Public Comment

Proposed Amendments

DECEMBER 1989

Emergency Amendments
1989 OBSCENITY/CRACK

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

July 10, 1989

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Staff Director
Staff

FROM: Paul K. Martin

SUBJECT: Additional Public Comment on Emergency Amendments

Appended for your review is additional comment received late Friday afternoon regarding the Commission's proposed emergency guideline amendments.

Attachments

afa
Education and Legal
Defense Foundation, Inc.

July 6, 1989

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

Dear Chairman Wilkins:

I am writing to you on behalf of the American Family Association Education and Legal Defense Foundation, Inc., a non-profit organization working together with American Family Association, Inc., to promote moral principles in our society. AFA has a mailing list of over 380,000 individuals and churches and has local chapters in all fifty states.

AFA and its Legal Defense Foundation have consistently been concerned with the enforcement of obscenity laws and the efforts to curb the exploitation of women and children through the production and distribution of pornographic material. As the Attorney General's Commission on Pornography found in 1986, the most effective means of curbing the flow of obscene material is through the enforcement of the law and the punishment of the offenders.

I would offer two specific concerns regarding the currently proposed Guidelines regarding obscene material and child pornography. The first is with respect to the base offense level set for the crime of distributing obscene materials. AFA Education and Legal Defense Foundation strongly urges the use of a minimum level 8 for such an offense. We are becoming increasingly aware of the dangers the distribution of such material poses in our society and the punishment for such a crime should reflect the seriousness of the crime.

Secondly, the formulation of the enhancement provision based upon the retail value of the obscene material does not reflect the nature of the crime or its prosecution. The prosecution of organized criminal enterprises engaged in the distribution of obscene material is generally based upon a limited number of items within the vast array of similar material. Consequently, the total retail value of the material found to be obscene is actually a relatively insignificant percentage of the total

illegal operation. Therefore any sentence based upon the pecuniary value of the material found to be obscene does not accurately reflect the nature of the enterprise.

In addition, the application of a pecuniary value standard to materials involving the sexual exploitation of children is inapplicable. Such material is routinely traded in a clandestine network rather than openly sold as a business venture. Therefore, the severity of the crime should not be judged by the retail value of the material since the societal harm is measured by the number of children who are abused through the production and distribution of the depictions.

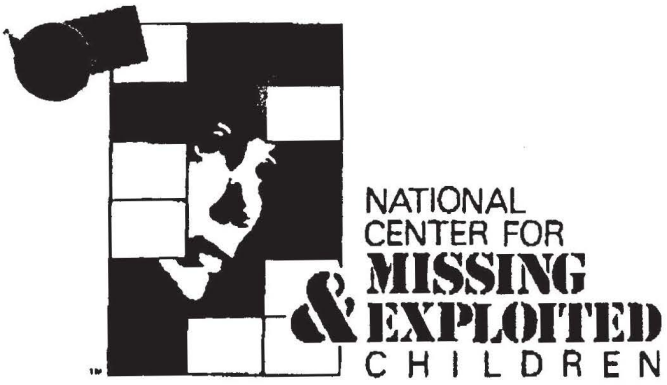
I would urge the Sentencing Commission to set a minimum level for an obscenity offense which would mandate actual jail time. Anything less does not properly reflect the severity of the act or society's intolerance for this form of exploitation. In addition, reliance on a measure of retail value of the material which is the subject of the prosecution is misplaced. The nature of the crime and the criminal enterprise involved in the distribution of obscene material or child pornography defies common theories of criminal activity.

I appreciate this opportunity to comment on these proposals. Please feel free to contact me if additional information is required.

Sincerely,

Donald E. Wildmon

Donald E. Wildmon
President
American Family Association
Education and Legal Defense
Foundation, Inc.



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July 7, 1989

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

Dear Mr. Wilkins:

Thank you for asking the National Center for Missing and Exploited Children to comment on the proposed amendments to the federal sentencing guidelines with regard to the changes to the child pornography statute as passed in the Anti-Drug Abuse Act of 1988.

The National Center for Missing and Exploited Children is concerned about the protection of this nation's children. We do not feel that we are in a position to comment directly on the guideline proposals since our mission is to work on issues concerning missing and exploited children, not post-conviction issues pertaining to adults. We do, however, want to make some general comments. We sincerely hope that the penalties imposed for conviction for use of children in pornographic and obscene depictions will convey a message to those who would involve children in such activities that we are very serious about protecting the safety and well-being of our children and that such harmful activities will not be tolerated, condoned or treated lightly.

Sincerely,

Judith Drazen Schretter
General Counsel

United States Department of Justice

DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON 20530

JUN 30 1989

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

Re: Emergency Amendment Comments

Dear Billy:

We have reviewed the proposed emergency sentencing guideline amendments recently proposed by the Sentencing Commission concerning cocaine base ("crack") and obscene materials. We urge the Commission not to promulgate these amendments as emergency amendments because we believe that the authority of the Commission to issue them under section 21 of the Sentencing Act of 1987 is questionable. We also have serious reservations about the substance of these amendments and, therefore, urge the Commission not to promulgate them in their present form when the opportunity arises under the normal amendment process.

Emergency Amendment Authority

We turn first to the issue of the use of the emergency amendment authority under section 21(a)(2) of the Sentencing Act of 1987, Pub. L. No. 100-182, to promulgate the amendments in question. This provision authorizes the Commission, in the case of the creation of a new offense or amendment of an existing offense, to promulgate "a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress" under the regular amendment process, 28 U.S.C. §994(p). A section-by-section analysis that appeared with the bill that became the Sentencing Act of 1987, S. 1822, when it was passed by the House, states that a narrow construction of the Commission's emergency powers should apply:

> It is expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances. If a guideline is invalidated, a new offense is created, or an existing offense is modified, an emergency guideline may be unnecessary because 18 U.S.C. 3553(b) may adequately addresses

> [sic] situations where there is no applicable guideline. In such circumstances, the Commission should submit a new or revised guideline to Congress in manner [sic] called for in 28 U.S.C. 994(p). 133 Cong. Rec. H10019 (daily ed. Nov. 16, 1987).

We agree with the view that the Commission should judiciously exercise its emergency amendment power, which allows it temporarily to by-pass the normal period of guideline review by Congress. However, neither the proposed crack amendments nor the proposed obscenity amendments in our opinion reflect this approach. On the contrary, they result from an overly broad reading of the Commission's emergency amendment authority and one that will likely cause considerable litigation and may result in an unfavorable ruling. Such litigation would divert Department resources from more important sentencing and other criminal law matters, possibly engender a negative reaction to the emergency amendment process in general on the part of the judiciary and the Congress, and ultimately undermine the Commission's ability successfully to seek an extension of the emergency authority, which is due to expire November 1, 1989, should the Commission wish to pursue this course. Moreover, we point out that overreaching by the Commission in the use of its emergency amendment authority and revising of guidelines related to, but not directly affected by, a statutory change will result in unwarranted sentencing disparity between offenses committed before the effective date of a guideline change and those committed thereafter. An expansive use of the emergency amendment authority in essence violates Congress's intent reflected in the rigorous requirements of the regular amendment process.

Crack

Turning first to the crack amendments, we note that they purport to respond to an amendment of the simple possession statute, 21 U.S.C. §844, by section 6371 of the Anti-Drug Abuse Act of 1988. This provision establishes a mandatory term of imprisonment of five to 20 years for anyone convicted of possessing (1) more than five grams of a mixture or substance containing cocaine base, (2) more than three grams of such a mixture or substance after a previous conviction under section 844(a) for such possession, and (3) more than one gram of such a mixture or substance after two or more previous convictions under section 844(a) for such possession. Prior to this amendment a person convicted under section 844(a) for a crack offense would have been subject to a maximum term of imprisonment of one year for a first offense, regardless of quantity; this one-year term still applies to quantities not covered by the 1988 crack amendments.

Also relevant is the statute prohibiting the manufacture, distribution, and possession with intent to distribute controlled substances, which establishes substantial mandatory penalties for specified quantities of crack. It provides a mandatory penalty

of five to 40 years for a first offense involving five or more grams of a mixture or substance containing cocaine base, 21 U.S.C. §841(b)(1)(B)(iii), and 10 years to life for a first offense involving 50 or more grams of such a mixture or substance, 21 U.S.C. §841(b)(1)(A)(iii). Thus, possession with intent to distribute crack in amounts of five grams or more was already subject to at least a five-year mandatory penalty prior to the 1988 amendment of the simple possession statute. In addition, possession with intent to distribute five grams or more of crack was already subject to higher maximum penalties -- either 40 years or life, depending upon the quantity involved -- than the 20 years now provided by the possession provision. The net effect of the Anti-Drug Abuse Act crack amendments was: (1) to eliminate the need to prove an intent to distribute (which can be inferred from sufficient quantities), and (2) to establish mandatory penalties that did not exist under the distribution statute for amounts less than five grams. However, these new mandatory penalties for less than five grams only apply to second and subsequent convictions under the simple possession statute.

The Commission's proposal amends guideline §2D2.1, applicable to simple possession offenses, by changing the offense level from six to eight for possession of crack in amounts not subject to the enhanced penalties added by the Anti-Drug Abuse Act of 1988. In addition, the Commission's proposal changes the drug quantity table in guideline §2D1.1, applicable to drug distribution offenses (including possession with intent to distribute) and drug importation offenses, by halving the amounts of crack subject to each offense level specified. Whereas under the current table five to 19 grams of crack are subject to offense level 26 (which corresponds to the mandatory-minimum five-year prison term), the proposed guideline would make this offense level applicable to just 2.5 to 9.9 grams of crack. 1/ The drug quantities for other drugs would remain unchanged. Finally, the proposed amendments include a cross-reference to the drug quantity table for crack possession offenses subject to the mandatory penalties of the amended possession statute. That is, the amendments direct the user of the guideline relating to simple possession, §2D2.1, to apply the drug distribution guideline, §2D1.1, which includes the drug quantity table, to offenses that involve the simple possession of the quantities of crack specified in the 1988 Anti-Drug Abuse Act amendments.

1/ The Commission's proposal also cuts the crack quantities in half in the proposed drug quantity table included in the sentencing amendments submitted to Congress May 1, 1989. We note that in item three of these amendments a mistake is present: "1.5 KG" should be changed to "2.5 KG" in the phrase "At least 750 G but less than 1.5 KG of Cocaine Base."

The Commission's proposed revisions increase sentences for crack possession and distribution offenses across-the-board. However, the 1988 crack amendments do not in our view reflect a congressional judgment that crack offenses generally have been subject to sentences that were too low in the past. Congress merely amended the penalties in a manner that increases them for subsequent offenses involving less than five grams of the drug. To read into the 1988 amendments an intent by Congress to bring about higher crack penalties for all amounts is simply not consistent with what Congress actually did. The 1988 statutory amendments do not, therefore, justify in any direct way the sweeping changes to the guidelines the Commission proposes.

While we do not agree with the use of the emergency authority in the manner proposed, we, nevertheless, believe there are ways the Commission can respond to the Anti-Drug Abuse Act crack amendments appropriately through use of the emergency amendment power. For example, the Commission could provide a cross-reference in guideline §2D2.1 to the existing drug quantity table in guideline §2D1.1 for cases involving conviction under 21 U.S.C. §844(a) involving the mandatory penalties, i.e., Amendment 1 of the package recently published, but without the change in the table contained in Amendment 3. In addition, it could provide an augmented offense level based on the new mandatory minimum penalties for subsequent offenses involving less than five grams of crack. The applicability of such an amendment to both subsequent simple possession and subsequent manufacture, distribution (including possession with intent to distribute), and importation offenses would be appropriate. It would reflect the belief that higher penalties for small amounts of crack involved in a simple possession case should also apply to such quantities when the government can in fact prove an intent to distribute, an importation, or other specified element of the more serious offense. (It is likely, however, that the simple possession statute will be used in such cases.)

We believe that amendments of the type we suggest are consistent with the goals of the Sentencing Reform Act of 1984. These goals are made applicable to the Commission's emergency amendment power by the requirement in section 21 of the Sentencing Act of 1987 that the Commission act in a manner "consistent with all pertinent provisions of title 28 and title 18, United States Code." We disagree with the notion that it is necessary or advisable, in order to preserve proportionality or to avoid unwarranted disparity, to amend the drug quantity table in its entirety in responding to the 1988 statutory changes relating to small quantities of crack. In the 1988 crack amendments Congress specifically provided that the possession of small quantities of crack by repeat offenders is a more serious offense than possession of small quantities of crack by first-time offenders and possession of proportionally small quantities of other controlled substances. Revising only the guidelines applicable to small quantities of crack involved in repeat offenses to reflect the new mandatory minimum penalties would not result in unwarranted

sentencing disparity in our view, but rather, a justifiable difference reflecting the congressional judgment that certain repeat crack offenses are more serious than offenses involving other drugs. In the case of repeat offenses involving less than five grams of crack, Congress has specifically negated the ratio among quantities of certain drugs set forth in 21 U.S.C. §841(b)(1)(A) and (B) and has established a new ratio.

Obscenity

We consider next the power of the Commission under its emergency amendment authority to promulgate the proposed obscenity guidelines amending §2G3.1, Amendment 4 of the package recently published for comment. The Commission's purported reason for the amendment is to establish a guideline that covers two new offenses created by the Anti-Drug Abuse Act of 1988: (1) possession with intent to sell and sale of obscene matter in areas of federal jurisdiction and on federal property, 18 U.S.C. §1460; and (2) engaging in the business of selling or transferring obscene matter, 18 U.S.C. §1466.

The Commission's proposal completely restructures guideline §23G.1, which at present applies to obscenity offenses in 18 U.S.C. §§1461-1463 and 1465, and makes this guideline applicable to the new offenses. Currently, the guideline establishes a base offense level of six, with specific offense characteristics providing: (1) an increase of at least five levels if the offense involved distribution for pecuniary gain; and (2) a four-level increase if the material portrayed sadomasochistic conduct or other type of violence. In addition, the current guideline includes a cross-reference to the guidelines on criminal enterprise and racketeering offenses.

The proposed amendments would raise the base offense level to a level selected by the Commission from between 12 and 16 if the offense involved distribution for pecuniary gain and to either six or eight otherwise. The specific offense characteristics included in the proposal provide for an increase corresponding to the retail value of the material, but this increase only comes into play if the value is more than $2,000. A new specific offense characteristic is included for "engaging in a pattern of distributing the obscene matter to persons under eighteen years of age." Finally, a cross-reference to the child pornography guideline, §2G2.2, is included if the offense involved the visual depiction of a person under eighteen years engaging in or assisting another person to engage in sexually explicit conduct. The proposal deletes the existing specific offense characteristic for violent conduct and the cross-reference to the racketeering guideline. Depending upon which base offense level is chosen, the net effect of the changes to guideline §2G3.1 could significantly increase the punishment for material that does not portray violent conduct or lower it for conduct which does portray such conduct.

We perceive almost no relationship between the proposed amendments and the creation of the two new offenses by Congress, with the possible exception of the creation of the new cross-reference. The existing obscenity guideline applies to offenses which in our view are inherently as serious as the newly created offenses and carry maximum terms of imprisonment at least as great as those established in the new offenses. We understand the argument for restructuring the existing guideline to be that the Commission in developing a guideline to cover new offenses under its emergency amendment authority need not be bound by existing offense levels for related offenses. If the Commission determines that a higher level is appropriate for new offenses, the argument goes, it should also amend the existing, related guidelines under its emergency authority so that unwarranted disparity would not result. We believe this approach results from an overly broad reading of the Commission's emergency authority and for the reasons stated above recommend against it. To avoid unwarranted disparity between the existing guidelines and the new guidelines, the Commission can be governed by the existing guidelines until the next regular amendment period.

In this case the arguments in favor of the amendments proposed are particularly weak because the Commission included in its submission to Congress an amendment of the statutory reference in the existing guideline, §2G3.1, to make it applicable to the newly created offenses. See Amendment 97, 54 Fed. Reg. 21365 (1989). The Commission, thus, responded to the creation of a new offense. If it had believed that a restructuring of the guideline was also necessary to respond to the new offense, it should have proposed such a restructuring in the course of the development of the amendment submitted to Congress.

Policy Issues

The Commission has also requested comment on the broader policy questions associated with the proposed amendments. Specifically, the Commission has asked whether the proposed amendments appropriately reflect congressional intent regarding sentencing for the newly created offenses or closely related ones. In addition, the Commission has asked whether the proposed amendments reflect sound public policy. Since we recommend against the promulgation of these amendments under the Commission's emergency amendment authority because of the need for a prudent construction of such authority, we interpret these questions as seeking comment on whether there are sound policy reasons for the Commission to promulgate these amendment in the future under its regular amendment authority. For the reasons set forth below, we also recommend against the promulgation of these amendments, with a few exceptions as to isolated revisions, for policy reasons.

First, in answer to the Commission's question whether the Anti-Drug Abuse Act amendments discussed provide a policy basis for the proposed guidelines, we believe that on the whole they do not, as explained in our analysis of the Commission's emergency

amendment authority. That is, neither the amendment of the simple possession statute relating to crack nor the creation of two new obscenity offenses in our view signals a congressional intent in favor of guideline amendments of the type proposed. Obviously, however, some fairly narrow amendments would address the statutory amendments.

Crack

Since we do not believe the 1988 statutory amendments provide a policy basis for the proposed guideline modifications, we have considered whether some other policy ground exists. We have sought information from prosecutors as to whether the current crack distribution guideline sentences are too low. The response has been, however, that the guideline sentences appear appropriate at present. In the absence of a consensus among prosecutors involved in drug cases that higher guideline sentences are needed, we are not inclined to recommend a change, particularly at a time when we are seeking to ensure proper plea bargaining procedures. We recognize that the situation may change in the future, and we may perceive a need for higher guideline sentences for certain drug offenses after more experience is gained under the current guidelines.

Obscenity

The obscenity guideline revisions include several aspects which are worth retaining but others that we strongly oppose. The incorporation in the base offense level of the pecuniary gain factor is a change we favor since most obscenity distribution offenses involve distribution for pecuniary gain. We recommend that the base offense level selected by the Commission be between 12 and 14 where there is pecuniary gain and eight otherwise.

We point out, however, that we would not favor such restructuring of the guideline if pecuniary gain were incorporated in the base offense level in a way that did not provide at least a base offense level of 12. That is, the fact of pecuniary gain, without the need to show a significant dollar amount, should result in a substantial increase in the offense level over non-pecuniary gain cases because in obscenity prosecutions the government must prove the obscenity of each item of pornography at issue. It is unlikely that the charged material will ever be very high in retail value, unless in an unusual case the defendant is found to have shipped numerous copies of the same film or magazine. It should be noted that the proposed specific offense characteristic, proposed §2G3.1(b)(1), relating to pecuniary gain does not provide a floor increase as does the existing characteristic.

Our greatest problem with the proposed guideline is the deletion of the existing four-level increase for material that portrays sadomasochistic conduct or other types of violence. The proposed guideline makes no distinction between types of obscenity,

such as sadomasochistic conduct or bestiality, except for the cross-reference to child pornography and the application note for pseudo-child pornography. We believe that the four-level increase for violent or sadomasochistic conduct should be retained, since violent pornography has an especially harmful effect upon society.

The deletion of the four-level increase for violent portrayals is particularly significant since the proposed aggravating factor that would take its place is nearly meaningless and will be utilized far less frequently than the violence factor. The proposed new specific offense characteristic -- increases for a pattern of distributing obscene material to minors -- comes from uncertain origins and has uncertain applications. While most states have statutes prohibiting unlawful display or distribution of pornography to minors, there is no similar federal statute. Neither is distribution to minors a factor in obscenity prosecutions which normally concern interstate distribution to undercover officers or adult bookstores. Perhaps this characteristic would apply to new section 1460 of title 18, United States Code, for selling obscene material in a PX, but this scenario would be rare. Suffice it to say, we would rather have an increase for material that portrays violence than for a "pattern of distribution to minors."

The proposed amendments also add the "pattern" characteristic to the child pornography guideline, §2G2.2. This produces the result of increasing the base level for those engaged in a pattern of distributing child pornography to children. While such a scenario could conceivably happen, in our memory, it never has.

Finally, we turn to the proposed additional cross-reference, proposed §2G3.1(c)(1), involving child pornography. We agree that this new cross-reference is appropriate to take into account that the new statute, 18 U.S.C. §1460, prohibits not only possession with intent to sell obscenity but also child pornography. While most offenses involving child pornography are normally prosecuted under the child pornography statutes, rather than 18 U.S.C. §1460, there may be some cases where section 1460 will be used. We note, however, that Application Note 2 includes "pseudo-child pornography" in this cross-reference. Since caselaw establishes that the use of adults who attempt to appear youthful contributes to the "patent offensiveness" of the material, an element of the Miller v. California obscenity test, we agree with the notion of greater punishment for pseudo-child pornography cases than for obscenity cases not making use of this charade. However, pseudo-child pornography in our view is not as serious as actual child pornography and should not subject the offender to the same punishment, as would be required by the application note in question. Instead, we believe a specific offense characteristic providing a modest increase would be more appropriate for pseudo-child pornography cases than would the cross-reference to the child pornography guideline.

I look forward to the discussion of these important issues at a future meeting.

Sincerely,

Stephen A. Saltzburg

Stephen A. Saltzburg
Deputy Assistant Attorney General

UNITED STATES SENTENCING COMMISSION
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WASHINGTON, D.C. 20004
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July 6, 1989

MEMORANDUM:

TO: *Chairman Wilkins*
Commissioners
Staff Director
Research, Drafting, Legal, Monitoring, and Evaluation Staffs

FROM: *Paul K. Martin* PKM

SUBJECT: *Public Comment - Emergency Amendments*

Attached for your review is public comment received today from the American Bar Association, Morality in Media, the Federal Public Defenders, the American Civil Liberties Union, and Senator Jesse Helms. Earlier, Sid circulated comment from the Department of Justice. I re-circulate Commissioner Saltzburg's letter for your convenience in maintaining a complete file.

Today is the deadline for written comment on the Commission's emergency amendments published in the Federal Register.

Attachments

AMERICAN BAR ASSOCIATION **Section of Criminal Justice**
1800 M Street, NW, 2nd Floor
South Lobby
Washington, DC 20036-5886
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ABA/net: ABA128

July 5, 1989

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

Dear Judge Wilkins:

The Sentencing Commission has solicited public comment on a set of proposed emergency guidelines pertaining to (1) possession and distribution of cocaine base (crack) and (2) distribution of obscenity. In my capacity as Chairman of the American Bar Association's Committee on the United States Sentencing Commission, I would like to offer the following comments on the proposed emergency guidelines.

I commend the Commission for again seeking public comment on not only the substantive guideline amendments but also the process by which amendments are adopted. I have followed with great interest the open process by which the Commission is considering the promulgation of guidelines on organizational sanctions. While I recognize that not all guideline issues will permit the same degree of public participation and deliberative decision making, I commend the Commission for its dedication to the process of full and open rulemaking.

I urge the Commission to not utilize the emergency amendment process as contemplated in the proposed guidelines. The emergency guideline promulgation authority contained in Section 21 of the Sentencing Act of 1987 (Pub. L. 100-182) should be used sparingly. Congress "expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances." 133 Cong. Rec. H10019 (daily ed. November 16, 1987). Emergency guidelines are not required every time Congress creates a new criminal offense, because 18 U.S.C. 3553(b) and section 2X5.1 of the guidelines provide direction to the sentencing court if the defendant has been convicted of an offense for which a guideline has not been promulgated.

There does not appear to be an emergency with respect to section 6371 and Part N of the Omnibus Anti-Drug Abuse Act of 1988, because sufficiently analogous guidelines exist for possession of crack and distribution of obscenity. Even if the current circumstances constitute an "emergency," promulgation of three of the four draft guidelines published in the Federal Register would appear to exceed the Commission's authority under section 21.

The first three proposed amendments concern the subject of "crack" cocaine. The first proposal clearly falls within the Commission's emergency authority, because it is directly responsive to a new criminal statute. The other proposed amendments cannot be so characterized. The second amendment corrects what seems to be an oversight in section 2D2.1, but bears no relation to the new statute except that both concern the general subject of crack. Even more troubling is the third proposed amendment, in which the Commission contemplates a substantive revision of the drug distribution guideline as a result of the new drug possession statute. I see nothing in section 21 of the Sentencing Act of 1987 that authorizes the Commission to enact without the benefit of Congressional review guideline amendments tangentially related to the subject matter of a new statute.

The fourth proposed amendment is a wholesale revision of the obscenity guideline. Congress created two new offenses: "engaging in the business" of selling obscene matter and possession with intent to distribute obscene matter. These statutes are refinements of the existing obscenity distribution statutes (18 U.S.C. 1461 - 1465) now covered by guideline section 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). In its May 1 submission to Congress, the Commission reasonably responded to the new statutes by adding them to the list of statutes covered by section 2G3.1. Thus, it is difficult to comprehend what "emergency" justifies the proposed emergency guideline. Instead, the Commission appears to have changed its mind very recently about the proper structure of section 2G3.1 and the danger exists that the Commission may be viewed as using the new statute as a pretext to effect the change.

Underlying our objection to the proposed emergency guidelines is a concern about the process by which the Commission enacts guideline amendments. By definition, the non-emergency promulgation procedure set forth in 28 U.S.C. 994(p) is more deliberative than the emergency procedure set forth in section 21 of the Sentencing Act. Proposed permanent amendments are exposed to public

hearings, following which there is a legally mandated six month review period. In contrast, these emergency amendments would become law immediately after the barest minimum of public comment.

Further deliberation would be desirable in this instance because the new crack and obscenity statutes raise profound questions about the guidelines system. In the case of the crack statute, the following are some of the questions raised: How should the Commission respond to mandatory minimum sentencing statutes? What is the relative seriousness of possession of a controlled substance, possession with intent to distribute the substance, and distribution itself? How much more serious, if at all, is possession of large amounts of crack than possession of large amounts of heroin, PCP, or other dangerous drugs?

Other important questions are raised by the new obscenity statute. The Commission seeks public comment on whether the base offense level for this crime should be 12, 13, 14, 15, or 16. In its current unadorned form, the question is unanswerable. Confronted with this new statute, the Commission has not addressed past practice for related offenses so as to demonstrate why the particular offense level was selected, and why it is more appropriate than some other level. It has not published any data upon which the selection of an offense level was based. There is no public record of what legal, empirical or other principles were utilized in setting the offense levels. The important statutory responsibilities to consider specific offense characteristics are similarly absent from any public record. Given the recent court opinions on departures, the Commission should include specific comments in the proposed guidelines on the factors it considered and those that it did not as a guide to future departure decisions. Absent these types of detailed statements of reasons, those applying the guidelines are left with an inadequate basis to determine the Commission's intent.

None of these are easy issues. At its most recent meeting, my Committee began to discuss some of these issues, but reached no conclusions except to urge the Commission to proceed more slowly. Perhaps the Commission believes it has resolved these questions to its own satisfaction, but the amendments published in the Federal Register do not begin to explain the Commission's decisions to the outside world. With these and other amendments, the Commission should publish more complete statements of its reasons for adopting guideline

amendments. Such statements of reason are critical to the proper application of the guidelines in the judicial system.

In closing, I request that the Commission consider these comments in conjunction with the testimony that I delivered at the Commission's last public hearing on the guideline amendment process. There is perhaps no more serious issue facing the Commission than rationalizing the process by which it will conform its initial guidelines to application experience, new legislation and intervening events. I urge the Commission to sparingly use any emergency authority until the process issues are more clearly resolved. Emergency amendments should be viewed as a last resort and used only where there is a true emergency reason for departure from the notice, comment and congressional review requirements of the Commission's rulemaking process.

Sincerely,

Samuel J. Buffone
Chairman
A.B.A, Criminal Justice Section
Committee on the U.S. Sentencing Commission

COMMENTS REGARDING THE PROPOSED TEMPORARY, EMERGENCY AMENDMENT TO SECTION 2G3.1 (OBSCENITY) OF THE FEDERAL SENTENCING GUIDELINES

Prepared by:
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INTRODUCTION

Morality in Media welcomes the opportunity to submit Comments to the proposed Temporary Amendment to Sentencing Guideline 2G3.1, pertaining to violations of 18 U.S.C. Sections 1460-1463, 1465-1466 (obscene matter). Part I of the Comments discusses the policy basis for treating obscenity offenses more severely than the existing Guidelines direct. Part II discusses appropriate base offense levels for these offenses.

I. POLICY CONSIDERATIONS

A. Obscenity Regulation Becomes Dormant

As we noted in our Comments submitted in April 1989, the prosecution and sentencing practices during the period from 1966 - 1986 are not an adequate basis for determining appropriate sentencing ranges for obscenity offenses.

In 1966, the United States Supreme Court handed down its Fanny Hill - Memoirs decision which required, in order to prove obscenity, that the U.S. Attorney show that the material was "utterly without redeeming social value." In rejecting this test in 1973, the Court in Miller v. California said it "called on the prosecution to prove a negative--a burden almost impossible to discharge under our criminal standards of proof." As noted by Morality in Media General Counsel Paul J. McGeady in a statement to the Attorney General's Commission on Pornography (Chicago, Ill., July 24, 1985):

> "This Fanny Hill case made it a practical impossibility to convict from 1966 to 1973, and a policy of non-enforcement set in at the U.S. Attorney level. Miller, of course, rejected this

test and gave us a workable definition, but Justice apparently has never recovered from its lethargy."

In 1970, The President's Commission On Obscenity and Pornography issued a report which was accurately described in the Hill-Link Minority Report of the Presidential Commission as a "Magna Carta for the Pornographer." Among other things the Commission leadership and majority recommended repeal of obscenity laws for "consenting adults." In commenting on the work of this 1970 Presidential Commission, the 1986 Final Report of the Attorney General's Commission on Pornography stated:

> "[B]y the late 1960's obscenity regulation became essentially dormant. This trend was reinforced by the issuance in 1970 of the Report of the President's Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on material available to consenting adults. Although the Report was soundly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late 1960's onward of the volume and explicitness of materials that were widely available." (emphasis supplied)

In the 1970's, America also witnessed what has since been described as a "sexual revolution." This "sexual revolution" did indeed prove costly. As New York Daily News columnist Bill Reel put it in a June 16, 1983 article:

> "The legacy of liberation is AIDS, herpes, gang rape and sexual abuse of children.
> ....
> The sexual revolution was supposed to liberate society, to provide harmless outlets for repressed urges. The opposite has occurred. An explosion of raw sex in magazines and movies has been accompanied by a scary upsurge of violence.
> ....
> 'Who will deny that there is something new and sinister in the air?' Michael Gallagher wrote recently.... 'And is it unfair to indict pornography for some share of the blame?'
> ....
> Gallagher, who works for the U.S. Catholic Conference, urges citizens to demand enforcement of anti-pornography laws. That's a beginning.... The sexual revolution has brutalized many innocent

victims. How many more will follow? Where are our leaders?"

B. Growing Concern

On March 28, 1983, at the behest of Morality in Media President Morton A. Hill, S.J., President Ronald Reagan--along with the Attorney General, Postmaster General, Commissioner of Customs, and FBI Director--met with a group of religious leaders and heads of major anti-pornography organizations. It was estimated that the religious and organizational leaders present represented a constituency of 100 million persons. Of that meeting, President Reagan stated in a July 7, 1983 letter to Fr. Hill:

> "I was pleased to have the opportunity on March 28 to meet with you and other leaders in the drive against pornography and to discuss methods to improve enforcement of our federal anti-obscenity laws.
>
> We share a deep concern about the ever more extreme forms of pornography being distributed throughout our land.
>
> In response to the recommendations made at that meeting, I have directed that a working group be established here at the White House to coordinate investigation and enforcement of the Federal anti-obscenity laws."

And, in a May 22, 1985 letter to a conference on pornography sponsored by Morality in Media, President Reagan stated:

> "Just two years ago I had the opportunity to meet with Father Morton Hill and other national leaders to discuss the spread of ever more extreme forms of pornography across the land. Our meeting made clear that ... efforts by law enforcement agencies and private organizations to deal with the problem were in need of renewal.
>
> [T]hat renewal is now well under way. Parents, schools, churches and community groups are joining forces to combat pornography and to urge public officials to take the steps within their power to control its production and distribution in their communities. This activity is truly encouraging ....
>
> ... Last week ... Attorney General Meese announced the formation of the Commission on

Pornography.... This Commission will study the full dimensions of the pornography problem.... I look forward to reviewing the work of the Commission when it reports its findings next year."

C. Final Report of the Attorney General's Commission on Pornography Marks Turning Point In Obscenity Law Enforcement

In July 1986, the Attorney General's Commission on Pornography released its Final Report, revealing the explosive growth of pornographic materials in America since 1970, as well as the degenerative change in their content. Pursuant to its Charter Mandate and consistent with "Constitutional guarantees," the Commission made recommendations for both government and private action.

At an October 22, 1986 press conference to announce the Justice Department's response to the Commission on Pornography, Attorney General Meese outlined a seven-point program to curb the growth of obscenity and child pornography, promising to pursue "with a vengeance" and prosecute "to the hilt" those trafficking in obscenity. The seven points of the Justice Department's program included:

(a) A center for obscenity prosecution;
(b) A task force of attorneys to work closely with the center;
(c) An enhanced effort by each U.S. Attorney's office concentrating on interstate trafficking in obscenity;
(d) An enhanced effort by the Organized Crime and Racketeering Strike Forces against organized criminal enterprises involved with obscenity production and distribution;
(e) A legislative package to be introduced in the next Congress.

On February 10, 1989 Attorney General Edwin Meese announced the creation of the Obscenity Enforcement Unit within the Justice Department consisting of two components--a Task Force and Law Center. In addition, Mr. Meese stated that all 93 U.S. Attorney's Offices would have at least one lawyer trained in obscenity matters.

On November 10, 1987 President Reagan unveiled the "Child Protection and Obscenity Enforcement Act." In his transmittal message, the President stated that the purposes of the Act were two fold:

(a) To update Federal law to take into account new technologies and ways of doing business employed by pornographers; and

(b) To remove loopholes and weaknesses in the laws "which have given criminals in this area the upper hand for far too long."

On February 2, 1988, the Child Protection and Obscenity Enforcement Act of 1988 was introduced in the 100th Congress, 2nd Session, and on Friday, October 21, 1988, in the closing hours of its legislative session, Congress passed the Child Protection and Obscenity Enforcement Act.

D. Enforcement of Federal Obscenity Laws Now A Priority.

In the brief time since the National Obscenity Enforcement Unit was formed, many milestones in obscenity prosecution have been reached. Although statistics have not yet been released for the 1988 fiscal year, there was an 800% increase in federal obscenity prosecutions in the 1987 fiscal year. In 1987 the Justice Department also obtained the first federal conviction against "dial-a-porn" companies and the first conviction under the federal R.I.C.O. law where the predicate offenses consisted of obscenity violations. In October 1987 a federal grand jury in Las Vegas also indicted Reuben Sturman on RICO/obscenity charges.

In 1988, a federal grand jury in Los Angeles returned a 12-count indictment against two men and two companies for alleged violations of RICO and obscenity laws. The Justice Department and the Postal Service announced that criminal charges had been brought in eight states against 20 persons and 14 corporations for using the mails to advertise and distribute obscene materials. As of May 1989, Project Postporn had resulted in 18 convictions for mailing obscene material in 11 districts.

On March 13, 1989 the Justice Department announced that a Washington, D.C. corporation pled guilty to violating the federal RICO statute where the predicate offenses consisted of obscenity violations.

In another case tried in Nashville, Tennessee, three Chicago men pled guilty on June 1, 1989 to using the U.S. mail to distribute obscene materials.

The above "chronology" of obscenity prosecutions is by no means an exhaustive list of obscenity investigations and prosecutions initiated or completed

since 1986. They do show that enforcement of the federal obscenity laws has become a Justice Department priority since 1986, and the new Justice Department head, Attorney General Dick Thornburgh, has made it clear that obscenity enforcement will remain a priority. President Bush has expressed his full support of obscenity enforcement efforts, and last, but not least, opinion poll after opinion poll show that the American people want obscenity laws enforced.

B. The Child Protection and Obscenity Enforcement Act of 1986 Does Provide a Basis for Providing Stiff Sentences for Obscenity Offenders

Congress' action in passing the Child Protection and Obscenity Enforcement Act of 1988 is the clearest indication that Congress fully shares the concerns of the Reagan/Bush administrations and of parents and decent citizens about the proliferation of hardcore pornographic material in American society and that Congress means business about dealing with those who traffic in such materials.

In the obscenity portions of the Act, Congress expanded the scope of federal obscenity laws to reach the sale of obscene matter on federal lands and the distribution of obscene material on subscription TV. Congress also made it easier to prosecute those who would use the channels of commerce as a "means of spreading [the] evil" of obscene matter [See United States v. Orito, 413 U.S. 139, at 144 (1973)] by:

a. Punishing those who receive obscene matter shipped interstate;

b. Punishing those who use a facility or means of interstate commerce to transport obscenity;

c. Permitting court ordered "wire taps" for obscenity violations;

d. Creating rebuttable presumptions to show that the channels of commerce have in fact been utilized; and

e. Facilitating cooperation between the Customs Service and U.S. Attorney's Office when both civil forfeiture of obscene material and criminal prosecution under 18 U.S.C. 1462 may be appropriate.

Congress also increased the penalty from misdemeanor to felony status for making obscene telephone communications for commercial purposes and authorized criminal forfeiture in obscenity cases.

Congress has chosen to exercise its authority to keep the channels of interstate commerce clear of obscene matter, has made all violations of the federal

obscenity laws felonies, has made property constituting or traceable to proceeds obtained from obscenity offenses subject to criminal forfeiture, and has defined "racketeering activity" in 18 U.S.C. 1961(1) to encompass obscenity offenses.

We think the Congressional intent is clear: obscenity offenses are serious offenses and sentences imposed on obscenity offenders should reflect that fact.

II. APPROPRIATE BASE OFFENSE LEVELS FOR OBSCENITY OFFENSES

A. Base Offense Level Where There Is No Distribution For Pecuniary Gain

The existing Guidelines permit a sentence range of between 0-6 months for obscenity offenses not related to distribution for pecuniary gain. This sentence can be satisfied soley by probation. Public comment is now sought as to whether the base offense level should be raised to 8.

There is an important lesson to be learned from the Constitutional analysis in determining whether there is a Sixth Amendment right to a trial by jury for persons charged with a particular offense. In it's recent Blanton v. City of North Las Vegas decision (57 L.W. 4314, 3/6/89), the United States Supreme Court wrote:

> In recent years ... we have sought more 'objective indications of the seriousness with which society regards the offense.' ...'[W]e have found the most relevant criteria in the severity of the maximum authorized penalty.'
>
> ....
>
> Primary emphasis ... must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender a significant infringement of personal freedom, ... but they cannot approximate in severity the loss of liberty that a prison term entails.
>
> ....
>
> Following this approach...a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of six months. (emphasis supplied)

In the Court's own language, the primary indicator as to the "seriousness with which society regards the offense" is the maximum authorized period of incarceration. Offenses punishable by a maximum

sentence of six months or less are "categorized as 'petty.'"

We think Congress intends all obscenity offenses to be regarded as serious offenses. Raising the Base Offense Level to at least 8, and thereby permitting a maximum sentence of 8 months, is a step in the right direction.

B. Base Offense Level for Offenses Involving Distribution for Pecuniary Gain

Under the existing Guidelines, the Base Offense Level is increased to at least 11 if the offense involved an act related to distribution for pecuniary gain. Public comment is now sought as to whether the Base Offense Level for offenses involving pecuniary gain should be increased to either 12, 13, 14, 15, or 16.

We think the Base Offense Level should be increased to at least 18 for all offenses involving distribution for pecuniary gain, unless enhancements are provided for retailers and for wholesalers, distributors, manufacturers, and producers.

In regard to the seriousness of an offense, there is a difference between the person who sells a "few" obscene videotapes to a neighbor or co-worker and the person who retails obscene matter as a regular course of trade or business. For the former, we would recommend a Base Offense Level of at least 13; for the latter a Base Offense Level of at least 16.

There is also a difference between the retailer, on the one hand, and the wholesaler, distributor, manufacturer and producer, on the other. In New York and Pennsylvania, for example, a retailer who violates the obscenity law for the first time is guilty of a misdemeanor; the person who manufactures, sells or distributes for purpose of resale is guilty of a felony. Accordingly, we would recommend a Base Offense Level of at least 18 for those who sell, distribute, manufacture or produce obscene matter for purposes of resale.

C. Specific Offense Characteristics

(1) Retail Value of the Obscene Matter

As noted in our April Comments, providing an enhancement calibrated to the retail value of the material involved is of little value in most obscenity cases. Because of the requirement that the trier of

fact must make an obscenity determination for each item, prosecutors usually do not base an obscenity prosecution on large numbers of allegedly obscene items. In the recent, well-publicized Pryba case, for example,.the RICO charges were based on seven counts of interstate distribution of obscene material and on fifteen prior convictions obtained against the corporate defendant for violating the Virginia obscenity statute. Yet, the dollar value of the obscene videotapes in the instant case was $105.30.

In obscenity cases, it makes more sense to provide an enhancement if the offender retails obscene matter and a greater enhancement for those who traffic in obscene matter for purposes of resale.

(2) Distribution of Obscene Matter to Minors

Again, we doubt that this enhancement will be of much use in obscenity cases. While youth do seem to have an uncanny ability to obtain pornographic materials, it is doubtful that retailers are an important source of it. Most youth obtain pornogrphic material "second hand." The one exception to this is "dial-a-porn," but Section 2G3.1 does not encompass dial-a-porn.

Also, it is not clear whether defendant must "knowingly" engage in a pattern of distributing obscene matter to minors.

CONCLUSIONS

Passage of the Child Protection and Obscenity Enforcement Act of 1988 does indeed provide a policy basis for amending Guideline 2G3.1 to increase the Base Offense Level for various obscenity offenses. In passing the Act, Congress responded to a ground swell of concern from the American people about the proliferation of hardcore pornography in the nation. The specific provisions of the Act indicate clearly the Congressional intent that obscenity offenses be treated as serious offenses.

Enhancements for retail value of obscene matter and distribution to minors will not significantly further the Congressional intent. The dollar value of obscene material at issue in an obscenity case is usually small and minors typically do not receive hardcore pornography from retail outlets. It would be better to provide an enhancement where defendant sells at retail obscene matter as a regular course of trade or business and a greater enhancement for those who traffic in obscenity for purposes of resale.

FEDERAL PUBLIC DEFENDER
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San Antonio
July 3, 1989

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

RE: Temporary Emergency Amendments

Dear Judge Wilkins:

The Commission has solicited comment on certain proposed temporary emergency amendments to the Sentencing Guidelines and Commentary. I am pleased to respond on behalf of the Legislative Subcommittee of the Federal Defender Advisory Committee.

Emergency Guideline Promulgation Authority

The Commission has specifically invited comment on its authority under Section 21 of the Sentencing Act of 1987[1] to issue these proposed amendments. As a matter of policy, the Commission should resort to the emergency guideline authority sparingly, for both legal and practical reasons. The grant of authority in the 1987 Act was carefully circumscribed. The broader authority to promulgate an emergency amendment for any "urgent and compelling" reason has already expired, and the more limited authority which the Commission proposes to utilize will soon expire, with no apparent move to extend them. The legislative history argues for restrictive, rather than expansive use of this temporary authority:

> It is expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances. If a guideline is invalidated, a new offense is created, or an existing offense is modified, an emergency guideline may be unnecessary because 18 U.S.C. 3553(b) may adequately address[] situations where there is no applicable guideline. In such circumstances, the

[1]Pub.L. 100-182 § 21(a)(2), Dec. 7, 1988.

> Commission should submit a new or revised guideline to Congress in [the] manner called for in 28 U.S.C. 994(p).

133 Cong. Rec. H10014, H10019 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers).

In addition to the statutory procedure for no-guideline cases, cited above, the guidelines themselves provide a first step which will deal adequately with many, if not most, no-guideline situations. For a felony or misdemeanor for which no guideline has been promulgated, the court is to use the "most analogous" offense guideline; only if there is no "sufficiently analogous" guideline is the court to resort to the more subjective process set out in § 3553(b). Guideline §2X5.1. This underscores the Congressional expectation that the emergency guideline authority will be used only in "truly emergency circumstances."

Practical considerations as well argue against expansive use of the emergency authority. Because of the interplay between 18 U.S.C. § 3553(a)(4), which requires the court to use the guideline in effect on the date of sentencing, and the *ex post facto* clause (as interpreted in *Miller v. Florida*[2]), it is incumbent upon counsel to retain all superseded guidelines and to check carefully for amendments intervening between commission of the offense and sentencing. Regular amendments alone will be substantial in volume (witness the package of 237 numbered amendments submitted to the Congress in the 1989 amendment process); emergency amendments will only add to that burden.

The timing of these proposals argues against their propriety as emergency amendments. They are based upon new or amended statutes enacted by the Anti-Drug Abuse Act of 1988,[3] which was signed into law over six months ago. It would appear that if emergency guidelines were necessary, they would have been promulgated and sent to Congress with the regular amendments on May 1, 1989. By just missing the 1989 regular amendment window, the Commission proposes to promulgate emergency guidelines which will remain in effect as such for well over a year, until November 1, 1990. This does not comport with the spirit of the emergency authority, even where it may meet the letter.

In sum, the Commission lacks authority to promulgate emergency guidelines beyond that granted in Section 21(a)(1) and (2) of the 1987 Sentencing Act, for an invalidated sentencing guide-

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[2]107 S.Ct. 2446 (1987).

[3]Pub.L. 100-690 (Nov. 18, 1988).

line or a new or amended statute. To the extent the Commission proposes to go beyond new or amended statutes, that would partake of a power which, by the express terms of Section 21(b), has already expired. To the extent the Commission proposes to promulgate certain emergency guidelines within its authority, there are compelling policy reasons why the Commission should refrain from doing so. The merits of individual amendments are discussed below.

Drug Amendments

The Federal Defenders oppose the adoption of proposed emergency amendment 1 to Guideline §2D2.1. As presently worded, the proposed new subsection (b) would require that, in a case involving a defendant who possessed five grams or more of cocaine base, the guideline applicable to the possession of that quantity of cocaine base with intent to distribute be applied. This guideline is objectionable because it does not take into account the fact that the maximum possible sentence for the simple possession charge is only 20 years while the statutory maximum for the possession with intent to distribute charge is 40 years and, in the case of quantities in excess of 50 grams, life imprisonment. In light of this difference in the statutory maxima, we submit that any new guideline which addresses the offense of simple possession of cocaine base should scale the increase in offense level for quantities greater than five grams on a less severe slope than that which applies to the possession with intent to distribute offense.

The Federal Defenders strongly oppose the Sentencing Commission's proposed emergency amendment number 3. We respectfully submit that the proposal is not supportable on the merits and, moreover, that the Commission lacks authority to promulgate this amendment as an emergency guideline.

Amendment 3 would modify the drug quantity table of Guideline §2D1.1 so as to increase by two levels the offense severity level for all offenses involving the distribution of cocaine base or possession of cocaine base quantities in excess of 125 milligrams with intent to distribute. In support of this proposed amendment, the Commission states that this increase in the offense level for cocaine base offenses is necessary to "more appropriately reflect the seriousness of offenses involving this substance as indicated by the enhanced penalties for possession of cocaine base contained in Section 6371 of the Anti-Drug Abuse Act of 1988."

The Commission's proffered justification fails to take into account the fact that although Congress has, in the case of simple possession of certain quantities of cocaine base, provided

for a mandatory minimum penalty of five years, it has not chosen to amend either the minimum or the maximum penalties for the distribution of or possession with intent to distribute cocaine base. Rather, the penalties for those offenses remain the same and bear the same relationship to the penalties for the distribution of other drugs that they had prior to the enactment of the Anti-Drug Abuse Act. In this regard, it is noteworthy that in other portions of the Anti-Drug Abuse Act, Congress has taken action to impose enhanced statutory penalties (e.g., §§ 6462, 6468) or to direct the adoption of minimum guideline levels for specific offenses (e.g., §§ 6453, 6454, 6468). In light of Congress's failure to take such affirmative action with regard to the penalties to be applied to offenses involving the distribution of cocaine base and/or the possession of cocaine base with the intent to distribute, the Commission's justification for enhancing the offense severity levels for those crimes is not well founded. In fact, the Federal Defenders submit that the proposed amendment, by adjusting cocaine base offense levels to those provided for offenses involving other controlled substances such as cocaine and heroin inappropriately upsets the scale of penalties which Congress has provided in existing law.

For all these reasons, as well as the lack of authority discussed above, the Federal Defenders urge that the Commission withdraw its proposed emergency amendment number 3.

Obscenity Amendments

The Commission proposes to amend Guidelines §2G3.1 and §2G2.2 in light of Sections 7521 and 7526 of the Anti-Drug Abuse Act of 1988. At the outset it should be observed that the Commission has already dealt with these new offenses in the regular amendment process by amending the statutory coverage of Guideline §2G3.1.[4] The proposal for comment does not address why the Commission now finds an emergency requiring different treatment.

The offenses previously governed by the Guideline §2G3.1, §§ 1461-1465 of Title 18, dealt with the importation, mailing, broadcasting, or interstate transportation of obscene matter. Each statute had a maximum penalty of five years, except for § 1464 (broadcasting obscene language) which was punishable by a maximum term of two years. The two new statutes enacted in the Anti-Drug Abuse Act of 1988 prohibit the sale or possession with intent to sell of a visual depiction either of obscenity or of a minor engaging in explicit sexual conduct (18 U.S.C. § 1460); and sale or possession with intent to distribute of obscene material

[4]Amendment No. 97, 54 FR 21365.

by a person engaged in the business of selling obscene materials (18 U.S.C. § 1466). Both statutes require as an element of the offense distribution or an intent to distribute the prohibited material. The maximum penalties, however, differ. A dealer engaged in distributing pornography can be punished up to five years (§ 1466) whereas other distributors of obscene or child pornography materials can receive sentences only up to two years. This appears to reflect a decision by Congress to provide a relatively lighter sentence for persons who are not engaged in the business of pornography. Since the offenses set out in §§ 1461-1465 do not have as an element that the offender be engaged in the pornography business, those cases should be governed by a guideline similar to that provided for § 1460. Such a guideline would have offense levels in keeping with the maximum penalty of 24 months' imprisonment.

The proposed guideline has just the opposite effect. Instead of generally lowering the offense levels it has very substantially raised them. The Commission has rejected Congress's choice of the enhancing factor--being engaged in the obscenity business--for a much broader standard of its own creation, distribution for pecuniary gain. No explanation is offered for this variance from apparent legislative intent.

The proposed guideline also appears to produce a disparity in sentencing for offenses for which Congress has prescribed like terms. Mail fraud (18 U.S.C. § 1341), bank embezzlement (18 U.S.C. § 656), false statement to a government agency (18 U.S.C. § 1001), and passport offenses (18 U.S.C. §§ 1542-1544) are, like first offenses against 18 U.S.C. §§ 1461-1463 and 1465-1466, Class D felonies punishable by a maximum of five years. The base offense levels for these offenses are 6. Higher offense levels are reached depending on the value of the property taken. While the proposed guideline uses the same basic scheme, its base offense levels are two to three times higher than other Class D offenses. This disparity is based neither on Congressional intent nor on past sentencing practices. No reasons are given for the selection of these offense levels which seem disproportionately high to the grade of offense.

The disparity is even greater in comparing the proposed guideline's applicability to §§ 1460 and 1464 with the guidelines governing other Class E felonies that have a maximum term of two years. Acceptance of a gratuity (18 U.S.C. § 201(c)(1)), conflict of interest (18 U.S.C. § 208), and illegal entry into the United States (8 U.S.C. § 1326) have base offense levels respectively of 6, 7 and 8. Yet a person possessing an obscene magazine which he sells to another would have a base offense level between 12 and 16. His base offense level would be higher than a person convicted of involuntary manslaughter (10), at least as

high as a drug trafficker using a communication facility (12), a perjurer (12), or a commercial burglar (12), and perhaps higher than a person who has committed aggravated assault (15). Such a result offends not just the principles of uniformity and proportionality but common sense as well.

The Federal Defenders appreciate this opportunity to comment on the proposed emergency amendments. If the Commission believes it would be productive for a representative of the Defenders to meet with members of the Commission or staff on these issues, we will of course be pleased to do so.

Respectfully,

Lucien B. Campbell

COMMENTS OF

THE AMERICAN CIVIL LIBERTIES UNION

TO THE

UNITED STATES SENTENCING COMMISSION

REGARDING

PROPOSED EMERGENCY AMENDMENTS
TO SENTENCING GUIDELINES FOR OBSCENITY OFFENSES

Filed: July 5, 1989

The American Civil Liberties Union does not believe that the provisions of the Anti-Drug Abuse Act of 1988 dealing with obscenity warrants promulgation of emergency guidelines or amendments to existing guidelines for related obscenity offenses. Quite properly, obscenity offenses are not treated as a major priority in most federal jurisdictions. Indeed, Justice Department testimony given in 1988 to the Crime Subcommittee indicated that approximately 50 percent of jurisdictions were not pursuing a single adult obscenity case. There has been no apparent rush to use any of the new obscenity provisions in the Anti-Drug Abuse Act and we can envision no basis for not using normal procedures, including Congressional review, to put guidelines in place.

On the merits, the ACLU opposes the proposed amendments to Guideline 2G3.1 (Importing, Mailing or Transporting Obscene Matter). Subtitle N of the Anti-Drug Abuse Act of 1988, which creates the offense of "engaging in the business of selling obscene matter," does not provide a sufficient policy basis for increasing the penalties for all obscenity-related offenses. In addition, increasing the sentence for any obscenity-related offense unfairly equates obscenity with offenses involving willful harm and serious physical danger to individuals.

Congressional action on Subtitle N of the Anti-Drug Abuse Act of 1988 provides no policy basis for amending the guidelines as proposed. The new offense involves being in the "business" of selling or distributing obscene materials. The current guidelines more than adequately penalize simple distribution of

obscene material for pecuniary gain. The Congressional decision to create a new crime for engaging in a "business" of obscenity distribution implies that there is a distinction between obscenity distribution and engaging in the "business" of obscenity distribution. It would, therefore, be illogical for the Sentencing Commission to make the base sentences for all obscenity offenses identical. The ACLU believes that the proposed guidelines would unfairly penalize and stigmatize an "offender" who, perhaps even unwittingly, sells or distributes what is later determined to be "obscene" material to consenting adults.

The new guidelines would raise the base offense level of an obscenity crime from level 6 to a minimum level of between 12 and 16. Thus, the new provisions would increase the minimum permissible sentence from 0-6 months to 10-27 months. As a result, obscenity offenses would carry essentially the same base level penalty as serious physical crimes such as aggravated assault and criminal sexual abuse of a minor (both carrying minimum sentences of 18-24 months). Notwithstanding the possible addition of levels according to specific offense characteristics, the new guidelines would suggest that selling <u>one</u> videotape classified as obscene endangers individuals and society and stigmatizes the offender as much as sexually abusing a minor. Certainly the "harm" created by distributing "obscene" materials to consenting adults cannot be compared to the harm involved in assault crimes.

The ACLU believes that neither the elements of the offense

nor the danger posed by the seller of obscene materials justify the imposition of the higher sentences. Selling or distributing obscene materials differs substantially from every other crime. Obscenity is so abstract a concept that the United States Supreme Court has been unable to adequately define or describe it. As Justice Brennan wrote, "we are manifestly unable to describe it except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." Unlike criminal sexual abuse of a minor or aggravated assault, distributing or possessing obscene material is not an offense which the common law would recognize as malum in se. Whereas an individual committing aggravated assault is aware that he is committing an illegal act or at least an act carrying a sense of lawlessness or evil, a possessor or distributor of obscene materials to adults is generally not clearly aware he is committing an offense until a court pronounces the material "obscene" and him "guilty." Placing an offense that lacks the element of wilful behavior on the same level as offenses defined by the intentional infliction of harm to an individual is blatantly unreasonable and reflects unsound public policy.

Finally, the "commentary" section of the proposals suggests in its "application note" that when a person "pretending to be under eighteen years of age" is involved in the material, sentencing is to be conducted under the much harsher § 2G2.2 guidelines related to the sexual exploitation of minors. This is wholly unjustified and unconstitutional. Production and distribution of even non-obscene depictions of actual minors

engaged in sexual conduct is constitutionally unprotected under the Supreme Court decision in New York v. Ferber, 458 U.S. 747 (1982). However, there is no evidence in the Congressional debate on obscenity laws justifying the conclusion that depictions of persons "pretending to be" minors should be treated any differently from depictions of other forms of sexual activity. It is also unclear what it even means to "pretend" to be under eighteen? If an obviously mature woman is wearing pigtails or holding a stuffed animal is she "pretending" to be under eighteen?

In summary, we do not believe that an emergency promulgation of new obscenity guidelines is justified. Moreover, the proposed guidelines are unreasonably harsh.

Submitted by:
Barry W. Lynn
Legislative Counsel
American Civil Liberties Union

JESSE HELMS
NORTH CAROLINA

United States Senate

WASHINGTON, DC 20510

June 30, 1989

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

Dear Judge Wilkins:

I am pleased with the proposed guideline amendments regarding the possession of crack cocaine. The proposed amendment reflects the intent of Congress to get tough on crack cocaine dealers.

I am concerned about the proposed amendment regarding the Distribution of Obscene material. The proposed base levels vary from 12 to 16 for those engaged in the business of selling obscene material. A base level of 12 can be reduced to 10 upon acceptance of responsibility, which only amounts to a sentence of 6-10 months, whereas the statute provides for up to 5 years for this offense. This is very low and totally unacceptable.

Further increases are allowed only if the value of the seized material exceeds $2,000 -- this is very unlikely in pornography cases. It must be remembered that prosecutors only use a limited amount of the pornography in proving their case -- as little as two or three magazines or video tapes.

Another problem is that the fines are tied to the base levels. A person charged with distributing obscene material who gets a base level of 10, faces as little as a $2,000 fine!

I strongly urge you to consider higher base levels, at least a base level of 16, so that perpetrators of these crimes will receive tough sentences, not slaps on the wrist.

Kindest regards.

Sincerely,

Jesse Helms

JESSE HELMS:sjc

United States Department of Justice

DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
WASHINGTON 20530

JUN 30 1989

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

Re: Emergency Amendment Comments

Dear Billy:

We have reviewed the proposed emergency sentencing guideline amendments recently proposed by the Sentencing Commission concerning cocaine base ("crack") and obscene materials. We urge the Commission not to promulgate these amendments as emergency amendments because we believe that the authority of the Commission to issue them under section 21 of the Sentencing Act of 1987 is questionable. We also have serious reservations about the substance of these amendments and, therefore, urge the Commission not to promulgate them in their present form when the opportunity arises under the normal amendment process.

Emergency Amendment Authority

We turn first to the issue of the use of the emergency amendment authority under section 21(a)(2) of the Sentencing Act of 1987, Pub. L. No. 100-182, to promulgate the amendments in question. This provision authorizes the Commission, in the case of the creation of a new offense or amendment of an existing offense, to promulgate "a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress" under the regular amendment process, 28 U.S.C. §994(p). A section-by-section analysis that appeared with the bill that became the Sentencing Act of 1987, S. 1822, when it was passed by the House, states that a narrow construction of the Commission's emergency powers should apply:

> It is expected that the Commission will use the authority to promulgate emergency guidelines only in truly emergency circumstances. If a guideline is invalidated, a new offense is created, or an existing offense is modified, an emergency guideline may be unnecessary because 18 U.S.C. 3553(b) may adequately addresses

> [sic] situations where there is no applicable guideline. In such circumstances, the Commission should submit a new or revised guideline to Congress in manner [sic] called for in 28 U.S.C. 994(p). 133 Cong. Rec. H10019 (daily ed. Nov. 16, 1987).

We agree with the view that the Commission should judiciously exercise its emergency amendment power, which allows it temporarily to by-pass the normal period of guideline review by Congress. However, neither the proposed crack amendments nor the proposed obscenity amendments in our opinion reflect this approach. On the contrary, they result from an overly broad reading of the Commission's emergency amendment authority and one that will likely cause considerable litigation and may result in an unfavorable ruling. Such litigation would divert Department resources from more important sentencing and other criminal law matters, possibly engender a negative reaction to the emergency amendment process in general on the part of the judiciary and the Congress, and ultimately undermine the Commission's ability successfully to seek an extension of the emergency authority, which is due to expire November 1, 1989, should the Commission wish to pursue this course. Moreover, we point out that overreaching by the Commission in the use of its emergency amendment authority and revising of guidelines related to, but not directly affected by, a statutory change will result in unwarranted sentencing disparity between offenses committed before the effective date of a guideline change and those committed thereafter. An expansive use of the emergency amendment authority in essence violates Congress's intent reflected in the rigorous requirements of the regular amendment process.

Crack

Turning first to the crack amendments, we note that they purport to respond to an amendment of the simple possession statute, 21 U.S.C. §844, by section 6371 of the Anti-Drug Abuse Act of 1988. This provision establishes a mandatory term of imprisonment of five to 20 years for anyone convicted of possessing (1) more than five grams of a mixture or substance containing cocaine base, (2) more than three grams of such a mixture or substance after a previous conviction under section 844(a) for such possession, and (3) more than one gram of such a mixture or substance after two or more previous convictions under section 844(a) for such possession. Prior to this amendment a person convicted under section 844(a) for a crack offense would have been subject to a maximum term of imprisonment of one year for a first offense, regardless of quantity; this one-year term still applies to quantities not covered by the 1988 crack amendments.

Also relevant is the statute prohibiting the manufacture, distribution, and possession with intent to distribute controlled substances, which establishes substantial mandatory penalties for specified quantities of crack. It provides a mandatory penalty

of five to 40 years for a first offense involving five or more grams of a mixture or substance containing cocaine base, 21 U.S.C. §841(b)(1)(B)(iii), and 10 years to life for a first offense involving 50 or more grams of such a mixture or substance, 21 U.S.C. §841(b)(1)(A)(iii). Thus, possession with intent to distribute crack in amounts of five grams or more was already subject to at least a five-year mandatory penalty prior to the 1988 amendment of the simple possession statute. In addition, possession with intent to distribute five grams or more of crack was already subject to higher maximum penalties -- either 40 years or life, depending upon the quantity involved -- than the 20 years now provided by the possession provision. The net effect of the Anti-Drug Abuse Act crack amendments was: (1) to eliminate the need to prove an intent to distribute (which can be inferred from sufficient quantities), and (2) to establish mandatory penalties that did not exist under the distribution statute for amounts less than five grams. However, these new mandatory penalties for less than five grams only apply to second and subsequent convictions under the simple possession statute.

The Commission's proposal amends guideline §2D2.1, applicable to simple possession offenses, by changing the offense level from six to eight for possession of crack in amounts not subject to the enhanced penalties added by the Anti-Drug Abuse Act of 1988. In addition, the Commission's proposal changes the drug quantity table in guideline §2D1.1, applicable to drug distribution offenses (including possession with intent to distribute) and drug importation offenses, by halving the amounts of crack subject to each offense level specified. Whereas under the current table five to 19 grams of crack are subject to offense level 26 (which corresponds to the mandatory-minimum five-year prison term), the proposed guideline would make this offense level applicable to just 2.5 to 9.9 grams of crack. 1/ The drug quantities for other drugs would remain unchanged. Finally, the proposed amendments include a cross-reference to the drug quantity table for crack possession offenses subject to the mandatory penalties of the amended possession statute. That is, the amendments direct the user of the guideline relating to simple possession, §2D2.1, to apply the drug distribution guideline, §2D1.1, which includes the drug quantity table, to offenses that involve the simple possession of the quantities of crack specified in the 1988 Anti-Drug Abuse Act amendments.

1/ The Commission's proposal also cuts the crack quantities in half in the proposed drug quantity table included in the sentencing amendments submitted to Congress May 1, 1989. We note that in item three of these amendments a mistake is present: "1.5 KG" should be changed to "2.5 KG" in the phrase "At least 750 G but less than 1.5 KG of Cocaine Base."

The Commission's proposed revisions increase sentences for crack possession and distribution offenses across-the-board. However, the 1988 crack amendments do not in our view reflect a congressional judgment that crack offenses generally have been subject to sentences that were too low in the past. Congress merely amended the penalties in a manner that increases them for subsequent offenses involving less than five grams of the drug. To read into the 1988 amendments an intent by Congress to bring about higher crack penalties for all amounts is simply not consistent with what Congress actually did. The 1988 statutory amendments do not, therefore, justify in any direct way the sweeping changes to the guidelines the Commission proposes.

While we do not agree with the use of the emergency authority in the manner proposed, we, nevertheless, believe there are ways the Commission can respond to the Anti-Drug Abuse Act crack amendments appropriately through use of the emergency amendment power. For example, the Commission could provide a cross-reference in guideline §2D2.1 to the existing drug quantity table in guideline §2D1.1 for cases involving conviction under 21 U.S.C. §844(a) involving the mandatory penalties, i.e., Amendment 1 of the package recently published, but without the change in the table contained in Amendment 3. In addition, it could provide an augmented offense level based on the new mandatory minimum penalties for subsequent offenses involving less than five grams of crack. The applicability of such an amendment to both subsequent simple possession and subsequent manufacture, distribution (including possession with intent to distribute), and importation offenses would be appropriate. It would reflect the belief that higher penalties for small amounts of crack involved in a simple possession case should also apply to such quantities when the government can in fact prove an intent to distribute, an importation, or other specified element of the more serious offense. (It is likely, however, that the simple possession statute will be used in such cases.)

We believe that amendments of the type we suggest are consistent with the goals of the Sentencing Reform Act of 1984. These goals are made applicable to the Commission's emergency amendment power by the requirement in section 21 of the Sentencing Act of 1987 that the Commission act in a manner "consistent with all pertinent provisions of title 28 and title 18, United States Code." We disagree with the notion that it is necessary or advisable, in order to preserve proportionality or to avoid unwarranted disparity, to amend the drug quantity table in its entirety in responding to the 1988 statutory changes relating to small quantities of crack. In the 1988 crack amendments Congress specifically provided that the possession of small quantities of crack by repeat offenders is a more serious offense than possession of small quantities of crack by first-time offenders and possession of proportionally small quantities of other controlled substances. Revising only the guidelines applicable to small quantities of crack involved in repeat offenses to reflect the new mandatory minimum penalties would not result in unwarranted

sentencing disparity in our view, but rather, a justifiable difference reflecting the congressional judgment that certain repeat crack offenses are more serious than offenses involving other drugs. In the case of repeat offenses involving less than five grams of crack, Congress has specifically negated the ratio among quantities of certain drugs set forth in 21 U.S.C. §841(b)(1)(A) and (B) and has established a new ratio.

Obscenity

We consider next the power of the Commission under its emergency amendment authority to promulgate the proposed obscenity guidelines amending §2G3.1, Amendment 4 of the package recently published for comment. The Commission's purported reason for the amendment is to establish a guideline that covers two new offenses created by the Anti-Drug Abuse Act of 1988: (1) possession with intent to sell and sale of obscene matter in areas of federal jurisdiction and on federal property, 18 U.S.C. §1460; and (2) engaging in the business of selling or transferring obscene matter, 18 U.S.C. §1466.

The Commission's proposal completely restructures guideline §23G.1, which at present applies to obscenity offenses in 18 U.S.C. §§1461-1463 and 1465, and makes this guideline applicable to the new offenses. Currently, the guideline establishes a base offense level of six, with specific offense characteristics providing: (1) an increase of at least five levels if the offense involved distribution for pecuniary gain; and (2) a four-level increase if the material portrayed sadomasochistic conduct or other type of violence. In addition, the current guideline includes a cross-reference to the guidelines on criminal enterprise and racketeering offenses.

The proposed amendments would raise the base offense level to a level selected by the Commission from between 12 and 16 if the offense involved distribution for pecuniary gain and to either six or eight otherwise. The specific offense characteristics included in the proposal provide for an increase corresponding to the retail value of the material, but this increase only comes into play if the value is more than $2,000. A new specific offense characteristic is included for "engaging in a pattern of distributing the obscene matter to persons under eighteen years of age." Finally, a cross-reference to the child pornography guideline, §2G2.2, is included if the offense involved the visual depiction of a person under eighteen years engaging in or assisting another person to engage in sexually explicit conduct. The proposal deletes the existing specific offense characteristic for violent conduct and the cross-reference to the racketeering guideline. Depending upon which base offense level is chosen, the net effect of the changes to guideline §2G3.1 could significantly increase the punishment for material that does not portray violent conduct or lower it for conduct which does portray such conduct.

We perceive almost no relationship between the proposed amendments and the creation of the two new offenses by Congress, with the possible exception of the creation of the new cross-reference. The existing obscenity guideline applies to offenses which in our view are inherently as serious as the newly created offenses and carry maximum terms of imprisonment at least as great as those established in the new offenses. We understand the argument for restructuring the existing guideline to be that the Commission in developing a guideline to cover new offenses under its emergency amendment authority need not be bound by existing offense levels for related offenses. If the Commission determines that a higher level is appropriate for new offenses, the argument goes, it should also amend the existing, related guidelines under its emergency authority so that unwarranted disparity would not result. We believe this approach results from an overly broad reading of the Commission's emergency authority and for the reasons stated above recommend against it. To avoid unwarranted disparity between the existing guidelines and the new guidelines, the Commission can be governed by the existing guidelines until the next regular amendment period.

In this case the arguments in favor of the amendments proposed are particularly weak because the Commission included in its submission to Congress an amendment of the statutory reference in the existing guideline, §2G3.1, to make it applicable to the newly created offenses. See Amendment 97, 54 Fed. Reg. 21365 (1989). The Commission, thus, responded to the creation of a new offense. If it had believed that a restructuring of the guideline was also necessary to respond to the new offense, it should have proposed such a restructuring in the course of the development of the amendment submitted to Congress.

Policy Issues

The Commission has also requested comment on the broader policy questions associated with the proposed amendments. Specifically, the Commission has asked whether the proposed amendments appropriately reflect congressional intent regarding sentencing for the newly created offenses or closely related ones. In addition, the Commission has asked whether the proposed amendments reflect sound public policy. Since we recommend against the promulgation of these amendments under the Commission's emergency amendment authority because of the need for a prudent construction of such authority, we interpret these questions as seeking comment on whether there are sound policy reasons for the Commission to promulgate these amendment in the future under its regular amendment authority. For the reasons set forth below, we also recommend against the promulgation of these amendments, with a few exceptions as to isolated revisions, for policy reasons.

First, in answer to the Commission's question whether the Anti-Drug Abuse Act amendments discussed provide a policy basis for the proposed guidelines, we believe that on the whole they do not, as explained in our analysis of the Commission's emergency