Fickling, 621 F.2d 1362 (5th Cir. 1980) (Public announcement of material information prior to sheriff's sale would have brought substantially higher bids than those actually received absent the disclosure; therefore, nondisclosure by bidders in actual sheriff's sale harmed plaintiff.). *See also* Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc) (bond purchaser has cause of action if he can prove that he reasonably relied on integrity of market to protect him from bonds not entitled to be marketed); Blackie v. Barrack, 524 F.2d 891, 906-08 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380-81 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975); 3A H. BLOOMETHAL, *supra* note 2, § 9.21[5][b]; 3 A. BROMBERG & L. LOWENFELS, *supra* note 2, § 8.7(1), at 216; 5 A. JACOBS, *supra* note 2, § 64.03, at 3-226 to -227; R. JENNINGS & H. MARSH, *supra* note 51, at 1066; W. PAINTER, *supra* note 2, at 187, 206-07; Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 592-96 (1975).

U.S. Department of Justice

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April 12, 1989

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

Re: Proposed Amended Sentencing Guidelines for Title 8, United States Code, Section 1326

Dear Judge Wilkins:

As you are aware, Section 7345 of the Omnibus Anti-Drug Abuse Act of 1988 amended 8 U.S.C. § 1326 and set up a three-part sentencing structure. For an alien who re-enters after a prior deportation and does not have any prior convictions, the maximum penalty remains two years; for a defendant who was deported after a conviction of a felony and returned to the United States, the maximum penalty is five years imprisonment; and for a person who was convicted of an aggravated felony (which includes any drug trafficking crime), the maximum penalty is fifteen years imprisonment. The Sentencing Commission has proposed amendments to the current guidelines to accommodate these new statutory changes.

The proposed amendments which relate to those aliens who return and have no prior convictions or have a plain felony conviction seem appropriate. The suggested "specific offense characteristics" would raise the offense level another four levels which would reflect the seriousness of the offense. The proposed enhancement for those defendants convicted of an "aggravated felony" does not seem to be adequate however. The proposed guidelines suggest that in the case of an illegally re-entering defendant previously convicted of an aggravated felony "an upward departure <u>should</u> be considered." We are concerned that the proposal does not provide adequate deterrence to re-entering aliens, especially for those defendants who have been convicted of prior drug offenses because the enhancement does not set a definite, stern term of imprisonment that an alien <u>knows</u> will be imposed if he returns illegally.

The proposal to have the court "consider" an upward departure in the case of these aggravated felons we believe would not provide sufficient deterrence. It would lead to highly variable sentences from district to district and in many cases it might lead to a sentence that is not lengthy enough to be deemed a deterrent to other returning drug dealers. It should be noted that the returning aliens often are part of an organization that has members both in the United States and in other countries. News between members of the organization people does travel. If we intend to provide both specific and general deterrence to those who are considering re-entry after deportation, a special offense characteristic level which would raise the offense level to 24 would provide such a deterrent. The time of incarceration then would range between five and twelve years. This would provide the kind of deterrence that we believe would be effective and commensurate with the seriousness of the offense.

In sum, we hope the Commission will raise the offense level so that returning drug dealers will realize that their actions will result in long-term incarceration, rather than a brief stop on their way back to dealing drugs in the United States.

Thank you for your cooperation.

Very truly yours,

Henry K. Oncken
United States Attorney

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

April 11, 1989

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

Re: Proposed rule Changes:
Use of home detention and cost of incarceration.

Dear Chairman Wilkins:

I would like to take this opportunity to comment on two proposals recently published in the Federal Register.

First, I would like to comment on the use of home detention as an alternative to imprisonment (Section 5F5.2). The current Sentencing Commission policy should be changed to allow home detention as a substitute for imprisonment under intermittent confinement or community confinement. Experience of the U.S. Parole Commission with home detention, combined with electronic monitoring, has shown that home detention is not only cost effective but it results in greater offender accountability than typically occurs when an offender is placed in a halfway house. Our experience has shown that it is easier to monitor the whereabouts of an offender in home detention than is often the case in a halfway house.

Further, home detention should be substituted on an exact day for day ratio since it is comparable in punishment, if not more so. Based on our findings in this area, home detention under the restrictions of a strict curfew, is viewed as punishment by offenders. It is seen by the offender as at least on the same level of punishment as halfway house placement.

I do not recommend that the tool of electronic monitoring be an absolute requirement for home detention. While the use of electronic monitors to enforce a curfew should be the rule rather than the exception, there may be unusual circumstances where the use of electronic monitors is unnecessary, impractical, or prohibitively expensive.

In my opinion home detention provides a more positive environment than will be experienced in a halfway house; at a much lower cost; and protection to the public will be enhanced.

Second, I would like to comment on the feasibility of requiring offenders to pay for the cost of incarceration. I believe prisoners should pay for the costs of their confinement. As outlined in Section 7301 of the Omnibus Anti-drug Abuse Act of 1988, the Sentencing Commission should study the feasibility of allowing prisoners unable to pay fines the opportunity to work at paid employment to reimburse the government for the cost of incarceration. In addition, emphasis should be placed on allowing prisoners to work in the community during confinement to pay these costs. A number of states are experimenting with innovative approaches to community corrections. The Sentencing Commission should be a leader in this regard. It is possible to design community corrections programs that are nearly self-sufficient, which maintain accountability without endangering the public, and are viewed as punishment by the offender and the general public. The burden on the taxpayer for maintaining and expanding the Federal Prison System threatens to be overwhelming. A means of reducing this burden should be explored wherever feasible.

I look forward to the discussion of these issues at the Commission meeting in April.

Sincerely,

Benjamin F. Baer
Chairman

CC: ALL COMMISSIONERS

MORALITY IN MEDIA, INC. 475 RIVERSIDE DRIVE, NEW YORK, NY 10115 (212) 870-3222

April 5, 1989

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, D.C. 20004

Attn.: Paul Martin

Re: Proposed Amendments 126-128,
Pertaining To Obscenity

Dear Mr. Chairman:

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. The founder and President of Morality In Media (until his death in 1985) was Rev. Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography" [two copies enclosed].

Morality In Media, Inc. files the attached Comments with a genuine appreciation of the complexity of the task faced by the Commission, but also with deep concern about the impact that the Guidelines and Proposed Amendments 126, 127 and 128 [pertaining to obscenity] will have on the future enforcement of both federal and state obscenity laws.

The Proposed Amendments 126, 127 and 128 are set forth verbatim. Our Comments follow.

Sincerely,

Robert Peters
Attorney

RP/mtb

COMMENTS REGARDING THE PROPOSED AMENDMENTS 126-128 (OBSCENITY) TO THE FEDERAL SENTENCING GUIDELINES

Prepared by:
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115

126. Proposed Amendment to Section 2G3.1 Of the Guidelines [pertaining to Title 18, Sections 1460-1463 and 1465-1466].

"§2G3.1 Importing, Transporting, Mailing, or Distributing (Including Possessing With Intent to Distribute) Obscene Matter

Base Offense Level: 6

Specific Offense Characteristics:
(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material but in no event by less than 5 levels
(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. **"Base Offense Level: 6"**

Comment: The proposed Amendment does not change the Base Level Offense established under the existing Guidelines. The existing Guidelines permit a sentence range between 0-6 months for an Offense Level 6, which may be satisfied solely by probation. Under the existing Guidelines, even repeat obscenity offenders have little to fear, so long as their offenses are not "related to distribution for pecuniary gain."

In contrast Sections 1461, 1462 and 1465 of Title 18 permit a maximum prison term of 5 years for a first offense and Sections 1461 and 1462 permit a maximum term of 10 years for each subsequent offense, irrespective of whether there is a commercial element. In United States v. Orito, 413 U.S. 139 (1973), the United States Supreme Court upheld 18 U.S.C. 1462 as applied to a person who allegedly transported the obscene material (which included 83 reels of film) by private carriage and "solely for the private use of the transporter." The Court stated:

> That the transporter has an abstract proprietary power to shield the obscene material from all others...is not controlling. Congress could reasonably determine such regulation to be necessary..., based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In July 1986 the Attorney General's Commission on Pornography released its Final Report—revealing both an explosive increase in the quantity of pornographic materials and a radical degenerative change in their content since 1970. The Commission had access to testimony from victims, victimizers, law enforcement officials, physicians, psychologists and pastoral counselors, as well as social scientists, which showed the destructive impact that substantial, habitual exposure to pornographic materials can have on users. The Commission found that youth, ages 12 to 17, constitute the largest audience for pornographic material in America today. Several Commissioners noted the moral harms of pornography as well as its destructive impact on family life--concerns which the Supreme Court has also raised in its decisions upholding obscenity laws.

The harms associated with obscene material occur irrespective of whether distribution is for pecuniary gain, and we respectfully suggest that the Commission's classification of obscenity offenses at Base Offense Level 6 neither promotes respect for the federal obscenity laws nor reflects the nature and degree of harm caused by the crime.

Of course, if the Proposed Amendment is accepted, the Base Level Offense will be 6 even where the act is "related to distribution for pecuniary gain"--if the defendant is not also "in the business."

B. "Specific Offense Characteristics

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels."

Comment: The proposed Amendment changes the existing Guideline which reads, in part:

> "(1) If the offense involved an act related to distribution for pecuniary gain, increase by...."

The **"Reason for Amendment"** provided in the Proposed Amendment states:

> "The purpose of this amendment is to incorporate the new offenses created by sections 7521 and 7526 of the Omnibus Anti-Drug Abuse Act of 1988..., and to make clarifying changes." (emphasis supplied)

The "new offenses" noted are Sections **"1466. Engaging in the business of selling or transferring obscene matter"** and **"1460. Possession with intent to sell, and sale, of obscene matter on federal property."** Section 1466 does include an "engaged in the business" requirement. Section 1460 includes only a "sale" requirement. As stated previously, it is not necessary to prove a commercial element in order to convict under Sections 1461-1465 of Title 18.

Under the existing Guidelines, a showing that the offense "involved

an act related to distribution for pecuniary gain" is necessary to upgrade the Base Offense Level to eleven (11). Such a showing would seldom place an additonal burden of proof on the U.S. Attorney. On the other hand, a showing that the defendant "denotes time, attention, or labor to such activities, as a regular course of business, with the objective of earning a profit" may very well add such a burden—a burden Congress placed on a prosecutor only regarding Section 1466.

Further, the Proposed Amendment relegates an offense involving "pecuniary gain" to a Base Offense Level 6, unless it can also be proved that the defendant is, so to speak, "in the business." At the same time, the Proposed Amendment does not increase the Base Level Offense beyond grade 11 even where a defendant is in fact "in the business." Of course, the Base Level Offense can, theoretically, be increased beyond grade 11 if the "retail value of the material" exceeds $100,000. This, however, will almost never happen in obscenity cases because of the requirement that the trier of fact must make an obscenity determination for each item. Prosecutors will seldom if ever ask a jury to make such a determination for each of hundreds, even thousands, of individual magazines, films, and books.

C. **"Specific Offense Characteristics**

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(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Under the existing Guideline, the offense need only "involve" material depicting sadomasochistic abuse. The Proposed Amendment also requires a "distribution" element. Presumably, the terms "distributed" and "distribute" mean that defendant would have to sell, rent, lend, or give the material to others or intend to do so. Accordingly, if an American travelling abroad returned with boxes of sadomasochistic tapes and magazines "solely for private use" [i.e. no distribution or "intent to distribute"], the Base Level Offense would not be increased—despite the fact that much of the material would almost certainly "find its way" into others' hands--including children's. See United States v. Orito, supra.

But there is a further problem with both the existing Guideline, as well as the Proposed Amendment--to wit, the special treatment accorded material "that portrays sadomasochistic or other violent conduct." It is for the trier of fact to determine what is obscene, and there is no concept of "degrees of obscenity" in the obscenity law field. Nor is it clear that materials depicting "sadomasochistic abuse" per se pose a greater threat of harm to society, or to individual victims, than do materials "portraying," for example:

1. incest;
2. man/boy love—with "performers" who look 14 but are 18 or over;
3. bestiality;

4. sodomy, group sex, or promiscuous sex, in the age of AIDS;
5. adultery, in the age of family breakdown; or
6. excretory activities or products.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, the United States Supreme Court spelled out the various governmental interests that justify obscenity legislation. These include:

> "[T]he interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers...."

The Paris Court continued:

> "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature...could quite reasonably determine that such a connection does or might exist. ...[t]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis supplied)

In Roth v. United States, 354 U.S. 476, at 502 (1957), Mr. Justice Harlan, in a concurring opinion, elaborated:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.
>
> [E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

Few would quarrel with the assertion that materials depicting sadomasochistic abuse are heinous, but it is a great and tragic mistake to ignore or downgrade the harms associated with other types of hardcore pornography.

Congress has not made distinctions, and we respectfully urge this Commission to also avoid doing so.

127. Proposed Amendment to Section 263.2 of the Guidelines [pertaining to 47 U.S.C. 223(b)]

"**263.2 Obscene Telephone Communications for a Commercial Purpose**
(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved material that describes sadomasochistic or other violent conduct, increase by 4 levels.

(2) If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

A. "(a) Base Offense Level: 6"

Comment: The "dial-a-porn" industry is a multi-million dollar business and a major U.S. distributor of hardcore pornography. Congress in part recognized this by upgrading the penalty from misdemeanor to felony status for making any "obscene communication for commercial purposes." Yet, the Proposed Amendment simply turns a "blind eye" to the commercial aspect of the dial-a-porn industry, relegating all offenses to Base Level 6, unless the communication describes sadomasochism or the person receiving the communication is a child. We think this ignores the nature and degree of the harm caused by the crime, as well as the community view of the gravity of the offense.

Kim Murphy (Staff writer), "Regulators Answer Protests Of Huge 976 Phone Charges," Los Angeles Times, Sept. 28, 1987, at p. 3:

> Clester Jones' 15-year-old son hid the...phone bill when it arrived, so Jones did not see it until the phone was shut off for nonpayment of $5,312 for calls to a 976 number that offered sexually explicit conversation. "The boy didn't realize it was going to cost that much. He got hooked.... He just got so that he couldn't keep from calling," said [the boy's Aunt].... Complaints like the Jones' have drawn the attention of regulators [of] the nation's booming dial-a-message industry, which is expected to expand by 80% this year....

Dr. Victor Cline (psychologist), NFD Journal, Nov. 1985:

> With the sponsorship of the U.S. Justice Department, I conducted a pilot field study of the effects of Dial-a-Porn on child consumers in January 1985.... With everyone of the children we studied we found an "addiction" effect in making these calls. In every case...the children (girls as well as boys) became hooked on this sex by phone and kept going back for more.... I next found that nearly all of the children had clear memories of a great deal of the content of the calls they heard.... We also found that almost without exception the children felt guilty, embarrassed, and ashamed.... In nearly all cases there were some problems and tensions generated in the parent-child relationships....

Dr. Cline continues:

> When one makes a call to Dial-A-Porn, it is usually answered by a very sexy, seductive sounding female (actually a recording) who talks directly to the caller about how bad she wants to have sex with him now. She then tells the caller all the things she wants to

do to him--oral sex, vaginal sex, anal sex, etc. This is done with a lot panting and groaning suggesting that she is in intense heat. She may discuss the turgid state of her sex organs or that of the caller. There may be a second female on the line and they may talk about having sex together as well as with the caller. They may mention having a sex marathon today will all the explicit details. In some cases bondage is a part of the scenario.... Sex with animals is also included as well as group sex (e.g., five guys at once), lesbianism, anal sex, rape, having sex with a "baby sister," a school teacher having sex with class members, inviting the married male to have sex with the babysitter, inviting the caller to urinate in the woman's face, inviting beatings, torture and physical abuse as part of the sexual activity. The messages keep changing every hour or so and new numbers are given out in order to encourage constant call backs.

From a letter to a public official. Names have been changed:

I must relate to you a terrible incident that happened to our family.... It occurred July 26, 1987. My 13 year old son Tim called the dial-a-porn number.... Tim's friend Edward, aged 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me Tim's 14 year old brother was listening on another line with his two friends.... Karen, age 10, was also listening on her extension. Within the next 48 hours, Edward and his 11 year old brother molested my daughter Karen. Police were notified and in their investigation revealed that Karen had encouraged the boys by asking them to touch her and "do it with her." She actually used phrases she heard on the "Dial-a-Porn."

From an article in the Daily News (LA), 10/3/87:

"A man who ran up nearly $38,000 in phone-sex bills has been ordered to spend 180 days in a psychiatric hospital and repay the money he embezzled from a North Hollywood insurance agency to support his habit." (emphasis supplied)

From a May 1987 letter from a Christian ministry to people coming out of homosexuality:

"But there is another matter I would like to address and that is the possibility of proposing and lobbying for legislation that would prohibit the networking of gay telephone sex across this nation.... All I can tell you is that many, many men and women I counsel are being dragged into sexual addiction in this form of perverse activity." (emphasis supplied)

B. **"(b) Specific Offense Characteristics**

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(2) If a person who received the communication was less than

18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

Comment: The Commission is certainly aware that in early 1988, Congress amended 47 U.S.C. 223(b) to prohibit obscene or indecent communication for commercial purposes to any person, regardless of the caller's age, and to abolish the "defense" under the old law for those who complied with FCC regulations intended to restrict access to adults only. Congress did so because it concluded that a "safe harbor" for obscene or indecent dial-a-porn was not constitutionally required for adults or minors.

On July 19, 1988, the United States District Court for the Central District of California upheld the prohibition in 47 U.S.C. 223(b) on obscene commercial messages, but invalidated 223(b)'s prohibition on indecent commercial messages. The United States Supreme Court agreed to hear the appeal of that decision, and oral argument is scheduled for April 19. [Sable Communications of California, Inc. v. FCC, 88-515 & 88-525.]

We fully expect the Supreme Court to uphold Section 223(b), as amended, and urge the Commission to follow the good example of Congress which did away with both the distinction in the previous law between adults and minors and with the statutory "defense" for those complying with ineffective FCC regulations--lest the Commission unwittingly grant dial-a-porn operators what is in effect a "partial immunity" for following its ineffective "rules."

It is to be noted that the Guidelines do not elsewhere make distinctions based on the age of the recipient of obscene (or indecent) matter. There is no reason to do so here.

128. Proposed Amendment: Adding An Additional Guideline, §2G3.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

(a) Base Offense Level: 6
(b) Specific Offense Characteristic:
(1) If the offense involved the broadcast of material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Again, the Commission chooses to treat obscenity offenses as "low grade;" again, chooses to turn a "blind eye" to the commercial element in most broadcast and cable TV programming; again, attempts to determine "degrees of obscenity."

Conclusion

We genuinely appreciate the difficulty faced by the United States Sentencing Commission in determining appropriate Sentencing Guidelines for the hundreds of criminal provisions contained in the United States Code. We fear, however, that in determining sentencing ranges for obscenity offences, the Commission has been unduly influenced by a policy of non-enforcement of obscenity laws that existed for approximately 20 years, roughly from the United States Supreme Court's Fanny Hill-Memoirs decision in 1966 (requiring proof that material was "utterly without redeeming social value"--a burden almost impossible to discharge) until the Final Report of the Attorney General's Commission on Pornography in 1986. The prosecution and sentencing practices of the late 1960's, the 1970's and early 1980's are simply an inadequate basis for determining appropriate sentencing ranges for obscenity offenses.

This is not to say that every obscenity offense should be put in the the highest possible offense level. Nor is it to say that noncommercial offenders, those who profit financially from the distribution of obscenity, and those who are "in the business" of distributing obscene material should be treated exactly alike.

It is to say that those who violate the federal obscenity laws, like those who violate federal drug laws, should know that if apprehended, they will not be treated with "kid gloves." It is to say that if a prosecutor expends the office resources needed to investigate and successfully prosecute a major distributor of obscene matter in his or her district—including a "dial-a-porn" provider, he or she can know that the defendant will not get off with a "slap on the wrist" simply because the defendant is a "first offender" or because the dollar value of the materials that formed the basis of the prosecution is relatively small.

We think too that it is not for the Commission to attempt to establish "degrees of obscenity." Hardcore pornography by its very nature reduces human beings to objects for sexual gratification, and, as noted by the United States Supreme Court in its Paris Adult Theatre I v. Slaton, supra, decision:

> The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Congress passed laws punishing the transportation and dissemination of obscene material, and all obscene materials endanger the social fabric.

UNIVERSITY OF CALIFORNIA

HASTINGS COLLEGE OF THE LAW

WILLIAM K.S. WANG
Professor of Law

March 15, 1989

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

Dear Commissioner Wilkins:

I understand that the Commission has invited public comment on the fraud guidelines.

Although I have no remarks on the level of the guidelines, I do wish to address the issue whether stock market insider trading is a victimless crime, as some commentators have suggested.

Each stock market insider trade has specific victims. The outstanding number of shares of a company generally remains constant between the insider trade and public dissemination of the information on which the insider acted. With an insider purchase of an existing issue of securities, the insider has more of that issue at dissemination; someone else must have less. That someone is worse off because of the insider trade. With an insider sale of an existing issue of securities, the insider has less of that issue at dissemination; someone else must have more. That someone is worse off because of the insider trade. In a 1981 law review article, I called this phenomenon "the law of conservation of securities" and labelled those harmed by it "trade victims." Enclosed is an excerpt from that article, Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?, 54 S. Cal. L. Rev. 1217, 1234-40 (1981).

Those who trade on insider information clearly benefit financially. To assume that such a benefit has no corresponding cost is contrary to common sense. To paraphrase Milton Friedman, there is no such thing as a free insider trade.

Respectfully,

William Wang

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TRADING ON MATERIAL NONPUBLIC INFORMATION ON IMPERSONAL STOCK MARKETS: WHO IS HARMED, AND WHO CAN SUE WHOM UNDER SEC RULE 10b-5?

WILLIAM K.S. WANG*

TABLE OF CONTENTS

* Professor, Hastings College of the Law. B.A. 1967, Amherst College. J.D. 1971, Yale Law School. Member, California Bar. This Article was written primarily while the author was a professor of law at the University of San Diego.

Roger Blanc, Esq., and Professors Joseph Bishop, Louis Loss, Grant Morris, Mike Navin, and David Ratner made helpful comments on portions of the drafts of this Article. The author is especially grateful to Professor Homer Kripke for thoroughly reviewing the manuscript and suggesting numerous improvements, and to Professor Lawrence Alexander for acting as a sounding board throughout the writing of this Article. Valuable research assistance was provided by Gerald Sims, Edwin F. McPherson, and Cheryl Peterson.

better off.[62] Members of the same type class, however, are unsympathetic figures. Along with the inside trader, they are either buying into a windfall gain or selling into a windfall avoidance of loss. On the other hand, members of the opposite type class are selling into a fortuitous avoidance of gain or buying into a fortuitous loss. The price change induced by the inside trade decreases the extent of these various undeserved fortuities. Arguably, this is beneficial.[63]

C. Harm to Specific Individuals Caused by the Nondisclosure

1. *Moral or Legal Causation*

A stock market inside trader fails to disclose the nonpublic information to both the party in privity and the world. As noted in Part III(B) above, the typical inside trade harms neither the party in privity nor the overwhelming majority of investors. Normally, the inside trader is a total stranger to the party in privity and other investors. If the inside trader were to disclose to a stranger who would be unharmed by the trade, the inside trader would be acting like a Good Samaritan.[64] If the inside trader had disclosed to the party in privity, the latter would have traded at a different price or not at all. Had the inside trader decided to be a quasi-Samaritan and disseminated the secret information to the investing public, the universe would have been dramatically different. In the case of favorable information, the price would have been higher. Sellers would have benefited, and buyers would have been harmed. Many individuals would have abstained from selling once they knew the good news. With adverse news, the price would have dropped. Buyers would have been better off, and sellers would have been harmed. Many investors would have abstained from buying once they knew the bad news.

If the inside trader does not engage in any quasi-Samaritan disclosure, the question is whether he has morally or legally harmed all those who would have been better off had he disclosed. This is the issue of

62. *See* Manne, *In Defense of Insider Trading*, 44 Harv. Bus. Rev. 113 (1966), *reprinted in* R. Posner & A. Scott, Economics of Corporation Law and Securities Regulation 130, 132 (1980). *Cf.* Stromfeld v. Great Atl. & Pac. Tea Co., 484 F. Supp. 1264, 1270, 496 F. Supp. 1084, 1086 (S.D.N.Y. 1980) (amended complaint) (If the price of A & P common stock was artificially depressed by defendants' section 10(b) and 13(d) violations, plaintiff buyers actually benefited by paying less for the stock than it was actually worth.).

63. *See* text accompanying notes 28-31 *supra*. *But see* note 32 and accompanying text *supra* (suggesting that inside trading would not have a significant effect on stock prices).

64. Henceforth, such an obligation to disclose will be referred to as a "quasi-Samaritan" duty.

U.S. Department of Justice

United States Attorney

Southern District of Texas

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Houston, Texas 77208

April 12, 1989

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

Re: Proposed Amended Sentencing Guidelines for Title 8, United States Code, Section 1326

Dear Judge Wilkins:

As you are aware, Section 7345 of the Omnibus Anti-Drug Abuse Act of 1988 amended 8 U.S.C. § 1326 and set up a three-part sentencing structure. For an alien who re-enters after a prior deportation and does not have any prior convictions, the maximum penalty remains two years; for a defendant who was deported after a conviction of a felony and returned to the United States, the maximum penalty is five years imprisonment; and for a person who was convicted of an aggravated felony (which includes any drug trafficking crime), the maximum penalty is fifteen years imprisonment. The Sentencing Commission has proposed amendments to the current guidelines to accommodate these new statutory changes.

The proposed amendments which relate to those aliens who return and have no prior convictions or have a plain felony conviction seem appropriate. The suggested "specific offense characteristics" would raise the offense level another four levels which would reflect the seriousness of the offense. The proposed enhancement for those defendants convicted of an "aggravated felony" does not seem to be adequate however. The proposed guidelines suggest that in the case of an illegally re-entering defendant previously convicted of an aggravated felony "an upward departure <u>should</u> be considered." We are concerned that the proposal does not provide adequate deterrence to re-entering aliens, especially for those defendants who have been convicted of prior drug offenses because the enhancement does not set a definite, stern term of imprisonment that an alien <u>knows</u> will be imposed if he returns illegally.

The proposal to have the court "consider" an upward departure in the case of these aggravated felons we believe would not provide sufficient deterrence. It would lead to highly variable sentences from district to district and in many cases it might lead to a sentence that is not lengthy enough to be deemed a deterrent to other returning drug dealers. It should be noted that the returning aliens often are part of an organization that has members both in the United States and in other countries. News between members of the organization people does travel. If we intend to provide both specific and general deterrence to those who are considering re-entry after deportation, a special offense characteristic level which would raise the offense level to 24 would provide such a deterrent. The time of incarceration then would range between five and twelve years. This would provide the kind of deterrence that we believe would be effective and commensurate with the seriousness of the offense.

In sum, we hope the Commission will raise the offense level so that returning drug dealers will realize that their actions will result in long-term incarceration, rather than a brief stop on their way back to dealing drugs in the United States.

Thank you for your cooperation.

Very truly yours,

Henry K. Oncken
United States Attorney

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

April 11, 1989

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

Re: Proposed rule Changes:
Use of home detention and cost of incarceration.

Dear Chairman Wilkins:

I would like to take this opportunity to comment on two proposals recently published in the Federal Register.

First, I would like to comment on the use of home detention as an alternative to imprisonment (Section 5F5.2). The current Sentencing Commission policy should be changed to allow home detention as a substitute for imprisonment under intermittent confinement or community confinement. Experience of the U.S. Parole Commission with home detention, combined with electronic monitoring, has shown that home detention is not only cost effective but it results in greater offender accountability than typically occurs when an offender is placed in a halfway house. Our experience has shown that it is easier to monitor the whereabouts of an offender in home detention than is often the case in a halfway house.

Further, home detention should be substituted on an exact day for day ratio since it is comparable in punishment, if not more so. Based on our findings in this area, home detention under the restrictions of a strict curfew, is viewed as punishment by offenders. It is seen by the offender as at least on the same level of punishment as halfway house placement.

I do not recommend that the tool of electronic monitoring be an absolute requirement for home detention. While the use of electronic monitors to enforce a curfew should be the rule rather than the exception, there may be unusual circumstances where the use of electronic monitors is unnecessary, impractical, or prohibitively expensive.

In my opinion home detention provides a more positive environment than will be experienced in a halfway house; at a much lower cost; and protection to the public will be enhanced.

Second, I would like to comment on the feasibility of requiring offenders to pay for the cost of incarceration. I believe prisoners should pay for the costs of their confinement. As outlined in Section 7301 of the Omnibus Anti-drug Abuse Act of 1988, the Sentencing Commission should study the feasibility of allowing prisoners unable to pay fines the opportunity to work at paid employment to reimburse the government for the cost of incarceration. In addition, emphasis should be placed on allowing prisoners to work in the community during confinement to pay these costs. A number of states are experimenting with innovative approaches to community corrections. The Sentencing Commission should be a leader in this regard. It is possible to design community corrections programs that are nearly self-sufficient, which maintain accountability without endangering the public, and are viewed as punishment by the offender and the general public. The burden on the taxpayer for maintaining and expanding the Federal Prison System threatens to be overwhelming. A means of reducing this burden should be explored wherever feasible.

I look forward to the discussion of these issues at the Commission meeting in April.

Sincerely,

Benjamin F. Baer
Chairman

CC: ALL COMMISSIONERS

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

April 11, 1989

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

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I look forward to the discussion of these issues at the Commission meeting in April.

Sincerely,

Benjamin F. Baer
Chairman

CC: ALL COMMISSIONERS

NACDL

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April 10, 1989

VIA FEDERAL EXPRESS

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

Re: Supplementary Written Comments on Proposed Amendments to the Sentencing Guidelines Authorized by Commission Action Dated February 14, 1989

Dear Judge Wilkins:

These written comments are submitted to supplement the public testimony of Scott Wallace and I, on behalf of the National Association of Criminal Defense Lawyers, at the hearings dated April 7, 1989, in Washington, D.C. NACDL is a non-profit organization representing approximately 15,000 criminal defense attorneys, law professors and criminal justice professionals residing and practicing in every state throughout the nation. NACDL has been working with the Commission over the past several years with respect to the development of the Guidelines. Representatives of

NACDL have testified in previous public hearings held by the Commission. I serve as Vice-Chair of the NACDL Sentencing Committee and Co-Chair of the NACDL Committee on Prisoner's Rights. My private practice is limited to federal post-conviction remedies, including Guideline sentencing, direct appeals and habeas corpus litigation in federal courts throughout the nation.

I. Introduction: The Amendment Process

As a threshold issue, NACDL urges that before further amendments to the Guidelines are considered or acted upon by the Commission, careful scrutiny and attention must be given to the process by which amendments are developed and the precedent which is being set for the development of future amendments.

The initial Guideline package developed by the Commission was the product of an extraordinarily thorough, deliberative process which, according to Commission statements, was based upon an exhaustive empirical review of existing sentencing practices.[1/] It is precisely this

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[1/] See e.g., "Supplementary Report on the Initial Sentencing Guidelines and Policy Statements" (June 18, 1987) ("The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that starts from existing sentences. It has analyzed and considered detailed data drawn from more than 10,000 presentence investigations, less

(continued...)

intense level of scrutiny that Congress hoped for when it established the Commission. However, after reviewing the present set of Proposed Guideline Amendments, NACDL is deeply concerned that the Commission appears to be retreating from its earlier painstaking, empirically-based approach. We do not believe that there is presently enough data available to conduct any meaningful analysis of sentencing practices under the Guidelines and whether they are "working" as intended.[2/]

In lieu of basing Proposed Guideline Amendments on empirical data and an examination of past sentencing practices, particularly experiences under the Guidelines in

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1/ (...continued)
detailed data on nearly 100,000 federal convictions during a two-year period, distinctions made in substantive criminal statutes, the United States Parole Commission's Guidelines and resulting statistics, public commentary, and information from other relevant sources, in order to determine current sentencing practices, including which distinctions are significant in present practice." Ibid. at 16.

2/ At the April 7, 1989, public hearings, Judge Breyer essentially conceded that point by stating that the Commission did base the Proposed Amendments pertaining to robbery (amendment nos. 47-50,) and the career criminal offender amendment (amendment no. 243) on statistical analysis. This data has not yet been made available to NACDL but, upon information and belief, we feel from what we know thus far that such data fails to reflect the commitment to empirically-based review established by the initial development of The Sentencing Guidelines. We are unaware as to whether exhaustive, empirically-based analysis formed the rationale for other Guideline amendments at issue herein particularly since many district courts throughout the nation did not apply the Guidelines until after the decision in Mistretta.

relation to previous sentencing statistics, it appears -- much to our chagrin -- that this process is one of "amendment by anecdote." Most striking among the anecdotal amendments is the Commission's reaction to United States v. Correa-Vargas, 860 F. 2d 35, 1 Fed. Sent. R. 313 (2nd Cir. 1988) (amendment no. 97, §2D1.6, discussed infra.). Similarly, the proposal for amendment to the bank robbery guideline (amendment no. 50, §2B3.1) is evidently based upon the comments of a self-selected array of "comments from several sources, primarily Assistant United States Attorneys and certain district judges." This, clearly, is not the type of scientifically-based empirical analysis that Congress expects of the Commission.

Finally, with respect to this point, NACDL firmly believes that the process of "amendment by anecdote" is inconsistent with the enabling legislation which subjects Sentencing Commission rules and regulations to the notice and comment provision of the Administrative Procedure Act. See, 28 U.S.C. 994(x); 5 U.S.C. §553. et seq. [3/]

[3/] Although the "judiciary" is generally immune from A.P.A. challenges, based upon the unique "agency" characteristics of the Commission, it is possible that the Commission will be faced with Administrative Procedure Act challenges under 5 U.S.C. §706(2)(A) which states that "the reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." In more than 20 constitutional challenges

(continued...)

NACDL also believes that a prison impact statement should be prepared as to each proposed amendment. While it is our understanding that a prison impact statement is in progress, it was not completed prior to the publication of the proposed amendments. In this regard, the Commission may have discounted the integral role of a prison impact statement which promulgation of each amendment may effect. It may serve as a post hoc rationalization only.

In summary as to this point, NACDL does not believe that the Commission has had adequate experience under the existing Guidelines, nor has it continued its exhaustive,

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3/ (...continued)
to the Guidelines in which NACDL participated, amicus curiae, there was a vast difference of opinion between the Sentencing Commission and the Department of Justice as to the appropriate location, for separation of powers purposes, of the Commission. The Sentencing Commission displays all of the incidents normally associated with an executive agency and the United States consistently maintained, even in the Supreme Court, that the Commission is or may be an executive agency notwithstanding the statutory moniker placing it within the judicial branch. See e.g., Brief of the United States to the Supreme Court in Mistretta which stated, in relevant part, "the Commission thus performs a type of rulemaking function that has regularly been assigned to administrative agencies exercising the executive power." Ibid. at 34 (footnote omitted). In Mistretta, the court noted that the Commission "is an independent agency in every relevant sense." 109 S. Ct. at 665-66 (1989). Thus, NACDL is opined that the Commission must be far more sensitive to the spirit and intent of the Administrative Procedure Act in promulgating regulations or amendments which may become subject to challenge -- on procedural and substantive grounds -- through judicial review.

deliberative, empirically-based analysis of past sentencing practices to place itself in the position of proposing amendments at this time. **For these reasons alone, we urge the Commission to withhold any action on the proposed amendments, except for all but indisputably non-controversial or purely technical amendments, until its submission to Congress in May 1990.**

II. Comment on Specific Guideline Amendments

The following constitutes NACDL's position with respect to the proposed Guideline Amendments, seriatim.

Amendment Nos. 1-2: No comment.

Amendment No. 3: This proposed amendment would delete "interpolation" as a standard means of departure. At present, most of the assault offense Guidelines increase two levels for bodily injury, four levels for serious bodily injury, and six levels for permanent or life threatening bodily injury. This amendment sets the stage to provide for three and five level increases for injuries occurring in between the already described injuries rather than suggesting that the court "interpolate" and depart up or down. Not having much experience with how the Guidelines apply in assault cases yet, it is difficult to comment on the effect of this amendment. NACDL concurs

with the Federal Defenders' position that "interpolation" is a useful tool and should be preserved in the Guidelines. While the impact on assault cases may be slight, NACDL believes that interpolation should be specifically authorized and not just in an "additional explanatory statement" as the amendment suggests.[4/]

Amendment Nos. 4-5: No comment.

Amendment No. 6: NACDL suggests a clearer definition of "dangerous weapon."

Amendment No. 7: The necessity of this amendment is unclear. It simply refers to §2J1.7 for defendants subject to a sentence enhancement under 18 U.S.C. §3147. There is a substantive amendment to §2J1.7 contained in proposed amendment no. 142. In that section, the Commission proposes to add two, three, or four levels to the offense level for the offense committed while on release rather than to give a separate offense level for a §3147 enhancement. The difference in the two sections, assuming an

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[4/] The Commission appears to create a new category called the "additional explanatory statement." It is unclear from the amendments what role these additional explanatory statements have and whether they will be reproduced with the Guidelines. In the interpolation example, the additional explanatory statement acknowledges that the amendment does not preclude interpolation in other cases. However, if the additional explanatory statement does not appear in the Guidelines, the term will effectively be lost except for those administrative law buffs who can locate the history of the regulations.

addition of only two levels (rather than three or four levels) is probably negligible depending upon the offense level for the new offense. Under existing §2J1.7, a defendant could have an offense level for a §3147 violation of up to 12 levels. Unless the §3147 offense level was five or more levels less serious than the underlying offense level (as we understand it at this moment), there would likely be a two-level increase anyway. In short, NACDL takes no position on amendment no. 7 other than to express our concern about the necessity for the amendment.

Amendment Nos. 8-9: No comment.

Amendment No. 10: The fundamental objection that we have to the proposed addition of (d) relates to the provision that a conspiracy count with multiple objectives is to be treated as if the defendant were convicted of a separate conspiracy count for each objective set forth in the conspiracy. A similar instruction is now found at Application Note 9 of §3D1.2 which the Commission now says is inadequate. The fundamental objection we have is that the Guideline attempts to transform a single count of conviction into multiple counts of conviction with a related increase in units that increases the overall offense level. Consequently, a defendant convicted of a conspiracy with multiple objectives (however objectives are

determined) will then face an offense level higher than the count of conviction. This would probably happen in drug and fraud cases as a result of the relevant conduct rules anyway. Yet, this amendment attempts to cover conspiracy convictions where substantive offenses are not otherwise obtained. It is laudable that the Commission suggests that the court should not apply the new rule unless it would convict the defendant of conspiring each object of the conspiracy. We urge the Commission to consider conspiracy as only one count of conviction unless the defendant is also convicted of the substantive objects of the conspiracy. The rule encourages prosecutors to file a one-count conspiracy charge with multiple objectives without having to prove the substantive offenses. That is, through a potential abuse of prosecutorial discretion, Guidelines in conspiracy cases may be determined by the preponderance of the evidence standard where it might be more appropriate, and consistent with fundamental notions of due process, to require proof beyond a reasonable doubt.

Amendment No. 11: No comment.

Amendment No. 12: This amendment attempts to clarify the sentencing liability of one defendant for conduct of codefendants. In actuality, it appears to impute liability for reasonably foreseeable codefendants' conduct in all

cases rather than in just conspiracy cases. This appears to be in marked contrast to former Parole Commission policy from which this idea evidently originated. The Guidelines would create sentencing liability for an uncharged conspiracy or an uncharged aiding and abetting offense so long as the conduct of a codefendant was reasonably foreseeable by the defendant. Actually, the language is broad enough ("conduct of others") to place sentencing liability on the defendant for uncharged conduct of unindicted persons. This appears to be a substantial break from the offense of conviction system with all of its variables under the rules of relevant conduct. In addition, the proposed amendment to the Application Note contains an example of where the Commission would hold a defendant liable for acts of other codefendants in a bank robbery case. This example is inappropriate because it concludes that a defendant who did not enter the bank would be held liable for injury inflicted on a teller by codefendants who enter the bank "because such an injury is reasonably foreseeable of the commission of a bank robbery." This example should be deleted. Another example regarding an ongoing marijuana importation conspiracy purports to limit the sentencing liability of a defendant hired to off load a single shipment. While this example could be construed as favorable

to the defense, on balance, we recommend that all examples be deleted and that the courts be left to their own interpretation as to what is reasonably foreseeable.

Amendment Nos. 13-19: No comment.

Amendment Nos. 20 & 21: These amendments provide that the base level of six for a "minor assault" include conduct that involves physical contact or where a dangerous weapon (including a firearm) was possessed and its use threatened. This appears to broaden sentencing responsibility in minor assault cases. It is not possible to determine from the amendment the impact on prison population.

Amendment Nos. 22 & 23: Apparently this is a clarifying amendment except that it appears to authorize (in the commentary) the application of the "official victim" adjustment if the conviction is for aggravated assault. If the conviction is under 18 U.S.C. §111 where the official status of the victim is a material element of the offense, there should not be an official victim adjustment to avoid double counting.

Amendment Nos. 24 & 25: See comment to amendment no. 3.

Amendment Nos. 26-28: No comment.

Amendment No. 29: See comment to amendment no. 3.

Amendment Nos. 30-31: No comment.

Amendment Nos. 32-33: These sections purport to change the theft-loss tables to match the tax-loss tables and then further increase the levels for various monetary amounts at the higher end of the range. While it probably makes sense to have one table for theft, fraud, and tax losses, in the absence of evidence that sentences are too low, the increase in levels at the higher ends of the tables would appear inappropriate.

Amendment Nos. 34-49: No comment.

Amendment No. 50: This represents a significant change in the bank robbery guidelines with the Commission suggesting several options. The proposal results from "comments from several sources, primarily Assistant United States Attorneys and certain district judges" that the robbery guidelines result in low sentences for first offenders. We strongly object to any amendment to this guideline unless and until it is shown by experience that the past sentencing practice warrant an increase to avoid disparity. The relevant conduct rules for dismissed counts appear inequitable here.

Amendment Nos. 51-53: No comment.

Amendment No. 54: See, Amendment 3, supra.

Amendment Nos. 55-63: No comment.

Amendment No. 64: This section seeks to clarify the commentary to bribery guidelines specifying that bribes are treated as separate unrelated offenses unless the counts involved several related payments as part of a single bribe. NACDL supports a proposal to allow bribery offenses to be grouped rather than clarifying that they are not to be grouped unless part of a common scheme or plan.

Amendment No. 65: No comment.

Amendment No. 66: The Commission seeks comments and suggestions on how to address multiple bribery or gratuity cases. The Commission acknowledges that there is no enhancement for repeated instances of bribery involving the same course of conduct or common scheme or plan whereas the fraud and theft guidelines provide an increase for more than minimal planning. The Commission suggests consideration of a two-level increase for offenses involving more than one bribe. NACDL recommends that the Commission withhold adoption of this amendment to determine how many cases are actually involved, what departures are being used, and so that the Commission may evaluate the impact on prison population of this two-level increase before making any change.

Amendment No. 69: No comment.

Amendment No. 70: See comment on amendment no. 6, supra.

Amendment No. 71: No comment.

Amendment Nos. 72-78: These proposed amendments concern the "Application Notes" relating to the "drug equivalency tables." The drug equivalency tables set forth in chapter 2D convert most drugs, regardless of their pharmacological characteristics, to a heroin or marijuana equivalency. For example, one gram of LSD[5/] is deemed the functional equivalent of 100 grams of heroin or PCP notwithstanding the fact that pharmacologically LSD is an hallucinogen rather than a traditional narcotic or opiate derivative. The Guidelines convert one gram of methaqualone (quaaludes) to .7 grams of heroin or seven milligrams of marijuana. Methaqualone, a psychotropic drug, is not in the same pharmacological class as opiates or marijuana. The list goes on and on, ad infinitum. Barbiturates such as sodium secobarbital (seconal) are also converted to a heroin or marijuana equivalency. So are tranquilizers such as valium.

Not only is the Commission's drug equivalency table irrational, the drug quantity table is equally irrational

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5/ See amendment no. 82, infra.

by arbitrarily classifying drugs with different pharmacological characteristics in the same base offense level. This may lead to the type of Administrative Procedure Act challenges described, supra. NACDL believes that the drug equivalency tables and drug quantity table set forth in chapter 2D represent agency rules which are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

Amendment Nos. 80-81: No comment.

Amendment No. 82: In the interest of uniformity and fairness, it is critical that the Commission clarify that the carrier on which LSD is placed is not considered as part of the mixture and therefore weighed.

Amendment Nos. 83-84: No comment.

Amendment No. 85: See comments to amendments 72-78 regarding drug equivalency tables generally.

Amendment No. 86: NACDL supports this proposal for the reasons stated in the Notice of Proposed Amendments.

Amendment No. 87: See generally, comments on drug equivalency tables set forth at amendments 72-78, supra.

Amendment No. 88: No comment.

Amendment No. 89: This section pertains to the "drug equivalency tables" which previously converted one gram of paregoric into two milligrams of heroin or two grams of

marijuana. It also converted one gram of hydrocodone cough syrup into two milligrams of heroin or two grams of marijuana. The proposed amendment would partially achieve its stated goal by measuring paregoric and hydrocodone cough syrup in milliliters instead of grams since these opiate derivatives are generally in liquid form. But for the reasons previously stated, conversion to a marijuana alternative equivalency lacks any pharmacologically based validity.

Amendment No. 90: See comments to amendments 72-78, supra.

Amendment Nos. 91-92: No comment.

Amendment No. 93: NACDL opposes the proposed amendment to section 2D1.4. The Commission's stated "reason for amendment" is inconsistent with the proposed amendment because it makes the Application Note more restrictive by adding another material element, intent. The determinative factor here should be either capability or intent recognizing -- as the Commission apparently does -- that mere "puffing" absent either the capability or intention to produce additional drugs should not be calculated in reaching the base offense level.

Amendment No. 94: NACDL opposes the proposed amendment to Application Note (1) to section 2D1.4, and for the

reasons stated herein, also opposes the amendment of 1B1.3 (proposed amendment 12). The purpose of this Application Note is to hold an offender accountable for his or her individual offense characteristics. Inchoate offenses, including conspiracy, should clearly exclude conduct which was not "reasonably foreseeable" but also -- in the conjunctive "or" -- excludes conduct where the offender had no reasonable ability to control the activities of other offenders committing more serious acts in furtherance of the overall offense conduct. This conforms with previous Parole Commission policies.

Amendment No. 95: NACDL opposes this proposed amendment because it takes away the plain meaning, as clarified by the Application Note, that a downward departure may be indicated for an unconsummated or uncompleted attempt or conspiracy.

Amendment No. 96: No comment.

Amendment No. 97: NACDL vigorously opposes the proposed amendment relating to section 2D1.6 for several reasons. First, the Commission has not accumulated or analyzed sufficient data regarding violations of 21 U.S.C. §843(b) to fully appreciate the far reaching ramifications of this radical change in Commission policy. Second, it sets a dangerous precedent, for purposes of future amend-

ments, to base a proposed amendment upon one or two currently isolated Court of Appeals decisions which further experience will only determine to be predictively significant as to the manner in which sentencing courts generally treat telephone counts in individual cases.

The third reason why NACDL strongly opposes any modification to this section relates to plea bargaining. This offense represents the only "safety valve" providing an escape from the restrictive drug quantity table which determines the base offense level for all other narcotics offenses. This valve must be left open in order to avoid a complete breakdown of the plea bargaining process, especially for offenders with relatively low culpability and peripheral involvement. See generally, §§6B1.2, 6B1.4. See also U.S. Department of Justice, Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984, and the "Thornburgh Memorandum" dated March 13, 1989.

Amendment Nos. 98-100: No comment.

Amendment No. 101: NACDL opposes this proposed amendment.

Amendment Nos. 102-109: No comment.

Amendment No. 110: The stated purpose is "to ensure that attempts and solicitations are expressly covered" but

the language is confusing. Is an attempt or solicitation to be graded under 2E5.1 or 2X1.1? The commentary should make it clear that section 2X1.1 controls.

Amendment No. 111: By incorporating the general breach of trust provision and removing the specific one presently contained in section 2E5.2, the Commission may unintentionally expand the scope of the breach of trust provision. Only one special kind of fiduciary is treated in 29 U.S.C. §1002(21)(A). As a result, this provision of the Guidelines should apply only to that class of fiduciary and to the exclusion of those who may fall within the scope of section 3B1.3. Maintaining the distinction is consistent with section 2E5.4.

Amendment No. 112: The proposed amendment works a significant increase in the scope of the guideline, applying it to efforts to conceal a theft or embezzlement. We suggest that concealment more properly is treated as the Commission has structured accessorial liability after the fact, i.e., a false entry to conceal should be treated less harshly than a false statement to conceal. In addition, we are concerned that the language "to facilitate" is too ambiguous and therefore may result in unnecessary litigation.

Amendment No. 113: No comment.

Amendment No. 114: See comment on amendment no. 112, supra.

Amendment No. 115: Comparing the theft loss and tax loss tables, the former are clearer and more workable. The fragmentation of dollar ranges in the tax loss tables creates an unwarranted need for litigation. There should be fewer, not more, gradations.

Amendment No. 116: See comment on 115, supra.

Amendment No. 117: No comment.

Amendment No. 118: In our view, this proposal places too much sentencing power in the hands of the prosecutor without any ability for the defendant to challenge the allegations. If the prosecutor can persuade a jury that an arson was committed, then let him or her file that charge. It is unfair to apply guidelines for a crime that has not been charged, and force the defendant to litigate at sentencing allegations never brought by a grand jury and which will be resolved by a lower standard of evidence at sentencing.

Amendment No. 119: The Commission should act in accordance with Congress's limited and specific direction. It should provide an enhancement only for the Major Fraud Act and should not provide a minimum offense level. Moreover, it is too early in the history of Guideline

sentencing to consider a new Guideline or higher offense level for insider trading or procurement fraud. There is no indication at present that change is indicated.

Amendment No. 120: The proposal is ambiguous. What is "coercion by drugs?"

Amendment No. 121: No comment.

Amendment No. 122: See comment to amendment no. 120, supra.

Amendment Nos. 123-127: No comment.

Amendment No. 128: The aggravating offense characteristic is not one contemplated by Congress or included in the statute. If there is media coverage of a trial involving "sadomasochistic or other violent conduct," does the increased penalty apply assuming that the material is otherwise obscene?

Amendment Nos. 129-139: No comment.

Amendment No. 140: NACDL opposes (c)(1) applying Guidelines for an offense which was not charged or tried, placing the defendant at sentencing in the position of defending against allegations never brought by a grand jury and which will be determined by a substantially lower standard of evidence applicable during the penalty phase.

Amendment No. 141: No comment.

Amendment No. 142: Given the confusion over the nature of 18 U.S.C. §3147 and the relatively few circuits that have decided the question to date, we suggest that the issue is best left for resolution by the courts as a matter of law and that the Guideline be held in abeyance until the legal issue is resolved.

Amendment No. 143: No comment.

Amendment No. 144: Is making an offer an attempt which therefore would fall within the scope of section 2X1.1?

Amendment Nos. 145-152: No comment.

Amendment No. 159: This amendment suggests consideration of the status of the smuggler of illegal aliens and increases the offense level to at least a level eight. Without this amendment, the offense levels range from six to 14 depending upon whether the offense was for profit and if the defendant has a prior conviction for smuggling aliens. In some respects, this amendment extends the relevant conduct rules to situations where the defendant is a deported alien (which carries a base level eight). This amendment would hurt the defendant if the smuggling was not for profit (level six) and the illegal alien defendant had no prior smuggling conviction. What this does, however, is allow the prosecutor to obtain a conviction for alien

smuggling and not have to charge or convict the defendant of his or her illegal status. However, it would appear to prevent an increase in levels in a multiple count conviction situation (e.g., one count of smuggling and one count of being a deportable alien found in the United States). On balance, we urge the Commission to consider the impact on prison population before amending.

Amendment Nos. 160-161: No comment.

Amendment No. 162: This proposal introduces a presumption of profit in section 2L2.1, trafficking in evidence of citizenship or documents authorizing entry. This amendment conforms section 2L2.1 to the structure of section 2L1.1. We object on the grounds that profit is an aggravator that should be proven by the government and not presumed as inherent in the offense. Section 2L1.1 should be reamended to conform to existing section 2L2.1 (section 2L1.1 was amended in January 1988 to presume profit).

Amendment No. 163: This purports to do the same to section 2L2.2 that amendment no. 159 does to section 2L1.1.

Amendment No. 164: This attempts to presume profit in section 2L2.3 (trafficking in United States passport). See comments to amendment no. 162, supra.

Amendment No. 165: This section seeks to amend section 2L2.4 in a manner similar to amendment no. 159. See comments to amendment no. 159, supra.

Amendment Nos. 166-168: No comment.

Amendment No. 169: The Commission seeks comment on whether an additional distinction should be made in escape cases where the escape is from secure as opposed to nonsecure custody. Presently, the Guidelines only distinguish between escapes from secure custody and those from nonsecure custody where the defendant voluntarily returns within 96 hours. Many escape cases involve walk-a-ways from halfway houses where the defendant does not voluntarily return within 96 hours. However, this kind of "escape" is significantly different from secure custody escapes. A nonsecure 96 hour return case should have a guideline which permits probation. Other walk-a-ways without a voluntary return could be placed within Guideline ranges where probation or 30 to 90 day sentences could be imposed. The Commission could also consider the relative severity of the offense for which the defendant was serving time when he or she absconded and the conduct while on escape status. There should be statistical support from past practices to give the Commission appropriate guidance regarding such sentences.

Amendment Nos. 170-187: No comment.

Amendment Nos. 188-242: No comment.

Amendment No. 243: NACDL concurs with the numerous critical grounds set forth in the Notice of Proposed Rule Making. The Commission proposes three options but NACDL does not believe that any one of those options would adequately remedy the flawed application of career offender guidelines and its reconciliation with the enabling legislation. We believe that further empirical study is needed in addition to more experience under this section before amending this important guideline. In reaching this conclusion, NACDL has studied the positions advanced by the Federal Defender Service and the American Bar Association. Of the two, NACDL tends to agree with the suggestion by the ABA indicating that "the Commission may want to consider making the career offender designation a basis for departure, given the tremendous variations among the underlying prior convictions that define a 'career offender.'"

Amendment Nos. 224-245: No comment.

Amendment No. 246: NACDL adopts the commentary submitted by the Federal Defender Service on the Criminal Livelihood Guideline Amendment, section 4B1.3. See also, United States v. Rivera, 694 F.Supp. 1105 (S.D.N.Y. 1988).

Amendment Nos. 247-259: No comment.

Amendment No. 260: The Commission seeks public comment on the question of whether the policy reflected in the existing Guidelines should be revised to accommodate the provision in section 7305 of the Omnibus Anti-Drug Abuse Act of 1988 providing for the use of home detention as an alternative to imprisonment in light of the existing Guideline distinction between home detention, community or intermittent confinement and imprisonment. First, it is clear that section 5C2.1(e) must be amended to permit home detention to be imposed as a substitute for imprisonment. As with intermittent community confinement, home detention, if substituted for imprisonment, should be done as an exact equivalent, i.e., day for day credit. Additionally, NACDL would not object to the court's discretionary imposition of electronic monitoring being used to supplement probation officer enforcement of the condition so long as the prisoner not be made to bear the cost of the hardware which could preclude large numbers of offenders from the benefit contemplated by this section. NACDL also believes that no type of offender should be precluded from home detention and that offenders should be able to be sentenced directly to home detention even if the applicable guideline range in the sentencing table is more than ten months. At the very least, if the Sentencing Guideline range is more than six

months but not more than ten months, a defendant should be able to be sentenced to home detention without being required to serve at least one-half of the minimum term in prison.

Amendment Nos. 260-267: No comment.

Amendment No. 268: NACDL strongly opposes this amendment which would revise section 5K1.1 relating to substantial assistance. First, prosecutors have far too much discretion in determining whether to move the sentencing court to authorize a sentence below any mandatory minimum, 18 U.S.C. §3553(e), or for a reduction of sentence, Rule 35(b), F.R.Cr.P. on account of cooperation with the United States. The proposed amendment to this section relating to the defendant's best good-faith efforts represent an impractical limitation. NACDL has consistently favored the use of cooperation as a ground for departure. Concomitantly, however, we feel that the enabling legislation vests far too much discretion in the government to unilaterally seek to reward a defendant's cooperation. Ultimately, we feel that both parties should have the opportunity to move the sentencing court either to impose a sentence below a statutory minimum or for relief under Rule 35. We recognize, of course, that this is beyond the Commission's authority. The proposed amendment,

in our view, which essentially requires "results" will likely lead to widespread perjury and confidential informant overreaching in order to secure the benefits of the proposed amendment.

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In conclusion, it is the position of the National Association of Criminal Defense Lawyers that the Commission should not adopt any amendments at this time due to the lack of empirically-based data and sufficient experience under the Guideline system upon which to predicate the promulgation of further rules. This point was underscored in comments by a number of the Commission's members in the Federal Sentencing Reporter (Feb./March 1989).

I wish to acknowledge the valuable assistance provided to me in the compilation of these comments, including the efforts of Alan Ellis, Esq., Judy Clarke, Esq., Alan Chaset, Esq., Neil Jaffe, Esq., Scott Wallace, Esq., and Irwin Schwartz, Esq.

We deeply appreciate the opportunity to comment on these matters of public importance.

Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

By: _____
BENSON B. WEINTRAUB,
Vice-Chair, NACDL
Sentencing Committee

BBW/p

cc: Honorable Michael K. Block
Honorable Stephen G. Breyer
Honorable Helen G. Corrothers
Honorable George E. MacKinnon
Honorable Ilene H. Nagel

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW.
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

April 10, 1989

MEMORANDUM:

TO: *Commissioners*
Staff Director
Legal, Research, Drafting & Hotline Staffs

FROM: *Paul K. Martin* PKM

SUBJECT: *Public Comment on Corporate Sanctions*

Amidst the deluge of public comment on the proposed amendments comes two submissions on corporate sanctions. The first is from the National Association of Manufacturers and stems from the group's meeting with Commissioners several months ago. The second comment comes from Joseph R. Creighton, Senior Legal Advisor with Harris Corporation.

Attachments

Paul Martin

National Association
of Manufacturers

JAMES P. CARTY
Vice President
Government Regulation, Competition
& Small Manufacturing

April 10, 1989

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

Dear Mr. Chairman:

The NAM today is submitting its written comments on the Discussion Materials on Organizational Sanctions per the request of the Commission.

We appreciated the opportunity to meet with you and your fellow Commissioners and your staff to discuss the materials and we look forward to working with you on this ongoing project.

We hope that you will find our comments useful. If you believe an additional meeting is necessary, we would, of course, make ourselves available at your convenience.

Sincerely,

enclosure

cc: Commission members

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MANUFACTURING CREATES AMERICA'S STRENGTH

COMMENTS

on

DISCUSSION MATERIALS
ON ORGANIZATIONAL SANCTIONS (JULY, 1988)
UNITED STATES SENTENCING COMMISSION

by

Corporate Finance and Management Committee
National Association of Manufacturers

April 10, 1989

National Association of Manufacturers
1331 Pennsylvania Avenue, NW, Suite 1500 — North Lobby
Washington, DC 20004-1703 (202) 637-3000

EXECUTIVE SUMMARY

NATIONAL ASSOCIATION OF MANUFACTURERS
Corporate Finance and Management Committee

Comments
Submitted April 10, 1989
on the Discussion Materials
on Organizational Sanctions (July, 1988)

United States Sentencing Commission

In July 1988 the U.S. Sentencing Commission - an independent federal commission - established in 1984 to set up mandatory sentencing guidelines for individuals and organizations, issued a draft paper on possible areas for guidelines to be used by courts in determining the proper sentence for corporations and businesses. The Commission invited public comment and this paper is submitted in response to that invitation. The authors of the paper also met with Commission members on December 15, 1988 to review the material and these written comments expand on and supplement those comments.

The NAM's most serious criticism points out that the smallness of the sample, less than one percent of federal defendants, raises serious questions regarding the generalizations in the Materials upon which the suggested guidelines will have to be based.

In these comments, we point out that the Discussion Materials confuse individual and corporate crimes and thus we conclude that the model of corporate conduct proposed by the Commission for a corporation carefully measuring the benefits anticipated from illegal action against the possibility of detection is not a valid one.

We also disagree with choice of the "loss" to third parties concept as the basis for sentencing. Our comments point out problems with the use of "multiplier" to double the loss amount and then the addition of enforcement cost to arrive at the "total loss." This aggregation of factors greatly increases the potential financial burden on defendants and will lead many companies to settle their cases instead of contesting them to the end even if they believe they are not guilty.

The possible use of probation for corporations is also challenged as being inappropriate under the circumstances.

Additionally, the existing antitrust offenses should be revised to avoid overdeterrence and to be made consistent with the proposed organizational sanctions to achieve "coordination of collateral sanctions...through recognizing...fines and civil remedies."

In closing we recommend:

(1) With respect to the draft Discussion Materials for Organizational Sanctions, we suggest that, given the comparative paucity of experience with corporate fines and criminal penalties, the Discussion Materials should continue to be regarded as flexible and discretionary general principles to be reconsidered and further evaluated by the Commission and the courts.

(2) The existing guidelines for antitrust offenses by organizations should be revised. In addition, they should be amended to provide for integration of individual fines, civil penalties and treble damage awards with organizational fines.

April 10, 1989

NATIONAL ASSOCIATION OF MANUFACTURERS
Corporate Finance and Management Committee

Comments
Submitted April 10, 1989
on the Discussion Materials
on Organizational Sanctions (July, 1988)

United States Sentencing Commission

The National Association of Manufacturers (NAM), is pleased to have this opportunity to comment on the draft Discussion Materials on Organizational Sanctions (July, 1988).

The NAM met with the U.S. Sentencing Commission and presented orally its comments and suggestions on the draft Discussion Materials, as summarized in this paper.

These comments are divided into two sections. In the first section, we reiterate several suggestions on the draft Organizational Materials which our committee registered with the Commission at the meeting. Additionally, we make certain criticisms of the proposed Organizational Sanctions and offer suggestions for their improvement. We find ourselves in agreement with the respective statements of Thomas B. Leary, (December 1, 1988) on behalf of the Business Roundtable; Hon. Charles Renfrew (December 1988), and Samuel Buffone (October 11, 1988) on behalf of the American Bar Association. In the second section we respond to the invitation of the Commission in its General Statement of Subjects and Issues for Public Comment to provide comments on "whether substantive changes to the existing antitrust guideline" (Sec. 2R.1.1 of the existing guidelines) "will be desirable."

A. General Comments on the Discussion Materials

By way of background, the Comprehensive Crime Control Act of 1984 (28 USC Sec. 991 et seq.) established the United States Sentencing Commission. It also revised the Criminal Code to provide specifically that organizations be sentenced to a fine or to probation (18 USC Sec. 3551) as authorized by Subchapter B, which covers probation in detail (Sections 3561-66) but does so in a manner relevant for individuals, but mostly irrelevant for organizations. In this connection, it is clear from the General Statement at the beginning that this draft is intended to deal only with "business firms operated for profit" (see par. 7, p. 2), not labor unions, charitable and other not-for-profit organizations.

It seems clear that the guiding principles for the Discussion Materials come from the "Staff Working Paper," which adopts a somewhat academic approach to many of the crucial issues. Much more realistic conclusions are included in Chapter 18, Sentencing Alternatives and Procedures, 1986 Supplement, which was issued by the Standing Committee on the Association's Standards for Criminal Justice of the American Bar Association. The ABA conclusions deal with the same issues with far more emphasis on the difficulties of application and dangers which may result from these proposals.

We note some general problems with the draft's overall approach which need discussion at the outset:

1. The Discussion Materials Confuse Individual and Corporate Activity

As several previous comments to the Commission (Leary, Renfrew) have noted, corporations do not commit crimes; individuals do. Except possibly in certain closely-held corporate cases, the individual employees of business organizations who commit actions constituting a criminal offense do not try to balance a marginal increase in corporate profit against possible penalties against the corporation. The employees are far more likely to be considering whether they may be able to derive greater individual benefits in the form of promotions or job security. We therefore believe that the model of corporate conduct proposed by the Commission of a corporation carefully measuring the benefits anticipated from illegal action against the possibility of detection is not a valid one.

The Discussion Materials attempt to deal with this gap in reasoning by asserting that application of greater corporate penalties will call forth greater diligence on the part of corporate managers in preventing individuals under their supervision from committing crimes. On the other hand, in many if not most cases, an individual's commission of a crime is carried out in blatant violation of express corporate directives or policies requiring compliance with the law. If a corporation has established a compliance program and has attempted to supervise that compliance program and is defeated from detecting the offense only because of the employees' falsehoods or deceptions, the question may be asked whether the corporation should be fined at all in such a situation, at least where management is not involved and is not negligent. We submit that application of multipliers in such circumstances would be unwarranted.

2. The "Offense Loss" and "Multiplier" Concepts

The Discussion Materials select loss to third parties resulting from a crime as the fundamental basis for

sentencing. To this basis is applied a "multiplier," essentially to double the amount of this loss. Then law enforcement costs are added to get what the Commission calls the "total loss." This aggregation of factors greatly increases the financial burden on defendant companies and makes it likely that every alleged violation of the Federal Code is a potentially catastrophic event. Although the draft recognized this approach, we submit that the Commission does not face up to the almost insuperable difficulties that will result from this basis for sentencing, particularly as applied to corporations.

The first problem is the inevitable distortion of trial procedures and fairness that will obviously result. Although the defendant has had a trial where the applicable criminal protections, procedures, rules of evidence and burden of proof apply, issues such as loss or gain are not tried by the jury. Evidence about them is normally not relevant to conviction or acquittal. Sentencing procedures, on the other hand, do not involve a jury and are not governed by rules of procedure applicable in criminal trials. Currently, criminal procedures do not include what amounts to a second trial to determine complex issues of either loss or gain from the alleged activities.

Another serious problem with using loss as a basis for sentencing is that it must be estimated, as the Commission recognizes. The commentary states that there is no intent to waste resources excessively in the estimating process. From a defendant's viewpoint, this is a cavalier attitude indeed. It is difficult to see how the requirements of due process of law can be met if sentences are based upon losses which are estimated in a cursory fashion. It seems clear that the draft's conclusions, undoubtedly drawn from academic exercises, are based upon concentration on certain white collar crimes, such as embezzlement or some securities frauds, where there are monetary amounts which can be determined with some reasonable certainty.

Many regulatory and environmental studies provide for criminal penalties for offenses that are only generally defined. If provision is to be made for recovering "potential" as well as "actual" loss, the possibility of greatly inflating the "loss" figure is much increased.

The whole problem of loss is made more acute by the second major factor to be applied in sentencing: the multiplier. Fixed multipliers are to be used to increase the figure. Then, law enforcement costs, which are also estimated, are added and an adjustment is made for a variety of other factors that are now used by courts in sentencing. This total is then to be the basis for fines, and, in addition, for imposition of probation. True uniformity in sentencing

results seems very unlikely, and even that is to be sacrificed to achieve uniformity in procedures.

With these procedures, we see the potential of future defendants facing fines totaling in the millions, thus forcing even large companies to close down or accept a deal to protect their economic survivability with very little consideration of their culpability, a prosecutor's dream, but a defendant's nightmare.

3. The "Moral Culpability" Model Is Preferable

We believe that it is far more effective and in greater accord with the realities of business to follow a model based on moral culpability and to examine and evaluate offender characteristics, than to place excessive reliance upon the accident of detectability. We endorse the recommendation of the American Bar Association that the sentencing court should retain flexible discretion to draw upon the range of available corporate sanctions based on such offender characteristics as the degree of responsibility of corporate management or the importance of a corporation's conduct or services to the economy (see statement of Buffone at pp. 16-20). Much will turn upon whether the corporation is a closed corporation, owned and managed by the very individuals who commit the illegal acts, or a publicly-owned corporation where management may not be aware of the criminal acts of its employees.

In addition, the penalties which are imposed in the first instance on corporations (in the form of fines or probation) are not borne by the people who have committed the crime (the employees) but are borne by innocent stockholders or other innocent employees. In the case of a publicly-owned corporation, any fines, if not borne by the shareholders, may be passed on to the public in the form of increased prices for products. Such an action, of course, can injure both the corporation and the economy by rendering the corporation less competitive, in comparison to both its American and foreign competitors.

The short conclusion from all this is that most organizational crime is substantially different from almost all individual crimes. This does not mean that organizations should not be convicted and punished if they have overstepped the line, but it does mean that mechanical application of principles of loss or gain, or multiples, is simply not likely to be relevant most of the time.

4. The Lack of an Empirical Basis for the Proposals

The Discussion Materials note that the sample of corporate criminal experience upon which the Discussion Materials are based is very small indeed. Parker in his paper notes that

"organizations account for less than one percent of federal criminal cases - an annual average of approximately 400 organizations out of 55,000 defendants" (at p. 5). Indeed, he notes that the Discussion Materials are essentially based on a sample of only 370 convicted organizations (Appendix B1).

The smallness of the sample and the fact that it involves "very few" large or well-known firms suggest that the validity of the generalizations in the Discussion Materials should be tested before being legislated as binding guidelines.

The lack of a real need for the radical concepts of "offense loss" and the multiplier as the basis for organizational sentencing is demonstrated by the statistics cited in the materials. A four-year survey covering 1984 to 1987 shows that corporate convictions averaged only 305 per year. Of these, the vast majority, 87 percent of the organizations, were closely-held corporations.

Crimes by closely-held corporations are likely to be best punished or deterred by the sentencing of the responsible individuals rather than their legal entity. This would apply to about 265 out of the 305 cases per year, leaving only 40 cases throughout the entire United States to be governed by an exceedingly complex set of guidelines which inaugurates completely untried principles. Additionally, as pointed out by the Commission, applicable laws and procedures already provide for compensation and restitution to third parties injured by organizational crimes. Consent decrees and agreements reached in plea bargaining now achieve most of the purposes cited for both the "offense loss" concept and probation. The inescapable conclusion is that all these complex, new and untried procedures will relate to only a very few cases a year and without any substantial evidence on the record to justify such a radical new approach.

5. Questions Concerning Probation for Corporations

The Sentencing Commission's emphasis in this draft on probation for corporations seems to be an anomaly. The Comprehensive Crime Control Act of 1984 undoubtedly requires some use of probation, but the Sentencing Commission has the ultimate authority to determine when probation is appropriate and how it should be applied. For reasons discussed hereafter, it seems clear that the Commission has gone too far in this draft. The document recognizes all of the reasons why probation is not appropriate and calls for the courts to use it sparingly, but nevertheless proposes guidelines which the courts will almost certainly interpret as requiring them to use probation more than can be justified.

For many reasons, very careful review is required before probation is extended to organizations such as publicly-held corporations. Some of these reasons are:

(a) No evidence is presented of any problem or need which requires a solution.

(b) It is virtually untried.

(c) Past experience with it relates to individuals where it is used as an ameliorating factor for deserving defendants where imprisonment is not necessary.

(d) Corporate supervision by probation officers in the traditional sense is obviously impractical; probation can be achieved by other and better means.

(e) Corporations (at least publicly-owned ones) usually have the means to compensate victims or to pay any monetary fines for public injury, whereas imprisoned individuals may not.

A proper approach, it is submitted, would be for the Commission to state that the statute permits, and the Commission believes, that probation should be available to the court. It should be utilized, however, only in rare circumstances when absolutely needed and where the obviously objectionable factors are clearly not present. In such instances, the courts should be required to include a specific justification for use of probation with a clear delineation of the need and lack of any other appropriate remedies of a civil, criminal or administrative nature. If the corporate defendant is able to pay the fine or make restitution and has agreed in plea bargaining or sentencing procedures to other alternatives, in the nature of a consent decree or agreements with regulatory or procurement agencies of the government or injured third party, then probation would not be permissible.

The absence of any real need to apply probation to publicly-held corporations as a general rule is clearly apparent from the Commission's draft. Although proposals for increased use of probation as applied to corporations may be contained in academic literature, the materials presented by the Commission clearly indicate that the objectives are easily achievable with respect to corporations under existing procedures, probably with only a very few exceptions. As indicated heretofore, scant evidence exists of a need for any guidelines as applied to publicly-held corporations in view of the paucity of cases--about 40 a year in total. There is no evidence probation would have been appropriate, or even needed, in those few instances.

The term "probation" has a long-standing meaning in relation to individuals where an imprisonment sentence will not be carried out because of ameliorating circumstances, or the individual can be freed from imprisonment without danger to the public where properly supervised by a probation officer. A suspended sentence is another device to achieve this purpose where supervision is not required. Probation officers are trained to deal with individuals in the criminal process. No matter how the quality or performance of such officers is to be assessed, at least they have experience with people's behavioral characteristics.

Probation officers have no such experience in dealing with complex business matters, and supervision of a large corporation by such a probation officer would be unworkable.

B. The existing guideline for antitrust offenses should be revised to avoid overdeterrence and to be consistent with other Organizational Sanctions

Existing guideline Sec. 2R.1.1, which deals with bid-rigging, price-fixing or market-allocation agreements among competitors, provides that:

> A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 20 percent of the volume of commerce, but not less than $20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than $100,000.

The commentary goes on to provide:

> Substantial fines are a substantial part of the sanction. It is estimated that the average additional profit attributable to price-fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time. The statutory maximum fine is $250,000 for individuals and $1,000,000 for organizations, but is increased when there are convictions on multiple counts.

We believe that the net result of the above provisions will be to increase drastically, to the point of overdeterrence, the fines likely to be imposed for the wide variety of so-called price-fixing and market allocation cases.

(1) The Commentary states that "it is estimated that the average additional profit attributable to price-fixing is 10 percent of the selling price." No further information is provided as to the basis of this estimate which, in the opinion of most businessmen with whom this guideline has been discussed, seems grossly excessive. Certainly the Commission should provide particulars on the basis of this estimate to enable others to analyze and evaluate its validity. We believe the Commission should instead direct the courts to determine, in accordance with their standard procedure, the actual loss or gain experienced as result of the antitrust violation.

(2) The Commentary goes on to provide that the multiplier to be applied to the above figure of 10 percent of the selling price will range from two to five "because of the difficulty in identifying violators." It has been the experience of most businessmen that those organizations that violate the antitrust laws through price-fixing and market allocation offenses are comparatively easy to identify, particularly given the fact that a treble damage bounty is offered to victims to identify and sue for these offenses. Thus the wide range between two to five times the asserted loss provides prosecutors with excessive prosecutorial discretion in recommending proposed fines to the court.

(3) The Commission specifically notes that "additional monetary penalties can be provided through treble damage actions." If treble damages are added to proposed fines totaling "20 to 50 percent of the commerce involved," the fines clearly fall within the category of overdeterrence and excessive punishment. That this is clearly possible is confirmed by the effect of the 1987 Criminal Fines Improvement Act. This legislation provides that the maximum fine for each count shall be either $1 million or an amount equal to double the gain or loss resulting from the crime, whichever is the greater. The 1987 Act was enacted in the final hours of the respective legislative session with no testimony from business organizations and practically no public debate as to the propriety of the increases sought. If double the gain or loss is added to an award of treble damages in parallel civil litigation, the defendant could wind up paying five times the gain or loss plus counsel fees. Such fines would clearly impose enormous penalties on defendants.

(4) We believe that the present guidelines for antitrust offenses by organizations is inconsistent with the draft 1988 Discussion Materials on Organizations Sanctions, which note (at p. 8.5);

(c) Coordination of Collateral Sanctions

> The third basic principle of organizational sentencing is that the several criminal sanctions and civil remedies typically available for the same organizational offense should be coordinated to produce the appropriate total sanction in the most effective manner. There are two separate aspects to this task: first, adjusting the organization's sentence to reflect the punishments imposed on the individual agents responsible for the organization's offense; and second, coordinating the organization's criminal sentence with the sanctions imposed by parallel enforcement activities.

The antitrust guideline specifically provides for additional monetary penalties via private treble damage actions. NAM believes that this express exclusion of civil penalties under this guideline is inconsistent with the basic objective of the Discussion Materials to achieve "coordination of collateral sanctions" for organizational offenses through recognizing the criminal fines and civil remedies. The fines and other sentences imposed on individuals should also be considered and coordinated in a similar manner with any organizational sanctions. Such coordination will help avoid the overdeterrence that otherwise seems likely to result.

RECOMMENDATIONS

It is submitted that the Commission should reevaluate its entire approach to sentencing guidelines for corporations, both to find a better basis for sentencing and uniformity than the use of the "offense loss" and multiplier concepts and to deal more realistically with probation so as to make its application an exception to be applied only to the extent specifically required by the statute and in situations where it is needed and appropriate. Additionally, the existing antitrust guidelines should be revised as outlined in our comments.

As corporate attorneys we are aware of the tremendous variety in size, type of management and purpose that characterize our various companies. In sharp contrast with fines for individuals, organizational sanctions must span a wide breadth of different organizational patterns and modes of operation. This diversity of organization argues strongly in favor of giving the courts a greatly increased flexibility of action to deal with the different factual situations which they will meet in imposing organizational sanctions.

We recommend that the Sentencing Commission take the following actions:

(1) With respect to the draft Discussion Materials for Organizational Sanctions, we suggest that, given the comparative paucity of experience with corporate fines and criminal penalties, the Discussion Materials should continue to be regarded as flexible and discretionary general principles to be reconsidered and further evaluated by the Commission and the courts. In our discussion with the Commission, we were asked whether we preferred specific or generalized guidelines for organizational sanctions. We believe that, given the current lack of experience with the guidelines and the disputed premises underlying much of the Discussion Materials, it would be wise and prudent for the Commission to make clear that it is attempting to articulate a set of general principles to be weighed by the courts rather than rigid guidelines.

(2) The existing guidelines for antitrust offenses by organizations should be revised. There should be a further public discussion of the bases for the present guidelines and an interim decision that such guidelines should be viewed as nonbinding and subject to reconsideration by the Commission. In addition, they should be amended to provide for integration of individual fines, civil penalties and treble damage awards with organizational fines and, when so amended, integrated into chapter 8.

HARRIS

JOSEPH R. CREIGHTON
VICE PRESIDENT
SENIOR LEGAL ADVISOR

April 6, 1989

U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
14th Floor
Washington, DC 20004

Dear Sirs/Mesdames:

Enclosed are comments concerning the "Discussion Materials on Organizational Sanctions" issued by the United States Sentencing Commission, July 1988. These comments are submitted by me personally not by my employer, Harris Corporation, although both Harris and I are also participating in preparation of comments to be submitted by the National Association of Manufacturers. Additionally, last fall, I participated with several other lawyers and executives of major American corporations in a meeting with the Commission arranged by the National Association of Manufacturers.

I am submitting these views because I believe it is important that viewpoints of criminologists, academicians, judges and representatives of government be supplemented by viewpoints of persons having a broad range of experience in the practice of law, particularly with major corporations. The personal views of lawyers in my position may differ somewhat from comments expressed by large industry associations such as NAM or The Business Roundtable, or even an individual company, since those comments necessarily involve something of a common denominator. For that reason, equal consideration should be given to inputs from individuals.

To explain my perspective, it may be useful to outline my experience during over 33 years as a lawyer at three major corporations, preceded by four years of small firm practice and three years as an associate in a large metropolitan law firm. My areas of specialization over the years have been antitrust law, labor law, contracts of all types, international transactions and government procurement. I served as a division counsel in the General Electric Company and Raytheon Company for a combined period of 11 years; I was General Counsel of Harris Corporation from 1968 to 1985, and have devoted most of the last four years to consideration of pending legislation on matters such as the National Cooperative Research Act, the Uniform Corrupt Practices Act, product liability reform, hostile takeover legislation, RICO, and so-called program fraud and false claims in government procurement. I have testified before the Senate and House of Representatives on ten or twelve occasions, involving the above issues, on behalf of my company, NAM, the U.S. Chamber, the Coalition for Uniform Product Liability laws, and the coalition responsible for enactment of the National Cooperative Research Act. I am currently Chairman of the Law Committee of the Semiconductor Industry Association and have previously served as Chairman of the Law Council of the Machinery and Allied Products Institute and the Corporate Counsel Section of the Ohio State Bar Association.

It might seem, facially, that comments concerning the Commission's proposals should come from those experienced with criminal law and procedures. Yet, these proposals deal with profit-making corporations where the knowledge of lawyers with real corporate experience ought to be of crucial importance. Unfortunately, or perhaps fortunately, we deal relatively infrequently with criminal activity or potential criminal activity of the corporation itself. Thus, we may not know criminal procedure intimately. However, we do have exposure to criminal charges against our employees. Most of the latter involve activities of a personal nature by employees or actions by them directed against their employer. We are concerned with their personal rights, both when the corporation is considering charges against them and when the corporation is a mere bystander in their activities. Consideration of their rights when their activities may expose the corporation to potential criminal charges does provide us with a perspective towards criminal law which probably differs drastically from the viewpoints of criminal law experts, particularly as applied to preventive law and compliance procedures.

With this background, I view some of the assumptions as to corporate behavior, objectives and planning, upon which the conclusions in the draft materials seem to be based, to be unrealistic and very far from anything I have experienced during the past 33 years. On the other hand, I find the materials very thoughtful and innovative, if somewhat academic in the approach. The enclosed comments amplify upon the differences in these viewpoints and deal with a few specific issues.

Very truly yours,

Joseph R. Creighton

/md

Attachments

COMMENTS OF

JOSEPH R. CREIGHTON

TO THE

UNITED STATES SENTENCING COMMISSION

RELATING TO

DISCUSSION MATERIALS ON

ORGANIZATIONAL SANCTIONS (JULY 1988)

April 6, 1989

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I. BACKGROUND

These comments are respectfully submitted as personal comments in response to the request for comments by the United Sentencing Commission concerning the discussion materials on organizational sanctions issued in July 1988.

The Commission has very properly asked for comments about a variety of its approaches and has listed over 10 specific issues for consideration. However, these comments deal primarily with a few basic assumptions and conclusions set forth in the Commission's materials (herein called the "draft"), particularly the concepts of "offense loss" and probation for corporations. The intent is to highlight the inherent problems in these approaches. Although most of these problem areas have been recognized in the Commission's materials, it is submitted that their seriousness has not been appropriately recognized. In this connection, the materials seem to indicate that there is substantial disagreement within the Commission on many of the covered issues.

Thus, the draft is a combination of ideas and seems to be a "least common denominator" of the views of various members. There should have been some very strong dissents to portions of the document. One is reminded of the Abilene Paradox discovered by Dr. Jerry Harvey of George Washington University (see Dixon, The Common Laws of Organizational Stupidity, Financial Times, September 4, 1986) to the effect that a group tends to agree on what everybody least dislikes rather than on anything anyone positively wants. To do that in the context of criminal sentencing could be disastrous.

The guiding principles in the materials appear to derive from the "Staff Working Paper." From a corporate lawyer's viewpoint, that document evidences a somewhat academic approach to many of the crucial issues. The draft proposal prepared by Professors Coffee, Gruner and Stone appears even more academic in its approach. Much more realistic conclusions are included in Chapter 18, Sentencing Alternatives and Procedures, 1986 Supplement, which was issued by the Standing Committee on the American Bar Association's Standards for Criminal Justice. The ABA conclusions deal with the same issues with far more emphasis on the difficulties of application and dangers which may result from the proposals.

The Commission's request for industry comments from such organizations as The Business Roundtable and the National Association of Manufacturers has been very welcome. The meeting between NAM representatives and members of the Commission's staff last fall was most encouraging, particularly as it evidenced a clear recognition by Commission members of the magnitude of the task at hand and the inherent difficulties in carrying out the mandate of Congress. Those who attended were pleased that constructive comments were welcomed. These comments are submitted with full recognition that the Commission has a mandate to act and that the only useful comments will be constructive ones. Any critical comments contained herein are offered in that spirit and are intended only in the hope that they may direct the Commission towards other and more constructive directions.

II. THE COMMISSION'S BASIC PREMISES

Some general problems with the entire approach of this draft need discussion at the outset.

1. The "Offense Loss" Concept

The draft selects loss to third parties resulting from the crime as the fundamental basis for sentencing. To this basis is added a "multiplier," essentially to more or less double the amount of this loss. Then law enforcement costs are added to get what the Commission calls the "total loss." The only real alternative approach considered by the Commission is the gain to the perpetrator of the crime. Although the draft recognized that there are problems to the "offense loss" approach, it is submitted that the Commission does not appear to face up to the almost insuperable difficulties which will result from applying this basis for sentencing to corporations.

The first problem is the inevitable distortion of trial procedures and fairness which will obviously result. Although the defendant has had a trial where the applicable criminal protections, procedures, rules of evidence and burden of proof apply, issues such as loss or gain are not tried by the jury. Evidence about them is normally not relevant to conviction or acquittal. Sentencing procedures, on the other hand, do not involve a jury and are not governed by rules of procedure applicable in criminal trials. Currently, the sentencing hearing and procedures do not include what amounts to a second trial to determine complex issues of either loss or gain from the alleged activities.

If the "offense loss" concept is adopted, corporate defendants will have to add to their defensive effort a massive effort of collection of economic evidence and statistical analysis. No doubt a major portion of the corporate criminal cases looked at by the drafters were

of a sort where a precise amount of loss can be ascertained or estimated. Unfortunately, that is not true in many situations and in most major antitrust, procurement or securities fraud cases. As a minimum, extensive discovery would seem to be required, but the defendant will not have a right to such discovery. Consequently, there ought to be some overwhelming need for this innovation, based on real evidence of a problem, before anyone should consider conducting a second trial on loss or gain in sentencing procedures. Unfortunately, no such evidence is presented, and the conclusions in the draft seem to be based almost entirely on theoretical analysis by the professors and the staff, probably predicated upon some earlier writings of criminologists.

2. Is there a need for this drastic innovation?

The absence of a real need for the radical concept of using loss or gain as the basis for organizational sentencing is indicated by the statistics cited in the draft. A four-year survey covering 1984 to 1987 shows that corporate convictions averaged 305 per year. Of these, 87% of the organizations were closely held corporations. It certainly must be true that crimes by closely held corporations are likely to be best punished or deterred by sentences of the responsible individuals rather than their legal entity. This would apply to about 265 out of the 305 cases per year, leaving only 40 cases throughout the entire United States to be governed by this exceedingly complex set of guidelines which inaugurates completely untried principles. Furthermore, as pointed out by the Commission, currently applicable

laws and procedures already provide for compensation and restitution to third parties injured by organizational crimes. Consent decrees and agreements reached in plea bargaining now achieve most of the purposes cited for both the "offense loss" concept and probation. The inescapable conclusion is that all these complex new procedures will relate to only a very few cases a year.

3. The Problem of Estimates

The next problem with using loss as a basis for sentencing is that it must be estimated, as the Commission recognizes. The commentary states that there is no intent to waste resources excessively in the estimating process. From a defendant's viewpoint, this is a cavalier attitude indeed. It is difficult to see how the requirements of due process of law can be met if sentences are based upon losses which are estimated in a cursory fashion. It seems clear that the draft's conclusions, undoubtedly drawn from academic exercises, are based upon concentration on certain white collar crimes, such as embezzlement or some securities frauds, where there are monetary amounts which can be determined with some reasonable certainty. Even in cases of bid-rigging antitrust violations, which probably constitute a substantial portion of the corporate crimes reviewed by the Commission, the actual loss to the governmental agency is probably not as easily computable as is sometimes suggested in court decisions and antitrust treatises. Antitrust loss is basically an economic analysis. Nevertheless, this so-called loss is to be estimated in all cases whether or not there are any liquidated amounts or any tangible basis for the estimate.

4. Multipliers as Applied to Estimates

The whole problem of loss is made more acute by the second major factor to be applied in sentencing: the multiplier. It has become commonplace in statistical analysis to estimate amounts and then use such estimates as a realistic basis for further computations. Nevertheless, it seems almost inconceivable that someone really believes that losses are to be estimated with respect to all organizational crimes, no matter what their character may be, and that then a fixed multiplier is to be used to double the figure. Then, law enforcement costs, which are also estimated, are added and an upward adjustment is made for a variety of other factors of sorts which are probably now used by courts in sentencing. This total is then to be the basis for fines, and, in addition, for imposition of probation. That result appears to be no more than a house of cards which, unfortunately, will not easily be toppled by a defendant. Moreover, true uniformity in sentencing results seems very unlikely, but that is to be sacrificed to achieve uniformity in procedures.

5. Differences between Crimes of Individuals and Corporations

A further major problem with the draft's approach relates to the failure to distinguish adequately between individuals and corporations as criminals. It is only fair to note that the Commission recognizes there are such differences, but mention of the distinctions does not mean that these differences are fully appreciated or incorporated into

the final conclusions. First, and probably most important, is a point not recognized at all by the Commission. That relates to a distinction between the types of crimes committed by most individuals as compared to those which are normally the subject of prosecutions of profit-making organizations. Although I have no statistics, my observations from over 33 years in corporate law departments is that the laws and potential violations which most concern corporations are neither clear in their interpretation or application, nor easily explainable by counsel to corporate personnel, particularly operational people in the field. Convictions are based upon trials where evidence is collected which may not have been available to corporate operators and decision-makers.The applicable law at time of trial may be based upon decisions of courts and agency interpretations occurring after the activity which is being prosecuted. Most important, everything is viewed by hindsight at the trial. Certainly, matters such as the extent of potential loss to the public or third parties are hardly ever known, in cases not involving embezzlement, at the time of corporate decision making.

All corporate activity designed for law compliance and education, as well as the direction of corporate employees, must be done in advance based on counsel's interpretations of unclear laws and regulations and where potential future activities of hundreds of people must be anticipated and guarded against. Nevertheless, despite all of the gray areas, conviction or acquittal establishes a hard and fast line between black and white. Then the sentencing guidelines relating to estimated loss, multiples and law enforcement will follow as night follows day with only some upward or downward adjustments. The present power of the

court to consider all these factors in the sentence is to be drastically reduced, if not wholly eliminated.

A further characteristic of corporate criminal involvement is the emergence of a class of cases wherein an employee's wrongdoing against the corporation is regarded as a wrong of the corporation itself. This occurs, for example, where the corporation has a government contract of a cost-reimbursement type or where costs are used in negotiating fixed prices. The corporation is charged with fraud or submission of a false claim when the real basis for the allegations is that the corporation is liable for not properly educating or controlling the employee, for not establishing appropriate procedures to control behavior or costs, or for not properly investigating to discover the wrongs or punishing the wrongdoer adequately. Even where the employee's activity allegedly benefits the corporation, in many circumstances the employees motivation is primarily personal in nature. The alleged cost overcharges are very frequently not applicable to a specific contract but involve overhead charges, and the issues of liability or wrongdoing and loss or damage involve accounting principles and procedures. Here again, uniformity as contemplated by the Commission's draft materials is almost certain to produce results which are, in fact, non-uniform because the same results will be applied to widely diverse circumstances.

The short conclusion from all this is that most organizational crime is probably substantially different from almost all individual crimes. That may not mean that organizations should not be convicted and punished if they have overstepped the line, but it does mean that

mechanical application of principles of loss or gain, or multiples, is simply not likely to be relevant most of the time. The adjustment factors are probably the only real basis for organizational sentencing.

6. Distortions from Defining "Persons" to Include Corporations

A further problem stems from the almost universal practice of making crimes apply to "persons" and then including corporations in the definition of "persons." However appropriate that may be in some instances, the practice obscures certain serious problems. The Commission has recognized that corporations must act through persons. Thus all corporate culpability is the culpability of individuals, and the corporation is held to be liable only on agency-like principles, such as respondeat superior, and often without any thought whatsoever being given to the problem. This process can reasonably be applied in almost all cases to individuals whose business is conducted through a corporate form for purposes of limitation of liability. Thus these comments are not intended to relate to closely held corporations, but only to publicly held ones.

In a large corporation, where a responsible person acting for the corporation intentionally violates a clear law, it may be reasonable to punish the corporation for a crime even if the acts were contrary to the policies of the corporation, not authorized or condoned by it, or known to higher management. On the other hand, most current laws facing corporations today and most alleged violations do not fall into this category or any comparable category. Many involve knowledge and use

terms such as "knowingly," or "have reason to know." Since only persons, and not legal entities, can have actual knowledge, such laws really relate to such matters as whether or not the corporation had proper policies or procedures, or the individuals who had the knowledge were at a high enough level. Although it may be conceded that circumstances exist in which the corporation, as distinct from the individuals, should be convicted of a crime, the issues relating to sentencing ought to be based on relevant facts. The principles which are applied to conviction and sentencing of individuals because of their "knowledge" are not at all relevant to corporate activity. Thus it is difficult to see how the basic concepts upon which the Commission's draft is predicated--loss and multiples--have any relevance to most types of corporate crime.

Also, it seems clear that uniformity in sentencing, however worthy a goal it may be, is simply not achievable if measured by the results of the draft's proposals, rather than the process. Applying a uniform formula predicated upon loss, multipliers and enforcement costs may give an appearance of uniformity in sentences, but it will really mean that uniform sentences will be applied to corporate activity which is, in fact, very different. That is true because the basis for the corporate crime in these circumstances has no relationship to the loss but is, in fact, related to knowledge, condonation and the other factors mentioned above. Since there is no way to compare the extent of such activities in policies, education, accounting procedures and the like from corporation to corporation, the whole objective of uniformity will be defeated. This is particularly true when there are simply not enough

cases per year nationwide to make uniformity of sentencing for publicly held corporations a possibility in the first place--the statistical base is not large enough. That may not mean that the Commission should not try to find some standards to be applied, but it does mean that these principles cannot be applied mechanically. Almost certainly they should concentrate on the types of characteristics which the Commission's draft uses for upward or downward adjustment.

7. The Impact of Plea Bargaining

The impact of these new proposals on plea bargaining and, conversely, the impact of plea bargaining on the results of their adoption, would appear to be significant. In fact, the prospects are alarming, although almost impossible to evaluate. Such correlative impacts must be faced, nevertheless, since so many criminal cases are resolved that way.

Pressures for plea bargaining are extreme on both sides; on the one hand because of the time, energy and costs of criminal prosecutions, and on the other, because of the same factors superimposed upon the disruption to the corporation's business and the damage to the reputation of key individuals during extensive trials and potential appeals. Casual observation indicates that some corporations enter into plea agreements to protect their employees, whereas others may settle the case against the corporation and leave the individuals to face trial on their own. Significantly, observation of past cases suggests that, when either the corporation or the individuals have chosen to contest procurement fraud criminal charges, the defense has usually proved successful. Nevertheless, most corporations have

chosen to settle even when they are normally no longer permitted to plead "nolo contendere."

The prospect of sentencing procedures based upon "offense loss" would seemingly increase drastically this pressure on the corporation to settle any case involving large numbers of potential victims or alleged loss to the public as a whole. The risk of losing would become impossible to evaluate, and any evaluation would be inordinately costly. Extensive discovery would be required and almost certainly would not be permitted. The type of trial necessary to ascertain such losses would be denied because it would not be a part of the basic trial leading to conviction or acquittal, and it would usually be too complex and extensive to be allowed in sentencing procedures. If the corporation should incur such costs while believing itself to be innocent and acquittal likely, vindication of that belief would not be a basis for recovering the extensive costs of determining what the loss to the many victims or the public might be, or might be determined to be, in the sentencing procedures.

On the other side, prosecutors can be expected to use the threat of huge victim and public losses as a means of obtaining plea agreements even in doubtful cases. Note that the costs and potential astronomical damages in antitrust and RICO cases, and their effect upon pressure to settle, have been much discussed in recent years. The consensus seems to have developed that changes in the law are indicated. Thus amendments to RICO are under consideration by Congress, and the Congress also has

under consideration "claims reduction" and other remedies for pressures for settlement in civil antitrust cases.

The powers of federal prosecutors to apply pressure for plea bargaining have already been enhanced by recent legislation allowing consideration of loss, and it is recognized that some action by the Commission to establish standards may be desirable or even essential. It is not contended that loss is not relevant to the magnitude of the crime or the reasonableness of the sentence. The Commission probably should establish rules for application of the concept. Nevertheless, an automatic and mathematical application for the purpose of obtaining perceived uniformity is not warranted, it is submitted. Also, for reasons set forth above, that will not produce actual uniformity or justice.

8. Falacious Assumptions Concerning the Corporate Decisional Process

Throughout the discussion materials there appears to be an implicit assumption that corporate officers and managers decide whether or not to take action which is criminal based upon a risk/benefit calculation. For those persons who believe that, nothing much can be said. Nevertheless, it must be clear to the Commission that, of all of the myriad of corporate decisions made throughout the United States every day, there can be only an infinitesimal fraction of examples anyone can point to where those calculations were made. It may be true that risks of civil liability for specific actions are sometimes considered in corporate decision-making. Perhaps the debate concerning the effect of

"deterrence" may never be resolved. Notwithstanding, it is possible to believe that deterrence is a desirable aspect of criminal sentencing without making the assumption that a majority of people, acting individually or in organizations, obey the law simply out of fear of punishment. Deterrents may be a factor in preventing crimes where the individual organization is willing or pre-disposed to break the law if it can get away with it, but there is little evidence that most individuals and organizations will break most laws most of the time where the law is clear to them. The fact is that most larger corporations today have clear policies for law compliance. Most corporate lawyers and executives do not, in fact, very often face an issue where criminal activity is even considered. Thus, it is submitted, discussion materials based upon assumptions such as these are a most unsound basis for conclusions as to sentencing.

III. PROBATION

1. Questions concerning Probation for Corporations.

It is recognized that probation can now be applied to corporations and also that the Congress has expressly provided for Commission proposals as to its application. Nevertheless, for many reasons, very careful review is required before probation sentencing is extended to organizations such as publicly held corporations. Some of these reasons are:

(a) it is virtually untried;

(b) past experience with it relates to individuals where it is used as an ameliorating factor for deserving defendants where imprisonment is not necessary;

(c) the extent of it would be based upon the total loss concept as determined by use of loss or gain plus multipliers, as discussed in Section II above;

(d) corporate supervision by probation officers in the traditional sense is obviously impractical;

(e) most, if not all, of the objectives listed for probation can be achieved by other and better means;

(f) there are inherent differences between individual and corporate crimes, particularly as related to the clarity and liquidity of injury to victims or the public;

(g) corporations (at least publicly owned ones) usually have the means to compensate victims or to pay any monetary fines for public injury, whereas imprisoned individuals may not; and

(h) no evidence is presented of any problem or need which requires a solution.

2. Is there a real need?

It is true that the Act, as amended in 1984, calls for sentencing of organizations by probation or fines. However, probation for corporations is not specifically required by the language of the statute. It is probably true, nevertheless, that the intent of Congress was to apply probation to corporations convicted of crimes in some circumstances. Furthermore, inasmuch as courts have used, and are considering use of the device, it is perhaps desirable for the Commission to evaluate the use of probation and to provide for its use where it is appropriate. Nevertheless, its use should be permitted only where it is appropriate.

Although the Commission may have tried to do that in this draft, unfortunately, the result is to overemphasize probation: that is, the discussion of probation in the draft will almost certainly encourage courts to use it in circumstances where it may be inappropriate and very injurious. It is simply not enough for the Commission to point out the problems and state that it should be used sparingly.

A proper approach, it is submitted, would be for the Commission to state something to the effect that the statute permits, and the Commission believes, that probation should be available to the court. However, it should be utilized only in rare circumstances where it is absolutely needed, and where the obviously objectionable factors are clearly not present. In such instances, the courts should be required to include a specific justification for use of probation with a clear delineation of

the need and the lack of any other appropriate remedies of a civil, criminal or administrative nature. If the corporate defendant is able to pay the fine or make restitution and has agreed in plea bargaining or sentencing procedures to other alternatives in the nature of a consent decree or agreements with regulatory or procurement agencies of the government or injured third party, then probation would not be permissible.

The absence of any real need to apply probation to publicly held corporations as a general rule is clearly set forth in the Commission's draft itself. Although proposals for increased use of probation as applied to corporations may be contained in academic literature, the materials presented by the Commission clearly indicate that the objectives are easily achievable with respect to corporations under existing procedures, probably with only a very few exceptions. As indicated in Section I above, there is scant evidence of a need for any guidelines as applied to publicly held corporations in view of the paucity of cases--about forty a year in total. There is no evidence probation would have been appropriate or needed even in those few instances. Guidelines dealing with sentencing, with an objective of uniformity, ought not to be obfuscated by extensive consideration of very rare cases. Such cases should be handled as an exception to the guidelines, where probation could be utilized where needed and appropriate, perhaps only in an addendum. Any indication of Congressional intent for use of probation in sentencing corporations can be reflected fully in this manner, particularly bearing in mind that (1) the Congress clearly intended that the Commission should make the final

judgment in applying the Congressional intent; and (2) the circumstances applicable to corporations and the appropriateness of corporate probation are inherently not susceptible to the type of guidelines and uniformity which the Congress was hoping to achieve.

3. The probation concept is appropriate for sentencing individuals, not corporations.

The term "probation" has a long-standing meaning relating to individuals where an imprisonment sentence will not be carried out because of ameliorating circumstances, or the individual can be freed from imprisonment without danger to the public where properly supervised by a probation officer. A suspended sentence is another device to achieve this purpose where supervision is not required. Probation officers are trained to deal with individuals in the criminal process. No matter how the quality or performance of such officers is to be assessed, they at least have experience with behavioral characteristics of individuals. Probation officers have no such experience in dealing with complex business matters, and supervision of a large corporation by such a probation officer would be utter nonsense. Thus a court really cannot apply probation in its traditional sense to a corporation: it would certainly be required to develop a new process to substitute for the traditional assignment to a probation officer. It is submitted that courts can achieve the benefits sought by the Congress through probation under existing procedures in almost all, if not all, situations. If that is not the case, the Commission ought to address itself to the specific needs and problems it has found to exist and then

should devise a tailor-made solution which should be applied only to exceptional circumstances. That is a necessary part of any useful guidelines.

4. Probation applied to corporations will not produce uniformity of sentences.

Probation as used in the Commission's draft and the enclosures seems a direct contradiction to the purpose of uniformity conceded for purposes of discussion. It may be, as the Discussion Draft memo states, that the public wishes to have a system of uniform fines, but that corporations should not be permitted to pay a "tariff" to violate the law and, therefore, providing for probation as a supplementary sentence would make it clear that there is no "price" for illegal behavior. It must be obvious, however, that punishment for individuals is the most effective means for achieving that result. As the draft points out, probation would merely be a means of assuring corporate performance or assessing extra costs on the corporation. The difficulty is that the stated objectives can be achieved by other means, whereas use of probation creates unforeseen difficulties and destroys the objective of uniformity. The entire concept of probation is one of flexibility to avoid harsh sentences and imprisonment where special circumstances justify. As to individuals, this objective can be preserved to some extent, while also injecting some increased uniformity. As to corporations, however, although the appearance of uniformity can be achieved by making the processes uniform, sentencing corporations to probation involves so many difficulties and requires so many evaluations that there simply will be no way to determine whether the results are or are not uniform. Thus,

this objective of the Act will surely not be achieved but will effectively be defeated.

IV. CONCLUSION

It is submitted that the Commission should reevaluate its entire approach to sentencing guidelines for corporations, both to find a better basis for both sentencing and uniformity than "offense loss" (or gain), plus multiples, and to deal more realistically with probation so as to make its application an exception to be applied only to the extent specifically required by the statute and in situations where it is both needed and appropriate.

It is further submitted that the essential differences between criminal behavior of individuals and that of corporations has not been truly appreciated, even though these differences have been discussed. These differences relate to the nature of the violations; the fact that issues of criminal intent mean actual intent as applied to individuals but relate to other issues with respect to corporations; the application in the case of corporations of hard and fast sentencing rules to an unclear set of facts applied to unclear laws resulting in convictions based upon a "yes" or "no" decision by court jury; and the essentially differing purposes of sentencing as applied to individuals and corporations.

/md

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March 28, 1989

U.S. Sentencing Commission
Attn: Hon. William W. Wilkins, Jr., Chairman
U.S. District Court Judge
1331 Pennsylania Avenue, N.W., Suite 1400
Washington, D.C. 20004

RE: GUIDELINE APPLICATIONS

Dear Judge Wilkins:

Please allow me to preface this letter with praise for the United States Sentencing Commission and the work which has gone into the guidelines manuals, training and application thereof to the U.S. Probation Service and other entities. I have had the privilege and opportunity to work at the Sentencing Commission in November 1988 assisting, in some small way, in developing the training packages for the upcoming seminars.

However, in dealing with the guideline applications, as the "district expert", and I use that term loosely as I am still a novice in this field, there have been several areas which I think the Commission should look at very closely and address immediately. These areas of concern are as follows:

1. Part B, Role in the Offense. Under 3B1.1 the Commission has clearly given some structure to how we as probation officers can make assessments as to a person's culpability and leadership role in an offense. The commentaries following on pages 3.3 through 3.4 give us some insight on the thoughts which the Commissioners used in making these assessments. Nonetheless, when we get to the area of 3B1.2, **Mitigating Role**, the confusion enters the picture and this becomes a very troublesome area for the probation office and the Court. By Webster's own definition, the degree of difference between minimal and minor is similar to that old proverb "six of one, half dozen of another". As you are probably aware, it is extremely difficult to come to a rationale and defendable position of whether a defendant is a minimal participant, a minor participant, or pursuant to 3B1.4, that no adjustment is to be made for their role in the offense. This becomes more of a emotive area rather than a cognitive one when dealing with these different criminal cases. The commentary on

page 3.4, no. 3, would indicate that perhaps every case should have a minor participant, regardless of the criminal culpability.

It is recommended that perhaps the Commissioners radically modify 3B1.2 and have only one mitigating level to consider, that of a "minimal participant"; whereby the offense level could be decreased four levels. However, the Commission needs to give guidance to the field in assessing how this is to be done and some criteria, such as the following:

A. That the defendant's participation was in a given time period, in that they were only involved in the criminal activity for a very short period of time such as 24 to 48 hours. This should cover your one time "mules", those who are "plainly among the least culpable", and those who are perhaps initially duped into becoming involved in a criminal scheme, but who later become clearly guilty by legal statutes.

B. A second criteria might be based upon the amount of money or reward that each defendant received for his role in the crime. Perhaps a level of $0 to $2500 would be an appropriate figure as any funds more than this, in this writer's estimation, would definitely aggravate the situation, as the defendant did realize a sizeable profit from the criminal offense, whatever it might be. Again, we are only asking for some definition in how these guidelines are to be applied and offering some concrete suggestions.

2. The next area which I would like for the Commission to address would be 3B1.3, the Abuse of Position of Trust or use of Special Skill.

Let's break this down into two separate components, position of public or private trust, or the use of a special skill. Initially, the position of public or private trust is a contradiction between the guideline and the application note. In the application note the embezzlement by an ordinary bank teller is precluded. However, in the guideline, the very first sentence opens with "If the defendant abused the position of public or private trust..." To me, this would include the bank teller. Do you not trust that the bank teller deposits your check or cash when you take it in for deposit. Likewise, a bank teller used their position with the bank to facilitate this crime which could not have been been done by an ordinary person.

The postal employee theft or embezzlement could also be applied pursuant to 3B1.3, but would be precluded by the application notes. One or the other needs to be changed. I understand that the intent of the guideline was to address the defendants who were not subject to an authority, or that they cloaked themselves in the discretionary job to commit an offense. While that may be true, the guideline does not say that, only alludes to it in the application notes.

As to a suggestion, you could leave 3B1.3 alone as written, as it is a good adjustment in this writer's opinion. However, the application notes could be changed to include any person who violates a position of public or private trust to receive this enhancement. This would take away the ambiguity of the previous application notes and allow a more reasonable approach in assessing this guideline increase.

As to the special skill, that is not as cloudy as the public trust issue and at present we have had no difficulty in assessing that level. However, it is foreseen that perhaps more definition under the application notes would be favorable to help the officers and the Courts in assessing this increase in the future.

As to acceptance of responsibility, it is believed the Commission could go even farther by taking a position as to what the sentencing judge should consider in awarding this reduction. We are finding that individuals are being counseled by their attorney not to make any comment to the probation officer regarding the offense, and to deal only with the federal judge at the time of sentencing. Therefore, the probation officer is unable to award this individual a two-point reduction, even if he was worthy of such, because of the prohibition from the defense counsel. Therefore, at the time of sentencing, the Court has generally given the acceptance of responsibility to the defendant even though he has made no statement to the probation officer. On several occasions the defendant, upon advice from the attorney, has written the judge a letter outlining his guilt and "acceptance for responsibility for his actions" and the probation officer has not seen that until the time of sentencing. Or, the defendant makes an impassioned plea at the time of sentencing and thus awarded the two-point reduction. Perhaps if the Commission could be more definitive as to when the judge is to accept or reject the acceptance of responsibility would be helpful. In particular, following application note (g), that the Court

be mandated, per the guidelines, not to accept an impassioned last-minute plea and award the acceptance of responsibility. Clearly, this circumvents the guidelines by defense counsel and is not reaching what the Commission originally intended, that the defendant truthfully and honestly feel contrite about his criminal activities and thus on the road to rehabilitation. Of course, the defense attorney generally has his client not accept responsibility as that opens up problems that the defendant might face through the relevant conduct section of the report, 1B1.3.

Please do not take these comments as being critical of the U.S. Sentencing Commission whatsoever. As previously stated, I have nothing but the highest praise for the Commission and am one of your biggest "fans". I think overall it is amazing the job which you and your staff have done in handling many complex issues and matters. This is only my thoughts as to how some things could be improved and/or addressed by the Commission. Should you wish any follow-up, I would be glad to provide additional information based upon my abilitites.

Respectfully submitted,

Gary L. Combs
Senior U.S. Probation Officer

GLC:ss