Public Comment

Proposed Amendments

1997
VOLUME I

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	[no comment received]	

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

February 4, 1997

Honorable Richard P. Conaboy
Chair, United States Sentencing Commission
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Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy:

On behalf of the Federal Public and Community Defenders, I submit the following comments on the proposed emergency amendments to the guidelines.

Amendment 1
(§ 2D1.11)

Amendment 1 would raise the penalties for list I chemicals by two levels and increase from level 28 to level 30 the top of the chemical quantity table for list I chemicals. This amendment responds to the Congressional directive in the Comprehensive Methamphetamine Control Act of 1996 (P.L. 104-237). Section 302 of the Act directs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). The Act also raises the maximum penalty for these offenses from ten to twenty years. We do not oppose the amendment.

Amendment 2
(§ 2L1.1)

Amendment 2 responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), which directs the Commission to increase the

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guideline penalties for alien smuggling offenses. Specifically, the legislation directs the Commission to increase the base offense level for alien smuggling by at least three levels; increase the enhancement in § 2L1.1(b)(2) by at least 50 percent; provide an enhancement for an offender with a prior felony conviction for a similar offense; impose an enhancement for death or bodily injury; and consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child.

Base Offense Level

Amendment 2 would increase by three to five levels the base offense level in § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony." The amendment would increase the base offense level for other smuggling offenses covered under § 2L1.1 (a)(2) by three, four, or five levels. A three-level increase in the offense levels of both subsection (a)(1) and subsection (a)(2) satisfies the Congressional directive in section 203, and best serves the purposes of sentencing. Without data indicating that the resulting offense levels are inadequate, there is no rationale for raising the offense levels higher than the legislation requires.

Number of Aliens Smuggled

In response to the second directive, which requires at least a 50-percent increase in the sentencing enhancement for the number of aliens smuggled, transported, or harbored, the proposed amendment would completely revise the present alien-smuggling table. We oppose this part of the proposal as written.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of aliens	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to promulgate an emergency amendment adding an enhancement for offenses involving 3-5 aliens. Under the amendment, however, an offense involving 3-5 aliens will result in a one-level increase for number of aliens smuggled. The Commission should collect data to determine if it is necessary to promulgate such an amendment, increasing already harsh penalties for low level offenders, under the Commission's regular authority.

There is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 aliens. The legislation requires that the two-level enhancement for these offenses be increased by one level, but the amendment would increase the enhancement by three levels. According to Commission data,[1] between October 1994 and September 1995, 63.7 percent of the offenses covered by § 2L1.1 involved the smuggling of 6-24 unlawful aliens. Thus, without any

[1]Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 44 (December 2, 1996).

rational justification, the amendment increases the enhancement for a large percentage of cases by 150 percent.

For offenses involving 25-99 aliens, the amendment, without a reasoned basis, would increase the enhancement by three-levels -- a 75-percent increase. The enhancement for the most egregious cases, those involving 100 or more aliens, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. The cosmetic uniformity provided by a table with two-level increments is not worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 2 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

We oppose the amendment's broad interpretation of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction of an immigration, naturalization, or passport offense.

We support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 (three-strikes), which requires predicate offenses to be separated from the instant offense (and from each other) by a conviction. The Commission has adopted a similar policy for the career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions . . . ." In addition, as the Commission staff has pointed out, the approach of option 2 "would make the enhancement more susceptible to prosecutorial manipulation."[2] To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Firearm Enhancement

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . uses or brandishes a firearm or other dangerous weapon." In response, the amendment would provide a six-level increase and a minimum offense level of [22-24] if "[the defendant discharged a firearm][a firearm was discharged]," a four-level increase and a minimum

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[2]Id. at 6.

offense level of [20-22] if [the defendant brandished or otherwise used a dangerous weapon (including a firearm),] [a dangerous weapon (including a firearm) was brandished or otherwise used], and a two-level increase and a minimum offense level of [18-20] if "a dangerous weapon was possessed."

We oppose the part of this amendment that would provide minimum offense levels. These minimum offense levels would only result in a greater proportional increase for possession or use of a weapon in less egregious cases where the base offense level would be determined under § 2L1.1(b). For example, a defendant whose base offense level is determined under § 2L1.1(a)(1), would, under the amendment, receive a base offense level of [23-25]. If that defendant brandished a firearm, then the offense level would be increased to [27-29] -- an increase of up to four levels. A defendant convicted of a less egregious offense would receive a base offense level of [12-14]. If that defendant brandished a firearm, however, the offense level would be [20-22] -- an increase of up to ten levels. We find this tendency to over punish relatively less serious offenders troubling and inconsistent with thoughtful legislation, such as 18 U.S.C. § 3553(f), the "safety valve" statute. Rather than create mandatory minimums within the guideline structure, the enhancement should simply provide a uniform increase for use of a weapon.

We oppose those parts of this amendment that do not strictly conform to the legislative directive. We therefore oppose that part of the amendment that would provide a two-level increase and a minimum offense level of [18, 19, or 20] "if a dangerous weapon (including a firearm) was possessed." The legislation does not give the Commission emergency authority to provide an enhancement for possession of a weapon. Similarly, the legislation does not give the Commission emergency authority to impose an enhancement on a defendant who did not personally discharge,

brandish or otherwise use a firearm or other dangerous weapon. To comply with the Congressional directive, the proposed enhancements should apply as presented in the first brackets. Thus, for discharging a weapon, the enhancement should read "if the defendant discharged a firearm" and the proposed enhancement of § 2L1.1(4)(B) should read, "if the defendant brandished or otherwise used a dangerous weapon . . ."

The proposed amendment would also add a new application note, which would hold a defendant accountable if "another person discharges, brandishes, or otherwise uses a firearm and the defendant is aware of the presence of the firearm," and if "another person possesses a dangerous weapon during the offense." We oppose this part of the amendment.

The legislation requires the defendant personally to have used the weapon; the legislation does not give the Commission emergency authority to make the defendant accountable for another person's use or possession of a weapon. In any event, the language proposed is flawed. Although the note appears to be designed to limit a defendant's accountability for acts of others under § 1B1.3, the proposed application note would hold a defendant accountable for possession or use of a weapon by "another person." Thus, the enhancement would apply to an offense involving an unarmed defendant who is stopped by an armed border patrol officer. We also believe that a defendant's "awareness" of the presence of a weapon should not make that defendant as culpable as the defendant who controls and is in a position to use the weapon. A defendant who is aware of the presence of a weapon should not receive the same enhancement as a defendant who fires the weapon. Finally, the note should specify that the defendant was aware of the presence of the weapon when the offense commenced. A defendant may be unaware of a weapon when the

offense begins, but become aware of the weapon (when a co-defendant displays it, for example) after it is too late for the defendant to back out.

Risk of Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury." The amendment presents two options to carry out that directive. Each option provides a two-level increase and a minimum offense level of [18, 19 or 20] "if the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person." The first option would make this enhancement an alternative to the weapon enhancement, by putting the risk of death enhancement in the same subsection as the weapon enhancement. The second option would call for the risk of bodily injury enhancement to be in addition to the weapon enhancement. Neither option properly responds to the Congressional mandate.

The Congressional directive calls for an enhancement if the defendant personally "engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury . . . ." The amendment, however, applies more broadly than that. The enhancement would apply "if the offense involved" creating a risk of injury. Congress has not given the Commission emergency authority to make a defendant accountable for conduct other than the defendant's own conduct. If the amendment is limited to cover only the defendant's conduct, we would support the placement of the enhancement as presented in option 1.

The presence of a weapon always increases the risk of death or serious bodily injury. When a weapon is present, a separate, additional enhancement to account for risk of death or

injury, will often result in double-counting. Under option 2, a sentence could be enhanced for discharge of a weapon under § 2L1.1(b)(4), for creating a substantial risk of death or bodily injury under § 2L1.1(b)(5), and for actual bodily injury under § 2L1.1(b)(6). The Congressional directive does not authorize an emergency amendment cumulating the enhancements. Congress has directed the Commission to impose an enhancement on a defendant who "(i) murders or otherwise causes death; (ii) uses or brandishes a firearm or other weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury (emphasis added)." The use of the term "or" between (ii) and (iii) requires that the enhancements be alternative.

We also oppose the part of this amendment that would require a minimum offense level of [18, 19, or 20]. A mandatory minimum in the guideline structure disproportionately increases the sentence of less serious offenders. Thus, under the proposal, a defendant with a base offense level of [12-14] under § 2L1.1(a)(2) would receive an increase of four to eight levels. A more serious offender, with a base offense level of [23-25] under § 2L1.1(a)(1) would receive only a two-level increase.

Bodily Injury or Death

Congress has directed the Commission to "impose an appropriate sentencing enhancement on a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury to another individual." In response, the amendment would provide an enhancement "[i]f any person died or sustained bodily injury as a result of the offense," including a two-level increase for bodily injury, a four-level increase for serious bodily injury, a six-level increase for permanent or life-threatening injury, and an eight-level increase for death. In addition, the amendment would

add a cross-reference to the murder guideline "[i]f any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special and maritime and territorial jurisdiction of the United States."

We believe that the proposed enhancement for death or bodily injury exceeds the emergency authority that Congress gave the Commission. The legislation specifies that the enhancement should apply to "a defendant who . . . murders or otherwise causes death, bodily injury, or serious bodily injury . . . ." This directive limits the accountability of the defendant to acts the defendant committed or aided and abetted.

Downward Adjustment for First Offense if Person Smuggled is Defendant's Spouse or Child

This part of the amendment responds to the Congressional directive which requires the Commission to "consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child." The proposed amendment would delete § 2L1.1(b)(1), which provides a three-level reduction "if the defendant committed the offense other than for profit" and replace that provision with "[i]f the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child, decrease by [2-3] levels." We oppose this amendment.

The Congressional directive does not require the Commission to amend the guidelines or policy statements, but only to consider the appropriateness of a downward adjustment under the circumstances described in the Congressional directive. Section 2L1.1(b)(1) already provides for a reduction in such circumstances. There is nothing in the legislation to confer emergency authority on the Commission to delete the reduction provided by § 2L1.1(b)(1) if, for example, a defendant, for no profit, smuggles a parent into the country. The directive mandates study -- not

change. We suggest that before deleting § 2L2.1(b)(1), the Commission should study further the appropriateness of amending the existing downward adjustment. The legislative language produces a result difficult to defend -- a defendant would receive a downward adjustment for smuggling a spouse or child, but not for smuggling a parent or grandparent.

The proposed amendment would also provide a [2-4] level enhancement "if the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense." We oppose this amendment. Congress did not give the Commission emergency authority to add an enhancement for a defendant's status as a former deportee.

Amendment 3
(§§ 2L2.1 and 2L2.2)

Amendment 3 responds to section 211 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (P.L 104-208). The legislation directs the Commission to increase by two levels the guidelines applicable to offenses involving the fraudulent use of government documents; "review the sentencing enhancement for number of documents or passports involved (U.S.S.G. § 2L2.1(b)(2)), and increase the upward adjustment by at least 50 percent;" and provide an enhancement if the defendant has one or more prior felony convictions for an offense that involved the same or similar underlying conduct as the current offense.

Base Offense Level

In response to the legislation, amendment 3 would increase the base offense level of § 2L2.1(trafficking in immigration documents) from level 9 to level [11-13] and the base offense level of § 2L2.2 (fraudulently acquiring immigration documents or passports) from level 6 to level [8-10]. We believe that the amendment should increase the base offense level of both guidelines

by two-levels -- the minimum required by the legislation. Without data to indicate that the current base offense levels are inadequate, there is no justification for an increase of more than two levels.

Downward Adjustment

The amendment presents two options to provide a reduction from the base offense level of § 2L2.1. Either option would replace the three-level reduction in § 2L2.1(b)(1) currently available "if the defendant committed the offense other than for profit." Option 1 would provide a three-level decrease "if the defendant committed the offense other than for profit and had not been convicted of an immigration and naturalization offense prior to the commission of the instant offense." Option 2 would provide a decrease of [2-3] levels "if the offense involves documents only related to the defendant's spouse or child." We oppose both options.

The legislation does not authorize the Commission to promulgate an emergency amendment to limit or revise the reduction available under § 2L2.1(b)(1). Further, without data to indicate that the existing adjustment needs revision, there is no justification for this part of the amendment.

Enhancement for Number of Documents

In response to the directive to provide an increased enhancement based on the number of documents, the amendment completely revises the table in § 2L2.1(b)(2). The revised table would provide a one-level increase if the offense involved three to five documents, a three-level increase if the offense involved six to eleven documents, a five-level increase if the offense involved 12 to 24 documents, a seven-level increase for 25-99 documents, and a nine-level increase if 100 or more documents were involved. We oppose this part of the amendment.

The legislation directs the Commission to "review the sentencing enhancement for the number of documents or passports involved . . ." We believe that the Commission should increase the enhancement by the 50 percent that Congress mandated until the Commission has thoroughly reviewed the sentences under this guideline. The review may indicate that no further adjustment is necessary.

The proposed amendment unnecessarily increases punishment beyond the 50 percent required by the legislation. The following chart illustrates how the proposed amendment would reconstruct the table to provide two-level incremental increases.

Number of documents	Current enhancement	Proposed enhancement	Percentage increase
3-5	0	add 1	infinite
6-11	add 2	add 3	50 percent
12-24	add 2	add 5	150 percent
25-99	add 4	add 7	75 percent
100 or more	add 6	add 9	50 percent

The legislation contains no directive to, and therefore no authorization for, the Commission to add an enhancement for offenses involving 3-5 documents. Under the amendment, however, an offense involving 3-5 documents will result in a one-level increase. Instead of arbitrarily increasing the penalty for offenses involving 3-5 documents, the Commission should collect data to determine whether such an increase is warranted.

Similarly, there is no justification for increasing beyond 50 percent the enhancement for offenses involving 12-24 documents. The legislation requires that the two-level enhancement for these offenses be increased by one-level, but the amendment would increase the enhancement by

three levels. For offenses involving 25-99 documents or passports, the legislation requires a two-level increase (50 percent of four). Again, without a reasoned basis, the amendment would increase the enhancement by three-levels -- a 75-percent increase. The most egregious cases, those involving 100 or more documents, would receive the minimum 50-percent increase required by the legislation.

We believe that instead of creating a new table, the Commission should, as directed by Congress, increase the number of levels of the existing enhancement by 50 percent. The proposed amendment is structured to provide two-level increments. We do not believe that the cosmetic uniformity provided by a table with two-level increments is worth an otherwise unwarranted increase in penalties.

Enhancement for Prior Convictions

Amendment 3 offers two options for an enhancement if the defendant has prior convictions for "offenses that involved the same or similar underlying conduct as the current offense." The first option would count convictions for an "immigration and naturalization offense" that occurred prior to the commission of the instant offense, by providing a two-level increase for one prior conviction and a four-level increase for more than one prior conviction. The second option would count convictions received prior to sentencing. Under either option, an "immigration or naturalization offense" would be defined as "any offense covered by chapter 2, part L."

Here too, we oppose the amendment's broad use of the phrase "offenses that involved the same or similar underlying conduct as the current offense." The offenses covered by chapter 2, part L include a wide range of offenses, from failure to surrender canceled naturalization certificates to smuggling unlawful aliens. Fraudulently using a passport, for example, is not the

same as, or even similar to, harboring an alien. If Congress had intended the recidivist enhancement to apply as broadly as the proposed amendment would apply, Congress would have called for an enhancement for a prior conviction for an immigration, naturalization, or passport offense.

As stated in our comments to proposed amendment 2, we support counting convictions that occur before the instant offense. Chapter 4 already provides punishment for prior convictions (whether they occur before or after commission of the instant offense). The enhancement required by Congress should be reserved for those offenders who commit the same offense after being punished for the previous offense. This approach is more consistent with the recent Congressional enactment of 18 U.S.C. § 3559 ("three-strikes") and the Commission's career offender guideline, which applies only if the instant offense was committed "subsequent to sustaining at least two felony convictions." Both the "three-strikes" and career offender provisions lessen the ability of prosecutors to manipulate sentences. To ensure fairness and consistency, the enhancement should count only those convictions that occur before the instant offense.

Our comments to amendments 2 and 3 suggest that the Commission, as the sentencing policy maker, should move thoughtfully and not more aggressively than is minimally required by Congress. We are, of course, concerned about increasing the harsh penalties already suffered by our non-citizen clients. But we are also mindful that the legislative directives for change in these guidelines flow from a volatile, emotional, political environment. Such an environment is not the best for producing rational and fair sentencing law. By moving cautiously, the Commission furthers a greater, overriding Congressional mandate for penalties that are "sufficient, but not greater than necessary" to satisfy the purposes of sentencing and the goal of equal justice.

Amendment 4
(§ 2H4.1)

Amendment 4 responds to section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). The legislation increases the maximum penalty for peonage offenses and slavery offenses from five to ten years imprisonment and directs the Commission to review the guidelines for involuntary servitude offenses and to amend the guidelines as necessary.[3]

Involuntary servitude, peonage, and slavery cases are brought infrequently. The Commission's staff reports seven cases brought in the last ten years -- less than one case per year. The involuntary servitude guideline (§ 2H4.1) presently calls for an offense level of 15 or two plus the offense level applicable to an underlying offense. That offense, almost invariably, will be kidnaping. Because the present guideline produces an offense level greater than the kidnaping guideline, any disparity that may exist results from § 2H4.1 producing an offense level greater than the offense level for kidnaping. Similarly, when the offense involves alien smuggling, § 2H4.1 produces an offense level greater than the alien smuggling guideline. Again, any disparity that

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[3]Section 218 directs the Commission to amend the guidelines as necessary to:

> (A) reduce or eliminate any unwarranted disparity . . . between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnaping offenses and alien smuggling offenses; (B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses and adequately reflect the heinous nature of such offenses; and (C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve — (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude."

may exist is caused by § 2H4.1 producing an offense level greater than the offense level for alien smuggling.

We believe, therefore, that no increase in the offense level produced by § 2H4.1 is necessary to eliminate unwarranted disparity with the kidnaping and alien smuggling guidelines. The additional complexity that amendment 4(A) would bring to § 2H4.1 is unnecessary. We oppose amendment 4(A).

Amendment 4(B) invites comment on whether the enhancements provided by the multiple count rules "are sufficient to ensure appropriately enhanced sentences when peonage, involuntary servitude, or slave trade offenses involve a large number of victims or whether a new specific offense characteristic for a large number of victims is needed." We believe that the multiple count rules ensure appropriate incremental punishment for the number of victims.

Of the seven cases in the past ten years reported on by the Commission's staff, four involved one victim and another involved "several" men.[4] In the unusual case where a large number of victims are involved, the grouping rules provide additional sufficient punishment to account for the number of victims. Under the grouping rules of § 3D1.2, offenses involving different victims will not group together. Each count involving a separate victim will comprise a separate group. Under § 3D1.4, the combined offense level will result in as much as a five-level increase. If, in a particular case, the increase provided by § 3D1.4 inadequately addresses a large number of victims, the court can depart upwards. "Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be

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[4]Memorandum from John Steer and Jonathan Wroblewski to Chairman Conaboy and Commissioners 38-40 (Dec. 2, 1996).

unusual and can be handled by departure from the guidelines." U.S.S.G. § 3D1.4, comment (backg'd.). Because cases involving a large number of victims occur infrequently, we do not believe that a specific offense characteristic is necessary to account for the number of victims.

We appreciate the opportunity to express our views on the proposed emergency amendments and trust that you will give serious consideration to our comments.

Thank you for your consideration.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender
Western District of Washington,
on behalf of the Federal Public
and Community Defenders

National Association of Criminal Defense Lawyers • NACDL • 1958

February 4, 1997

The Honorable Richard P. Conaboy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy and Commissioners:

We write on behalf of the National Association of Criminal Defense Lawyers to comment on the proposed Emergency Amendments.

The NACDL is a nationwide organization comprised of 9000 attorneys actively engaged in defending criminal prosecutions, including private attorneys and public defenders; our membership also includes judges, law professors and law students. NACDL is also affiliated with 78 state and local criminal defense organizations, allowing us to speak for more than 25,000 members nationwide. Each of us is committed to preserving fairness within America's judicial system.

We commend you for your forthright attempts to assure that federal sentences "provide just punishment". As you embark on this year's amendment cycle, we ask you to be cognizant that: (a) our rate of incarceration in the United States is the greatest of any civilized nation; (b) federal criminal laws are impacting and being applied disproportionally on minorities; and (c) sentences must be "sufficient, but not greater than necessary" to meet the purposes of sentencing.

Disturbing Rate of Incarceration

First and foremost, we want to express our alarm at the "disturbing state of affairs," to quote the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, in which our criminal justice system finds itself.

> Our retention, indeed our expanding use, of capital punishment, our other exceptionally severe criminal punishments, (many for intrinsically minor, esoteric, archaic, or victimless offenses), our adoption of pretrial

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> detention, as a result of which some criminal defendants languish in jail for years awaiting trial, and our enormous prison and jail population, which has now passed the one-million mark, mark us as the most penal of civilized nations. . . .
>
> [W]e have had slavery, and segregation, and criminal laws against miscegenation ("dishonoring the race"), and Red Scares, and the internment in World War II of tens of thousands of harmless Japanese-Americans; and most of our judges went along with these things without protest. . . .
>
> [J]udges on the one hand should not be eager enlisters in popular movements, but on the other hand should not allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions, and in addition should be wary of embracing totalizing visions that . . . reduce individual human beings to numbers or objects. . . .

Richard A, Posner, Overcoming Law 157-58 (Harvard U. Press 1995). Chief Judge Posner's advise to judges applies equally well to you, Sentencing Commissioners who have been entrusted with establishing federal sentencing guidelines.

Disparate Application & Impact of Criminal Penalties

Second, we also express alarm at the unwarranted and increasing racial disparity of the prison population. This pernicious reality seems to have developed "between 1986 and 1988" but continues into today.[1] U.S.S.C., Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 82 (1991). This troubling disparity results not merely from a disparate impact but from a disparate application of the harshest federal penalties.

The Commission has reported the disparate racial application of the penalties for federal drug and gun offenses.

> The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the

[1] "Traced over time, the relative proportion of Whites in the defendant population has steadily declined since 1990, while increasing considerably for Hispanics, and to a lesser degree for Blacks." U.S.S.C. Annual Report 46 (1995).

> defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum; and to the circuit in which the defendant happens to be sentenced. . . . This differential application on the basis of race and circuit reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce.

Id. at ii.

The Commission has also reported the disparate racial impact of the penalties for cocaine use and trafficking. U.S.S.C., Special Report to the Congress: Cocaine and Federal Sentencing Policy 192 (1995) ("To the extent that a comparison of the harms between powder and crack cocaine reveals a 100-to-1 quantity ratio to be an unduly high ratio, the vast majority of those persons most affected by such an exaggerated ratio are racial minorities. Thus, sentences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness.").

We commend you for your forthright actions in discovering, reporting and attempting to correct these injustices. In particular in promulgating the immigration amendments, the Commission should be mindful of the Supreme Court's recognition that there may be unwitting or invidious discrimination against "races or types which are inimical to the dominant group" and that therefore "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds a statute that required sterilization of habitual felony offenders excluding felonies involving embezzling, revenue act violations, and political offenses while including larceny).

We ask you to continue to perform your proper statutory function in leading the fight to eradicate the unwarranted disparate application and impact on minorities of federal sentencing laws.

Just Punishment

Third, we ask you to keep in mind the congressional mandate that sentencing courts must impose "a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing, the first of which is "just punishment". 18 U.S.C. § 3553(a); see also 28 U.S.C. § 991(b)(1)(A). Absent empirical evidence to support increased penalties, the Commission should not devise guidelines that increase the term a convicted person must spend in prison.

Three other matters are also of concern.

Emergency Amendments

We question the Commission's promulgation of emergency amendments when the congressional grant of authority requires only that you promulgate amendments "as soon as practicable". These emergency amendments came at a time when the Commission was already considering a substantial number of issues as it implements its simplification project. The Commission has had less than three months from the passage of the methamphetamine (October 3, 1996) and immigration (September 30, 1996) bills until it voted to publish these emergency amendments at its December 17, 1996 meeting. It is not practicable for the Commission to promulgate amendments if it has not had adequate time to gather empirical evidence and study the issues. Amendments promulgated under the abbreviated emergency procedures lack the reasoned and empirical base necessary to provide certainty and fairness. The Commission's exercise of this emergency authority seems particularly debatable when there has been no Congressional finding that an emergency in fact exists.

The four emergency amendments under consideration illustrate the problem with this abbreviated procedure. In publishing multiple options for a number of the adjustments, the Commission has seemingly selected numbers willi-nilly without any empirical or other reasoned basis. While the power of Congress to make such political judgments as it pertains to criminal laws may be subject to few restraints beyond the will of the electorate, the Commission does not have such unchecked authority. Both by virtue of the enabling legislation and of its function as an agency in the judicial branch, the Commission may act only pursuant to reasoned judgment.

In light of the shortcomings of the abbreviated emergency procedures, we ask the Commission to promulgate only those options that are directly required by the legislation. The Commission should not exceed the congressional directive unless and until the Commission is able to provide due consideration to the issues raised by these amendments.

Vacancies on the Commission

We are troubled that the Commission is undertaking such serious amendments to the sentencing guidelines without its full seven-person membership. Of concern is the fact that the Commission is missing one of its three vice-chairs. Of greatest concern is the fact that at present the Commission has only two federal judges rather than the "[a]t least three" that Congress considered necessary for the proper functioning of the Commission. 28 U.S.C. § 991(a).

The opinion of a single Commissioner, especially a federal judge, speaking with the considered judgment gained from experience, knowledge and wisdom cannot easily be discounted. Indeed, a single Commissioner may well sway the whole Commission on any one or a number of issues. We urge the Commission to defer action on any of the amendments until such time as it at least has three federal judges, appointed by the President and confirmed by the Senate, able to consider and vote on the amendments.

Congressional Directives

Lastly, we are troubled that the increasing use by Congress of specific directives to the Commission threatens to undo the cohesiveness of the sentencing guidelines and thereby undermine the congressional purpose of securing "certainty and fairness, [while] avoiding unwarranted sentencing disparities". 28 U.S.C. § 991(b)(1)(A). Congressional directives are aimed at troubleshooting in limited areas but fail to consider the interrelated complexity of the guidelines which may already account for factors which Congress is attempting to address. Congress established the Sentencing Commission as an expert body to develop sentencing policies and practices. The enabling legislation provides for a dynamic process, permitting fine tuning as warranted by empirical evidence.

We urge the Commissioners to persuade Congressional leaders to refrain from undermining the structure and purpose of the sentencing guidelines through the increasing use of such specific directives. We intend, with other interested individuals, to petition our representatives in Congress on this issue.

Thank you for your consideration of NACDL's concerns. Attached are our particularized comments on the proposed emergency amendments. If the Commission desires additional information on any of these matters, we welcome the opportunity to provide it.

Very truly yours,

Judy Clarke/cm

Judy Clarke
President

Alan Chaset
Carmen Hernandez
Benson Weintraub
Co-Chairpersons
Post-Conviction and Sentencing Committee

COMMENTS ON THE 1997 EMERGENCY AMENDMENTS

Amendment 1 - § 2D1.11 (Listed Chemicals)

We do not support this amendment because we believe that Congress had insufficient evidence before it that the penalties available under title 21 and the guidelines were inadequate. However, because this amendment implements the congressional mandate, and no more, we recognize the Commission's limited authority in promulgating it.

The amendment increases by two the offense levels for list I chemicals, raising the top of the chemical quantity table to level 30 from level 28. Congress directed the Commission to effect this increase. Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237, § 302. Section 302 also raised the maximum penalty from ten to twenty years for offenses under 21 U.S.C. §§ 841(d)(1), (2) and 960(d)(1), (3).

Amendment 2 - § 2L1.1 (Alien Smuggling)

The Commission should amend to meet the statutory directive, not go it one better. In the absence of empirical evidence to support anything more than Congress directed, the higher options would not be reasonable and warranted. The Commission also should not delete provisions currently in effect that are not addressed by the congressional directives. The grant of emergency authority is limited to "promulgat[ing] the guidelines or amendments provided for under" § 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.C. The Commission has not been granted emergency authority to delete or amend existing guideline provisions that are not referred to in § 203.

IIRIRA

Section 203(e) of IIRIRA, directs the Commission to (a) increase the base offense level for alien smuggling, (b) increase or create enhancements for the number of aliens, the use of a firearm, causing death or serious bodily injury, creating a risk of such injury, and for offenders with prior felony convictions for similar conduct, and (c) consider other aggravating or mitigating circumstances.

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1. Base Offense Level - § § 2L1.1(a)(1) & (a)(2)[1]

The Commission should not raise the base offense level beyond the 3 levels mandated by § 203(e)(2)(A) of IIRIRA. A three level increase would raise the base offense level from 20 to 23 for offenses under § 2L1.1(a)(1), which applies "if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony."

The Commission should consider that a 3-level increase results in a base offense level for this nonviolent offense that is equal to or greater than that for most violent offenses. E.g., § 2A2.1(a)(2) (base offense level 22 for assault with intent to commit murder, where the object of the offense would not have constituted first degree murder); § 2A2.2 (base offense level 15 for aggravated assault); § 2A3.2 (base offense level 15 for criminal sexual abuse of a minor (statutory rape)); § 2A4.1 (base offense level 24 for kidnapping and abduction); § 2B3.1 (base offense level 20 for robbery).

Section 2L1.1(a)(2), which applies to all other offenses covered under this guideline, would be raised from 9 to 12. The Commission has provided no empirical evidence or other reason why the increase should go beyond what Congress required. Most importantly, offenders who engage in conduct that involves aggravating factors will see their offense level substantially increase as a result of the other congressional directives enacted under IIRIRA.

2. Number of Aliens Smuggled - § 2L1.1(b)(2)

Here also, for the same reasons, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' increase. With respect to the number of aliens smuggled, IIRIRA directs the Commission to "increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 203(e)(2)(B).

We recommend a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment, unduly complicates it and does not follow the congressional directive.

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[1] This guideline applies to convictions of offenses under 8 U.S.C. §§ 1324(a) and 1327. Section 1327 makes it a crime to aid or assist certain aliens to enter the United States. Section 1324(a), makes it a crime to unlawfully employ aliens.

Section 2L1.1(b)(2) currently reads:

If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

Number of Unlawful Aliens...		Increase in Level
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6

U.S.S.G. § 2L1.1(b)(2). The following table illustrates our position:

Number of Aliens	Current	NACDL Recommendation (% increase)	Proposed Amendment # of aliens - adjustment - (% increase)
			3-5 - add 1 - (new)
6-24	add 2	add 3 - (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 - (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 - (50%)	100 or more - add 9 - (50%)

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L1.1.

Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 203(e)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. Id.

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. See e.g., U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense as a prior, even if the conduct is as dissimilar as obtaining a false work permit for one's own use. See 2L2.2. NACDL recommends that only offenses scored under the same guideline, § 2L1.1, would amount to the same or similar conduct.

4. Firearm Enhancements

NACDL opposes the amendment options that make the defendant vicariously liable for the actions of others in possessing or using a firearm. Congress directed enhancements where the defendant himself used the firearm or caused the injury. IIRIRA, §203(e)(2)(E). As we have previously stated, in this emergency amendment the Commission should restrict itself to the enhancements specifically directed by Congress.

NACDL also opposes the provision that requires imposition of a minimum offense level, if a firearm enhancement applies. Such minimum offense levels are not mandated by the congressional directive and are not used by the Commission in either the robbery or aggravated assault guidelines that contain similar enhancements.

5. Cross-Reference to Murder Guidelines

NACDL opposes a cross-reference to the first degree murder guideline under any circumstances. Imposition of a sentence of life imprisonment is the harshest penalty, short of the death penalty, that a sovereign may impose upon an individual. Under our criminal laws, life imprisonment is life without parole, reduction for good time credit or other release from imprisonment while the convicted person remains alive. We believe it corrupts the criminal justice system and our constitutional guarantees to impose such a penalty on the basis that a person committed murder in the absence of a grand jury indictment, the right to confrontation, proof beyond a reasonable doubt to be determined by a jury and all the other constitutional and procedural guarantees afforded criminal defendants.

A sentence of life imprisonment pursuant to a cross-reference would certainly amount to "a tail which wags the dog of the substantive offense". McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). In these circumstances, it would violate due process. The Supreme Court has never upheld imposition of such a harsh sentence on the basis of a mere preponderance of the evidence. See United States v. Watts, 117 S.Ct. 633, 637-38 n.2 (1997) (declining to address the issue under the circumstances of that case but acknowledging divergence of opinion among the Circuits as to whether due process prohibits imposition of a dramatically increased penalty on a preponderance standard).

Furthermore, IIRIRA does not direct the Commission to provide for a cross-reference to the murder guideline. The Commission should certainly not undertake such an enhancement under an emergency amendment.

6. Other Adjustments for Death, Bodily Injury and Risk of Injury

IIRIRA also does not direct a sentencing enhancement on the basis of vicarious liability. It directs an enhancement only where the bodily injury or death was caused by the defendant, himself. Section 203(e)(2)(E) provides in pertinent part:

> (2) [T]he Commission shall . . .
> (E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection--
> (i) murders or otherwise causes death, bodily injury, or serious bodily injury to an individual;
> (ii) uses or brandishes a firearm or other dangerous weapon; or
> (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

The Commission should cap the cumulative effects of the weapons and injury enhancements. As proposed, depending on the option chosen, a defendant's offense level may be increased by as many as 14 levels where the offense results in injury short of death (discharge of a firearm, recklessly creating risk of serious bodily injury, permanent bodily injury). This represents a substantial increase, even for a first offender, if the applicable base offense level is 23. (OL 23 & CH I = 46 to 57 months; OL 37 (23 + 14) & CH I = 210 to 262 months). If any of the other enhancements apply, the numbers would be that much greater. The Commission should keep in mind that, as proposed, these substantial penalties would apply to a defendant who would be vicariously liable for the acts of others even if he or she did not personally handle a firearm of cause the injury.

Lastly, the commentary defining "reckless conduct" is too broad. It encompasses behavior such as "transporting persons in the trunk ... of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded ... condition." Proposed application note 9. This definition includes conduct that is typical for the offense -- smuggling, transporting, or harboring unlawful aliens -- in its simplest form. As such it is inconsistent with the structure utilized by the Commission in other guidelines. It is particularly inappropriate to add a specific offense adjustment for such conduct when the base offense level for this offense is relatively high.

7. Downward Adjustments - § 2L1.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2)". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 203 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to replace the existing § 2L1.1(b)(1) adjustment with the one suggested by Congress where the "offense is a first offense and involves the smuggling only of the alien's spouse or child." IIRIRA, § 203(e)(2)(F). The existing adjustment and the one suggested by Congress address different mitigating factors. The former could involve other family members or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted. Also, the existing adjustment applies only to the less serious offenses covered under § 2L1.1(a)(2).

Furthermore, Congress did not provide the Commission emergency authority to delete this provision.

NACDL recommends that the Commission add the downward adjustment identified by Congress but leave untouched the existing adjustment. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels. If the adjustment were found to be applicable, the base offense level under the emergency amendment would be decreased from 12 to 8, maintaining the 1/3 reduction.

8. Upward Adjustment for a Previously Deported Alien

NACDL opposes this new upward adjustment (§ 2L1.1(b)(7)). This adjustment potentially may cause triple counting of a prior offense if the deportation involved a prior conviction. It also is not warranted in light of the relatively high base offense level vis a vis violent offenses. As it is not directed by Congress and there is no empirical evidence that it represents a factor requiring emergency attention by the Commission, it should not be promulgated.

Amendment 3 - § § 2L2.1 & 2L2.2 (Immigration Document Fraud)

Many of the comments made with respect to emergency amendment 2 apply with equal force to emergency amendment 3.

1. Base Offense Level - § 2L2.1[2]

The Commission should not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. There is no empirical evidence to support a greater increase during this emergency cycle. The base offense level would increase from 9 to 11. Other enhancements directed by Congress would enhance the sentence for those offenders engaging in more aggravated conduct.

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[2] As it pertains to this amendment, these guidelines apply to convictions for offenses under 18 U.S.C. §§ 1028(b)(1) (fraudulent use of government-issued documents), 1425 (unlawful procurement of citizenship or naturalization), 1426 (fraudulent naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (issuance of passport without authority), 1542 (false statement in application or use of passport), 1543 (forgery or false use of passport), 1544 (misuse of passport), and 1546(a) (fraud and misuse of visas, permits, and other documents).

2. Number of Documents - § 2L2.1(b)(2)

Here also, the Commission should comply with the statutory directive, not go it one better. Without providing a reasoned basis, the Commission should not surpass Congress' suggested increase. With respect to the number of documents involved in the offense, IIRIRA directs the Commission to "increase the upward adjustment by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act." § 211(b)(2)(B).

NACDL recommends a plain reading of the congressional directive -- the Commission should take the specific offense characteristic currently in effect and increase the applicable levels by 50%. In contrast, the proposed amendment reformulates the adjustment and disproportionately increases it for the mid-level offenders.

The following table illustrates our point.

Number of Documents	Current Adjustment	NACDL Recommendation (% increase)	Proposed Amendment # of docs - adjust - (% increase)
-	-		3-5 - add 1 - (new)
6-24	add 2	add 3 (50%)	6-11 - add 3 - (50%)
			12-24 - add 5 - (150%)
25-99	add 4	add 6 (50%)	25-99 - add 7 - (75%)
100 or more	add 6	add 9 (50%)	100 or more - add 9 - (50%)

3. Enhancement for Prior Similar Convictions

NACDL opposes both options proposed by this amendment. The proposed amendment is harsher than necessary to comply with the congressional directive. It is also unduly broad in its definition of similar offenses. In surpassing the congressional directive, the amendment seemingly ignores the cumulative effect of the double counting and increased enhancements provided in this amended guideline.

NACDL proposes that if the defendant has one prior, the offense level be increased by 1 (rather than 2 as proposed by the amendment); a second prior would increase the offense level by 2 (rather than 4, as proposed by the amendment). In addition, NACDL proposes that "similar" prior conduct be limited to those offenses covered by U.S.S.G. § 2L2.1 Lastly, NACDL proposes that the enhancement apply only to true recidivists, those who had been convicted prior to committing the instant offense.

Congress directs the Commission to "impose an appropriate sentencing enhancement" upon offenders with "1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense". IIRIRA, § 211(b)(2)(C). Congress also directs that the priors be double counted -- they should serve to increase both the criminal history and the offense level. Id.

Because the prior convictions are being double counted, there is no need to pile on the levels when enhancing the offense level. A one-level increase in the offense level or a two-level increase if there are two prior convictions is sufficient in the absence of a directive by Congress and in the absence of empirical data supporting any greater increase.

For the same reason, the enhancement should apply only if the prior conviction existed at the time of the instant offense. This would be in keeping with the rationale for such an increase -- a person who, once having been apprehended and convicted, persists in criminal conduct is more blameworthy than one who is engaged in continuing wrongful conduct but has not been chastened by an arrest and conviction. See e.g., U.S.S.G. § 4A1.2, comment. (n. 3) (related cases). It is also consistent with the manner in which prior convictions are counted under the career offender guideline (§ 4B1.2(3)) and under the gun guidelines (§ 2K2.1).

For similar reasons, a plain reading of the phrase "the same or similar conduct" should be utilized. The proposed amendment would include any immigration or naturalization offense covered by U.S.S.G. § 2L as a prior, even if the conduct is dissimilar. NACDL recommends that only offenses scored under the same guideline, § 2L2.1, would amount to the same or similar conduct.

4. Downward Adjustments - § 2L2.1(b)(1)

NACDL opposes the Commission's proposal to delete the existing 3-level adjustment applicable "[i]f the defendant committed the offense other than for profit". Congress did not direct abolition of this adjustment although it appears clear from the specificity with which it drafted § 211 that Congress was familiar with the current guideline when it directed a number of changes.

NACDL opposes the Commission proposal to amend the existing § 2L2.1(b)(1) to require in addition that the defendant not have been convicted of a prior immigration offense. Because of the double counting directed by Congress for priors (as part of the offense level in addition to the criminal history), this additional impediment based also on a prior offense would amount to triple counting of the prior conviction. No other offenses, except perhaps, obstruction of justice impose such triple counting of a single aggravating factor. The existing adjustment and the one proposed as option 2 (if the documents relate only to the defendant's spouse or child) address different mitigating factors. The existing one which requires that the defendant have committed the offense other than for profit could involve family members (other than a spouse or child) or humanitarian motives. Because profit or greed is generally deemed a good indicator of culpability, the existing downward adjustment should not be deleted or be limited if a prior conviction exists.

NACDL recommends that the Commission not amend the existing adjustment for offenses committed other than for profit. Further, NACDL recommends that the existing downward adjustment be increased to maintain a proportional reduction in the offense level. The existing adjustment reduced the base offense level from 9 to 6, a 1/3 reduction. Having increased the base offense level as a result of this amendment, the Commission should maintain the proportionality of this reduction by increasing this downward adjustment from 3 to 4 levels.

NACDL also recommends that the Commission amend § 2L2.1 to provide an additional adjustment if the offense involved documents related only to the defendant's spouse and child.

5. Base Offense Level - § 2L2.2

NACDL recommends, for the reasons previously stated, that the Commission not raise the base offense level beyond the 2 levels mandated by § 211(b)(2)(A) of IIRIRA. This would result in a base offense level of 8 from the existing 6.

6. Enhancement for Prior Similar Convictions - § 2L2.2(b)(2)

NACDL opposes both options proposed by this amendment, for the reasons stated with respect to emergency amendments 1 and 2. The proposed amendment is harsher than necessary to comply with the congressional directive. In recognition of the double counting of the prior convictions, (as a basis for increasing both the offense level and the criminal history), the Commission should amend to provide a 1- level enhancement for a single prior and a 2-level enhancement for two priors.

The proposed amendment also contains an unduly broad definition of similar prior conduct. NACDL urges the Commission, in keeping with the manner in which double-counted criminal history is scored in those few guidelines where it occurs, to adopt the enhancement only for true recidivists.

Conclusion

NACDL appreciates this opportunity to provide our comments to the Commission. We urge each Commissioner in considering the proposed amendments to be guided by the mandate in 18 U.S.C. § 3553(a) that sentences should be "sufficient, but not greater than necessary" to provide just punishment.

U. S. Department of Justice

Criminal Division

#970002722

Washington, D.C. 20530

February 4, 1997

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

Dear Judge Conaboy:

The Department of Justice submits the following comments regarding the emergency sentencing guideline amendments recently proposed by the Sentencing Commission in the areas of List I chemicals, alien smuggling, document fraud, and involuntary servitude.

LIST I CHEMICALS (AMENDMENT 1)

Amendment 1 amends guideline section 2D1.11 to increase the penalties for List I chemicals involved in certain violations of the laws regulating chemicals used in the manufacture of controlled substances. The amendment generally raises the offense level by two levels for the most serious chemical violations, such as possessing a listed chemical with intent to manufacture a controlled substance or with knowledge or reasonable cause to believe it would be so used. The increase is mandated by section 302 of the Comprehensive Methamphetamine Control Act of 1996.

The proposed two-level increase in offense levels satisfies the Congressional directive with one exception. At offense level 12 in the proposed Chemical Quantity Table (the lowest level in the table under section 2D1.11), the amendment would result in no increase in offense level for many quantities of the listed chemicals previously subject to this offense level. No mention is made of this exception in the explanation of the amendment. As reflected in the proposed amendment, for example, less than 2.7 kilograms of anthranilic acid would result in offense level 12. The same result would exist under the current guideline, which provides level 12 for less than 3.6 kilograms of the substance.

It is true that the proposal provides a two-level increase from level 12 to 14 for the upper end of the range of List I

chemical quantities previously sentenced at level 12 -- e.g., 2.7 to 3.6 kilograms of anthranilic acid.[1] Apparently, the chemical quantities previously assigned to offense level 12 for anthranilic acid and other List I chemicals were split between levels 12 and 14 in the proposal so that only the upper end of the range was increased to the higher offense level. However, this approach does not comport with the Congressional mandate to increase the offense levels by at least two for List I chemicals for the offenses covered by guideline section 2D1.11. No exception was provided for small quantities, and if such an exception is needed, it should be sought from Congress.

Since Congress provided that a two-level increase is the minimum appropriate, we recommend that the Commission study the effect of the proposed two-level increase during the next year to determine whether offense levels are sufficient for the affected offenses. The gap between a controlled substance offense and the relevant chemical offenses may continue to be too great.

ALIEN SMUGGLING (AMENDMENT 2)

Amendment 2 amends guideline section 2L1.1 on smuggling, transporting, or harboring an unlawful alien. It responds to section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. We generally agree with the proposed amendment and have the following comments on specific issues it raises.

We strongly agree with the proposed narrowing of subsection (b)(1), which replaces the current three-level reduction for offenses committed other than for profit with a two-or three-level reduction if the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child. The current reduction is subject to overuse and does not correctly identify the least serious class of alien smugglers since an offender can transport or smuggle numerous aliens or otherwise engage in serious conduct even if not for profit. Moreover, what constitutes profit can be difficult to assess in some cases. The proposed amendment of subsection (b)(1) more appropriately identifies those smugglers who engage in the least serious offenses.

The proposed amendment of subsection (b)(1) presents a choice of either a two- or three-level reduction. We believe that the greater reduction would be appropriate if the Commission were to select more than a three-level increase in the base offense level. In addition, we urge the Commission to retain the

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[1] Curiously, 3.6 or more kilograms of anthranilic acid (which should be increased from level 14 to 16) seem to be absent altogether from the proposed table.

limitation on the reduction currently found in subsection (b)(1) -- namely, that it should apply only if the base offense level is determined under subsection (a)(2) for ordinary smuggling and related offenses. By contrast, a base offense level determined under subsection (a)(1) indicates that the defendant's violation involved an alien who was previously deported after a conviction for an aggravated felony. The reduced sentence should not be available for smuggling, transporting, or harboring such an alien, even if such a person is a close relation of the defendant's.

Subsection (b)(3) concerns the proposed enhancement for prior convictions for an immigration and naturalization offense, as mandated by the new immigration law. The amendment presents two options. We urge the Commission to select Option 2, which we believe more closely reflects the statutory directive. The directive requires an enhancement if the defendant had one or two prior felony convictions arising out of a separate and prior prosecution for conduct similar to that involved in the current offense. Option 1 limits the application of the enhancement to a case in which the defendant engaged in the new conduct subsequent to a conviction for the prior conduct. We see no reason for this limitation and do not believe that the statutory directive contemplated it. As long as the conviction occurred before the current sentencing and related to a separate transaction, there is an appropriate basis for enhancing the current sentence to reflect the defendant's recidivist tendencies.

Subsection (b)(4) concerns the possession or use of a weapon in connection with alien smuggling. The Commission has included two options. One is that the defendant must have discharged or used the weapon, while the second is that another person may have done so. However, commentary language in proposed Application Note 7 provides that if it is another person, the defendant must be aware of the presence of the firearm.

We disagree with creating what amounts to a special relevant conduct rule for firearms use in connection with alien smuggling and related offenses. The normal relevant conduct rules should operate since a special rule would unnecessarily complicate the guidelines and cause a great deal of litigation. Moreover, we see no policy basis for a narrower approach to addressing the conduct of others for this offense as compared to other offenses in which firearms are used. If the normal rules apply, the defendant's potential responsibility for another person's firearms use would be the same for this offense as for robbery. That is, section 1B1.3(a)(1)(B) of the guidelines would operate to make the defendant liable in the case of jointly undertaken criminal activity for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity ...." Similarly, the defendant would be

responsible for acts and omissions that he or she aided, abetted, counseled, or commanded, as provided in section 1B1.3(a)(1)(A).

The proposed amendments also address recklessly creating a substantial risk of death or serious bodily injury to another person. This enhancement is extremely important because of the dangerous situations sometimes created in alien smuggling and related violations. Option 2 is preferable to Option 1 since Option 2 seems to provide a cumulative, rather than an alternative, enhancement to the risk created by a weapon. A cumulative enhancement is needed unless the risk of death or serious bodily injury arises only because of the weapon. As Option 1 is drafted, an offender who brandished a weapon at one individual but also created a separate risk by transporting others in the trunk of a car would receive the same sentence as one who only brandished a weapon.

We also have several concerns with respect to proposed changes in the commentary to guideline section 2L1.1. Application Note 5, as amended, provides that if the offense involved more than 400 aliens, an upward departure may be warranted. This note previously allowed for upward departure in the case of substantially more than 100 aliens. The proposed amendment represents too great a gap between the enhancement for 100 aliens and the number required for an upward departure. For example, a court should be able to consider the possibility of an upward departure when 300 aliens are involved. We strongly recommend retaining the current language involving "substantially more than 100 aliens" for purposes of this departure.

Another problem with Application Note 5 is that it eliminates a useful basis for upward departure previously authorized -- inhumane treatment of aliens. It is not uncommon for defendants to subject smuggled aliens to demeaning living conditions. District courts should maintain their ability to enhance the sentence of a defendant who treats a smuggled alien in an inhumane manner, even if no substantial risk of death or serious bodily injury results.

With respect to Application Note 9 concerning the enhancement for risk of death or serious bodily injury, we suggest deleting "may include" and inserting "includes" in the second sentence so that it reads as follows: "Such conduct includes, but is not limited to, transporting persons in the trunk or engine compartment of a motor vehicle ...." If the defendant engaged in any of the types of conduct specified, the enhancement should apply. However, because of the word "may" in the proposed language, a court may conclude that it need not apply the enhancement in the situations listed.

Proposed Application Note 10 includes a definition of an "immigration and naturalization offense" as any offense covered

by Chapter 2, Part L. We suggest that this definition be modified to add any related offense under state or local law.

We also recommend the inclusion of language regarding another basis for departure from the guidelines: the defendant's knowing involvement in smuggling, transporting, or harboring an unlawful alien who engages in, or intends to engage in, unlawful activity upon arrival in this country. Certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. However, such smugglers generally have not engaged in conduct that would result in conviction for conspiring to traffic in narcotics. An alien smuggling or related offense in such circumstances should result in a Commission-sanctioned upward departure.

NATURALIZATION OR CITIZENSHIP DOCUMENT FRAUD (AMENDMENT 3)

Amendment 3 amends sections 2L2.1 and 2L2.2 of the guidelines regarding trafficking in, or fraudulently acquiring, documents relating to naturalization, citizenship, or legal resident status, or a United States passport. This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Subsection (b)(1) of section 2L2.1 includes two options for a reduced sentence. The first retains the current reduction for offenses committed other than for profit but adds a limitation that the defendant must not have been convicted of an immigration and naturalization offense prior to the commission of the new offense. The second option limits the reduction to cases involving documents only related to the defendant's spouse or child. We prefer Option 2 since the reduced sentence would not be appropriate in all cases of not-for-profit offenses. For example, committing document fraud to assist numerous aliens who enter unlawfully, even if not for profit, should not result in a reduced sentence.

Sections 2L2.1(b)(4) and 2L2.2(b)(2) provide two options for an enhancement if the defendant had one or two prior convictions for an immigration and naturalization offense. We prefer Option 2 for the reasons set forth in our discussion of Amendment 2 above on the same issue in the alien smuggling guideline.

Proposed Application Note 5 to section 2L2.1 and Note 3 to section 2L2.2 define "immigration and naturalization offense." The amendment we suggested above in the alien smuggling guideline should also apply to the definitions in these guidelines.

We also urge the Commission to include upward departure language in section 2L2.1 for offenses involving substantially more than 100 documents. Without such language a court may

conclude that the quantity of documents has been adequately considered by the Commission and that upward departure is not warranted even for hundreds of documents.

PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE (AMENDMENT 4)

Amendment 4 revises section 2H4.1 substantially and responds to a directive in section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Two key aspects of the directive are: 1) the reduction or elimination of any unwarranted disparity between the sentences for servitude offenses and the sentences for kidnapping and alien smuggling; and (2) the assurance of guidelines that are stringent enough to deter servitude offenses and adequately reflect their heinous nature.

In our view involuntary servitude and related offenses are very similar to kidnapping and should result in offense levels that are similar. Of course, some minor variation is necessary to reflect certain differences, such as the long period of time during which a servitude offense is likely to endure.

Several base offense levels are proposed, beginning with 18 and ending with 24. We strongly support level 24, which is the base offense level for kidnapping. See §2A4.1. If the Commission adopts base offense level 24, the lower offense levels for serious or life-threatening bodily injury in proposed subsection (b)(1) would be appropriate.

Assuming base offense level 24 is selected, the lower option (2 levels) for use of a dangerous weapon in proposed subsection (b)(2) would be consistent with the kidnapping guideline and adequate for peonage offenses.

Under proposed subsection (b)(3), which deals with the length of servitude, the high options provided are most appropriate since they most accurately reflect the seriousness of the conduct. For example, an increase of five levels is needed to reflect the seriousness of an involuntary servitude offense that lasts more than one year. In this regard, involuntary servitude and related offenses are distinguishable from kidnapping, which typically has a shorter duration, and the proposal reflects this distinction by including longer time periods than in the kidnapping guideline. The highest adjustment for length of time in that guideline is two levels if the victim is not released before 30 days have elapsed. Thus, it is appropriate to start with a three-level enhancement under the proposed amendment of the servitude guideline for cases in which the victim is held for more than thirty days and to increase in accordance with the high options presented for longer periods.

Proposed subsection (b)(4) concerns other offenses committed during the commission of, or in connection with, the servitude, peonage, or slave trade offense. As proposed, it only provides a two-level increase above the offense level otherwise determined under the amended guideline or above the offense level from the offense guideline applicable to that other offense. The kidnapping guideline provides a four-level increase. The two-level increase proposed for the servitude guideline is inadequate and would result in unwarranted disparity with the kidnapping guideline.

We note that the proposal fails to provide an enhancement for cases in which the victim is a minor. The kidnapping guideline includes a three-level enhancement where the victim was a minor and, in exchange for money or other consideration, the victim was placed in the care or custody of another person who had no legal right to such care or custody of the victim. §2A4.1(b)(6). A similar enhancement should be included in the servitude guideline since an offense involving the enslavement of a minor is particularly serious.

We also recommend several revisions to the proposed commentary to section 2H4.1. The term "dangerous weapon" in proposed Application Note 3 should be defined in terms that are appropriate to slavery and related cases. Since the essence of such a case is forced incarceration, implements used to enslave should be included in any sentence calculated under these guidelines. Thus, any device capable of causing injury to prevent or deter escape, such as razor wire or guard dogs, should be incorporated into this definition.

The proposed amendment includes upward departure language for cases involving the holding more than 10 victims. In addition, there is an issue for comment concerning the portion of the statutory directive requiring the Commission to ensure that the guidelines reflect the general appropriateness of enhanced sentences for cases involving a large number of victims. We believe that upward departure language is not sufficient to meet the directive. Nor are the current multiple count rules, which provide no increase in the sentence if there are more than six counts. See §3D1.4. A guideline increase is needed to address large number of victims, but such increase should be devised in such a way as not to defeat the operation of the multiple count rules where there are six or fewer victims.

We would be pleased to provide assistance in the further development of the guidelines discussed.

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider
Counsel to the Assistant
Attorney General

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February 4, 1997

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

Dear Judge Conaboy:

I am writing in response to the published "emergency amendments" on guideline §2L1.1, on behalf of the Committee on Criminal Law. I also have a personal interest in immigration cases, based on handling countless cases of this kind for over seventeen years.

In general, we urge the Commission to proceed cautiously in making upward adjustments higher than those mandated by Congress. Historically, most of these cases usually result in guilty pleas, at least partially because the sentences are relatively modest. If the sentences are significantly enhanced and more of these cases proceeded to trial, serious logistical problems will result. Typically, these cases involve "material witnesses," namely the aliens being smuggled or transported. These witnesses inevitably must be detained. They are generally indigent, illegally in this country, very poorly educated, and require interpreters. The combination of those factors means that they are usually very poor witnesses. Because they have been dealt with by many persons along the transportation chain, usually under clandestine conditions, they often cannot identify defendants and give testimony inconsistent from other material witnesses or from what they have allegedly told Border Patrol agents at the time of their own arrest.

The pre-trial detention of the necessary witnesses is itself a logistical problem of no small proportion. They must be detained in crowded pretrial detention facilities, which are limited and often located far from the court location. Indeed, the Department of Justice recently wrote to me, asking the assistance of the Criminal Law Committee in conveying to all judges the fact that housing pretrial

detainees has become a major problem for the Marshals Service--in absolute numbers, in medical needs, and in transportation needs.

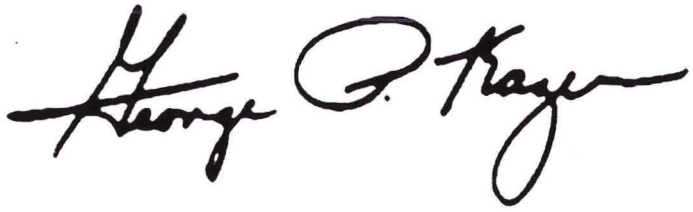
It is also true that the defendants being prosecuted for these offenses are generally not the main organizers of smuggling rings but rather low-level underlings. In fact, often the defendant is himself an undocumented alien selected by the "coyote" to drive or guide the group for a discounted fee. Moreover, at a time when the Commission is rethinking quantity-driven guidelines in narcotics cases, it should be slow to make quantity-driven increases in this area. Even more than with narcotics, the number of aliens being transported often has little bearing on the degree of culpability of the defendant.

We would also urge you not to abandon the "not for profit" language of §2L1.1(b)(1). There are many cases of defendant's helping relatives other than a spouse or child. In that connection, however, at some appropriate time it would be useful to clarify that this language does not refer to whether the defendant personally expected to profit but rather whether the transported or harbored aliens were paying someone for this service, as distinguished from directly working with a close friend or relative. Frequently I encounter cases where it is undisputed that a purely commercial venture was afoot, but there is no evidence that the particular defendant driving or guiding the group was directly receiving any money.

In sum, we realize you have no choice with respect to certain changes, but we urge great caution in going beyond the Congressional mandate.

Thank you for your consideration of these suggestions.

Sincerely,



cc: Commissioner Michael S. Gelacak
Commissioner Wayne A. Budd
Commissioner Michael Goldsmith
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
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February 4, 1997

Dear Mr. Courlander:

Enclosed, please find the American Bar Association's comments with regard to the emergency amendments proposed by the United States Sentencing Commission, pursuant to 61 C.F.R. 152-198.

Sincerely,

Alan J. Chaset
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Mary Lou Soller
Co-Chairperson
ABA Criminal Justice Section
Committee on
U.S. Sentencing Guidelines

Enclosure

AMERICAN BAR ASSOCIATION

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COMMENT OF

THE AMERICAN BAR ASSOCIATION

to

THE UNITED STATES SENTENCING COMMISSION

on

PROPOSED EMERGENCY AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

February 4, 1997

[46]

Our names are Mary Lou Soller and Alan J. Chaset and we serve as the Chairpersons of the American Bar Association Criminal Justice Section's Committee on the United States Sentencing Guidelines. The members of this committee include professionals with diverse views and who are involved in all aspects of the federal criminal justice system - including judges, prosecutors, public and private defense practitioners, academics and criminal justice specialists.

On January 2nd of this year, the Commission published notice of proposed temporary emergency guideline amendments which increase and/or impose penalties for certain offenses. The notice requested public comment from interested parties. On behalf of our Committee, the Criminal Justice Section, and the American Bar Association, please accept the following brief remarks as our response to that publication and that request.

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

As opposed to the changes to U.S.S.G. §§2L1.1, 2L2.1 and 2L2.2 initiated in response to the Illegal Immigration Reform and Immigration Responsibility Act of 1996, we recommend that the base offense levels in each instance be increased by the least amount required by the applicable legislative directive. As to that issue and the options presented in the proposals, we believe that the Commission bears the burden of justifying any additional increases. Since no data supporting the need for something more onerous has been offered and without any other rationale or argument provided to explain or support the larger increases, we conclude that this burden has not been met.

As to the options for enhancing the now increased base offense levels for offenders with prior records for the immigration and naturalization offenses, we recommend Option 1 in each instance. We believe that these options are fairer, more responsive to the legislative directive and more consistent with other aspects of the guidelines. And as to the various other specific offense characteristic enhancements, in the absence of data or a documented rationale, we can only recommend that option or that point in the enhanced range that would result in the less severe alternative.

Next, as regards the proposed downward adjustments where the offense involves the smuggling of only the alien's spouse or child, we recommend that the Commission permit a decrease in each instance equal to the base level increase discussed above.

Next, as to the proposed changes to U.S.S.G. §2H4.1 similarly initiated in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, we again feel that the Commission has not met its burden of justifying anything more than the minimum increases in either

the base offense level and/or the various specific offense characteristic increases. Thus we recommend the adoption of the least severe alternatives.

Finally, as regards the request for comment on the need for some additional amendment to better address those instances where the peonage, involuntary servitude, slave trade offense involve a large number of victims, please permit us to respond first that we do not possess nor have we been provided with enough information about these crimes and the difficulties they have presented to the sentencing courts in order for us to answer in a useful or intelligent fashion. Without an indication or evidence that the current mechanisms for dealing with unusual facts or atypical circumstances do not function well for these offenses and without data indicating that the number of victims is sufficiently remarkable to necessitate the development of a specific offense characteristic here, there should be no need to treat them any differently and no need to amend the guideline here any further.

Having said that, permit us to conclude that we remain uncomfortable with the emergency amendment process in general and its use in these four amendment circumstances in particular.[1] We do not understand why the Congress singled out these guideline changes for the more immediate reaction by the Commission and we do not appreciate the rationale for addressing these matters outside the normal amendment cycle. We recognize the increased burden these directives place on the Commission and would support any effort to communicate that problem to the appropriate committees of the Congress.

Thank you for this opportunity to comment.

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[1]We are offering no comment on the proposal to increase the base offense levels for offenses involving list chemicals pursuant to the Comprehensive Methamphetamine Control Act of 1996.

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February 21, 1997

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

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment regarding conflicts among the circuits, for the 1997 amendment cycle. The Committee will be sending another written response on other published amendments and issues in early March. While the Committee recommends that the Commission resolve all circuit splits, at a minimum we strongly recommend that the Commission resolve during this amendment cycle those splits listed below as priorities.

The Sentencing Commission should resolve conflicts among the circuits to minimize unwarranted disparity, which is a goal of the Sentencing Reform Act, and also to minimize unnecessary litigation. It is also only logical for the Commission to resolve conflicts on the definition of terms or application of procedures which the Commission itself has created. The Sentencing Commission is statutorily directed to monitor the application of the guidelines and to resolve those conflicts among the circuits which it is capable of resolving. This statutory mandate

was reaffirmed by the Supreme Court in United States v. Braxton, 111 S.Ct. 1854 (1991), as a reason why that court would not scrutinize such conflicts as closely as it does in other areas of law.[1]

Having been urged to narrow our list of recommendations regarding circuit conflicts, we are submitting a "top ten" list of conflicts which we urge the Commission to resolve. Most of these conflicts relate to Chapter Three or Four guidelines, and therefore affect most sentencings. Furthermore, all involve a fairly easy resolution that does not involve major policy decisions.

In each of the circuit conflicts listed there are several, if not many, circuits yet to resolve the issue. Rather than wait until all circuits attempt to determine what the Commission meant by its terms and procedures, the Commission should take action to resolve the controversy and prevent further litigation. The Commission's resolution of the ten conflicts listed below would avoid litigation in literally hundreds of district courts and numerous appellate courts, which would otherwise need to litigate the issues involved.

The Commission has asked for suggested resolutions to the conflicts. Where the Commission staff has suggested a resolution, we are recommending that the Commission adopt the proposed published resolutions. For the remaining conflicts, we have proposed the resolution which either most closely conforms to the Commission's probable intent, or what is most consistent with the application of the guidelines.

We also believe that resolution of some of the listed conflicts would have additional administrative or policy benefits. For example, clarification regarding the fine for costs would, in addition to resolving a conflict, clear up confusion about the nature of that basis for a fine when offenders are also asked to contribute to the cost of supervision services. The conflict regarding application of retroactive amendments would, in addition to resolving a conflict, avoid sentences being reduced below time served, thereby eliminating the administrative problem regarding the "prison credit" created by such an application. That resolution also clarifies the discretionary nature of such applications and helps defend against unnecessary collateral motions by confirming that the original sentence was not an "illegal" sentence. The suggested resolution to the conflict regarding escape from a federal prison camp would help provide deterrence for escapes from such facilities, where most federal escapes occur.

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[1] The Court said, "in charging the Commission 'periodically [to] review and revise' the guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." 111 S.Ct. 1854, 1858 (citing 28 U.S.C. §994(o)). The Court went on to indicate that because the Commission is charged with this role, the Court would be more "restrained and circumspect" in using its certiorari power to resolve circuit conflicts on sentencing matters. Id.

A. Published Amendments Which Resolve Circuit Conflicts:

1. Amendment # 11: Application of retroactive amendments.

We ask the Commission, as a proper exercise of its authority pursuant to 28 U.S.C. §994(u), to adopt published amendment 11, with one suggested addition. This amendment would be very helpful in clearing up several sources of ambiguity regarding the application of retroactive amendments. First, it clarifies that application of such amendments is discretionary with the court. Next, it more closely conforms the policy statement to the statute, by stating that such amendments can only be applied to a term of imprisonment, and not to any other component of the sentence - such as a period of supervised release. This helps to resolve several issues frequently raised and litigated. We suggest an additional phrase be added which would clarify that such amendments are applicable only to a term of imprisonment for the original offense, which would resolve the ambiguity which allowed a recent circuit court to hold that such amendments could be applied to a term of imprisonment for revocation of release.

Finally, and perhaps most importantly, the amendment specifies that courts are only authorized to apply such amendments to reduce a term of imprisonment down to the amount of time already served, and not below that time, thereby avoiding the generation of prison credit, which can create administrative problems for the courts.

2. Amendment # 14: **Express threat of death.**

We ask the Commission to adopt the published proposed amendment regarding "express threat of death" in §2B3.1 for robbery offenses. The amendment clarifies the operation of the guideline to include inferred threats. This is not only a logical resolution for this issue, but it is also the majority view of the circuits which have already litigated the issue.

3. Amendment # 17: **Underlying offense.**

We ask the Commission to adopt the published proposed amendment which clarifies how courts should compute the "underlying offense" for certain offenses The proposed resolution is logical as well as consistent with the application of the guidelines in general, which focus on the conduct for which the defendant was convicted.

4. Amendment #27: **Controlled substance offense/career offender.**

We ask the Commission to adopt the published proposed amendment regarding the career offender guideline. The proposed amendment resolves a circuit conflict by including in the career offender definition of "controlled substance offense," an offense of possessing a listed chemical with intent to manufacture a controlled substance. This is a logical resolution, consistent with other applications of the guidelines. The amendment also clarifies the guideline regarding "crime of violence," and makes other non-substantive, conforming amendments to the same guideline.

5. Amendment #23: **Obstructive Conduct.**

We ask that the Commission adopt the published proposed amendment, which resolves a circuit conflict and clarifies and conforms the operation of the obstruction guideline in several significant ways. This is precisely the kind of change that only the Commission can make, and which prevents litigation and confusion.

B. **Circuit Conflict Issues Published for Comment in Amendment #28:**

6. Item 4 of Amendment 28: **Whether a minimum security prison camp is a "similar facility" to a halfway house under §2P1.1(b)(3), in order to qualify for a downward adjustment.**

Resolution of this conflict would provide clarity and uniform application of the guideline regarding escape from prison. We recommend a resolution that would provide that a minimum security prison camp is not a "similar facility" for purposes of the §2P1.1(b)(3) downward adjustment, in keeping with the majority position of the circuits. Also, we understand that nearly all federal prison escapes take place from such facilities (and from halfway houses). Preventing a downward adjustment for escapes from prison camps would assist in deterring escapes from such camps.

7. Item 8 of Amendment 28: **Whether a sentence to a community confinement center, halfway house or drug treatment center qualifies as "imprisonment" under §4A1.2(e)(1).**

This conflict affects the criminal history computation of numerous cases. Its resolution would, therefore, significantly assist uniformity of application and avoid unwarranted disparity. We recommend that the Commission seek a resolution which would be consistent, to the extent possible, with the Bureau of Prisons' treatment of time spent in a halfway house as "prison" credit.[2] In general, the BOP procedure is that, service of time in a halfway house is not treated as "prison" credit if such time is spent as a condition of supervision, but such time is treated as "prison" credit by the BOP if it is spent as a result of a direct commitment as part of the sentence (either original or upon revocation), or as a result of BOP designation for the last portion of a prison sentence.

8. Item 10 of Amendment 28: **Whether a court may impose a fine for costs of supervision or imprisonment under §5E1.2(i) when it has not imposed a punitive fine under §5E1.2(c).**

We ask the Commission to eliminate §5E1.2(i) as an "additional" basis for a fine and convert it to a factor under §5E1.2(d) for determining a punitive fine under §5E1.2(c). This would avoid not only the circuit conflict, but would also avoid the potential recurrence of another conflict on the

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[2] The Supreme Court recently upheld the BOP's treatment of such time and resolved a similar circuit split. Reno v. Koray, 115 S.Ct 2021 (1995)