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March 16, 1987

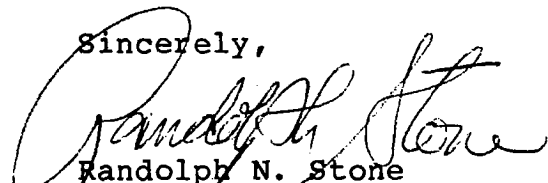
Hon. William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

Enclosed herewith are the comments from the Public Defender Service for the District of Columbia on the Revised Draft Sentencing Guidelines.

We hope that our comments will assist the Commission in the development of fair and consistent guidelines.

Sincerely,



Randolph N. Stone
Deputy Director

Enclosure

COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA
ON THE REVISED DRAFT SENTENCING GUIDELINES

Submitted to
THE UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

The Public Defender Service of the District of Columbia is an independent agency created by Act of Congress, D.C. Code §1-2701 et seq., Pub. L. 91-358, 84 Stat. 654 (1970) to provide representation to indigent persons charged with criminal offenses in the federal and local courts of the District of Columbia. PDS has long played an active role in the development of legislation and court procedures which affect criminal defendants, and has previously submitted comments to the Commission concerning the first draft of the proposed sentencing guidelines and the proposal to develop procedures for sentencing in capital cases.

In our view, the development of guidelines which will reduce sentencing disparity while achieving results in particular cases which are fair and consistent with the intent of Congress requires further study. The Revised Draft ("RD") guidelines are, in some respects, an improvement over the Commission's initial draft. Much more needs to be done before the guidelines are ready to be implemented following notice and comment. 28 U.S.C. §994(x).

While the Commission is not expected to produce a perfect system, it must produce one that is both more practical and fairer than the Revised Draft before the guidelines may be applied to real people. Two basic tasks must be accomplished. First, the Commission must develop a clearer, more coherent theory of sentencing. Until the Commission does so, it will be impossible to devise an offense severity scale or criminal

history score which serves the purposes of sentencing. A system devised without such a theory is arbitrary. Second, the Commission must devote more attention to the manner in which the guidelines will work in practice. Over 80% of federal criminal cases which result in convictions are resolved by guilty pleas rather than by trial, yet the Revised Draft devotes only 2 pages to the serious challenges which plea bargaining may present to the implementation of a guideline system. The Revised Draft generally has failed to grapple with the effects of the guidelines system on the criminal justice system as a whole, from the exercise of prosecutorial discretion, to the burden placed on probation officers, to the effect of the guidelines on prison populations.

The Commission recognizes that "[g]uideline sentencing is an evolutionary process ... that, over time, will be refined and amended as practical experience, analysis and logic dictate." RD at 1. For this very reason, the Commission's initial effort should be a less drastic upheaval of existing sentencing practices than is contemplated by the Revised Draft. The only certain result of these guidelines, if implemented, will be a significant increase in the proportion of federal criminal defendants sentenced to terms of incarceration and in the terms of their imprisonment. Even if this action rested on a solid theoretical base, it would be unsound for the Commission to adopt such a policy without a commitment from Congress to appropriate

the funds necessary to accomodate the vastly increased federal prison population. In our view, both good sentencing policy and a wise use of resources favor less, not more, incarceration, and more frequent use of community-based sentencing alternatives which have proved to be effective deterrents to criminal conduct.

The Theoretical Framework

The Commission has adopted five general principles to guide its decisions:

1. sentences should be commensurate with the seriousness of the offense, reflecting the physical, economic and psychological harms to the victim and society caused by the offense;
2. sentences should aim to control crime through general deterrence, special deterrence, incapacitation, and rehabilitation;
3. sentences should be sufficently punitive so as to make clear to offenders and to society that crime does not and will not pay;
4. to the extent that principles derived from retributive and crime control models conflict, justice for the public is the over-reaching goal; and
5. sentences should be effective, just, and efficient for the defendant, the victim and society.

RD at 2. These general principles implement 28 U.S.C. §994 and 18 U.S.C. §3553, which provide limited Congressional guidance for

the formulation of sentencing guidelines.¹ While unobjectionable as general principles, these policies do not lead to determinate, or even predictable results concerning guidelines for practical offenses or sentences in particular cases. No guideline or

¹/We recognize that the Commission can play only a limited role in the articulation of sentencing policy, and in the "rationalization" of sentencing laws to conform to this policy because of constitutional restrictions on the power of Congress to delegate legislative power to an administrative body such as the Commission. See generally Industrial Union v. American Petroleum Institute, 448 U.S. 607, 685-6 (1980) (Rehnquist, J. concurring); Note, The Fourth Branch: Reviving the Nondelegation Doctrine, 1984 B.Y.U. L. Rev. 619; Note, Rethinking the Nondelegation Doctrine, 62 B.U. L. Rev. 257 (1982); S. Barber, The Constitution and the Delegation of Congressional Power (1975); Aranson, Gelhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1 (1982). The specific range of punishments which may be imposed for a criminal offense, and the specification of what behavior may be punished are traditionally and exclusively legislative functions. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). Obviously, the Commission could not select guidelines for an offense which provide a longer sentence of imprisonment than the statutory maximum. Neither can the Commission provide for a lower sentence, under the guidelines, than a mandatory minimum sentence enacted by Congress. To a lesser degree, the nondelegation doctrine inhibits the Commission from making the fundamental value judgments required to resolve conflicts between the broad principles enunciated in the enabling legislation. Congress could not delegate the power to derive an "offense severity" scale out of nothing, since decisions about how seriously a particular act injures the public is a quintessentially legislative judgment. Nor could Congress delegate the power to undo Congressional judgments about the severity of various offenses, reflected in statutory maximum sentences, by classifying offenses with different statutory penalties under the same "guidelines." See page 7, infra.

Because the Commission can only implement moral and value judgments made by Congress, it may simply be impossible, and therefore an unfair criticism of the Revised Draft, for the Commission to articulate a more thorough-going theoretical framework for the guidelines. But this counsels, in turn, a set of guidelines anchored in existing sentencing law and practice.

sentence can be "tested" against these principles, as principles they are so general that they have little relevance to the task at hand. "Whether the allocation of punishment, is efficient, just, or effective cannot be assessed without specifying the criteria by which to judge the outcomes." NAS Study at 47.

A. Offense Levels

The Commission's general principles give the reader, and the Commission itself, little guidance about how to rate the seriousness of an offense. The Commission has failed to explain how it derived its offense levels, or why--and to what extent--it has departed from Congress' judgment of the relative seriousness of offenses. Several empirical sources of information about offense severity are available. One is existing sentencing practice. The Commission apparently has available to it a statistical "projection" of sentences for first offenders for a variety of federal crimes, based upon a sample of actual sentences in 40,000 cases. Whether or not the statistical analysis is accurate, since it is not based on actual first offender sentences but on a regression analysis which allows the statisticians to factor out portions of sentences based on prior criminal record, this data does give the Commission some insight into the hierarchy of offense severity, as perceived by current federal district judges. Of course, these judgments are those of unelected members of the judiciary, not members of Congress. But they are important for

two reasons: (1) to some extent judges do mirror the values and attitudes of their community; indeed this in large measure explains the greatest source of disparity in federal sentencing--the different perception of the seriousness of offenses in different areas of the country; (2) to work, the guidelines should be minimally compatible with the views and practices of those who will have to apply them. Otherwise, the guidelines will be undermined by formal but not substantive compliance, see National Academy of Sciences, Panel on Sentencing Research, Research on Sentencing: the Search for Reform 29 (1982)("NAS Study").²

The second important source of information about how serious offenses are--purely from the standpoint of "just desserts" sentencing--is federal law. Congress has provided maximum, and in some cases minimum, sentences for every offense. Although the federal criminal code has rightly been described as a patchwork, it is for Congress, not for an administrative body within the judicial branch, to decide when Congress has provided different penalties for the "same" offense through some error of judgment or lapse in attention, and when the difference has resulted from

²/Of course, the federal guidelines, like the Minnesota guidelines for which the NAS study found a high degree of substantive compliance, id. at 29-30, have an "external enforcement mechanism: in the form of appellate review. As we note, pages 17-19, infra, appellate review may be ineffective in the vast majority of cases which are resolved by guilty pleas. Id. at 180.

a conscious decision to provide greater protection to some interests than to others. A good example is the Commissioner's decision to treat theft and embezzlement as "essentially equivalent." Commentary, RD at 27. There are certainly arguments to be made for this position, but embezzlement differs from theft because it involves a breach of trust. The Commission views breaches of trust seriously; that much is evidence from Part C of the guidelines, which pertains to offenses involving public officials. Introduction, RD at 39. Likewise, elsewhere in the guidelines offenses involving breach of trust are treated differently from offenses involving similar tangible losses or injuries. See §E252, RD at 62 (increase in base offense level if the defendant had a fiduciary duty under ERISA); §E256(a)(1), RD at 63 (increase in offense level if defendant is a union officer or occupied a position of trust in the union). The Commission's assessment of the importance of "breach of trust" as a characteristic of an offense is inconsistent. In any event, the Commission's justification of its policy decision to equate theft and embezzlement is inadequate.

The Commission has also not offered sufficient justification for guidelines which apply equal offense levels to offenses for which Congress has provided different statutory penalties. E.g. Compare 18 U.S.C. §641 (maximum penalty 10 years) with 18 U.S.C. §1702-3 (maximum penalty five years). Not only do the part B

guidelines lump offenses punishable by five years with those punishable by ten years, they also fail to take into account the misdemeanor penalties for thefts involving less than \$100, e.g., 18 U.S.C. §641; 18 U.S.C. §§1361-63; 18 U.S.C. §2113(b). Nor, in our view, does federal law justify an enhancement of the offense level for the theft or destruction of United States mail. 18 U.S.C. §1703 provides a maximum of one year penalty for the destruction of mail, no longer than other destruction or property offenses, but under the Commission's guidelines this offense merits an increased severity level of 5. §B213(a)(1).

Our discussion of the Part B guidelines is intended merely to illustrate a more general criticism of the Commission's failure to explain the relationship between its offense levels and the offense levels implicit in the existing statutory penalties. To what extent has the Commission departed (and may it depart) from these earlier Congressional judgments? To give another illustration, under the guidelines, blackmail in the form of a threat to report an illegal act, which is a misdemeanor offense, 18 U.S.C. §873, earns a severity level of 10, §B233 high enough so that anyone with any prior criminal record under the Criminal History Score will be ineligible for probation. The Commission has failed to articulate a reason for treating this as a more serious offense than theft of less than \$50,000. §B211. The Commission applies the same offense level to unlawful conduct

relating to a gambling ship, §E233. Again, this offense is punishable by a maximum of 2 years imprisonment, one fifth as much as Congress allows for many theft, embezzlement, and fraud offenses. Other offenses in the same category include involuntary manslaughter, §A213, which is punishable by a maximum of three years imprisonment (18 U.S.C. §1111), failure to register when no peacetime draft is in effect, §M246, which is punishable by a maximum of five years imprisonment (50 U.S. App. §462(a)) and simple possession of a schedule I or II opiate, §D221 which is punishable by a maximum of one year, 21 U.S.C. §844(a). If the offense severity levels in the guidelines simply reflect the personal moral judgment of the members of the Commission, serious separation of powers problems arise. And, in any event, the Commission must do more to justify and to explain its moral judgments.

B. Adjustments and Departures

The Commission's failure to relate its guidelines to a theory of sentencing is also apparent in the provisions relating to adjustments and departures from the guidelines. The most glaring example is the treatment of drug dependence. Section D314 states that "drug dependence is not a reason for imposing a sentence below the guidelines," but may, in some cases, justify a sentence above the guidelines. This statement conflicts with the legislative history of the Sentencing Reform Act, and makes

little sense as a matter of sentencing policy. The Report of the Senate Judiciary Committee on the 1984 Act states:

Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In the unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for "drying out," as a condition of probation.

S.Rep. 98-225, 98th Cong., 1st Sess. 173 (1983). Congress contemplates exactly the opposite of what the Revised Draft guidelines provide. It is clear that Congress did not intend, when it abolished the special sentencing provisions for youthful offenders and drug addicts, to erase these important considerations from federal sentencing law. Rather, Congress sought to promote uniformity "[b]y including such considerations in the formulation of sentencing guidelines." Id. at 120.

Congressional intent also reflects wise policy. Drug dependence is relevant to many sentencing principles. In part, the Narcotics Addict Rehabilitation Act, 18 U.S.C. §4251 et seq. was based on the belief that, an individual driven by addiction is less morally responsible for his or her actions than someone engaging in the same conduct without a drive which overbears (to some extent) free will and judgment. Moreover, since drug addiction may be treated, "rehabilitation" of drug dependent offenders directly promotes the interest in special deterrence and incapacitation.

tation. A person who commits crimes because of drug addiction will no longer pose the same threat to society if his addiction is cured.

The Commission's proposal seems to be guided by the notion that there are no effective treatments for drug dependence and that therefore at least some offenders should be punished more harshly because of their status as drug addicts. This policy conflicts with the constitutional principles articulated in Robinson v. California, 370 U.S. 660 (1962). It is also empirically unsound. Our country should be devoting more, not less, resources to the treatment of drug addiction. The Revised Draft seems to miss the fundamental difference between the treatment of drug addicts and a general repudiation of the so-called "medical model" of corrections. Drug addiction is a medical problem, and it can be addressed by means other than incarceration.

The Commission's apparent judgment that youth is only an aggravating factor in sentencing also conflicts with Congress' desire to incorporate the flexibility of sentencing for youthful offenders into the guideline system. S.Rep. 98-225 at 120. §D311 does not fulfill this purpose. But the Commission has offered no adequate reason for rejecting the widespread belief that youthful offenders should be treated differently because they are likely to have less judgment than adults. e.g., Eddings

v. Oklahoma, 455 U.S. 104, 115 (1982). Age, in this sense, is relevant to culpability, and also to specific deterrence and incapacitation. A young person is likely to be deterred from future criminal activity by a less severe sanction than an adult. Furthermore, imprisonment of the young with hardened adult offenders is likely to breed more and more expert criminals, rather than to reduce crime in the long run. See Barker v. Wingo, 407 U.S. 514, 520 (1972).

Apart from the merits of these disputes, it is troubling that the Commission has failed, in its published guidelines, to grapple with these issues in greater detail. The consent, and therefore the understanding, of the governed is vital to the functioning of a free society. But in some respects, the Commission's Revised Draft guidelines appear to govern by edict rather than by consent.

A similar, and equally troubling omission is Section Y218, which allows a departure of no more than 4 offense levels to reflect the effect of the defendant's diminished capacity on his or her responsibility for the offense. To begin with, Y218 must be read in the context of the radical change in the federal insanity defense in the 1984 Comprehensive Crime Control Act of 1984. 18 U.S.C. §20 narrowly limits the insanity defense, and excludes evidence that the defendant's ability to conform his or her conduct to the law was impaired. A departure of no more than

four levels hardly captures the potential range of mental impairments which directly affect an individual's moral culpability for an offense. Nor is the limitation of §Y218 to nonviolent offenses justified. The conjunction of §Y218 and the new federal insanity law may cause the unjust punishment of persons who are only minimally responsible for their actions under any system of punishment guided by moral principles. The only conclusion to be drawn from the Revised Draft is that the Commission has decided to elevate general deterrence concerns over retribution or "just desserts" in this situation. But it is doubtful that the punishment of the mentally impaired contributes significantly to the general deterrence of the population at large, because of their small numbers. At the margin, the benefit of this guideline towards deterrence is small, and far less than the harm it causes to our shared notions of culpability.

In our view, §Y218 is comparable to §Y228 (coercion/durress) and should be treated as an adjustment. The Commission should also permit a departure, without limitation, for both violent and nonviolent offenses, to take into account the offender's diminished capacity for his or her conduct.

C. Criminal History

It is not clear what the Criminal History Score is designed to accomplish. The Commission should provide better empirical support if the Criminal History Score is to be defended as a good

predictor of recidivism and therefore of the need to incapacitate an offender. To us, the Score appears to overstate less serious criminal records. See NAS Study at 87. Sentences also escalate too rapidly. Without some solid empirical evidence that the Criminal History Score, as formulated, is an accurate predictor of future criminal behavior, which the Commission has not produced in the Revised Draft, uniform sentencing for like conduct is undermined without a corresponding gain to any other purpose of sentencing. It is not clear to us, for example, why a white collar criminal who defrauds investors of \$49,000 should be eligible for probation under the guidelines, while a mail carrier who destroys mail and has one prior conviction for a petty offense would not.

The Criminal History Score is also troubling because it builds race and class bias into the guidelines, despite the specific requirement of 28 U.S.C. §994(d). The Commission has limited judicial consideration of many factors long believed to have relevance to sentencing, such as the individual's family responsibilities. §D316, RD at 171. Yet the Commission perpetuates the disparity in sentencing of black and white, rich and poor, by escalating sentences based on prior record. Prior criminal record should, of course, play some important role in sentencing. The question is whether the Commission has allotted too large a role

to each single conviction, and whether it can justify the Score it has designed with empirical evidence.

The worst single feature of the Criminal History Score, and one which is not adequately explained by the Commission, is the use of juvenile adjudications. §A312(d)(2). As the Commission recognizes, §A312(d)(1), most jurisdictions provide for the transfer or waiver of juvenile court jurisdiction in most serious cases. This allows each state (or the federal government) to determine which types of offenses and which types of offenders should be treated as adult, with adult consequences including a lasting criminal record. Juvenile records are already used extensively in sentencing, despite the importance to the juvenile justice system of sealing records. NAS Study at 84. The Commission should not make matters worse by institutionalizing this practice under the guidelines. This is especially so because the evidence that race and socioeconomic class affects rates of arrest, "conviction" and incarceration for juvenile offenses is even stronger than for adult offenses. Krisberg, Schwartz, Fishman, Eiskovits, and Guttman, The Incarceration of Minority Youth, (monograph for the National Council on Crime and Delinquency) (1986).

The guidelines also fail to provide for convictions which are erased, expunged, or set aside under the provisions of the former Youth Corrections Act, 18 U.S.C. §5010 (1984), or analo-

gous state laws. Especially when prior state convictions are considered, this violates principles of comity and federalism. Respect for prior adjudications by state and federal judges requires that set aside convictions should be treated as a nullity for sentencing purposes, or, at most, should be counted under §A315 (adequacy of criminal history).

D. General

In our view, the work of the Commission is too important, and the consequences of criminal sentencing too severe, to use the Revised Draft as the basis for final sentencing guidelines. Even if additional time is needed, the Commission should rethink the guidelines in light of the policies which should guide criminal sentencing. We believe that the results will be more understandable, and therefore more acceptable to the public. The adoption of a sentencing scheme which treats many important human characteristics which we rely on in our daily assessment of blameworthiness as irrelevant should be undertaken with great caution, and only with a very clear articulation of the reasons for this action. Avoiding disparity means treating like cases alike. But this requires the Commission to determine which cases are alike. It is equally unjust to treat unlike cases as if they are alike, as to perpetuate the kind of disparity which prompted the creation of the Commission in the first place. See Coffee, The Repressed Issues of Sentencing: Accountability, Predictability

and Equality in the Era of the Sentencing Commission, 66 Geo. L.J. 975 (1977).

Practical Application

The vast majority of federal criminal sentences follow guilty pleas rather than trials. Most of these pleas result from negotiations between the government and the defense. The guidelines, as proposed in the Revised Draft, risk either a manyfold increase in the number of federal criminal trials, which would overwhelm judicial and prosecutorial resources, or a "black market" in sentencing which will undermine the guidelines. The Commission's failure to adopt adequate procedures for the resolution of factual disputes will also lead to great unpredictability. Either the guidelines will be implemented in a way which will violate the due process clause of the Fifth Amendment, or the workload of the federal courts will be multiplied by mini-trials of facts which must be established under the guidelines.

A. Effect on Plea Bargaining

The only acknowledgement of plea bargaining and its effect on sentencing is found at pages 173 to 174 of the Revised Draft. The ability of actors in the criminal process to undo reforms such as mandatory sentencing, presumptive sentencing, and even restrictions on plea negotiations by covert bargains is widely recognized. See e.g., NAS Study at 179-80. The Revised Draft attempts to control this problem by §A413, Ethical Standards for

Plea Agreements, which requires full disclosure of the relevant facts and circumstances of the offense in the agreement. In this way, the Commission hopes to prohibit "fact bargains." See NAS Study at 43. The Commission's hopes are unrealistic.

To begin with, the likelihood that a prosecutor and a defense lawyer (and client) will agree on the facts relevant to sentencing are much smaller than the likelihood of agreement on a charge or ultimate sentence. It may well be that a prosecutor has a firm conviction that certain things were part of the "offense," as defined at page 11. These things may not even be relevant to the charge to be proved at trial, certainly may include things that the prosecutor could not prove beyond a reasonable doubt and also may simply be untrue. Indeed, one should presume that allegations of uncharged criminal conduct are much less reliable than allegations leading to conviction.

No defendant, or defense lawyer can agree to "facts" which did not happen simply in order to obtain an agreement for a guilty plea. The most likely result is that prosecutors and defense lawyers will negotiate--since no facts were proved and no evidence was actually presented at trial--over what facts the plea agreement will contain. In effect, this creates a market system completely outside the guidelines, since the court cannot effectively prevent such negotiation. The court cannot determine when the resulting agreements are accurate, because the prosecu-

tor has dropped allegations which prove to be unfounded, and when the parties have essentially stipulated a sentence regardless of the real facts. Moreover, because the Commission has failed to adopt a standard of proof for facts relevant to sentencing under the guidelines but which are not elements of an offense, it is unclear when disputed facts ought to be included.

The result will be to give prosecutors more discretion and a larger role in determining ultimate sentences than they currently exercise. See generally Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for Fixed and Presumptive Sentencing, 126 U.Pa.L.Rev. 550 (1978). Indeed, it is possible that in white collar cases in which defense counsel frequently negotiate with the prosecution before an indictment is returned, negotiations will come to focus on the scope of the investigation itself, so as to limit the facts which must be disclosed to the court. On the other hand, it is also possible that the parties will find it very difficult to agree on a set of facts which will lead to a relatively predictable sentence, and will not bargain at all. If this happens, the federal courts will soon be overwhelmed.

A related question is whether a judge in a guilty plea case may rely upon any information other than what is contained in the plea agreement. For example, a judge who sentences a defendant who pleads guilty may have heard evidence in the trial of a

related case which might bear on the pleading defendant's role in the offense or culpability, or the presentence report may contain additional information. The Court should not be able to consider this information at all in sentencing. Otherwise plea agreements will be even more difficult to reach, or additional fact-finding hearings will be necessary, even in guilty plea cases.

B. Fact-finding

Section A414 states that "the court shall resolve disputed factors 'important to the sentencing determination' in accordance with Rule 32(a)(1), Fed. R. Cr. P." The Rule does not provide a standard of proof or a requirement that the court hear evidence before taking a "fact" into consideration in sentencing. We submit that the standard for proving disputed facts in a sentencing proceeding should be clear and convincing evidence. This is the standard of proof utilized in most proceedings which determine whether someone is to be confined involuntarily, see, e.g., Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing); Allen v. Illinois, ____ U.S. ____ 106 S.Ct. 2988 (reasonable doubt standard). See also Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights). Even if this standard of proof is not constitutionally required, McMillan v. Pennsylvania, ____ U.S. ____, 106 S.Ct. 2411 (1986), it would improve the reliability of sentencing determinations and reduce the potential for disparity for the Commission to adopt this

standard for use in federal sentencing proceedings. Note, A Hidden Issue of Sentencing: Burden of Proof for Disputed Allegations in Presentence Reports, 66 Geo. L.J. 1515, 1543 (1977). Unless a high standard of proof is adopted, fact-finding may become a loophole through which new disparity will emerge, since some judges may rely on a fact in sentencing while other judges would not.

More important, there must be procedures for resolving disputes through evidentiary hearings. Rule 32(a)(1) gives undue weight to the presentence report. Probation officers are not qualified to find "facts," especially when those facts need not be proven as part of the government's case at trial. The problems which result from inaccurate presentence reports are well documented. See generally, Note, A Proposal to Ensure Accuracy in Presentence Investigation Reports, 91 Yale L. J. 1225 (1982); Fennell & Hall, Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 Harv. L. Rev. 1613, 1628-30 (1980). Probation officers are overly dependent on the version of an offense reported by the government. Faced with conflicting versions, a probation officer has no reliable way to resolve the disagreement. Even if the government has witnesses who assert that a fact is true, a probation officer would be well advised to discount the information if the witness has significant reasons to curry favor

with the government, or there are other reasons to doubt the witness' credibility. Probation officers simply cannot resolve conflicts in credibility or determine whether or not a particular accusation is true. Reliance on the probation officer is an inadequate substitute for an evidentiary hearing at which the government would be required to prove the aggravating factors on which it intends to rely. See Note, How Unreliable Factfinding Can Undermine Sentencing Guidelines, 95 Yale L. J. 1258 (1986).

C. Disparity in the Application of the Guidelines

Sentencing decisions are complex. They are rendered no less so by the use of guidelines. Experience with the federal parole system has shown a high--indeed an intolerable--level of error in the calculation of parole guidelines. See NAS Study at 195. The experience of the Social Security Administration with a grid system very similar to the parole and sentencing guidelines which is used to determine eligibility for disability benefits is also discouraging. See generally J. Mashaw, Bureaucratic Justice (1985) (recommending "quality control" model of review). While federal judges may be expected to be better than parole hearing examiners and social security administrative law judges at applying guidelines, they will also make mistakes. Other actors in the system will also err--probation officers, defense attorneys who must advise clients of the probable consequences of a plea based on an specific agreement and statement of facts, and

prosecutors. Errors by probation officers in the calculation of guidelines may recur in judicial sentencing decisions. Coffee, 66 Geo. L. J. at 984. Apparently, a study conducted by Judge Heaney of the United States Court of Appeals for the Eighth Circuit shows that there is likely to be significant disparity in the application of the Revised Draft guidelines. The guidelines are hardly a solution to disparity if this is true.

D. Use of Alternatives to Incarceration

Our perception is that the guidelines, as proposed in the Revised Draft, will significantly increase the average length of criminal sentences, and the proportion of federal defendants sentenced to imprisonment. We believe this is undesirable for a number of reasons. First of all, the federal prisons are already overcrowded. Additional prison capacity will be expensive to construct, and it has not been authorized by Congress. Second, there is plentiful evidence that certain punishment is more important than severity of punishment. As punishments for individual crimes escalate, the efforts to assure that someone is punished for each crime committed diminish. Prosecutors and police devote fewer resources to minor offenses, with the expectation that bad characters can be dealt with harshly in the end, and punished for their accumulated wrongs. The result of this system of enforcement and punishment is more, not less crime. Alternatives to incarceration better serve the purposes of crime control,

without necessarily undermining the desire of the community for just punishment. After all, what the community wants in the end is a citizen who will live within the law.

CONCLUSION

We urge the Commission to continue its progress towards a workable and fair system, but we recommend that the Commission request an extension of time from Congress to conduct further study before proposing final guidelines.

Edwards

THE UNITED STATES SENTENCING COMMISSION

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March 31, 1987

TO: All Commissioners and Staff
FROM: Lynne Perry
RE: Public Comment

The attached is an update to the summary of public comment which was distributed last week. These synopses cover public comment PCB 00070 through PCB 00100.

PUBLIC COMMENT

PCB 00070 Judge George P. Kazen, Southern District of Texas

Comments on A221 assault/simple assault. All factors in Part Y should be departures. If adjustments are retained, they should be limited to factors which can be defined precisely. Comments on Part D regarding the drug table and attempts/uncompleted conspiracies. Questions regarding withdrawal from conspiracy (Part Z). Comments on Chapters 3(parts A, C, and D), 4(A) and 5(A).

PCB 00071 Harry Sullivan, Senior Vice-President, Food Marketing Institute

Supports tough sentencing for food tampering(N211, N212, N213). Guidelines should be higher regarding these sections. Commentary should state that Part Y is applicable where death, injury or significant monetary loss have not resulted. Reference to Part Y should also be appropriate where an unsuccessful attempt to tamper occurs. Finds inconsistencies between N212 and N213. Fine table is not high enough for attempted tampering- not close to the fine amount allowed by law.

PCB 00072 Harry Sullivan, Senior Vice-President, Food Marketing Institute

RE: N211. If knowing conduct is present, more stringent sentence is appropriate, non-volitional conduct should have lower sentences.

PCB 00074 Jeffery Cross Esq., et al

Re: Antitrust offenses. Consider mandatory sentence a powerful deterrent but are concerned with the rapid escalation of the minimum sentence. Minimum sentence should not exceed 6 months regardless of the volume of commerce involved. Provide comments regarding the volume of commerce for individuals and the fines for organizations.

PCB 00075 Robert C. Bishop

Non-violent offenders should be productively engaged in restoring the victim rather than in prison. Restitution should play a larger role in the guidelines.

PCB 00076 Joint Statement by Judges in the Second Circuit

Guidelines should allow more discretion. Sentences substantially exceed average current sentences in comparable situations. Suggest revisions to D316, D314. Need greater discretion in the use of probation. Maximum length of incarceration for which probation may be substituted should be raised to 18 months. Find some monetary penalties to be unnecessary and excessively punitive. Concerned with prison impact. Suggest one-year delay between Congressional approval and the implementation of the guidelines.

PCB 00077 Active Judges of the Second Circuit

Comments on Part Y: adjustments. Urge Commission not to precipitate imposition of sentences significantly higher than time served under current practice. Allow use of probation when minimum term specified is greater than six months.

PCB 00078 Kevin R. Houlihan, Assistant Director, U.S. Secret Service

Many criminal violations for which the Secret Service is responsible do not appear in the guidelines. Provide a listing of the criminal code violations which should be included. Concerned that none of the felony threat statutes are referenced yet there is no analogous offense to which one can refer-these violations are serious and frequent. Fraud section does not address use of device-making equipment(credit card imprint), the number of false identification documents or access devices (18 USC 1028-1029). Commission should review offense levels for counterfeiting, fraud and forgery with view toward raising them.

PCB 00079 Daniel J. Freed, Director, et al, Guggenheim Program in Criminal Justice, Yale Law School

In application researchers discovered great disparity within the guidelines. Not enough attention given the ambiguities. Commission should carry out extensive pre-testing. Guidelines are too severe and will increase the length of many prison sentences two and three-fold, too much discrepancy between current practice and the guidelines. Comments on chapters 3 and 4. Question system used to determine criminal history. Opposed to prohibitions against consideration of certain offender characteristics. Feel plea bargaining guidelines should be more explicit. Concerned with the disproportionality between the levels added for charged and uncharged offenses. Criminal Justice system does not have the resources to implement the guidelines. Commission should request extension.

PCB 00080 Judge Richard Mills, Central District of Illinois

Objects to proposal whereby the judge should make tentative findings prior to the sentencing hearing, if the application of the guidelines is disputed. This will be very time-consuming and cumbersome.

PCB 00081 Chief Judge Jack B. Weinstein, Eastern Dist of New York

Commission needs to publish statistics to support the choice of offense levels and criteria used to enhance or reduce sentences. Finds prison sentences generally excessive, drug sentences are high, while white-collar political offenses appear low. Opposed to such limited use of parole and non-prison alternatives-should recommend the reinstatement of split sentences. Extensive factual hearings on sentences will require excessive expenditure of court time. Operation of guidelines should be stayed for at least one and a half years if the guidelines go into effect.

PCB 00082 Donald L. Chamlee, Chief, Division of Probation Administrative Office of the U.S. Courts

Comments on limited number of offenders who will receive probation. Believes that high level of surveillance called for in guidelines may not be best allocation of resources, as many offenders do not need such strict supervision. Suggests clarifying instructions for determining criminal history score. Recommends that Commission address sentencing purposes that will be achieved by incarceration based on criminal record. Various comments on chapter 3, additions to the criminal history worksheet and guideline layout. Suggests removing departures from chapter 2. Departures should be distinct from the guidelines. Finds inconsistencies in Chapter 5. Suggests glossary of terms and revisions to commentary in chapter 6.

PCB 00083 Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice

RE: Antitrust guidelines. Concerned that the certainty of imprisonment has been reduced in the revised draft. Acceptance of Responsibility and Role in the Offense create a substantial risk that no term of imprisonment will be imposed. Urge that adjustments for such factors not be permitted to reduce the sentencing range below a minimum of two months. Agrees with a substantial reduction for cooperation. Also supports substantial fines. Finds problems with the "volume of commerce" measures as related to complementary bidders.

PCB 00086 Judge Alan H. Nevas, District of Connecticut

Urges Commission to request extension. Guidelines undercut incentive to accept plea agreement. Concerned that the increase in the average prison term for most offenses will over-burden prisons. Mentions low rate of recidivism among offenders sentenced to probation and questions the limited use of probation called for in the guidelines. Feels guidelines are too complex and do not reduce disparity. Finds uniform application difficult to achieve. Finds problems with criminal history and offender characteristics-guidelines have abolished some factors which are the best indicators of future criminality.

PCB 00087 Judge Thomas P. Griesa, Southern District of New York

Opposed to guideline system which gives numerical values to most of the factors which are to be considered in connection with sentencing-aggregating a series of numerical values is not consistent with a rational system of justice. Complexity goes far beyond that needed to curb disparity. Commission proposals seem not so much related to ending disparity as to establishment of entirely new norms for prison sentences.

PCB 00088 Michael Eberhardt, Assistant Inspector General For Criminal Investigations Policy and Oversight, Inspector General, Department of Defense

Find inadequacy in guidelines for white-collar and procurement fraud related crimes. Comments on embezzlement by government employees, commercial bribery and kickbacks

(specifically a new law raising the statutory maximum), bribery of government employees, conflict of interest, and fraud & deception. Concerned that because one can assume no prior record for government employees, sentencing guidelines for same fall way below the statutory maximum.

PCB 00089 Chief Judge John T. Curtin, Western Dist. of New York

Complexity is still a problem with the guidelines. Weekend and intermittent confinements pose too many problems. Comments by probation officers which were submitted with the Judge's letter include concerns that expanded discretion will weaken the goals of determinate sentencing. Probation Officers feel that substantial training will be necessary before the guidelines are implemented. Provide revision to p. 176.

PCB 00090 David C. Bach, Assistant Counsel, Ethyl Corporation

Provides detailed comments on sections Q211 and Q214, regarding omissions and revisions to both guidelines and commentary. Feels that guidelines paint with too broad a brush over a very complex area. Suggest creation of categories that adhere more closely to Congressional enactments. Same guideline covers offenses for which statutory maximum is very different.

PCB 00091 Maxine Cheever

Opposed to guidelines for sentencing convicted draft law violators.

PCB 00092 Phillip C. McGuire, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury

Guidelines include no reference to 18 USC 924(e), which provides for an enhanced penalty for possession of firearms by a felon who has three previous convictions for violent felonies or serious drug offenses.

PCB 00094 Veta T. Richardson, Sun Company Inc.

RE: Environmental Offenses. Suggests that base offense levels for Q211 and Q214 be reduced. Leave escalation of offense levels to discretion of the court, remove the mandatory nature of increases to the offense levels. Modify guidelines to allow further discretion concerning the imposition of probation. Encourage cooperation by increasing authority of court to reduce offense levels. Encourage responsible conduct on the part of environmental offenders by requiring a reduction in offense levels based on affirmative acceptance of responsibility.

PCB 00098 Richard J. Westman, Supervising USPO, Central District of California

Endorses guidelines as they relate to probation supervision but is concerned that increased supervision related to community service and home detention will have a serious impact on workload and equipment needs. Commission should acknowledge this impact upon resources early so that additional funding will be made available.

PCB 00099 Marcia G. Shein, President, Sentencing and Parole Planning, National Legal Services

Concerned that no clear-cut sentencing philosophy has been addressed. Commission is shifting stance to endorse the very worst aspects of our current system and annihilate all of the constructive possibilities it now offers. Sentencing Reform Act of 1984 intended that more alternatives to incarceration be used and that overcrowding would be reduced. Does not feel that deterrence has worked well- too often used as excuse to increase incarceration. Guidelines lack consideration for youthful offender. Guidelines include no specific sentencing alternatives and provide too little latitude for the application of alternatives to incarceration. They are a step backward.

PCB 00100 Victoria C. Gensen

Opposed to increased prison terms and fines for those convicted of draft law violations.

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April 3, 1987

BY FEDERAL EXPRESS

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

Attention: Guideline Comments

Gentlemen:

The Tax Section of the New York State Bar Association has approximately 3,000 members actively engaged in the practice of tax law. Through its 100 member Executive Committee and 30 standing committees, it regularly provides comments of a technical nature to various legislative and administrative bodies on matters involving federal and New York local taxation. Although the vast majority of the Tax Section membership deal with problems of a purely civil nature, the Tax Section has committees devoted to the administrative problems associated with civil and criminal penalties and with unreported income. It is also not uncommon for an active tax practitioner from time to time to become involved in the representation of, or advice to, a taxpayer involved with potential or actual prosecution for an alleged violation of the various tax laws.

We realize that the public comment period on the revised draft expired on March 16, 1987 and that the Commission must submit its sentencing guidelines to Congress on or before April 13, 1987. Our comments,

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which are directed to those portions of the guidelines pertaining to tax matters, are being submitted with the hope they can be taken into account by the Commission in its final submission.

We endorse the goal of greater consistency in sentencing practices, especially as regards federal tax crimes. We also believe that tax crimes are at least as susceptible to deterrence as other "white collar" crimes by the availability and predictable use of appropriate sanctions, including incarceration as well as monetary penalties. To that extent we endorse the revised draft of the guidelines.

At the outset we note that the revised draft and accompanying report do not deal with a critical issue which must be evaluated in considering the appropriateness of incarceration as a sanction for tax crimes and other white-collar crimes. This unaddressed issue relates to the type of incarceration facilities and the nature of unintended risks to which inmates may be subject by virtue of contact with other inmates. Since the report does not discuss this topic, we do not deal with it further in this letter.

With respect to matters addressed in the report, our principal questions relate to whether the severity of the sanction may have been tied too closely to the amount of tax evaded and the extent to which other extenuating circumstances can be considered.

The revised draft, in general, focuses on traditional offense categories, and assigns a certain point value to the offense. The sentencing judge is then permitted discretion to add or subtract further numerical points based upon other acts committed with the crime. However, the judge can only consider those acts listed specifically in the guidelines as relevant to the specific offense for which sentencing is to be imposed.

The judge further has some discretion to adjust the numerical point total, upwards or downwards, based upon "offender characteristics" including a defendant's criminal history, cooperation with the investigating authorities, and his recognition and acceptance of personal responsibility. After considering these relevant

offender characteristics and making numerical adjustments, the sentencing judge would then use a chart to calculate the sentence based upon the numerical total. As a general rule, the guideline would permit the sentencing judge to substitute non-incarcerative options for imprisonment only where the maximum term of imprisonment on the numerical chart comes out to six months or less. Under these standards, an offense that carries a numerical point count of 11 or more contemplates incarceration even after subtractions to recognize a person with the best criminal history.

Given that background, Part T, as a general rule, establishes a base offense level corresponding with the amount of the tax deficiency. (If the amount of the deficiency is not established, the base offense level is 9.) In the case of an offense which results in a tax deficiency, the tax table (at page 138 of the revised draft) would establish a level of 10 offense where the deficiency is \$20,001, or more. Level 11 is attained at \$20,001, level 12 at \$70,001, and the table continues upward to a level 17 when the deficiency is in excess of \$1,000,000.

Based on our experience, it would appear that the Department of Justice normally prosecutes a tax offense only if the deficiency is more than \$20,000, and further that, in many cases, the IRS will urge prosecution only if there is a "pattern" of two or three years of substantial omission of income. In practice, this would mean that conviction for a criminal tax evasion would in most cases produce a level of offense which would call for a period of incarceration under the standards set forth in the report.

We question whether the use by the guidelines of a quantitative scale of tax evaded (or attempted to be evaded) should be as significant a measure of the severity of the sentence to be imposed as appears to be the recommendation. We question whether in most cases the amount of tax evaded (or sought to be evaded) bears a direct relationship to the nature of egregiousness of the tax evasion conduct and, accordingly, is a truly relevant guide for appropriate sanctions. We therefore question whether the detailed schedule tied to levels of tax evaded (or sought to be evaded) should be made more

flexible. Such a change would recognize that incarceration might well be appropriate for evasions of relatively small amounts of tax in order to act as a deterrent for the type of potential broad-scale evasion which could have a serious adverse effect on the revenues and public perception of compliance. Furthermore, we question whether there should be a significantly lower standard of penalty for filing false statements under penalties of perjury (not tax returns) or the aiding, procuring or counseling or advising tax fraud.

On the other hand, uncoupling of the severity of the penalty and amount of tax evaded would support the ability to preserve room for adjusting sanctions for exceptional circumstance, particularly in the direction of allowing judicial evaluation for leniency in exceptional cases. Further, in considering such adjustments, we believe in appropriate cases the sentencing judge should be permitted to consider additional offender characteristics, not included in the guidelines, that may well require case-by-case judicial discretion: the offender's age, education and vocation skills, mental and emotional conditions, physical conditions (including drug dependence and alcohol abuse), employment record, family ties and responsibilities and community ties.

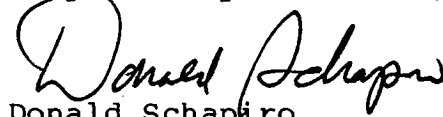
While suggesting the need to preserve some room for adjusting sanctions for exceptional circumstances, we recognize that such flexibility can be at odds with the goal of consistency. In balancing the factors of flexibility and consistency, we would not oppose an approach that would place on a judge a special intellectual and administrative onus to justify more than a limited adjustment for extenuating consideration, trusting then to judicial integrity to implement the guideline without allowing the exceptions to become the rule.

We also believe that a full assessment of the effects of increased emphasis on incarceration should recognize and accept the collateral effects on the justice process. Since the sentencing guideline generally would not apply to plea agreements, there will be a corollary increase in pressure on an accused to engage in plea negotiations to the extent that administrative practice does not adjust to require a suitably increased (and consistently applied) sanction in the cases of plea

agreement. Similarly, if a trial does result, it should be expected that the accused will make greater efforts to establish whatever factors may be relevant for reducing the severity of the usually expected sanction, with the correspondingly increased burden on judicial time and attention.

To summarize, whether on any objective or absolute scale, incarceration should be the normal sanction for tax evasion involves more than technical expertise in matters of taxation. Without expressing a view on that question, we do think that tax evasion by potential offenders is particularly susceptible of deterrence through application of appropriate sanctions, and that a structure that leads to an expectation of incarceration clearly would have a strong deterrent effect in that respect. Thus, we support both the objective of greater sentencing consistency and the relevance of deterrent effect on other possible offenders in fashioning a sentencing program for tax crimes. However, we question whether those objectives are best achieved by adopting a system that is tied so closely to a detailed schedule of the amounts of tax involved. Further, we believe that relevant extenuating personal factors must be taken into account to reflect an inherently human problem which does not lend itself to ready solutions tied to mechanical schedules.

Respectfully submitted,


Donald Schapiro



John F. Hall
President

March 30, 1987

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

RE: AWPI Comments on Proposed Sentencing Guidelines
for United States Courts

Dear Commissioners:

The American Wood Preservers Institute (AWPI) hereby submits its comments on the "Proposed Sentencing Guidelines and Policy Statements for United States Courts," which were published in the Federal Register on February 6, 1987. These comments were prepared for AWPI by Walter G. Talarek of the law firm of Walter G. Talarek, P.C.

AWPI is a national trade association representing 82 companies in the wood preserving industry. AWPI's membership includes both manufacturers and formulators of wood preserving chemicals, that are considered to be pesticides, and wood treating companies that use these chemicals. The members of AWPI are subject to the nation's many environmental statutes and regulations, the violation of which is addressed in Part Q of the Guidelines. AWPI, therefore, feels that it is appropriate to take this opportunity to comment on the unduly harsh and severe nature of the sentences and fines proposed for offenses involving the environment.

If you have any questions about AWPI's comments on the proposed Guidelines, please feel free to telephone me at (703) 893-4005.

Sincerely,



John F. Hall

American Wood Preservers Institute

Tyson's International Building, Suite 405
1945 Old Gallows Road, Vienna, VA 22180 (703) 893-4005

BEFORE THE
UNITED STATES SENTENCING COMMISSION

THE AMERICAN WOOD PRESERVERS INSTITUTE
COMMENTS ON THE PROPOSED GUIDELINES
AND POLICY STATEMENTS FOR THE
UNITED STATES COURTS

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March 30, 1987

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I. Introduction

On February 6, 1987, the United States Sentencing Commission published in the Federal Register, at page 3920, "Proposed Sentencing Guidelines and Policy Statements for the United State Courts" (Guidelines). Included in these Guidelines are base offense levels, specific offense characteristics and commentaries on offenses involving the environment. See Chapter 2, Part Q. In addition, the Guidelines contain a table and criteria by which fines for environmental, as well as other, offenses are to be calculated. See Chapter 5, Guideline A542.

For the reasons discussed below, the American Wood Preservers Institute (AWPI) believes the sentences and fines that would result from the application of these guidelines are unduly severe, unwarranted, and do not reflect Congressional intent as embodied in the criminal penalties provisions of the environmental statutes.

AWPI strongly urges the Commission to amend the environmental guidelines to reduce the base offense levels, the specific offense characteristics additions to base offense levels, and the fines to reflect more accurately the range of sentences and fines specified by Congress in the various environmental statutes, to recognize the different types of crimes and mens rea elements for these crimes contained in the environmental statutes, to assess the real, rather than potential, harm to the environment caused by the offense, and to take into account the differences between misdemeanors and felonies and between major and minor felonies.

II. The Guidelines Do Not Adequately Differentiate Between the Many Environmental Statutes and the Many Major and Minor Felonies and Misdemeanors Contained Therein

The Commission has proposed five guidelines for the Environment section of Part Q, "Offenses Involving the Environment." Two of these guidelines address only one criminal penalty provision of the Safe Drinking Water Act (SDWA), i.e., 42 U.S.C. §300i, while the other three guidelines address nineteen criminal penalty provisions contained in eleven environmental statutes, including the SDWA. By lumping so many environmental statutes and violations into only three gross guidelines, the Commission has not differentiated adequately among the many environmental statutes and among the many major and minor felonies and misdemeanors contained in these statutes. This result is undesirable because it does not carry out Congressional intent as expressed in each individual statute, and because it will lead to the imposition of more stringent sentences than warranted.

A good example of where the gross classification of offenses can lead to the imposition of inappropriate or more stringent sentences than warranted is Guideline Q211, which would assign a base offense level of 9 to all violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Toxic Substances Control Act (TSCA), the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act (CWA) involving hazardous or toxic substances or pesticides. Violations of FIFRA and TSCA are misdemeanors, which are punishable by imprisonment for no more than one year. Violations of RCRA include both minor and major felonies, which are punishable by maximum terms of imprisonment of no more than 5 years and 15 years, respectively. Violations of the CWA can be misdemeanors, minor felonies, or major felonies, which are punishable by maximum terms of imprisonment of no more than 1 year, 3 years, and 15 years, respectively. Yet, Guideline Q211 would initially lump all of these violations together and treat them the same by imposing a prison sentence of between 4 to 10 months on first time offenders. This result is inappropriate.

In enacting FIFRA and TSCA Congress intended pesticides and toxic substances to be addressed in a manner different from other substances. Both FIFRA and TSCA are risk/benefit statutes in which all of society's interests are balanced before allowing a pesticide or toxic substance into the marketplace. Moreover, these statutes address consumer products that are used virtually by everyone in our society, including farmers, ranchers and homeowners. On the other hand, RCRA is a health-based statute in which EPA only considers the risk that a hazardous waste or hazardous waste management activity presents to the environment; and the CWA is a health and technology-based statute in which EPA ascertains what water discharge standards, limitations, and guidelines are technologically feasible. Moreover, the CWA and RCRA address industrial wastes that are managed by a relatively small universe of people.

Another good example of where Guideline Q211 does not adequately differentiate between misdemeanors, minor felonies and major felonies is 33 U.S.C. §1319. This section contains four distinct offenses. Negligent violations are dealt with in §1319(c)(1) and constitute misdemeanors. Knowing violations are addressed in §1319(c)(2) and constitute minor felonies punishable by imprisonment for up to three years. Section 1319(c)(3) makes violations that entail knowing endangerment major felonies punishable by imprisonment for up to 15 years. And, §1319(c)(4) makes false statements minor felonies punishable by imprisonment for up to two years. However, Guideline Q211 would impose a base offense level of 9 for all of these offenses despite the facts that the mens rea elements and the maximum sentence lengths of these offenses are different.

III. Comments on Guidelines Q211, Q214, and Q215

A. The Base Offense Levels Are Too High for the Minor Felonies and Misdemeanors Addressed

Guidelines Q211 and Q215 specify a base offense level of 9 for a broad range of environmental misdemeanors, minor felonies, and major felonies specified in FIFRA, 7 U.S.C. §1361, TSCA, 15 U.S.C. §2615, CWA, 33 U.S.C. §§1319 and 1321, RCRA, 42 U.S.C. §6928, the Clean Air Act (CAA), 42 U.S.C. §7413, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1350, and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (CERCLA) 42 U.S.C. §9603. Under these proposed Guidelines, an individual with no prior criminal record who is convicted of an offense under any of these statutes would presumptively receive a term of imprisonment or other confinement of 4 to 10 months. Moreover, Guideline Q211 would increase the base offense level by 3 to 6 levels for offenses involving 42 U.S.C. §6928(d)(1) and (d)(2). Thus, a first-time offender of one of the minor felony RCRA permitting provisions would start with a base offense level of between 12 and 15 and, therefore, could be sentenced to a prison term of between 10 and 24 months. For the reasons discussed below, AWPI believes these results are unwarranted and unduly harsh.

The base offense level of 9 would take away the option of probation for a first time offender. As mentioned earlier, this base offense level would impose a prison sentence of between 4 to 10 months on first time FIFRA, TSCA, CWA and RCRA misdemeanor and minor felony offenders. Yet, in enacting FIFRA, TSCA, CWA and RCRA, Congress allowed, in most cases, a potential minimum sentence of no time in prison. Thus, the proposed guidelines would act to preclude a judge from exercising the full range of discretion that Congress meant him to have under these statutes.

The environmental statutes and regulations are numerous, complex and difficult to understand, particularly for small businessmen who cannot afford to have part or full-time environmental specialists on staff. There are eleven major environmental statutes and EPA's regulations are contained in eleven volumes of the Code of Federal Regulations. Considering the enormous task of keeping up with the large number of constantly changing environmental regulations, it would be very unfair to require the imposition of a prison sentence on a first-time misdemeanor or minor felony offender.

The environmental guidelines prescribe a base offense level of 9 for violations of 33 U.S.C. §1319(c), i.e., the criminal penalties provision of CWA, that involve hazardous

or toxic substances or pesticides and a base offense level of 6 for violations of 33 U.S.C. §1319(c) that involve other environmental pollutants (See Guidelines Q211 and Q214.) However, the criminal penalties provision of the CWA does not provide for this distinction. Rather, it specifically treats violations of sections 1311, 1312, 1316, 1317 and 1318 the same. These sections address conventional, non-conventional and toxic pollutants.

The environmental misdemeanors and minor felonies addressed in Guidelines Q211, Q214, and Q215 should be assigned base offense levels similar to those assigned to offenses involving food, drugs, agricultural products, and consumer products by Guidelines N221 and N231 of Part N. These two categories of offenses are similar in that they (1) derive from regulatory statutes, (2) in the case of pesticides and toxic substances, involve goods entered into commerce for public consumption, (3) prescribe similar prison terms and fines, (4) include similar mens rea elements, and (5) present similar risks to human health. AWPI believes the Commission was correct when it assigned base offense levels of 4 to violations of statutes and regulations dealing with food, drugs, biological products, devices, cosmetics, or agricultural products, and a base level of 6 to misbranding or mislabeling consumer products. AWPI believes the Commission should revise the environmental guidelines to impose similar base offense levels for environmental misdemeanors and minor felony offenses. In particular, AWPI recommends that the Commission revise (1) Guideline Q211 to divide the misdemeanor provisions of FIFRA, TSCA, CWA and CAA, i.e., 7 U.S.C. §1361, 15 U.S.C. §2615, 33 U.S.C. §1319(c)(1) and 42 U.S.C. §7413, into one guideline with a base offense level of 4 and the minor felony provisions of RCRA and CWA, i.e., 42 U.S.C. §6928(d) and 33 U.S.C. §1319(c)(2) and (c)(4), into another guideline with a base offense level of 6, and (2) Guideline 215 to reduce the base level offense for hazardous substances to 6.

In the case of the "knowing endangerment" provisions of RCRA and CWA, i.e., 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3), AWPI believes that these major felonies should be dealt with more harshly than the other types of environmental offenses. Thus, AWPI recommends that a separate guideline be established for these two offenses and that it be assigned a base offense level of 12. This will ensure that the specific mens rea elements of this crime are addressed and adequate punishment will be imposed on first time offenders.

B. Sections Q211(a)(1) and Q214(a)(2) Should Be Revised to Impose Additional Offense Levels Only for Violations of 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3)

The only two "knowing endangerment" offenses specified by the environmental statutes are 42 U.S.C. §6928(e) and 33

U.S.C. §1319(c)(3). None of the other environmental statutes have offenses with this specific mens rea, nor do they provide for the imposition of a more severe sentence when this mens rea is found linked to specified offenses. Therefore, calculation of a sentence based on this section is inappropriate for all offenses but for 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3). The commentaries on sections Q211(a)(1) and Q214(a)(2), therefore, should be modified to (1) strike the sentences which allow the addition of 6 to 12 offense levels to offenses involving other statutes and (2) clarify that this specific offense characteristic only applies to 42 U.S.C. §6928(e) and 33 U.S.C. §1319(c)(3).

C. Section Q211(a)(3) Should Be Revised to Impose Additional Offense Levels Only When There Is a Specific Mens Rea Or the Offense Presents a Significant Risk to the Environment

The commentary to section Q211(a)(3) states that this section applies to 42 U.S.C. §6928(d)(1) and (d)(2), for which Congress has prescribed more stringent levels of imprisonment than for other violations under 42 U.S.C. §6928(d). In essence, 42 U.S.C. §6928(d)(1) and (d)(2) cover violations of the permitting provisions of RCRA. The result of applying section Q211(a)(3) to first-time offenders of RCRA's permitting requirements is that they would be subject to a potential prison term of between 10 and 24 months. (See offense levels 12 to 15.)

While it is true that Congress has provided for a greater potential maximum prison sentence for violations of 42 U.S.C. §6928(d)(1) and (d)(2), i.e., five years, than for other violations of 42 U.S.C. §6928(d), i.e., two years, Congress also has provided for a potential minimum prison term of no years for all violations of 42 U.S.C. §6928(d). Moreover, both types of offenses would be classified as minor felonies, given the potential maximum prison sentence for each. In addition, there are varying degrees of permitting violations. Some violations are very minor, e.g., some recordkeeping requirements, while others are major, e.g., failure to manage a hazardous waste properly. Therefore, it would seem to be unduly harsh to require the imposition of a prison term on a first-time offender of a minor RCRA permitting requirement. AWPI urges the Commission to revise this section to impose additions to base offense levels only where the offenses presents a significant risk to the environment.

There is another problem presented by this specific offense characteristic. EPA's RCRA regulations are large in number and quite complex. In particular, the regulations which list and characterize hazardous wastes are difficult to understand. Therefore, it is not always easy for a generator to determine if his wastes are hazardous and

should be managed under a RCRA permit. (EPA's enforcement personnel often have this problem.) This problem was brought home recently to the wood treating industry when EPA announced in a draft of a proposed listing rule that many wood preserving wastes are hazardous wastes and should have been managed as such in past years. (See the February 19, 1987 draft titled "Hazardous Waste Management System: Identification and Listing of Hazardous Waste; CERCLA Hazardous Substance Designation; Reportable Quantity Adjustments.") However, since wood treaters have not been managing, nor has EPA required the management of, these wastes as hazardous wastes, wood treaters would be subject to immediate enforcement action and imprisonment if this section is promulgated.

The mens rea element of 42 U.S.C. §6928(d)(1) and (d)(2) is the offender must "knowingly" commit the act. The offender need not know the act he committed was wrong. Given that the RCRA permitting requirements are not always readily recognizable, AWPI also believes that an unduly harsh sentence would be imposed by this section absent a specific mens rea. Therefore, AWPI also urges the Commission to revise this section to add 3 to 6 levels to the base level offense only where the offender knows that his conduct is wrong.

D. Sections Q211(a)(4) and Q214(a)(4) Should Be Revised to Impose Additional Offense Levels Only If the Violation Concealed Is Major and Presents a Significant Risk to the Environment

Sections Q211(a)(4) and Q214(a)(4) address the "false statement" offenses of the environmental statutes. Most of these offenses are presently classified as misdemeanors or minor felonies. In the case of the misdemeanors, most offenses are punishable by a term in prison of no more than year. What the base level additions of sections Q211(a)(4) and Q214(a)(4) would do is impose on first-time misdemeanor and minor felony offenders minimum sentences of between 10 to 24 months and 4 to 16 months, respectively, when their conduct conceals an environmental offense violation. AWPI believes that this result is unduly harsh where the violation concealed is either a minor offense or a major offense that does not present a significant risk to the environment. AWPI recommends that these sections be revised to increase the base offense level only where the concealed violation is major and it presents a significant risk to the environment.

E. Section Q214(a)(1) Should Be Revised to Impose Additional Offense Levels Only When the Discharge Presents a Significant Risk to the Environment

Section Q214(a)(1) would increase the base offense level by 4 where the defendant discharged or emitted "other"

pollutants into the water, air, or land. Since the base offense level for Guideline Q214 is 6, this equates to an offense level of 10 and a potential prison sentence of between 6 to 12 months for a first-time offender. The commentary on section Q214(a)(1) states that the increase to the base offense level attaches whether environmental contamination is detectable or not.

AWPI believes that the above result is unduly harsh for a number of reasons. First, most of the offenses covered by this Guideline are misdemeanors or minor felonies with maximum prison sentences not exceeding one year. Second, these violations are "knowing" violations and do not require a specific mens rea. Third, offenders who intentionally cause discharges with significant environmental impacts should be treated more harshly than those who through omission or oversight cause discharges with little or no environmental impact. Therefore, AWPI recommends that this section be revised to impose the specific offense characteristic only when the discharge presents a significant risk to the environment.

F. Section Q215(a)(3) Should Be Revised to Impose Additional Offense Levels Only When There Is Significant Harm to the Environment, Wildlife, or the Public

Section Q215(a)(3) would increase the base offense level by 2 to 5 levels where a failure to report a spill results in harm to the environment, wildlife, or the public. This means that a first-time offender could be sentenced to a prison term of between 8 to 24 months where he fails to report in a timely manner, i.e., one day, a hazardous substance spill and the spill causes any harm, no matter how minor, to the environment, wildlife, or the public. AWPI believes that this result is unduly harsh given the short timeframe within which one must report, the difficulty in determining the necessary reporting information when the spill is gradual rather than sudden, and the fact that all spills cause some damage to the environment, albeit minor. AWPI recommends that this section be revised to impose the specified additions to the base offense level only when the failure to report causes significant harm.

IV. Fines for Individual, First-Time Offenders Are Too High

Guideline A542 prescribes the method by which fines are to be calculated for environmental, as well as other, offenses. This Guideline contains a table with minimum and maximum fines associated with the various offense levels. AWPI believes the fines that would be imposed for environmental offenses through use of this table are inappropriate and unduly harsh.

As an illustration, most violations of FIFRA and TSCA may be addressed through the imposition of fines ranging up to \$10,000 per offense. In the case of private applicators under FIFRA, a fine of no more than \$1,000 per offense may be imposed. Yet the base offense level for FIFRA and TSCA violations is 9, which would cause the imposition of a fine ranging between \$1,000 and \$10,000 for a first offense. Moreover, if specific offense characteristics are met and offense levels are added (for example, where the offense concealed an environmental offense), the first-time offender would be faced with a fine ranging between 3,000 and \$40,000.

Clearly, these fines are too large for first time offenses of these statutes. Most likely they result from assigning base offense levels that are too high for the statutory offenses. Therefore, AWPI recommends that the Commission either reduce the base offense levels for the statutory offenses or revise the fine table in section A542 to reflect more accurately the fines that Congress wanted to impose for violations of FIFRA, TSCA and the other environmental statutes.

Conclusion

In general, the proposed environmental sentencing guidelines would impose sentences and fines that are much higher than warranted for environmental crimes. This is particularly true with regard to the sentences and fines that would be imposed on first-time offenders. Therefore, AWPI strongly urges the Commission (1) to revise the guidelines to comport more closely with Congress's intent in enacting the nation's many environmental laws, as reflected in the criminal penalties provisions of these laws, (2) to treat misdemeanors less harshly than minor felonies and minor felonies less harshly than major felonies, (3) to provide for no prison term for first-time misdemeanor and minor felony offenders, and (4) to impose reasonable fines. In order to achieve these goals, the Commission should reduce the proposed base offense levels for Guidelines Q211 and Q215.



P.O. Box 17181
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March 30, 1987

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

Dear Judge Wilkins:

Enclosed is the testimony of Justice Fellowship on the revised draft of the Sentencing Guidelines. We recognize the tight deadlines of the Commission and applaud your hard work.

However, the draft contains several serious flaws which could jeopardize the Guidelines if they are not corrected before the final draft is submitted to Congress. Specifically, the revised Guidelines will have a significant detrimental effect on prison overcrowding, will discourage the use of alternative punishments for nonviolent offenders and will not reduce existing sentencing disparity.

As always, we are willing to assist the Commission in any way possible.

Sincerely,

Daniel W. Van Ness
President

DWV:jhs

Enclosure

Testimony of Justice Fellowship
before the
United States Sentencing Commission
on
Revised Draft
Sentencing Guidelines

March 1987
Washington, D.C.

As a national lobbying and public education organization which advocates reforms in the criminal justice system, Justice Fellowship is deeply interested in the content of the federal sentencing guidelines. Not only will they have a profound effect on federal courts and prisons, but they will also serve as a model for states to emulate. For these reasons, we carefully analyzed the preliminary draft of guidelines issued in September 1986 and provided written and oral testimony on December 3, 1986 in Washington, D.C.

Our testimony on the preliminary draft raised six specific concerns:

1. Although the legislation setting forth the duties of the Sentencing Commission stated that the sentencing guidelines were to be formulated to minimize the likelihood that the federal prison population would exceed federal prison capacity, it appeared that the draft guidelines would significantly increase prison overcrowding. We urged the Commission to conduct the impact analysis required by Congress before drafting the final guidelines in order to fulfill the statutory duty to consider impact.

2. The guidelines did not encourage the use of alternative punishments for nonviolent offenders as Congress intended.

3. The modified real offense approach was too complex and raised concerns about the standard of proof required at sentencing.

4. Relative sentences received for various offenses did not reflect current sentencing practices and produced anomalies in sentencing.

5. The guidelines did not require that a specific portion of the sentence be served on supervised release.

6. Basing the criminal history score upon the length of prior imprisonment and including juvenile records in this determination would only perpetuate existing sentencing disparity.

Our comments were echoed during the public hearings by judges, attorneys, victims rights advocates and other criminal justice professionals. Commission members had expressed a commitment to seriously consider these comments.

While the revised draft issued in January 1987, addressed several of these concerns, it continued to contain fatal flaws. Not only does it fail to address the two most significant problems generated by the preliminary guidelines (increased prison

overcrowding and insufficient use of alternative punishments for nonviolent offenders) it also unleashes a fundamental new concern.

In attempting to correct the complexity and inflexibility which characterized the preliminary draft, the Commission may have thrown the baby out with the bath water. The revised draft incorporates so much judicial discretion that it offers few of the benefits, but most of the problems, of sentencing guidelines.

If this draft were submitted to Congress, it would be a disappointing conclusion to more than fifteen years' work to establish federal guidelines. Our current reservations are so deep that we would be compelled to oppose its adoption. However, the Commission has demonstrated that it takes its responsibility seriously and is able to work hard under tight deadlines to fulfill it. Toward that end, we offer the attached recommendations and comments.

Further, we would encourage the Commission to consider requesting an extension of its April 13 deadline. We were impressed with the wisdom of your decision to conduct national hearings on the preliminary draft. Given the dramatically different character of the revised draft, it would be advisable, after considering responses to the January draft, to conduct similar hearings on the third draft prior to submitting it.

Use of Alternatives for Nonviolent Offenders

It is apparent that Congress intended that the guidelines encourage the use of alternative punishments for nonviolent offenders. In the authorizing legislation, imprisonment is viewed as appropriate for offenders who require incapacitation [Chapter 58, subsections 994(h), (i), and (j)], but punishments other than prison are prescribed for those who do not pose a significant risk to the community [Chapter 58, subsections 994(j), (k), and (l)]. The Commission explicitly recognizes its statutory duty to ensure that the guidelines reflect the general appropriateness of imposing a non-incarcerative sentence on some property offenders [p. 175]. However, as in the preliminary draft, the revised guidelines continue to fail to adequately use such alternatives for nonviolent offenders.

There is no offense which is not imprisonable under the guidelines. A first-time offender convicted of possessing an eavesdropping device could be sent to prison, as would an individual who masterminded a chain of vicious killings. A judge is permitted to order probation only for offenders whose minimum term of imprisonment under the guidelines is zero months. Other alternative punishments are completely unavailable for offenders whose minimum sentence is greater than six months under the guidelines.

This narrow view does not reflect current sentencing practices and is inconsistent with an important aspect of existing federal law. At present, federal law prescribes that all offenders be held responsible to their victims by paying restitution [Chapter 227, section 3553(c)]. In programs such as the pilot Federal Reparative Work Project instituted by the Bureau of Prisons and the U.S. Parole Commission, offenders are assigned to carefully-supervised settings to perform community service. The guidelines' emphasis on imprisonment would severely restrict the ability of offenders to pay restitution and would limit community service to relatively few offenders.

In our December 3, 1986 testimony, we recommended a solution to this problem. We suggested a three-fold approach to sentencing. The judge would calculate an offense score to determine length of sentence, a reparation score to determine the amount of victim restitution or community service, and a risk score to calculate the amount of control over the offender necessary to protect the public. The judge would then determine sentence length and sentencing option by comparing the three scores. We continue to advocate this approach as a means to promote just sentencing which is consistent with Congressional intent.

Recommendation: The Commission should modify the sentencing table in the guidelines to significantly increase the numbers of nonviolent offenders eligible for sentencing to alternative

punishments. Alternatively, the Commission should adopt an approach similar to that suggested above which separates the determination of sentence length and sentencing option in order to increase the number of nonviolent offenders who are punished by alternatives.

Effect on Prison Overcrowding

There are a number of indications that the sentencing guidelines would dramatically increase the burden of overcrowding in the federal prison system. First, the revised draft offers judges virtually all the discretion they now exercise, but without the mitigating influence of the Parole Commission. This not only raises issues concerning sentencing disparity (see discussion which follows), but promises to increase prison overcrowding.

The Parole Commission currently may act to curtail excessive sentences. However, when the guidelines become effective and the U.S. Parole Commission is abolished, parole will no longer be available to mitigate such overly harsh sentences. As a result, federal prisons, which are currently operating at 150% of capacity, will become even more severely overtaxed.

Second, the draft places a heavy emphasis on those offender characteristics which generally increase sentence length and

much less emphasis on those which generally decrease sentence length. For example, criminal history substantially increases sentence length under the guidelines. It determines where an offender falls within a sentencing level and thus, greatly enhances the overall sentence. [pages 5, 10, 159-162]. Similarly, the offender's role in the offense and degree of dependence upon criminal activity for a livelihood are also significant factors in the sentencing decision. [pages 157, 163].

On the other hand, the other eight characteristics which the Commission is required by statute to consider [Chapter 58, subsection 994(d)], some of which might compensate by decreasing sentence length, are by and large considered irrelevant. An offender's education and vocational skills are not relevant in determining sentence length unless these factors can be used to increase the sentence by a determination that the individual misused special training or education to facilitate criminal activity. [page 170]. The offender's previous employment record, which might indicate an ability to pay restitution, will not influence the sentence except in the rare instance where the sentence is low enough that the individual qualifies for an alternative. [page 171].

It is impossible for us to predict just how dramatically the revised draft would increase prison overcrowding. However, the

Commission has both the means and the mandate to do so. As we pointed out in our earlier testimony, the Commission is required to draft guidelines which will minimize the likelihood of overcrowding [Chapter 58, Subsection 994(g)], and to conduct an impact analysis to guide its deliberations. Perhaps the most serious procedural error the Commission has made in its work has been its failure to conduct such impact studies with each draft. Had it done so on the preliminary draft, we are convinced that the revised draft would have been much more responsive to current and future correctional resources.

Recommendation: The Commission should immediately conduct an impact study of the revised draft, and should revise the relative sentence lengths of its final draft to minimize the likelihood of overcrowding.

Reduction of Unwarranted Disparity

One of the primary purposes of the federal sentencing guidelines was to reduce unwarranted disparity of sentences between similar offenders who had committed similar offenses [Chapter 58, subsection 991(b)(1)(B)]. And this appeared to be one of the hallmarks of the preliminary draft.

That attempt was criticized as so complicated and inflexible that confusion about how to interpret it might actually create disparity.

The revised draft has moved too far in the other direction. It has discarded the modified real offense approach for a very loose set of guidelines which judges may depart from under fairly broad conditions. This flexible approach will grant judges almost free reign in sentencing. As a result, the unwarranted disparity which currently characterizes sentencing will continue under the guidelines, unmitigated by parole.

Judicial discretion comes from a variety of sources. First, in following the guidelines, judges have a wide range of sentence lengths from which to choose. In fact, as Commissioner Paul Robinson notes in his dissent, the guideline ranges for specific offenses are frequently in excess of the 25% permitted by statute.

In addition, judges may depart from these already broad ranges in a myriad of circumstances (i.e. in determining the criminal history score, the judge may depart if there is a "likelihood of future crime" -- arguably, such a likelihood is present in every case). Finally, the judge is not bound by the guidelines when there has been a plea agreement.

Recommendation: The Commission should develop narrower guidelines ranges to provide more direction for judges and should limit the circumstances under which judges may depart from the guidelines.

Review of Recommendations

1. The Commission should modify the sentencing table in the guidelines to significantly increase the numbers of nonviolent offenders eligible for sentencing to alternative punishments. Alternatives, the Commission should adopt an approach similar to that suggested above which separates the determination of sentence length and sentencing option in order to increase the number of nonviolent offenders who are punished by alternatives.

2. The Commission should immediately conduct an impact study of the revised draft, and should revise the relative sentence lengths of its final draft to minimize the likelihood of overcrowding.

3. The Commission should develop narrower guidelines ranges to provide more direction for judges and should limit the circumstances under which judges may depart from the guidelines.

* * * * *

Atlantic
Industries, Inc.

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Cable: Anildye-Passaic

TWX 710-989-1468
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March 27, 1987

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

Atlantic

Gentlemen:

Atlantic Industries, Inc has just been made aware of the proposed Sentencing Guidelines and Policy Statements for the United States Courts. 52 Fed.Reg. 3919 et seq. (February 6, 1987).

We address these coments specifically to Chapter 2, Part Q which deals with conviction for offenses under certain environmental laws.

We are particularly concerned with the proposed mandatory prison sentences for conviction of offenses that amount to nothing more than unintentional clerical errors or reporting errors resulting from differences in interpretation of a large number of very complex regulations, inadvertent omissions and other situations where no intent or willful action to commit a violation is involved. We believe that for first time offenders in particular the base level of 9 in Part Q should which leads to the presumption of imprisonment should be reduced to a level allowing a presumption that no imprisonment may be allowed and that for some of these minor violations the same should apply for repeat offenders.

We do not believe it is possible for anyone, even Government, to achieve 100% perfection in dealing with complex recordkeeping and reporting requirements and these Guidelines need to recognize this.

We support the more extensive comments submitted by CMA dealing with this issue and urge the Commission to reconsider the harshness of the proposed Guidelines for environmental offenses.

Thank you for your consideration of our comments.

Very truly yours,



M.B.Bochner, Ph.D.
Vice President

MBB/lis

PCB00113

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, NEW YORK 10007

CHAMBERS OF
JOHN E. SPRIZZO
DISTRICT JUDGE

March 26, 1987

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

Dear Judge Wilkins:

I have reviewed the second draft of the proposed Sentencing Guidelines and wish to commend the Commission for its efforts in producing a much more workable draft. Nevertheless, there are still some substantial problems with respect to those guidelines that warrant further corrective action by the Commission.

I am aware that you are receiving and will continue to receive an abundance of comments from the bench and bar with respect to the second draft. More particularly, I have reviewed the letter sent to your Commission by Judge Conner on behalf of the Judges of this Court as well as the letter sent to you by Chief Judge Weinstein on behalf of the Judges of the Eastern District of New York. I fully subscribe to all of the thoughts expressed therein. However, there are certain specific aspects of the guidelines which are particularly troublesome to me and which, therefore, warrant special comment.

My most serious objection to the proposed sentencing guidelines is that they still do not adequately deal with pleas of guilty. Although the second draft does permit departure from the guidelines in situations where there is cooperation with the government, it does not adequately deal with the ordinary garden variety plea in which the defendant is unable to provide any useful information to the government and where the government may not even be seeking such cooperation. As I indicated in my previous letter, pleas of guilty are essential to the smooth functioning of the system and any increase in the sentences imposed on such pleas will of necessity result in an increased number of trials that will further burden a judicial system which is already straining under an ever increasing civil and criminal case load. The maximum reductions in sentences set forth in the second draft

of the proposed sentencing guidelines in cases where a defendant acknowledges responsibility for his offense, are simply not sufficient to induce a substantial number of defendants to plead guilty.

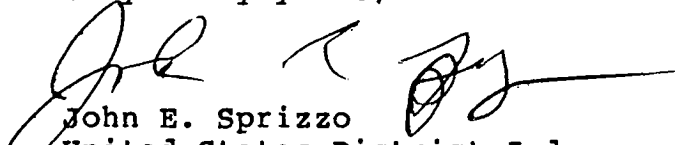
This is especially true since, as Judge Weinstein's letter indicates, the sentencing levels set forth in the guidelines do not reflect the present practice with respect to those who plead guilty as opposed to those who go to trial. I also share Judge Weinstein's view that the sentencing levels set forth in the guidelines will result in incarceration for much longer times than is presently the present practice. I think that is a further objection to the proposed sentencing guidelines. I don't think that Congress intended that we should eliminate sentencing disparity by increasing the jail time served by all defendants who are processed through the system.

It is also significant that we do not have the jail facilities to accommodate the ever increasing numbers of persons who will be sentenced to jail under the proposed guidelines. While it is conceivable that Congress may address this problem by providing appropriate funding for increased prison facilities, it is more likely that there will be a substantial time lag between the effective implementation of the guidelines and the funding necessary to provide the needed jail space, especially in view of the present deficit crisis. It is, therefore, highly probable that we will be presented with the rather unseemly prospect of eighth amendment claims being brought in the federal courts challenging overcrowding in federal institutions.

Another particularly disturbing aspect of the guidelines is that matters which are very frequently taken into account by sentencing judges as mitigating factors such as drug addiction, will for the most part be treated as aggravating circumstances warranting increased periods of incarceration. I do not think such an approach corresponds with a present judicial practice to which neither the bench, the bar nor the prosecution has ever voiced any strong objection.

In short, while I commend the Commission on its efforts to produce a much improved draft there is still much to do. I, therefore, do not believe that the implementation of the guidelines, even with slight modifications in sentencing levels is desirable, a sentiment, that I am sure will be echoed by most segments of the legal community in future correspondence directed to the Commission.

Very truly yours,


John E. Sprizzo
United States District Judge

United States District Court
Western District of Wisconsin
120 N. Henry St.
P. O. Box 591
Madison, Wisconsin 53701

March 24, 1987

Chambers of
Barbara B. Crabb
Chief Judge

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

Dear Judge Wilkins:

Although it is a few days after the deadline, I have a few comments on the second draft of the sentencing guidelines that I wanted to send you. I hope that it might not be too late to have them considered.

I have discussed the new proposals with the probation officers in our court. They and I are concerned that the revised guidelines are considerably more complicated in application than the first guidelines (and, as you know, we thought the first guidelines were pretty complicated). The biggest source of complication seems to be the sheer numbers of difficult areas that must be considered in computing the guidelines. Additionally, in some instances the court is told how many points are to be added or subtracted to the base score, while in other areas, that information is not provided. Also, the adjustments and departures from the guidelines are subjective and somewhat confusing.

Because I generally favor having greater flexibility, I am not necessarily concerned over the fact that these new guidelines provide for greater flexibility. However, I tend to agree with Commissioner Robinson that the commission could be subject to criticism if it issues guidelines that purport to provide more predictability in sentencing, when in fact they may not.

A major concern of mine and of the probation officers is the severe restriction on the use of probation. First of all, the instances in which probation may be utilized are very few (too few in my opinion). Second, there are only a few instances in which probation can be used in and of itself. I can understand the theory of adding some deterrent effect to a sentence of probation, but the practical reality is that in many instances such an additional restriction is inappropriate or simply unavailable. For example, community service is not always an appropriate requirement for a particular offender, and even when it is appropriate, few opportunities for well-supervised work exist, particularly in a large rural district such as ours.

Requiring weekend confinement in jail would be very difficult to

implement in our district, where the local jails are already overcrowded during the week. It's hard to imagine even asking them to take additional prisoners over the weekends when they have their own work-release prisoners to accommodate as well as the usual weekend offenders.

The concept of home detention is wholly unproven as an effective sentencing option. Further, it is no real deterrent unless it is monitored very closely and carefully. Such monitoring would require a significant amount of probation staff resources. I question whether it makes sense to commit significant resources to such a purpose.

I disagree with the concept that the length of the term of probation must be dictated by the offense severity category. There is no obvious reason to correlate the two. There are many instances in which an extended period of probation makes sense, if only to provide an opportunity for making restitution under supervision.

I am not clear why you have chosen to preclude probation as an alternative sentence. I have found it effective to impose a consecutive term of probation following a relatively short prison sentence, to provide an opportunity for after-care follow-up for offenders with alcohol or drug problems or for supervision of offenders with restitution obligations.

Overall, I continue to be concerned about implementing the enormous changes contemplated under the sentencing commission legislation without greater knowledge of the impact on prison populations, on probation office costs, and on judicial resources. I hope that Congress will contemplate an extension of the present deadlines to permit additional research and perhaps, additional drafts of sentencing guidelines.

Very truly yours,



Barbara B. Crabb
Chief Judge

BBC:jmd

cc:
The Hon. Joel Flaum
The Hon. Michael Mihm

HARTZ

THE HARTZ MOUNTAIN CORPORATION, 700 SOUTH FOURTH ST., HARRISON, N.J. 07029 TEL. 201/481-4800

JAMES D. PROUD
SENIOR VICE PRESIDENT
SALES AND MARKETING

March 25, 1987

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

Gentlemen:

I am pleased to know that our government is taking action toward correcting the present unfair and deplorable conditions surrounding the invocation and punishment for crimes against the state.

My purpose in writing is to urge your task to go beyond mere uniform treatment to look for alternative sentencing methods.

Our present overcrowding in prisons is not only non-productive in terms of rehabilitation, it is a financial disaster. I believe there are better ways to punish some non-violent offenders that would save the state money and help the problem of overcrowding. Making the offenders pay back the victim or do free work in the community not only holds that person responsible but also restores the victim.

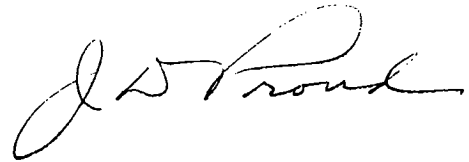
Because of my strong beliefs in the ineffectiveness of our present system, I have joined the Justice Fellowship, POB 17181, Washington, DC 20041, 703/759-9400. This organization has studied our prison problems in great depth. Their recommendations make a great deal of sense to me and I urge you to consider them during your deliberations.

You gentlemen have an opportunity to make some changes

United States Sentencing Commission
March 25, 1987
Page Two

which would affect all Americans financially, morally
and spiritually. Please don't let the opportunity pass.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. D. Rinaldo".

cc: Senator Frank Lautenberg
Senator Bill Bradley
Congressman Matthew Rinaldo

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

500 CAMP STREET

NEW ORLEANS, LOUISIANA 70130

CHAMBERS OF
GEORGE ARCENEUX, JR.
DISTRICT JUDGE

March 23, 1987

Hon. William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 1400
Washington, DC 20004

Dear Mr. Chairman:

My colleague, the Honorable Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, has favored me with a copy of his letter of March 16, addressed to you, relative to the Revised Draft Guidelines.

I have been attempting, over the pass several days, to frame a comment in connection with the guidelines, but after reviewing Judge Weinstein's letter, I find there is no way in which I could improve upon his cogent and thoughtful analysis, nor could I come up with a more constructive suggestion than his recommendation for a "controlled field experiment in actual sentencing."

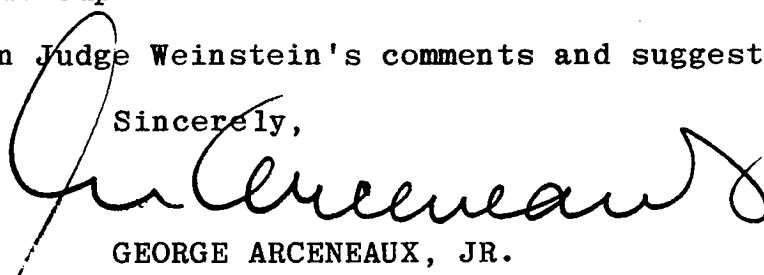
We must never forget that we are dealing with the lives of, in many instances, our fellow citizens, and, in all instances, our fellow human beings. It behoves us, as responsible public officials, and particularly as judges, to be as certain as possible of the consequences of our acts before we undertake them.

The anomalies pointed out by Judge Weinstein, and the possible hurtful consequences as to the individuals involved, to say nothing of the sanctity of our entire social fabric, cry out for as much certainty as possible under the circumstances.

Let us, then, be as certain as we reasonably can of what we are about to do - let us create the laboratory suggested by Judge Weinstein, and in this environment, test the new formulae, before we drink deeply from what may be a poisonous cup.

I concur thoroughly in Judge Weinstein's comments and suggestions.

Sincerely,



GEORGE ARCENEUX, JR.

GA:RGM

cc: Hon. Jack B. Weinstein
Hon. Frederick J. R. Heebe

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

624 U. S. COURT HOUSE

BUFFALO, NY 14202

**CHAMBERS OF
JOHN T. CURTIN
CHIEF JUDGE**

**(716) 846-4221
FTS 437-4221**

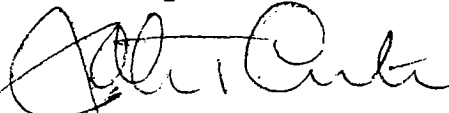
March 20, 1987

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

Dear Judge Wilkins:

Please add my name to the list of those judges
endorsing Judge Conner's comments to you concerning the
January 1987 revised draft.

Sincerely,



**JOHN T. CURTIN
United States District Judge**

14

LAW OFFICES

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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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202-371-2200

March 20, 1987

VIA MESSENGER

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

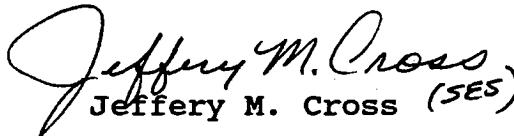
Re: Statement Commenting On The Revised Draft
Sentencing Guidelines

Dear Paul:

Enclosed is our Statement commenting on the Revised Draft Sentencing Guidelines.

Unfortunately, due to logistics we were not able to contact all of the signators to the October 31, 1986 Statement. The lack of those signators reflects the fact rather than disagreement.

Sincerely,


Jeffery M. Cross (SES)

**STATEMENT TO THE
UNITED STATES SENTENCING COMMISSION
COMMENTING ON THE
REVISED DRAFT SENTENCING GUIDELINES**

MARCH 16, 1987

The undersigned practitioners of antitrust law have previously commented on the preliminary draft of sentencing guidelines published by the Commission in September, 1986. Those comments were set forth in a written statement dated October 31, 1986 and Mark Crane appeared before the Commission to present those comments on November 5, 1986. In addition, we have commented on other occasions both collectively and individually on specific issues raised by the Commission and some of us have met informally with members of the Commission and staff during the Commission's early deliberations to provide the Commission with our input.

This statement is directed to the Revised Draft Sentencing Guidelines published in the Federal Register on February 6, 1987. As with our previous comments, this statement does not reflect the position of the Section of Antitrust Law of the American Bar Association, although we are active members in the leadership of that Section. Rather, we are presenting our personal views of the Revised Draft based on our individual experience in the prosecution and defense of criminal antitrust cases.

At the outset, we want to commend the Commission and its staff for the progress that we feel has been made in the Revised

Draft Guidelines. The Revised Draft contains several changes which meet many of our concerns regarding the preliminary draft as set forth in our October 31, 1986 statement, while at the same time continuing with certain important features which we feel are crucial in order to fulfill the mandate of the Sentencing Reform Act of 1984.

These comments are intended to focus on those portions of the Revised Draft which we feel need further modification along the lines articulated in our October 31, 1986 statement. We refer the Commission to our October 31, 1986 statement for amplification of these comments.

MINIMUM MANDATORY JAIL TERM

We continue to believe, as we stated in our October 31, 1986 statement, that setting a minimum jail term for individuals convicted of an antitrust crime is appropriate for "hard core" cartel activity such as price fixing and market allocation.

Of the various factors considered in imposing a sentence for violators of the antitrust laws, we believe that deterrence of future antitrust violations is by far the most significant. Except in the most egregious circumstances, such as perhaps a bid rigging conspiracy involving the bribing of public officials, our sense is that there is minimal societal interest in extracting harsh punishment of an antitrust offender by a long jail term. Furthermore, because we doubt that there is likely to be significant recidivism on the part of antitrust offenders, there is little need for a sentence to protect the public from further

crimes. In addition, there is little need to use incarceration as a means to retrain the antitrust offender.

As we have previously stated, we believe that a mandatory jail sentence is the most effective deterrent against further antitrust offenses. We recognize that mandatory jail sentences represents a significant departure from historical practice. As the Commission itself pointed out in its Commentary to the Antitrust Guidelines in the Revised Draft, historically only 20 percent of all individuals convicted of antitrust violations are imprisoned. Nevertheless, we believe that the certainty of time in jail is a powerful deterrent for the antitrust offender who neither is a minor participant in the conspiracy charged or has no mitigating circumstances which would warrant a sentence which does not include incarceration.

We continue to be concerned, however, with the rapid escalation of minimum sentences. In our comments to the preliminary draft, we recommended that, absent aggravating circumstances, the minimum jail sentence for an antitrust offense should not exceed six months regardless of the amount of commerce involved. We believe that there is little or no additional deterrent effect to a business executive from jail sentences in excess of six months. The certainty of time in jail rather than the length of time is the principal deterrent. As we stated in our previous comments, if the sentencing judge decides that a sentence higher than the minimum is warranted in a particular case, so be it. However, the judge should not be required to sentence an individual to more than six months.

In our comments to the preliminary draft, we proposed a series of base offense values for the relevant dollar amount of commerce in order to meet the goal of a minimum never to exceed six months. We recognize that the Revised Draft has reduced the minimum mandatory jail sentences substantially, but we do not believe the reductions go far enough. In order to put into practice our recommendation, we propose jail sentences using the Offense Levels of the Revised Draft as follows:

<u>VOLUME OF COMMERCE</u>	<u>OFFENSE LEVEL</u>
Up to \$3 Million	8
\$3 Million - \$25 Million	9
Over \$25 Million	10

DETERMINATION OF THE VOLUME OF
COMMERCE FOR INDIVIDUALS

In our comments to the preliminary draft, we stated that the amount of commerce used to determine the sentencing range for an individual executive convicted of an antitrust violation should be determined by the amount of commerce that was within the individual's control, not necessarily by all of his employer's commerce affected by the offense. We gave as an example the regional sales manager convicted of a conspiracy to fix prices whose responsibility over pricing and sales was limited to a narrow market. We believe that the commerce involved in this narrower market rather the national volume of commerce of his employer should be used absent compelling reasons to apply the larger figure. For a national sales vice president, on the other hand, the commerce involved would be the employer's commerce for it is all under the sales vice president's control.

The Revised Draft merely states that the volume of commerce "attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in the goods or services that are the subject of the violation." This statement is vague in terms of the particular volume of commerce a court should apply. We would urge the Commission to include in its Commentary some guidance for the sentencing court regarding the situation where a convicted offender's responsibility was much narrower than his employer's national volume of commerce. In such a situation, we believe that the volume of commerce should be that done by the individual absent compelling circumstances which would make the larger number appropriate.

FINES FOR ORGANIZATIONS

We continue to believe that the fines for organizations are too high. The Revised Draft sets fines at 20 to 50 percent of the volume of commerce involved. At a 20 percent rate, the volume of commerce needed to reach the statutory maximum of \$1,000,000 is only \$5,000,000. At the 50 percent rate, the volume of commerce needed to reach the statutory maximum is only \$2,000,000. The result is that, in most antitrust cases, the fine for an organization would be at the statutory maximum. As we pointed out in our October 31, 1986 statement, applying the standards literally, the suggested fine would be the same whether the conspiracy involved only two million dollars of commerce or several billion dollars. We continue to believe that this inequity will bring disrepute upon the guidelines and will cause

the sentencing judge to ignore the guidelines fines for corporate antitrust offenders.

The Sentencing Reform Act of 1984, of course, places a limit on the aggregate of multiple fines of "twice the amount imposable for the most serious offense" when a defendant has been convicted of "different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage...." 28 U.S.C. § 3572 (as proposed). Our experience has been that antitrust cases rarely have multiple counts that do not fall within this definition. We believe that the use of a high percentage rate applied to the volume of commerce in order to set a fine to avoid this statutory limit would be inappropriate.

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PCBC00086

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
UNITED STATES COURTHOUSE AND FEDERAL BUILDING
450 MAIN ST.
HARTFORD, CT 06103

CHAMBERS OF
ALAN H. NEVAS
DISTRICT JUDGE

March 20, 1987

TELEPHONE:
203-722-2953
FTS 244-2953

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Commissioners:

Since last September I have, with the assistance of two students from the Yale Sentencing Workshop, followed the Commission's work quite closely. In evaluating it, I have tried to draw not only upon my own sentencing experience as a judge, but also upon the experience which I gained in my four years as United States Attorney for the District of Connecticut. I was an early supporter of sentencing guidelines as a result of my exposure to wide disparity in sentencing in this small district.

The Commission has gained my respect in going about its difficult and politically unpleasant task. The substantial changes in the Revised Draft (January, 1987) leave little doubt that you have remained flexible as well as sensitive to the concerns of those who have offered comment. But in my view, the guidelines are still far from a point where they can be reasonably put into effect.

Simply put, Congress has asked you to overhaul the engine, but has given you insufficient time in which to do it. Rather

than simply allowing the next guideline draft to take effect, I urge you to request an extension of time from Congress. The final draft should be implemented only for observation on a limited scale. For the reasons that follow, I believe full-scale application of the most recent draft would wreak havoc within the federal system of criminal justice.

I. The Issue of Resources

In my view, the Revised Draft will greatly overextend the resources of the federal courts and detention facilities. This will unquestionably create an enormous problem of administration, and may also lead to a lessened quality of justice in the courts and to unconstitutional conditions in the prisons.

A. Plea-Agreements

Currently, over 85% of all convictions in the federal courts result from plea agreements. Thus, there is nothing of more importance to a rational guideline system than a careful evaluation of the role of plea agreements. This is a complex issue, requiring both careful thought and extensive research. With due respect, there is nothing in the cursory provisions of Chapter IV (pgs. 173-174) of the Revised Draft to suggest that the Commission has engaged in either.

In my opinion, the Revised Draft virtually destroys any incentive a defendant may have to plead guilty. Under Section A413, as well as Rule 11 of the Federal Rules of Criminal Procedure, the government and defense counsel must set all relevant facts before the court. The court is then required,

based on these facts, to impose a sentence within the guideline range. But the guideline sentences are generally so severe that - even with the allowable three level deduction under Section C321,^{1/} - few defendants are likely to accept plea agreements.

Moreover, it has been my experience that a significant percentage of defendants who enter into plea agreements are motivated by at least the possibility that a sentence of probation may be imposed. This is particularly true with first offenders. By abolishing the use of probation for all but the most minor offenses, see Section A 511, the Revised Draft further undercuts any incentive for a defendant to enter into a plea agreement.^{2/}

The increased burden on the United States Attorneys' offices creates an incentive for prosecutors to omit relevant facts in order to get defendants to enter into plea agreements. This practice would, of course, not only violate Section A413, but would also require prosecutors and defense counsel to be less than truthful during the Rule 11 inquiry prior to sentencing. It is difficult to believe that United States Attorneys would consistently, and as a matter of course, engage in such a

1. According to Section C323, offenders who plead guilty are not to receive this reduction as a "matter of right." In my opinion, however, judges will grant this reduction to virtually all offenders who plead guilty, because it is the only incentive which the guidelines provide to encourage guilty pleas.

2. A further discussion of the virtual elimination of probation by these guidelines is contained in Section I, B of this letter.

practice. But unless they do, I see no escape from their being buried in pending cases. The Speedy Trial Act may cause wholesale dismissals of cases which should be prosecuted, but which the government has insufficient resources to bring to trial in a timely manner.

Whether one likes it or not, the plea agreement is the oil which keeps the engine of the American Criminal Justice System running. Without it, that engine will come to a grinding halt.

B. Imprisonment v. Probation

Two other related concerns are the vast increase in the average term of imprisonment for most offenses, as well as the virtual elimination of the use of probation. By even the most conservative estimate, these changes will result in (1) a monumental increase in the number of offenders who are sentenced to prison; and (2) a 200-300% increase in the length of time most offenders will be incarcerated. Congress may be forced to appropriate hundreds of millions of dollars for the construction of new prisons. Without such funding, overcrowding in federal prisons will mandate wholesale release of convicted offenders.^{4/}

The Revised Draft guidelines will work a fundamental change - in terms of increased severity - in current sentencing practice. This change will have an enormous effect on the

4. The problem of overcrowding has already arisen in many state systems. As an example, United States District Judge William Wayne Justice of the Northern District of Texas found that overcrowding in the Texas state prisons violated the Eighth Amendment. See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265 (1980).

federal prison system. But there is nothing in the guidelines to suggest that the Commission has done an impact study, or in any other way considered the effect that these guidelines will have on the prisons.

Moreover, it is difficult to understand the Commission's reasons for the virtual abolition of probation. Currently, nearly 48% of convicted federal offenders receive sentences of probation. Recidivism among these offenders is less than 5%.^{5/} While there is much about federal criminal justice to be criticized, the use of probation has been one area of success. The low rate of recidivism among offenders sentenced to probation seems consistent with the Commission's goal of seeing that "sentences should aim to control crime." Revised Draft, p.2. In my view, the Commission's virtual abolition of probation is likely to be counter-productive.

II. Other Issues of Concern

Quite aside from resources, I believe that the Guidelines fail to accomplish their most basic task, and that sentences imposed under them will not only be disparate for similar offenders, but have the potential for being unjustly severe.

A. Complexity and Disparity

Based on three separate exercises, one involving members of the Yale Sentencing Workshop, one involving federal probation officers in the Eighth Circuit, and a third undertaken by the

5. These figures were supplied by United States Circuit Judge Gerald W. Heaney of the Eighth Circuit. They are consistent with my personal experience.

two students who have been assisting me, I have found that application of the guidelines will result in disparity based not upon rational differences among offenders, but rather upon who is doing the calculations. In each exercise, the participants used identical sets of Pre-Sentence Reports ("P.S.I.") to sentence the same offenders. Yet in each case the participants arrived at vastly different results. For one offender, criminal history scores ranged from II to VI. For another, offense levels ranged from 12 to 25. Based on these limited exercises, I believe the complexity of the guidelines will make uniform application of them very difficult.

In the first exercise, the participants included a Federal Circuit Judge and three members of the Yale faculty, two of whom are former Assistant United States Attorneys. The second group was comprised of federal probation officers - precisely the people who will be doing the initial calculations in actual practice. The two students involved in the third exercise will both be law clerks to federal district judges next year - precisely the people who are likely to be checking the probation officer's calculations prior to actual sentencing. The wide disparity in sentences imposed by these participants suggests that similarly disparate results will occur among those who will be applying the guidelines once they have been adopted.

B. Criminal History Score

One area in which participants had particular difficulty achieving consistency was in the area of criminal history score. This calculation is based on the previous criminal

record contained in the P.S.I. As anyone who has worked extensively in the field of criminal justice knows, the criminal history information contained in P.S.I.s is often sketchy, and often inaccurate.^{6/} Under present sentencing practice, the judge uses this information merely to get a general idea of the offender's previous criminality. Thus, sketchy information or even minor inaccuracies are inconsequential. But the guidelines require exact calculations based on inadequate information. It is not realistic to require that such calculations be based on the criminal history information contained in the average P.S.I.

Moreover, under Section A312(b), the calculations are based on "the maximum sentence imposed." This ignores the fact that judges generally impose sentence with a full understanding that the offender will be paroled after one-third to one-half of that sentence has been served. Thus the "maximum sentence imposed" often bears no relation to the seriousness of the offense - in either the court's or anyone else's eyes. In my view the Criminal History provisions (pgs. 159-164) of the Revised Draft are simply not realistic.

Finally, I believe these provisions are unjust. Even a few minor offenses can push one into Category VI. I do not believe

6. There may be several reasons for this. First, there may be mistakes made in copying the offender's F.B.I. "rap sheet" into the P.S.I. Secondly, state criminal convictions often contain only rudimentary information. In either case, it is unrealistic to make exact calculations based on P.S.I. versions of criminal history.

that minor offenders - even with three or four convictions - should be considered in the same category as violent offenders or serious recidivists. By making the sentence imposed rather than the crime of conviction the yardstick, the Commission fails to recognize that different states may have differing conceptions of the seriousness of an offense. Under the Guidelines, a one year state sentence for passing bad checks receives the same score as a twenty-five year sentence for armed robbery, rape, or even murder. What is the rational basis for this determination? I believe the Commission should carefully rethink its entire approach to criminal history.

C. Other Offender Characteristics

With due respect, I believe the provisions of Sections B311, 312, 314, 315, 316 border on the incredible. (Generally, they prohibit consideration of age, education, vocational skills, physical condition, previous employment record, family ties and responsibilities, and community ties.) In one fell swoop the Commission has abolished precisely those factors which, in my view - both as a prosecutor and a judge - are the best indicators of whether a person is likely to engage in future criminality, or whether he or she can be successfully returned to the community as a law abiding citizen.

I do not question the need for some type of guidance for judges on how these factors may be considered. But the Revised Draft has - with minor exceptions - simply outlawed consideration of these factors. The Revised Draft offers no clue as to why this was done. I believe that guidance to judges

on consideration of these characteristics is one of the most difficult, but most essential aspects of a practical guideline system. The wholesale prohibition is ill-considered, and will almost certainly lead to significant opposition within the court system.

III. Conclusion

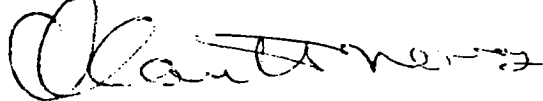
As the foregoing discussion suggests, I believe the Guidelines are far from a point where they can reasonably be implemented. As currently constituted, they are unduly severe, fail to reduce disparity, and do not account for individual factors which should be considered in sentencing. Moreover, their implementation would overburden the federal courts and prisons to a degree that may result in dismissal of charges under the Speedy Trial Act, and prison overcrowding which may violate the Eighth Amendment to the United States Constitution. These are, of course, predictions. But they are predictions based on experience. If even some of them are accurate, the effect of the guidelines on federal criminal justice will be severe.

I have offered a great deal of criticism, but precious few solutions. In fact, that is precisely the point. The complexity of each of the issues I have addressed (as well as many others I have not addressed) demands careful thought and research over an extended period of time. I believe the Commission has made an impressive beginning, but the task is far from completion. I urge the Commission to undertake trial

application of the guidelines on a limited scale, and to ask Congress for an extension of time within which to complete a careful impact analysis. Your task is monumental, and it cannot be completed in the next 30 days.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Alan H. Nevas".

Alan H. Nevas
United States District Judge

AHN:j

COMMENTS ON PROPOSED SENTENCING GUIDELINES
FOR U.S. COURTS, PART Q - OFFENSES
INVOLVING THE ENVIRONMENT

Although the imposition of criminal penalties for offenses involving the environment generally arises only in the case of willful and knowing violations, the courts should be given more flexibility in determining the type of sentence to be imposed. Admittedly, some environmental offenses are so heinous that the imposition of a term of imprisonment may be an appropriate penalty and serve to deter future violations; however, the Commission should bear in mind that imprisonment is not always the best, or the only type of acceptable deterrent, especially in the case of environmental offenses.

Thus, it is urged that the Commission further examine its guidelines on Imposition of a Term of Imprisonment, Chapter 5, § A521. According to this section, if, under the guidelines, the minimum term for the offense is from one to six months, the court is required to sentence the offender to prison or to some type of alternate confinement (e.g., halfway house, county jail). Furthermore, where the minimum term as determined by the guidelines is more than six months, the court is given no alternative but to impose a term of imprisonment. The court is stripped of authority to impose a probationary sentence in all cases except where the minimum term is determined to be zero months. It is urged that these requirements are harsh and severely limit the discretion of the court. The sentencing judge should not be bound by such hard and fast rules, especially in light of the way in which the guidelines determine the minimum term. The court should be given broader authority to determine when a probationary sentence is appropriate. Therefore, it is suggested that § A521 be amended to provide broader authority to the court, especially in determining the appropriateness of a probationary sentence.

Examining § A521 in terms of sections Q-211 and Q-214 of Part Q, Offenses Involving the Environment, further highlights the harshness of the guidelines.

Section Q-211 deals with the mishandling of hazardous or toxic substances. The base offense level for such an offense is 9. Even where the offender has the best historical record and has committed no previous violations, the base guideline range is 4 to 10 months imprisonment. At a minimum term of 4 months, according to § A521, no probationary sentence may be imposed. Moreover, section Q-211 further dictates that the offense level is to be increased from 9 by at least 3 levels, i.e., to at least 12, where (1) a community is evacuated, or (2) a public utility is disrupted, or (3) cleanup required a substantial public expenditure, or (4) there was an ongoing repetitive release of the hazardous substance, or (5) an environmental offense was concealed, or (6) transportation, treatment, storage or disposal without or in violation of a permit was involved. Thus, in most instances, some other occurrence will invariably trigger an increase in the base offense level.

Once the offense level moves beyond 6, the minimum sentence for the offender with even the cleanest of records is 6 months. With a 6-month minimum, the offender faces a term of imprisonment or some alternative confinement. Probation is not permitted. Arguably, it should be. At an offense level of 12, the minimum sentence is 10 months and in this case, § A521 dictates that the court sentence the offender to prison--no probation, no alternative confinement, no discretion. Arguably, a mandatory prison term of 10 to 16 months is too great a sentence for an offender with no prior violations. The court should be given broader discretion to prevent such harsh results.

Turning to Section Q-214, Mishandling of Other Pollutants, the rules for environmental offenses involving non-toxic or non-hazardous pollutants are no less harsh or restrictive than the guidelines for hazardous or toxic substances. Although the base offense level is 6 and at this level the minimum sentence is 0 months (thus permitting a probationary sentence) the escalator clauses in the guidelines will generally cause the minimum sentence term to rise above 0 months as the offense level is increased. Starting with a base offense level of 6, the court is instructed to add 4 levels anytime the pollutant is discharged into the water, air or land and to add at least 3, and up to 5 levels where public utilities are disrupted, a community is evacuated, the cleanup cost the public a substantial sum of money, the release was on-going, or where another offense was concealed. Thus, the escalator clause will have a substantial impact on the sentence imposed.

In addition to covering knowing violations, Section Q-214 also covers negligent violations that may involve criminal liability. Thus negligence by the cleanest of offenders could result in imprisonment, without possibility for a probationary sentence. The threshold at which imprisonment is mandated by the Guidelines is an offense level of 11 and this level is not difficult to reach once the court starts escalating the offense level in accordance with the various provisions. Invariably, some event will cause the offense level to be raised and, with an already high base level of 9, the resultant sentence is overstated.

On the other hand, the court is given little discretion insofar as decreasing the offense level to reflect the offender's acceptance of responsibility for the offense. The guidelines permit the court to adjust the offense level downward by 1-3 levels for an offender who affirmatively accepts responsibility for an offense. There is no obligation to reduce, and the available reduction is limited.

It is urged that the Commission modify this provision to 1) require a reduction in offense level where an offender affirmatively accepts responsibility and 2) give the court wider latitude to reduce the offense level by more than 3 levels. The rules for reduction of offense levels should be at least as broad as the currently proposed escalator provisions; the reduction range should perhaps be set at 3 to 5 levels, instead of 1 to 3. The court would then be free to evaluate the offender's conduct and reward positive action. This should encourage more responsibility on

the part of offenders. There would be a greater incentive to accept responsibility. This acceptance will only serve to reduce the overall costs of investigating the offense, determining the cause and taking action against the appropriate party. Time will be better spent resolving the problem.

Moreover, the post-offense conduct section of the guidelines should be likewise modified. Under this section, an offender who obstructs or impedes an investigation or interferes with the administration of justice is subject to an increase of 1 - 4 offense levels. This increase is required, not discretionary. The presumed goal is to deter such post-offense misconduct. However, any corresponding provision to reward and encourage cooperation with the authorities is not as forcefully written. The guidelines merely say that the court may decrease the sentence as appropriate when an offender is cooperative with the authorities. If the real purpose of examining post-offense conduct is to deter any further wrongdoing and encourage cooperation, then the rules should coincide. Thus, if increased offense levels are required for misconduct, decreased offense levels should be similarly required for good conduct. Moreover, the court should be free to appropriately award responsible cooperative conduct. This discretion should be broad.

Recommended Changes in Guidelines:

1. Reduce base offense level for section Q-211 and Q-214 environmental offenses.
2. Leave escalation of offense level to discretion of the court, and provide merely considerations, not mandates for use by the court when deciding whether to increase the offense level. Remove mandatory nature of increased offense levels.
3. Modify guidelines to allow court further discretion concerning the imposition of probationary sentences in the case of environmental offenses.
4. Encourage post offense cooperation by increasing authority of court to reduce offense levels, especially in the case of environmental offenders or offenders with otherwise reasonably clean records.
5. Reward and encourage responsible conduct on the part of environmental offenders by requiring decreased offense levels upon affirmative acceptance of responsibility, especially when coupled with remedial action on the part of the offender.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

219 SOUTH DEARBORN STREET

CHICAGO, ILLINOIS 60604

PCB 00106

CHAMBERS OF
JAMES B. MORAN

JUDGE

March 19, 1987

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

Dear Judge Wilkins:

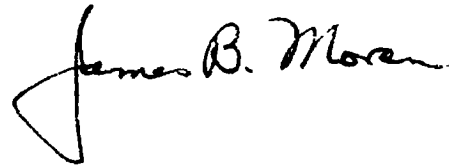
I do not pretend to be very conversant with the draft sentencing guidelines. I recognize it has been an immense and extremely complicated task and that even a superficial knowledge requires more time than I have devoted to that task.

I was, however, struck by a comment to the Commission by Judge Michael M. Mihm in his letter of March 5, 1987, respecting Section A521 on page 180. That comment referred to confinement in a community treatment center for reasons of addiction for 30 days, if there was a reasonable likelihood that completion of a treatment program would eliminate the dependence. It raised a concern which I would like to share with you.

For almost 20 years I have been involved in drug abuse treatment programs. During that entire period I have been an officer and/or director of Gateway Foundation in Illinois, which is a drug treatment program providing residential therapeutic treatment. It is similar to Day Top Villages in New York, Phoenix House, and various other programs around the country. They have provided a means, for some, of breaking a chronic dependence on drugs, which has been reflected in the past in a history of "junkie" crimes such as mail theft and fencing checks. The residential status is lengthy, often over a year, although the daily cost is very modest. The goal, and in a high percentage of cases the result, is absence from drug use. The benefits to the individual and to society of changing that person from a chronically drug-dependent individual with a propensity to commit crimes to support his habit to a self-supporting individual no longer involved with the criminal justice system is obvious. Such programs are not confinement in the traditional sense, but they do require a long term individual commitment and involve serious restrictions on individual liberty. Indeed, in the initial phases of such programs the resident generally may not even leave the facility briefly without an established purpose and without being accompanied by a staff person.

I do not know whether or how such programs fit into the guidelines. I do know that they are used to a considerable extent by the probation people under contract programs and that they are looked upon as very helpful and constructive alternatives to incarceration in a facility like Lexington. I would hope that the guidelines would leave room for the use of such an approach in appropriate cases.

Sincerely yours,

A handwritten signature in cursive script that reads "James B. Moran". The signature is written in dark ink and is positioned to the right of the typed name "James B. Moran".

JBM:ay

SENTENCING AND PAROLE PLANNING

National Legal Services, Inc.

Marcia G. Shein, M.S.
President
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Sentencing Investigator
District Office

March 19, 1987

Senator Sam Nunn
SD-303 Dirksen Senate
Office Building
Washington, DC 20510

Dear Senator Nunn:

It is with a most sincere concern that I forward to you my response to the United States Sentencing Commission's latest sentencing guidelines draft. Somehow word is not getting through to the Commission that they are preparing to propel us into the Dark Ages through a system which guarantees confinement for all and sponsors continual expansion of our prison capacity in this country.

Your conscientious moves on behalf of intelligent sentencing reform have been followed and applauded by many, our office staff included. Thank you for taking the time to review the enclosed concerns.

Sincerely,



Marcia G. Shien, President
Sentencing and Parole Consultant
NATIONAL LEGAL SERVICES

MGS/sd

cc: Robert W. Kastenmeier-Chairman House Judiciary
Committee
Carlos J. Moorhead-Ranking House Judiciary Committee
William J. Hughes-Chairman House Judiciary Committee
Bill McCollum-Ranking House Judiciary Committee
John Conyers-Chairman House Judiciary Committee
Joseph R. Biden-Senate Judiciary Committee
Edward M. Kennedy-Senate Judiciary Committee
William W. Wilkens-Chairman, US Sentencing Commission
Scott Wallace-Legislative Director, NACDL
Sentencing Alternatives/Guidelines • Legal Research
Parole Commission Rules and Regulations • Bureau of Prison Policies

**STATEMENT OF CONCERN REGARDING THE NEW FEDERAL
SENTENCING GUIDELINES**

by
Marcia G. Shein

I am the president of National Legal Services, a sentencing alternative planning organization. Our main purpose is to help relieve overcrowding in the prison system by developing constructive sentencing alternative proposals for use in the sentencing of first offenders of non-violent crimes and youthful offenders. This includes drug offenses and offenses that will be otherwise precluded from alternative sentencing programs under the new sentencing draft guidelines. The purpose of this correspondence is to voice my urgent concern regarding the Sentencing Commission's guidelines and related issues. My distress is founded on our diligent review of the guidelines juxtaposed with the present parole system guidelines, and the potential for the new sentencing guidelines to create more problems rather than diminish the ones that are already plaguing the judicial system.

It is evident from the Commission's original draft and the present re-draft of the guidelines that no clear cut sentencing philosophy has been addressed in establishing sentencing guidelines. More importantly every aspect of humanity has been eliminated from the sentencing process. It is all too often that deterrence of others against major crime is being used as an excuse for increased incarceration. This is the only "philosophy" readily apparent in the guidelines.

Deterrence has never been nor will it ever be a prime factor in reducing crime in this country or any other country. Research on deterrence suggests otherwise. For example, picture a 30 year old man, first offender, who has never been in any trouble before, who takes possession of less than 1 kilogram of cocaine. Consequently he is handed a 15 year sentence, the statutory maximum. That aspect of the case alone is outrageous. What is even more outrageous is that the excuse being used in imposing such exorbitant sentences on first offenders is deterrence to others. This excuse mirrors the judicial system's lack of responsibility for taking control of sentencing decisions. We have inundated our judicial system with images of a public crying out for more incarceration and lengthier sentences. That is not the story we see in our work. Politically that may be the perceived impression, but it is not accurate.

We cannot justify a 15 year imprisonment for an offender such as the above mentioned. No person on this earth will be deterred from engaging in illegal drug activity by knowing the sentence this man received. The only people affected are his family who were horrified by the inexorable sentence. This, of course, is just one example of hundreds in our experience of the system's blindness to the needs of humanity. If these needs were met with appropriate justice, the results would not only reduce overcrowding and disparity, but start to change the system and the way the system is perceived. Although the offender in this example received the short end of things as permitted under current sentencing practices, possibilities for a more lenient handling of his case existed which will not exist under the

new sentencing guidelines. Are we shifting our stance under these new guidelines so as to endorse the very worst aspects of our current system and annihilate all of the constructive possibilities it now offers? Even if the design of the new sentencing guidelines provides certainty and fairness pursuant to each individual's background, it conspicuously lacks any evidence of humane treatment of offenders. It looks like everyone's going to jail and for a good long time. A person who makes a mistake and commits a crime is still a human being and has the same standards of recovery that each of us has when we make a mistake in our lives which does not happen to be punishable by incarceration.

No where in the guidelines is the situation of overcrowding addressed and there is no sense that the cold, harsh guidelines reflect one iota of the original Senate bill. The sense of the Senate resolution in the Sentencing Reform Act of 1984 was an intention that more alternatives to incarceration would be used and more alternatives would be used for the purpose of reducing overcrowding. This would also mean alternatives in the direction of lesser periods of incarceration for appropriate offenders. However, the guidelines promulgated seem to have taken the bad and made it worse. Surely this is the very opposite of what Congress and conscientious criminal justice professionals envisioned as coming from the Act. The long-standing problems that plague the system at present cannot worsen the situation if left in effect until such time as a clear, rational sentencing alternative philosophy is addressed by the Commission.

Conspicuously absent from the guidelines is any consideration for the youthful offender. To suggest

that our young people from ages 18 to 25 should not be given a second chance with their age as a factor in recovery reflected in shorter periods of incarceration, is incomprehensible. We have taken the Youth Corrections Act provisions out of the system which would have allowed for some leniency with youthful offenders and have replaced it with cold, calculated guidelines for adult offenders only.

In researching the many states in the Union who have worked to establish sentencing guidelines it is evident that those guidelines were designed to be more lenient to reduce overcrowding. Those states in which the guidelines are working to any small degree are those in which the guidelines are considered lenient and practical. Though some of the proposed new guidelines represent a slackening of incarceration for certain types of offenses we cannot preclude drug offenses in proposing more realistic guidelines. This country is, in fact, inundated with a narcotics problem. However, each individual should be treated in relationship to their personal background as regards to the offense. These things are not being considered as strongly as they should be in order to accomplish the goals of justice. I think it would behoove the Commission to speak to family members of individuals who have gotten into trouble for the first time in their lives and have been devastated, the person and the family, by the torment of lengthy incarceration. I think if the Commission were to talk to family members who are the silent victims in criminal cases there would be more compassion inherent in the Sentencing Commission's guideline draft.

We must look to more sentencing alternative work

to accomplish the goals of the Commission. We must also look for an open-minded sentencing philosophy that encompasses not only justice and public safety, but humane treatment of the offender. Our criminal justice system is afflicted with an uncontrolled use of confinement. It is an established fact that the United States has some of the longest sentences in the world and one of the highest crime rates. In 1985 the prison population in the United States reached an all-time high passing the half-million mark. When I look at the extensive use of incarceration guaranteed under the new guidelines coupled with moves to continue expanding our prison capacity, I cannot help but think that we are moving in the wrong direction, namely backwards. Overflowing prison populations across the country are not a sign to me that deterrence is worth beans. We are applying band-aid solutions to our criminal ills. Once parole is abolished there will be no safeguards at all against the overcrowding of our prison system. The pendulum of the judicial system continues to swing in a handicapped fashion, but somewhere in the middle is a compromise of the swing to the right and the swing to the left.

If the House and Senate Judiciary Committee are interested in hearing further examples of the realities surrounding the sentencing and incarceration of individuals we would be more than happy to testify from our personal experiences as sentencing and parole consultants. The full scope of the human problems touched upon in the justice system at the time of sentencing is largely unseen by those who participate in the process. We would also like to be considered a part of any effort to make the sentencing guidelines more consistent

SENTENCING AND PAROLE PLANNING

with humane and economic need as well as help design a sentencing philosophy and sentencing alternatives. In addition to the above comments I want to note that there are no guidelines within the latest draft for specific sentencing alternatives and practically nonexistent latitude for the application of alternatives to incarceration.

A young man removed six bags of dirt from a national forest. The judge, instead of using a sentencing alternative, imposed a 6 month term of incarceration, one month for each bag of dirt. This is not an example of judicial cleverness it is a sad pronouncement of judicial thoughtlessness. This young man took up scarce prison space at the tax payers expense instead of paying back the tax payers through community service in our national parks which have been under funded for quite some time. It is these very real, day to day situations in our courts that are not being addressed by the Commission. The conspicuous absence of sentencing alternatives seriously limits the effectiveness of the original sense of the Senate resolution. Surely in its process of promulgating the guidelines the Commission has been made aware of countless other similar situations. Why aren't these situations addressed in the guidelines? Are they being ignored because they fail to fit into the current atmosphere wherein nothing short of incarceration will serve the ends of justice? If we cannot move forward, let's at least not move backward. Thank you for your consideration of these comments.



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

MAR 18 1987

Mr. Paul Martin
The United States Sentencing Commission
1331 Pennsylvania Avenue, NW.
Washington, DC 20004

Dear Mr. Martin:

A review of your Revised Draft Sentencing Guidelines has revealed an apparent omission. There is no reference to 18 U.S.C. section 924(e), which provides an enhanced penalty for possession of firearms by a felon who has three previous convictions for violent felonies or serious drug offenses. A further explanation is contained in Public Law 99-570, dated October 27, 1986.

This letter is in confirmation of your discussion of this subject with Joseph M. Wilson of my staff on March 16, 1987. If we can be of further assistance, please contact Mr. Wilson at 566-3021.

Sincerely yours,

Phillip C. McGuire



PCB 00069
ADDITIONAL COMMENTS
PCB 00021

CHEMICAL MANUFACTURERS ASSOCIATION

DAVID F. ZOLL
Vice President
General Counsel

March 18, 1987

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

Re: Supplemental CMA Comments on Proposed Sentencing Guidelines

Dear Commissioners:

The Chemical Manufacturers Association (CMA) is hereby submitting ten (10) copies of supplemental comments on the Proposed Sentencing Guidelines and Policy Statements for the United States Courts (51 Fed. Reg. 3920, February 6, 1987). These comments focus on the issue of fines, which was not addressed in CMA's initial comments of March 16, 1987. On March 16, we informed the Communications Director of the Commission of our intention to file these supplemental comments.

We recognize that these supplemental comments are being filed after the deadline for submission of comments. However, because the issues raised in these comments go to fundamental issues of statutory authority, we felt it important to bring these concerns to the Commission's attention. We would appreciate your consideration of the issues raised in these comments as well as CMA's initial comments. Please do not hesitate to contact me (202/887-1350) if you have any questions regarding the CMA submissions.

Sincerely,

LAW OFFICES
WILLIAMS & CONNOLLY

HILL BUILDING

839 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20006

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March 18, 1987

BY HAND

David F. Zoll, Esq.
Vice President & General Counsel
Chemical Manufacturers Association
2501 M Street, N.W.
Washington, D.C. 20037

Dear David:

You have asked us to review § A542 of the United States Sentencing Commission's Proposed Sentencing Guidelines for United States Courts, which deals with fines for individual defendants. 52 Fed. Reg. 3920, 3980-81 (Feb. 6, 1987). Our comments on that section of the Proposed Guidelines, for purposes of submission to the Commission on behalf of the Chemical Manufacturers Association, follow.^{1/}

^{1/} Comments on behalf of the Chemical Manufacturers Association with respect to §§ Q211-Q215 of the Proposed Guidelines were submitted to the Commission on March 16, 1987.

COUNSEL

CHARLES H. WILSON
LYMAN G. FRIEDMAN
DONALD E. SCHWARTZ
JAMES A. BRUTON, III

* NOT ADMITTED IN DC

David F. Zoll, Esq.
March 18, 1987
Page 2

We have been unable to find any statutory authority for two provisions of § A542. Indeed, we believe that each provision is contrary to relevant legislation recently enacted by Congress.

I

Section A542(c)(2)(c) provides that the maximum of the Guidelines fine may be "three times the estimated gain to the defendant." To our knowledge, no federal statute authorizes a fine of three times the gain to the defendant.

Indeed, Congress has specifically addressed the standard for basing a fine on gain to the defendant. Title 18 U.S.C. § 3623(c)(1) provides:

If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."

This statute was enacted October 24, 1984, and applies to offenses committed after December 1, 1984. The plain meaning of the statutory language is that any fine based on gain to the defendant shall be "not more than . . . twice the gross gain" (emphasis added). The provision of § A542(c)(2)(c) for a fine

David F. Zoll, Esq.
March 18, 1987
Page 3

"three times the estimated gain" is, therefore, contrary to § 3623(c)(1).

The fact that a fine imposed under § A542(c)(2)(c) is subject to the maximum set forth in § A542(b)(2) does not save § A542(c)(2)(c). The provision in 18 U.S.C. § 3623(c)(1) for fines based on gain to the defendant is independent of the provisions in § 3623(a) and (b) and the provisions in 18 U.S.C. § 3571 for establishing maximum limits for fines. Under those statutes, even where a fine is within the statutory range, if it is based on gain to the defendant it shall "not [be] more than . . . twice the gross gain" Therefore, if the amount of a fine is to be based on the gain to the defendant, then, even if three times the gain would be within the range permitted by the Guidelines, the fine must not be more than twice the gross gain.

In sum, to be authorized by statute and consistent with § 3623(c)(1), Guidelines § A542(c)(2)(c) should be revised to read: "twice the gross gain to the defendant."

II

Section A542(i) states:

Notwithstanding any other provisions of this section, the court shall impose an additional fine amount that is at least sufficient to pay the cost to the government of any

David F. Zoll, Esq.
March 18, 1987
Page 4

imprisonment or probation ordered unless the
defendant is unable to pay such costs

This subsection has two fatal defects.

First, to our knowledge, no federal statute authorizes the setting of the amount of a fine (or "additional fine") on the basis of the cost of imprisonment or probation supervision. In 18 U.S.C. § 3553(a), Congress has set forth "[f]actors to be considered in imposing a sentence." Reimbursement to the government for the cost of imprisonment or probation supervision is not one of them. In 28 U.S.C. § 991(b), Congress has set forth the purposes to be achieved by the Commission in establishing sentencing policies and practices. Reimbursement to the government for the cost of imprisonment or probation supervision is not one of them. In 18 U.S.C. § 3623(c)(1), Congress has set forth additional bases for determining the amount of a fine. Reimbursement to the government of the cost of imprisonment or probation supervision is not one of them. The failure of Congress, in legislation specifically addressing the purposes of sentences, the purposes of the Commission, and theories for the imposition of fines, to authorize the kind of "additional fine" mandated by § A542(i) requires the withdrawal of § A542(i).

Second, the initial clause of § A542(i) has the effect of overriding § 542(b)(2), which provides that a fine shall not

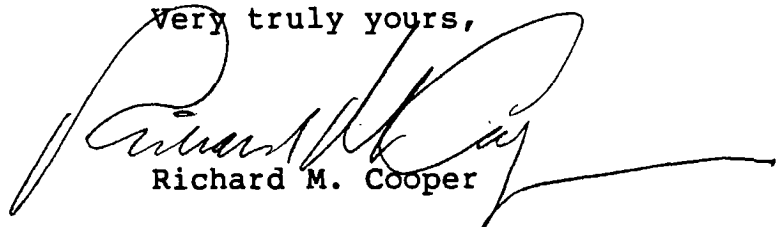
David F. Zoll, Esq.
March 18, 1987
Page 5

be greater than the statutory maximums set forth in 18 U.S.C. § 3571(b)(1). The necessary implication is that the additional fine authorized by § A542(i) must be imposed (the subsection is mandatory where the defendant is able to pay), even if a fine at the statutory maximum level has already been imposed. Thus, for example, if the offense level is 38 and the defendant is sentenced to 240 months in prison and the maximum fine of \$250,000, § A542(i) would require (unless the defendant cannot pay) that he be fined an additional \$360,000 to pay for his incarceration (240 months at \$1,500 per month).

This example demonstrates how § A542(i) can result in the imposition of a total fine for a single offense in violation of the maximums prescribed in 18 U.S.C. § 3571(b)(1) (and also in violation of the maximums prescribed in 18 U.S.C. § 3623(a)). Moreover, we know of no statutory authority for fines in excess of those statutory maximums.

Because it is not authorized by any statute, and because it can lead to results contrary to 18 U.S.C. § 3571(b)(1) and § 3623(a), § A542(i) should be deleted from the Guidelines.

Very truly yours,



Richard M. Cooper



Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 17 1987

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

Dear Judge Wilkins:

This letter responds to the Sentencing Commission's invitation for comments on the revised draft of the Sentencing Guidelines published in January, 1987. The Antitrust Division strongly supports the work of the Commission. We have sought to provide assistance in that work to the greatest extent possible and we will continue to join with the Commission in its efforts to build a new framework for sentencing that fully and fairly meets the needs of the criminal justice system.

The revised Guidelines represent a refinement of the preliminary draft in many respects. With respect to the sentencing recommendations for criminal violations of the antitrust laws, the Division fully endorses the primary thrust of the Sentencing Guidelines: that sentences should be designed to deter offenses, and that short, mandatory prison sentences coupled with substantial fines are necessary to deter antitrust offenses. We applaud the Commission for its continued adherence to this important law enforcement goal.

Our comments are directed toward ways in which the revised draft guidelines may fall short of this goal. We are concerned that certain provisions in the current draft could actually undermine, rather than promote, deterrence.

IMPRISONMENT

We are particularly concerned that the certainty of imprisonment for antitrust offenses has been greatly reduced in the revised draft guidelines. Although the range of imprisonment has been lowered somewhat for antitrust offenses involving large volumes of commerce, and the special, tough

antitrust recidivist penalty has been eliminated, 1/ the sentencing ranges in the current draft are acceptable provided that they are actually imposed. There are, however, a number of provisions in the revised Guidelines that make this problematical.

Complementary Bidders.

We note that the Commission has deleted the concept of apportioning the volume of commerce among antitrust defendants contained in its earlier draft. We understood that this apportionment scheme was intended to provide appropriate base offense values to complementary bidders in bid-rigging conspiracies since actual sales may not reflect adequately such bidders' participation in or benefit from a conspiracy.

In earlier comments to the Commission, we supported apportionment in concept, but we noted certain problems with determining (or disclosing) the number of conspirators during the early rounds of prosecuting a bid-rigging conspiracy. By completely deleting apportionment, however, the current draft of the Guidelines would apparently place all complementary bidders in the category of "under \$1,000,000" in commerce in all cases. Consequently, the role of complementary bidders is likely to be understated in many cases. We recommend that, with respect to complementary bidders, the offense level be set at no less than one level below the level of the bidder that actually received or would have received the contract, but in no case at less than the offense level for offenders with a volume of commerce under \$1,000,000.

Permissible Offense Level Reductions.

Given the present proclivity of judges not to send antitrust offenders to prison, any element of the Sentencing Guidelines that permits judges to arrive at a sentencing range with a minimum sentence of zero months of imprisonment creates a substantial risk of no term of imprisonment being imposed. We believe that this possibility exists with respect to section C321--Acceptance of Responsibility and section Z214--Role in the Offense. Giving judges broad discretion to reduce offense levels by 1 to 3 levels in the first instance and 1 to 6 levels in the second raises the possibility that participation in an

1/ In its commentary to revised §R211, the Commission suggests that recidivism in the antitrust area may warrant harsher treatment than that afforded by the prescribed adjustments for general criminal history. It does not, however, make recommendations regarding specific circumstances or adjustments.

antitrust crime may not entail a significant risk of incarceration. This result is at least implicitly acknowledged in the commentary to §R211 which seems to suggest that fines may be sufficient when such adjustments apply. We strongly urge that adjustments for such factors not be permitted to reduce the sentencing range below a minimum of two months.

We do not believe that an indication of rehabilitative potential through the acceptance of responsibility, no matter how sincere, should mitigate antitrust sentences. Such a reduction would undercut seriously the primary goal of the Guidelines in the antitrust area: deterrence of antitrust crime generally, not merely repeat offenses by the same individual. We recommend that §R211, or the commentary to that section, be amended to state that it is inappropriate for acceptance of responsibility for an antitrust crime to make applicable an offense level that does not carry a minimum term of imprisonment.

We also believe that a "role in the offense" reduction for antitrust violations should not reduce an offense level below that which would require a short but certain term of imprisonment. While it may be appropriate to increase levels for ringleaders, all conspirators are necessary parties to an antitrust violation since it is the aggregation of market power that makes the conspiracy successful. Even a pliant, totally reactive individual with relatively little to gain thus may be a key conspirator. Deterrence of his or her participation would be inappropriately reduced by calling into question the likelihood of imprisonment upon conviction.

We agree with the Commission that substantial reductions in offense levels are appropriate, even below mandatory jail levels, for cooperation. Deterrence is enhanced by rewarding cooperation with government investigations of antitrust offenses. The ability successfully to build an antitrust case often depends on gaining the cooperation of individuals involved in the violation under investigation. Moreover, when the rewards of cooperation are significant, potential violators may be deterred by the likely inability to maintain a united front in the face of an investigation.

Alternative Sentences.

Section A511 of the revised draft Guidelines permits courts to sentence an offender whose minimum term of imprisonment is not more than six months to probation. This alternative thus applies to all antitrust offenders whose volume of commerce is \$15 million or less (or even more if the offense level is otherwise lowered, e.g., for acceptance of responsibility). Although probation must include intermittent confinement, community confinement, or home detention if the minimum term of

imprisonment is greater than zero, these options do not carry the same deterrent force as an equal or perhaps lesser amount of straight prison time. While alternative sentences such as these are no doubt effective and appropriate for certain offenders, the possibility that an antitrust offender merely may have to stay in his or her comfortable home or, at worst, spend weekends in confinement while going about normal activities during the week, is not likely to be sufficient to deter violations. We recommend that § R211 be strengthened to make plain the Commission's intention that the short prison sentences called for in that section are actually to be imposed and that probation is not generally warranted for antitrust offenders.

FINES

The Antitrust Division concurs in the Commission's conclusion that substantial fines for both individuals and corporations must complement jail sentences in order to adequately deter antitrust crime. Antitrust violations are committed to achieve supra-competitive profits and often result in very substantial overcharges to consumers or procurement agencies. Deterring such potentially lucrative conduct requires very substantial penalties. For an organization, incarceration is not an option, so a fine is clearly the proper penalty. For an individual, both a substantial fine and a certain jail sentence are appropriate. The certainty of a substantial fine if caught will help counter the financial incentives that are the sole cause of antitrust violations.

We support the proposals for determining antitrust fines based on a percentage of the volume of commerce. However, as we discussed in connection with imprisonment, the revised Guidelines will result in many complementary bidders having a volume of commerce under \$1,000,000 attributed to them even though they were crucial to a conspiracy involving much higher amounts. Fines based on the relatively low volume of commerce may not be adequate to deter such conspiracies. We recommend some alternative basis for determining fines for complementary bidders; perhaps giving the court discretion to set a fine that is appropriate in relation to the volume of commerce attributed to the winning bidder.

* * *

To summarize, we support the Commission's proposed sentencing ranges in section R211 and its conclusion that short, mandatory prison sentences coupled with substantial fines are necessary to provide adequate deterrence of antitrust violations. We are concerned, however, that certain aspects of the proposed Guidelines may result in antitrust offenders routinely avoiding the imposition of prison sentences. We

recommend that the Commission clarify the application to antitrust offenses of these provisions and of certain provisions relating to fines.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles F. Rule". The signature is written in dark ink and is positioned above the printed name.

Charles F. Rule
Acting Assistant Attorney General

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR



WASHINGTON, D.C. 20544

March 17, 1987

DONALD L. CHAMLEE
CHIEF OF THE DIVISION
OF PROBATION

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

Dear Judge Wilkins:

In response to the January 1987 draft sentencing guidelines the Probation Division has prepared the following comments which supplement the comments made to you by the Probation Committee at its February 1987 meeting. This letter represents the work of staff and largely reflects concerns that were not raised at the Committee meeting.

We recommend that the Commission carefully study the impact of the draft guidelines on the eligibility for a sentence to probation. As we have indicated previously, it is our view that probation will be available only for a smaller percentage of persons than is the case under current law, and prison will be used more frequently for the remainder. The thrust of the guidelines is also decidedly more punitive in nature for those offenders who do come under supervision. The guidelines apply the sanctions of intermittent confinement, community confinement, and home detention as punishments that are connected to a sentence to probation. Many defendants assigned to these conditions currently receive only low activity supervision. The change will require a commitment of resources to ensure that the court orders are enforced. Not to do so would breed disrespect for the law. Such commitment of probation staff may not be the best allocation of resources, if high level surveillance is not justified by the specific needs of the offenders.

We have several concerns about the Commission's use of the defendants' prior criminal record. First, the guidelines, in increasing the sentence on the basis of a prior criminal record, do not establish the relevance of that increase to the statutory purposes of sentencing set forth in the Sentencing Reform Act. We recommend the Commission prescribe sentencing purpose(s) to be achieved by incarcerating an offender on the basis of his prior criminal record. Second, the Commission should clarify its instructions for determining prior criminal record. For example, under sec. A312, pp. 159-162, there are four different time intervals for the decay of prior criminal records - depending on the circumstances - of 3, 5, 10, and 15 years. We recognize the need for different considerations and only ask that the

Commission be sensitive to the difficulty of achieving reliable scoring across the nation when the categories are complicated. Also, in sec. 312(c)(2), we recommend the term "minor traffic" receive further definition. Does the Commission intend that speeding, reckless driving, or other aggravated violations be included or excluded? Finally, in sec. A313(a)(2), we recommend the Commission give further definition to the term "similar adult criminal conduct not resulting in a criminal charge or conviction." Absent further guidance, this will be subject to a variety of interpretations.

The Division asked a number of probation officers to apply the current guidelines draft to a set of cases. Although we recognize that the officers were not thoroughly trained in the application of the guidelines, we were nevertheless disturbed at the variations which occurred in the officers' assessments. The guidelines presented difficulty for probation staff in two ways: (1) ensuring all salient aspects of sentencing are addressed, and (2) the amount of time needed to apply the guidelines. We believe both of these problems can be remedied by changing the format of the guidelines and carefully reviewing how the guidelines read from a practitioner's viewpoint. As the guidelines are presented, a probation officer must refer to several sections for each offense. The officer must compute the criminal history score, determine the base offense level, adjust the offense level by referring to Departures and Adjustments in General Provisions (Chapter Two), Role in the Offense (Chapter Two), Obstruction of Justice and Perjury, Acceptance of Responsibility, Cooperation, and Other Offender Characteristics (Chapter Three). Then the officer must refer to a Sentencing Table and a Fine Table.

The guidelines would be easier to use if each offense discussion included the applicable general provisions and adjustments. We realize that this would increase the length of the instructions. If the Commission finds this too cumbersome we suggest that the worksheet for computing sentences be enlarged to include each element covered in Chapters Two and Three. Such an enlargement of the worksheet would better assure that probation staff address all salient items.

Departures allow the court to sentence outside the guidelines. Organizationally, both in the guidelines as now constructed and on the draft worksheet, departures appear within Chapter Two. It is suggested that departures are more appropriately considered last and presented as distinct from the other calculations.

Another suggestion is that the draft highlight major principles. On pages 167-168, C323, for example, (A defendant who enters a guilty plea is not entitled to a sentence reduction as a matter of right) the principle is stated in the middle of the commentary. On page 150, paragraph two states that "Departures should be no more than necessary to reflect the seriousness of the offense conduct." This should be stated at the beginning of the commentary or at the beginning of that guideline. A glossary of terms would also be helpful in distinguishing the difference between such items as policy statements, commentary, guidelines, and the various terms used in the guidelines.

Our reading of the guidelines at sec. A413, p. 174 leads to the conclusion an important point needs to be reemphasized. The probation officer, acting as the court's independent investigator, has the responsibility to include in the presentence investigation report the full circumstances of the offense conduct. A reference to the probation officer's responsibilities as set forth in Rule 32, Federal Rules of Criminal Procedure, would be constructive.

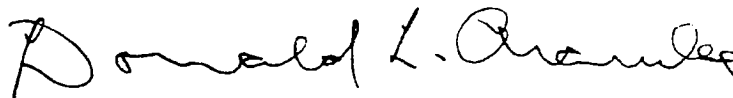
In Chapter 5, the revised draft refers to "recommended conditions" (A513(b), p. 176) which are then set forth in the commentary (p. 177). The commentary also indicates the conditions are "generally recommended for both probation and supervised release." In referring to the same recommended conditions on p. 199 the draft requires inclusion of both recommended and statutorily required conditions. We believe this is a drafting error. Also, in Chapter 5, the Commission provides the conditions of probation and supervised release (pp. 176-179, 181-182). Although the Commission provides conditions which "may be warranted in specific circumstances" (pp. 178-179), there is no mention of any outpatient or inpatient treatment conditions for the statutorily authorized drug and alcohol treatment programs for persons on probation and parole. The Probation Division recommends the Commission include such treatment conditions along with conditions for psychological or psychiatric treatment and such other conditions as may be warranted in specific circumstances.

In Chapter 6, the draft deals with violations of probation and supervised release by establishing four categories of violations with specific instructions for reporting the violations to the court. The commentary extends over five pages (pp. 197-201), which is reflective of its complicated nature. The Probation Division believes this will be difficult to apply uniformly and recommends the draft be given another review. As we have indicated previously, this chapter deals with the administration of violations of conditions. We do not believe this is required by the Sentencing Reform Act.

There are a few points in Chapter 6 that could be better defined. Sec. A611(a) calls "new criminal conduct," a category one violation. We question whether the Commission intends to include in the term criminal conduct such matters as minor traffic offenses. And in sec. A614(a)(5), it is a requirement that no credit be given for time spent in custody. We do not believe there is a lawful means of taking away that credit. The draft does not address conditions of probation and violations of probation involving organizations. The draft also does not provide special release procedures for cases of supervised release. In both instances we refer to our recommendations in the December 17, 1986 letter.

I extend my appreciation on behalf of the Probation Division for the opportunity of responding to the revised draft. This staff response, however, does not carry the imprimatur of the Probation Committee of the Judicial Conference.

Sincerely,

A handwritten signature in cursive script, reading "Donald L. Chamlee". The signature is written in dark ink on a white background.

Donald L. Chamlee

cc: Honorable Gerald Bard Tjoflat
Peter G. McCabe
Christy Massie



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

(Criminal Investigations
Policy and Oversight)

17 MAR 1987

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

Dear Sirs:

I have reviewed the Revised Draft Sentencing Guidelines, issued by the Commission in January 1987, and offer the following comments for consideration by the Commission prior to its submission of the initial set of Sentencing Guidelines to Congress in April 1987.

While not intending to diminish the importance of the other aspects of the commission's guidelines, my comments are limited to what I believe to be an inadequacy of sentencing in the area of so called "white collar" and procurement fraud related crimes. Where possible, I have referenced particular sections of the Guidelines which relate to, or are the focus of, my comments.

I. EMBEZZLEMENT BY GOVERNMENT EMPLOYEES (SECTION B211)

In considering potential sentencing of a Government employee convicted of embezzlement, one basic assumption (although not an absolute certainty) should be made, i.e., as a Government employee, the individual has no prior criminal history. Such being the case, the guidelines indicate sentencing ranging from no imprisonment to a maximum (where the embezzlement is under \$5 million) of 51 months, calculated as follows:

	<u>Under \$1,000</u>	<u>Over 2 Million</u>
Base Offense	4	4
Complexity (Section B211(a)(4))	-	3
Value (Section B211(a)(6))	-	11*
Role in Offense (Section 2212)	1	4
Offense Level	5	22
Imprisonment	0-5 months	41-51 months

* (While the value table states, over \$2 million adds 11 or more, the table progression implies any amount under \$5 million would be not more than 11)

Congress provided for imprisonment for up to ten years for the embezzlement of public monies (18 U.S.C. 641), and I see no justification for establishing guidelines which realistically set the maximum at less than half the statutory maximum.

II. COMMERCIAL BRIBERY AND KICKBACKS (SECTIONS B242 AND B243)

This section appears to be an addition from the Commission's Preliminary Draft and fails to consider passage of the Anti-Kickback Act of 1986 (Public Law 99-634). This law, which amended 41 U.S.C. Sections 51-54, provides for imprisonment for not more than 10 years, rather than two years as stated in your revised draft, (in addition to other criminal and civil sanctions). Passage of this legislation in 1986 should be considered by the Sentencing Commission as a clear signal from Congress on the seriousness of the problem of kickbacks in the Federal procurement process and the Sentencing Guidelines should reflect such concern. Additionally, I believe that violations of 41 U.S.C. Sections 51-54 would more properly be grouped with the statutes contained in Section B242, rather than Section B243.

I am also concerned about the applicability, if any, of Part Z, Role in the Offense adjustments under Sections Z211 and Z212. The language in these sections and their following Commentary is unclear as to their application in Commercial Bribery and Kickback situations.

Therefore, the Guidelines for Commercial Bribery and Kickbacks should be rewritten to:

- o Include 41 U.S.C. Sections 51-54 under Section B242;
- o Recognize the provisions of P.L. 99-634; and
- o Clarify applicability of Part Z adjustments.

III. BRIBERY OF GOVERNMENT EMPLOYEE (Sections C211 and C212)

The Guidelines narrative under this part recognizes the seriousness of bribery of public officials and the need to provide adequate and certain punishment; however the provisions of Sections C211 and C212 stop short of providing this adequate punishment. Title 18 U.S.C. Section 201 provides for imprisonment for up to 15 years upon conviction of bribery (18 U.S.C. Sections 201(b) thru 201(e)). However, the Commission Guidelines provide for a maximum imprisonment on first offense of under 5 years (57 months) and an absolute maximum, Criminal History Category VI, of under 10 years (115 months). In the case of a Government employee who demands a bribe (as with embezzlement discussed above, we can assume no prior criminal record), the sentencing guidelines provide for a sentence

maximum which is less than 1/3 the statutory provision (18 U.S.C. 201(c)). Again, I see no justification for the Commission to set guidelines which provide maximum sentencing far below the statutory provisions.

Although an additional offense level adjustment, under Part Z, Role in the Offense (Section Z212), might be applicable for a Government employee convicted of receiving a bribe, it would appear that "public position" has already been considered in the Section C212 offense level calculations and no further adjustment is warranted (no other Part Z adjustments would appear to apply in most bribery offenses). If such is not the case, the Guidelines should be rewritten to clarify the applicability of Part Z adjustments.

IV. CONFLICTS OF INTEREST (Section C214)

This Section carries a base offense level of 8 to 12, with no adjustments (again, we can assume a first offense for a Government employee). As such the maximum imprisonment under the Guidelines is 16 months, compared to the statutory two years. Again, I see no reason to establish guidelines which effectively reduce the statutory provisions.

V. FRAUD AND DECEPTIONS (Section F211)

This Section would encompass the bulk of the sentencing activity relating to Department of Defense (DoD) procurement fraud cases. The criminal activity which falls in this general category include: (1) defective pricing, (2) cost mischarging, and (3) product substitution. Defective pricing and cost mischarging are frauds committed by a contractor when he falsely certifies cost data either in the preaward contract negotiation phase (defective pricing) or the postaward contract execution phase (cost mischarging). Product substitution fraud, which poses the biggest potential threat to the operations of the Department of Defense, occurs when a contractor provides an inferior or otherwise non-conforming product to the Department. We have recently obtained convictions in cases relating to defective rifle barrels, artillery ammunition, aircraft wing bolts and similar life threatening situations.

Application of the various provisions of the Guidelines in the area of fraud and deceptions appears very cumbersome and confusing; i.e.,

- o Is the Federal Government one victim or more than one victim (base offense level 6 or 8)?
- o Is a contractor's set of books with multiple entries which support one defective pricing statement, one transaction, or a scheme to defraud more than one victim (base offense level 6 or 8)?

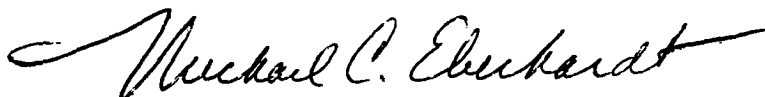
- o Is maintaining business records a special skill, etc., under Section Z212 (thereby increasing base offense by 1 to 4 levels)?
- o If an owner of a business alters employee time cards in a cost mischarging scheme, does the Section Z211 provision apply because the crime is "one of organization, leadership, direction or supervision of others...., making him more culpable than other participants, ..." (thereby increasing base offense 1 to 6 levels), or is he a sole participant under Section Z213?
 - oo What if he directed others to indicate an improper job number on their time cards?
- o In that the court may use Section F211(a)(2) to increase the base offense level, based upon an evaluation of the nature, sophistication, and duration of the offense, can the court still use either Sections Z211 or Z212 based upon the individual's role in the offense (thereby increasing base offense 1 to 6 levels), or, would this constitute a duplication in considering the nature of the criminal activity?

As can be seen from the type of questions which might be raised in applying various provisions of the Guidelines (each of which could cause significant changes in the offense level), I believe the Guidelines as written will be the cause of extensive and burdensome litigation and every effort should be made to eliminate this confusion.

Additionally, Section F211(a)(2) provides that where the gravity of the offense is not reflected by the amount of financial loss or gain, the base offense level may be increased by 3 to 9 levels depending upon the nature, sophistication and duration of the offense. While this provision would appear justified, it has the effect of eliminating the General Provisions Sections relating to death (Section Y211), disruption of Government function (Section Y212), and significant endangerment of National security, public health, or safety (Section Y215). These General Provisions Sections are necessary to ensure that the courts have the needed flexibility in sentencing Defense contractors who endanger National security and public safety in their commission of frauds against the Government. Section F211(a)(2) would typically be relied upon by the courts in sentencing individuals in production substitution fraud schemes. However, it is just these types of schemes where the courts need the greatest degree of flexibility in sentencing. When a Defense contractor, motivated by pure greed, provides inferior products which endangers the security of this nation and the lives of

its servicemen, the courts must be allowed maximum flexibility to provide sentences in line with the egregiousness of the offense.

Under the General Provisions Sections, the court could depart from the basic Guidelines in these cases and increase the offense level as it deemed appropriate. However, Section F211(a)(2) acts to limit this flexibility of the court, as it provides a gravity consideration factor which overrides the general provisions. I recommend the Guidelines be restructured so as to allow the courts the greatest latitude possible in dealing with these serious offenses.

A handwritten signature in black ink, reading "Michael C. Eberhardt". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael C. Eberhardt
Assistant Inspector General for
Criminal Investigations Policy and Oversight

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE



WASHINGTON, D.C. 20223

OFFICE OF THE DIRECTOR

March 17, 1987

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

Dear Mr. Wilkins:

Thank you for this opportunity for the Secret Service to offer comments regarding the Revised Draft of the Sentencing Guidelines published by the Sentencing Commission in January, 1987. First, I would like to state that the monumental task of standardizing the sentencing procedures throughout the Federal Judicial System is not an enviable one. I applaud the diligent work of the Commission members and staff in your efforts thus far.

As you are aware, the Secret Service has enforcement responsibilities concerning numerous Federal violations. These include laws pertaining to physical security and threats regarding individuals under the protection of this Service as well as laws pertaining to obligations of the United States and private financial organizations. These laws include counterfeiting, forgery, computer fraud, food stamp fraud, false identification fraud, and electronic funds transfer fraud.

In reviewing the Sentencing Guidelines, there are many criminal violations for which this Service has either a major or minor responsibility that are not mentioned. The Guidelines explain this by stating that violations not specifically noted will be added at a later date as appropriate. As an attachment, you will find a listing of the criminal code violations for which this Service has a prosecutive interest which should be included in the future.

As mentioned in the Guidelines, if available, an analogous offense already listed can be used to determine sentencing guidelines for unspecified violations. However, of major concern to the Secret Service is the fact that none of the felony threat statutes

(18 USC 871, 878 and 879), as well as the Temporary Residence of the President statute, are referenced in the Guidelines and there are no clear analogous offenses. These statutes concerning protectees of this Service are used extensively in our protective mission and we believe they must be included at this time to denote the extraordinary seriousness of those offenses.

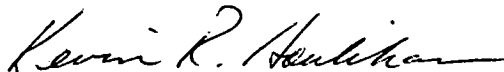
In addition, the Food Stamp Act of 1977 and the Electronic Funds Transfer Act of 1978 are also violations that this Service investigates. As the Guidelines are presently written, it is unknown to what offense level these violations will be assigned or to what analogous violation they will be associated.

Upon reviewing the Fraud Section of the Guidelines it is noted that offense level points are assigned based upon the number of occurrences, victims, and the dollar amount involved. The Guidelines do not address the issue of using or possessing device-making equipment (e.g., credit card imprint machine) or the number of false identification documents or access devices involved. Title 18, U.S. Code, Sections 1028 and 1029, specifically state that special penalties be imposed for the use or possession of device-making equipment and the production or transfer of more than five (5) identification documents or fifteen (15) access devices. It is the recommendation of this Service that the Commission include both possession and control of device-making equipment and the number of false identification documents or access devices in the special offense characteristics of the Fraud Section as is presently being considered in the Counterfeiting Section.

One final point I would like the Commission to review is the offense level at which the crimes of counterfeiting, forgery and fraud are assigned. As presently written, the crime of forgery has a base offense value of four and the crimes of counterfeiting and fraud have base offense values of six. In reviewing the Guidelines, I notice that removing the I.D. number from a motor vehicle has a base offense value of ten and the crime of burglary of an unoccupied dwelling has a base offense value of fourteen. Mailing obscene matter and the crime of eavesdropping have a base offense level of six. As a result, I believe the Commission should review the offense levels assigned to counterfeiting, fraud and forgery with a view toward raising their values to a level commensurate with the seriousness of those offenses.

I would invite the Committee to review and consider the comments of this letter before your final report is submitted to Congress in April, 1987. Representatives of this Service would like the opportunity to personally discuss the Guidelines, as they relate to this organization, at your convenience. Please contact Assistant Special Agent in Charge Jim Cool of this office (535-5716) should you have any questions and to arrange a personal meeting.

Sincerely,


Kevin R. Houlihan
Assistant Director
Office of Investigations

Attachment

ATTACHMENT

Criminal code violations for which the U.S. Secret Service has a prosecutive interest which have not yet been mentioned in the Sentencing Guidelines:

18 USC

35	Imparting or conveying false information
331	Mutilation, diminution, and falsification of coins
332	Debasement of coins; alteration of official scales or embezzlement of metals
333	Mutilation of national bank obligations
336	Issuance of circulating obligations of less than \$1
372	Conspiracy to impede or injure officer
474	Plates or stones for counterfeiting obligations or securities
475	Imitating obligations or securities; advertisements
476	Taking impressions of tools used for obligations or securities
477	Possessing or selling impressions of tools used for obligations or securities
478	Foreign obligations or securities
479	Uttering counterfeit foreign obligations or securities
480	Possessing counterfeit foreign obligations or securities
481	Plates or stones for counterfeiting foreign obligations or securities
482	Foreign bank notes
483	Uttering counterfeit
484	Connecting parts of different notes
485	Coins or bars
486	Uttering coins of gold, silver or other metal
487	Making or possessing counterfeit dies for coins
488	Making or possessing counterfeit dies for foreign coins
489	Making or possessing likeness of coins
490	Minor coins
491	Tokens or paper used as money
492	Forfeiture of counterfeit paraphernalia
493	Bonds and obligations of certain lending agencies
499	Military, naval, or official passes
502	Postage and revenue stamps of foreign governments
505	Seals of courts; signatures of judges or court officers

508	Transportation requests of Government
509	Possessing and making plates or stones for Government transportation requests
642	Tools and materials for counterfeiting purposes
643	Accounting generally for public money
644	Banker receiving unauthorized deposit of public money
648	Custodians, generally, misusing public funds
649	Custodians failing to deposit moneys; persons affected
651	Disbursing officer falsely certifying full payment
653	Disbursing officer misusing public funds
701	Official badges, identification cards, other insignia
709	False advertising or misuse of names to indicate Federal agency
871	Threats against President and successors to the Presidency
878	Threats and extortion against foreign officials, official guests, or internationally protected persons
879	Threats against former Presidents and certain other persons protected by the Secret Service
914	Creditors of the United States
1701	Obstruction of mails generally
1705	Destruction of letter boxes or mail
1706	Injury to mail bags
1716	Injurious articles as nonmailable
1752	Temporary residence of the President
1907	Disclosure of information by farm credit examiner
2073	False entries and reports of moneys or securities
2075	Officer failing to make returns or reports
7 USC	
2024	Food Stamp Act of 1977
15 USC	
1693n	Electric Funds Transfer Act of 1978
26 USC	
7206	Fraud and false statements
7207	Fraudulent returns, statements, or other documents

ETHYL CORPORATION

ETHYL TOWER
451 FLORIDA
BATON ROUGE, LA. 70801

March 17, 1987

LAW DEPARTMENT

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

Attention: Guidelines Comments

RE: Guidelines Published at
52 F.R. 3920 (Feb. 6, 1987)

Dear Commissioners:

Ethyl Corporation appreciates this opportunity to comment on the Sentencing Guidelines and Policy Statements for the U.S. Courts, as proposed at 52 F.R. 2930 et seq.

Enclosed are detailed comments on Q211 and Q214. It should be apparent from these comments that the proposed guidelines paint with too broad a brush in a very complex area. The proposed guidelines try to lump together things that Congress has made quite diverse. Although it may be highly desirable and conceptually simple to lump together offenses related to toxic pollutants, the guidelines gloss over too many complicating factors.

Although I recognize your time constraints, I suggest that Part Q be revised to create categories that adhere more closely to the Congressional enactments. For instance, the knowing endangerment of 42 U.S.C. §6928(e) should be put in a separate classification reflecting the unusually severe punishment (15 years maximum) Congress has provided for this heinous crime. The remainder of 42 U.S.C. §6928's criminal provisions could be treated together since they have maximum penalties of 2 or 5 years compared with the general 1 year maximum in the other environmental crimes. The falsification penalties may be lumped together as similar crimes even though their maximum penalties may vary slightly. It is far easier to provide a guideline that distinguishes between falsification involving toxic pollutants on one hand, and falsification involving other pollutants on the other other hand.

United States Sentencing
Commission
March 17, 1987
Page 2

RE: 52 F.R. 3920 (Feb. 6, 1987)

If there are any questions, I would be pleased to try
and answer them.

Respectfully yours,

ETHYL CORPORATION


By: David C. Bach
Assistant Counsel

DCB/c

Enclosure

cc: David F. Zoll, CMA
E. W. Elmore, Vice President
and General Counsel

Part Q

Introduction. The introduction should, in addition to the statement proposed, recognize that some cases may indeed be de minimis or not culpable to the degree suggested in the introduction. There are more than 10,000 pages regarding hazardous waste rules promulgated under Subtitle C of the Solid Waste Disposal Act that have appeared in the Federal Register since 1980. Title 40 of the Code of Federal Regulations (the rules of EPA) occupies over a foot of shelf-space. Many of these provisions are conflicting or vague, or highly technical, and such technical violations do not merit severe criminal punishment.

1. Environment. Since most of the environmental laws provide for civil or criminal penalties or both, the listing of statutes should be consistently narrowed to the criminal provision. There are also errors in the proposed listing. The listing should be as follows:

<u>Proposal</u>	<u>Should be</u>
7 U.S.C. §§136j, 136l	7 U.S.C. §136j, 136l(b)
15 U.S.C. §§2613, 2615(b)	15 U.S.C. §2614, 2615(b)
33 U.S.C. §403	deleted
33 U.S.C. §406-7	33 U.S.C. §§407, 411
33 U.S.C. §411	deleted
33 U.S.C. §1319	33 U.S.C. §1319(c) (1)
33 U.S.C. §1321	33 U.S.C. §1321(b) (5)
33 U.S.C. §1344(s)	33 U.S.C. §1344(s) (4) (a)
33 U.S.C. §1415	33 U.S.C. §1415(b)
33 U.S.C. §1517(d)	33 U.S.C. §1517(b)
33 U.S.C. §§1907-1908	33 U.S.C. §§1907, 1908(a)
42 U.S.C. §§300i, 300j-4	42 U.S.C. §§300i(b), 300j(e) (2), 300j-4(c)
42 U.S.C. §4912	42 U.S.C. §4912(c)
42 U.S.C. §6929(d), (e)	42 U.S.C. §6928(d), (e), (f)
42 U.S.C. §7413	42 U.S.C. §7413(c)
42 U.S.C. §9603	42 U.S.C. §9603(b), (c), (d)
-----	43 U.S.C. §1350(c)
43 U.S.C. §1816(a)	42 U.S.C. §1816(a), 1822(b)
43 U.S.C. §1822(b)	deleted

Q211-Commentary

The listing of the relevant statutes in the first paragraph should be specific to the criminal portions: 7 U.S.C. §§136j, 136l(b); 15 U.S.C. §§2614, 2615(b), 33 U.S.C. §1319(c) (1); 42 U.S.C. §6928(d), (e), (f) and §7413(c), and 42 U.S.C. §1350(c).

The criminal portion of the statutes cited are narrower than the "situation" to which "the guideline applies." For instance, Q211(a)(1), as noted later in the commentary, to violations of 42 U.S.C. §6928(e), (f). Similarly, Q211(a)(3) applies to violations of 42 U.S.C. §6928(d)(1) and §6928(d)(2). The guidelines do not apply to other subsections of 42 U.S.C. §6928 (i.e. §6928(a-c) which involve administrative compliance orders and penalties for violation thereof, and §6928(g), which establishes civil penalties.) Similarly, 33 U.S.C. §1319(c)(1) provides criminal penalties for violation of §§1311, 1312, 1316, 1317, 1318, 1328 or 1345 or any NPDES or "dredge and fill" permit issued under §1342 or §1344. Only 33 U.S.C. §1317(a) and rules pursuant thereto deals specifically with toxic pollutants. Many of the pollutants regulated under the Clean Water Act are by definition, "conventional" and not "toxic" pollutants.

Most sections cited provide for imprisonment of not more than one year (i.e., 7 U.S.C. §1361(b), 15 U.S.C. §2615(b), 33 U.S.C. §1319(c)(1), and §7413(c)). However, 42 U.S.C. §6928 provides for higher maximum sentences (2 years, 5 years or 15 years). One "falsification" offense (33 U.S.C. §1319(c)(2)) carries a maximum sentence of only 6 months, and should not be included in this category as the increase of 3 to 12 levels puts the matter past the statutory maximum of 6 months.

The Toxic Substances Control Act, 15 U.S.C. §2601, is a misnomer inasmuch as it regulates every chemical substance regardless of toxicity. For instance, the chemical inventory established pursuant to 15 U.S.C. §2607(b) contains essentially every chemical substance distributed in commerce without regard to toxicity. PCBs, which are widely reputed to be toxic, are covered only by 15 U.S.C. §2605(e). In fact, 15 U.S.C. §2605 and §2606 are the principal sections of the Act that regulate use of "hazardous" chemical substances or "imminent" hazards. The rest of the Act does not necessarily deal with hazardous chemical substances.

In the third paragraph of the commentary, the statutory reference to RCRA (i.e. 42 U.S.C. §9601) is incorrect. I assume that 42 U.S.C. §6901 was intended. However, even a reference to 42 U.S.C. §6901 is incorrect. Section 2 of the Resource Conservation and Recovery Act (RCRA) of 1976 (P.L. 94-580, 90 Stat. 2796) completely rewrote the Solid Waste Disposal Act. The revised Solid Waste Disposal Act, 42 U.S.C. §6901 et seq., contains 9 subchapters, only subchapter 3 (§§6921-6934) of which deals with hazardous waste management.

Q214-Commentary

Inclusion of 33 U.S.C. §§403 and 406 is inappropriate. These sections are limited to obstructions to navigation,

§406 establishing the penalty for violation of §403. To the extent §403 can be construed to extend to dredge and operations, the more specific provisions of 33 U.S.C. §§1344 and 1371(a) make §§403 and 406 little more than historical curiosities. Dredge and fill regulations, in any event, seem inappropriately included in discussions of control of chemical discharges.

Reference to 33 U.S.C. §§407 and 411 is also largely a matter of historical curiosity. Prior to enactment of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500), §407 (which was Section 13 of the Rivers and Harbors Act of 1899) had been dusted of and used effectively, but inefficiently to foster water pollution abatement. Indeed, the cumbersomeness of enforcing this section was one of the prime moving forces behind enactment of the 1972 amendments. However, §402(k) of the FWPCA, 33 U.S.C. §1342(k), has obviated the necessity of an action under 33 U.S.C. §411 in most cases.

Consistent with my comments on Q211, each statutory reference should be to the criminal portion of the statute.

The second paragraph of this commentary notes the possibility of a negligent violation of the Clean Water Act (33 U.S.C. §1319(c)(1)) as well as a knowing violation. Since Part Q does not discuss "scienter" in any other manner, it is appropriate to restate basic legal principles, which have not been articulated in Part Q, here. The environmental statutes (and other regulatory statutes) generally make distinction in punishment between "knowing", "willful" or "negligent" violations on the one hand and other violations not requiring this higher degree of "scienter." Because the "scienter" requirements for criminal charges already represent a greater extent of culpability than civil actions, it seems in general inappropriate to increase the sentences based on the distinction between toxic and non-toxic substances.

The final paragraph of this commentary discusses prior convictions. Although prior convictions could be a serious sentencing consideration, such situations in environmental enforcement are quite rare. Of more practical concern are the situations involving multiple offenses brought in a single action under statutes that provide that each day of violation constitutes a separate offense. In the case of continuing operation of major industrial facilities, the potential criminal sentences for, say, 30 consecutive days of discharge are staggering. The sentencing guidelines should consider such potential multiple offenses in a way such that the necessity for deterrence is balanced against fundamental fairness for legitimate businessmen who undertake significant enterprises with known operating risks which

cannot ever be entirely avoided. We hope that such balancing is done in the exercise of prosecutorial discretion. But in situations where prosecutorial discretion is abused, the judge can bring to bear his own discretion under the guidelines.

THE ASSOCIATION OF THE BAR
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COMMITTEE ON ANTITRUST AND TRADE REGULATION

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March 17, 1987

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Attention: Guideline Comments

Gentlemen:

Enclosed are comments on the revised draft of proposed Sentencing Guidelines for United States Courts issued on February 5, 1987.

While we have missed the stated deadline of March 16, 1987, we spoke with Paul Martin of the Commission staff who advised us that the Commission was very anxious to review our Committee's comments, particularly those of a technical nature, and would be able to consider them if received within a few days after the stated deadline.

We also note that these comments refer to and incorporate the comments we had submitted in December, 1986 on the Commission's preliminary draft issued in September, 1986.

We hope that these comments will be useful in further revisions of the Guidelines.

Very truly yours,

David Klingsberg

David Klingsberg, Chair
Committee on Antitrust
and Trade Regulation

Enclosure

COMMENTS ON REVISED DRAFT OF SENTENCING GUIDELINES
UNITED STATES SENTENCING COMMISSION (FEBRUARY 1987)

Committee on Antitrust and Trade Regulation
of the Association of the Bar of the City of New York

Summary of Comments

The Committee on Antitrust and Trade Regulation of the Association of the Bar of the City of New York has reviewed the Revised Draft of the Sentencing Guidelines with regard to antitrust offenses (sections R211, R212) and, pursuant to the request by the United States Sentencing Commission for critical analysis, submits its public comments. Although the Revised Guidelines represent an improvement over the Preliminary Draft Guidelines issued in September 1986, the Committee believes that further changes are needed to make the Guidelines more practical, equitable, and consistent with Congressional intent in the context of antitrust violations.

First, the Committee believes that the penalties required under the Revised Guidelines are excessively harsh, although less so than the penalties required under the Preliminary Draft Guidelines. Second, it is the Committee's view that the Revised Guidelines fail to address several factual situations adequately, resulting in either inadequate or inappropriate, and in one specific area seriously

inconsistent, guidance to the sentencing court. Lastly, the Committee believes that the Revised Guidelines, like the Preliminary Draft Guidelines, are not "enforcement neutral," in the sense that they embody the current Administration's enforcement views with regard to the criminality of horizontal price-fixing relative to other violations of the Sherman Act.

In the public comments it submitted on the Preliminary Draft Guidelines, the Committee stated its opinion that the result of the Preliminary Draft Guidelines would be imposition of prison sentences for individual antitrust offenders which greatly exceeded the current average prison sentence and routine imposition of the statutory maximum fines for individual and corporate offenders of the antitrust laws. The Committee contended that antitrust sentences resulting from the Preliminary Draft Guidelines were inconsistent with the intent of Congress. First, application of the Preliminary Draft Guidelines resulted in the routine imposition of prison sentences on first time antitrust offenders despite the intent of Congress, reflected in the same bill that authorized the creation of the Commission itself, that imprisonment was inappropriate for first offenders who had not committed a "crime of violence or an otherwise serious offense." 28 U.S.C. §994(j).¹ Second, routine imposition of maximum fines for

¹ The same legislation made it clear that an antitrust violation was not an "otherwise serious offense" because in 18 U.S.C. §3559 it categorized

corporate antitrust violators conflicted with Congress' intent when it established the current maximum fine for antitrust violations. The legislative intent of the law establishing the current statutory maximum fine was that the new maximum fine was to be imposed only in exceptional cases. Hearings on S-782 and S-1088 before Senate Subcommittee on Antitrust and Monopoly, 93d Cong., 1st Sess. 5, 96 (1973) (remarks of Sen. Tunney and Ass't. Attorney General Kauper). It appears from the Revised Guidelines that the Commission will be urging Congress to change on policy grounds its legislative intent regarding the appropriateness of harsh criminal antitrust sanctions. The Committee, therefore, will express any opinions it may have about the propriety vel non of more severe antitrust sanctions to Congress at the appropriate time. We only note at this time that the record upon which the Commission has based its decision to increase substantially the likelihood of imprisonment from the present figure of 20% is meager at best.

1. Imprisonment for Individual Defendants

The Revised Guidelines have basically retained the commerce-based test employed by the Preliminary Draft

antitrust violations in the least serious category, Class E, of federal felonies.

Guidelines² and the length of sentences for particular levels of commerce, without taking into account adjustments, remain largely unchanged except at the highest levels as demonstrated in the table below:

<u>Volume of Commerce</u>	<u>Sentence Months Revised Draft</u>	<u>Sentence Months Preliminary Draft</u>
500,000	2-8	2-8
1,000,000	2-8	4-10
2,000,000	4-10	4-10
4,000,000	4-10	6-12
5,000,000	6-12	6-12
11,000,000	6-12	8-14
15,000,000	6-12	8-14
20,000,000	8-14	8-14
30,000,000	8-14	12-18
50,000,000	8-14	12-18
100,000,000	10-16	18-24

The Committee endorses the reduction in the clearly excessive minimum sentences found in the Preliminary Draft. The Revised Guidelines also provide somewhat more flexibility to the sentencing court in making adjustments, a result the Committee considers salutary. For example, where the volume of commerce attributable to a particular defendant is at the maximum level (over \$50,000,000), a sentencing judge who has decided that the

2 The Revised Draft Guidelines, like the Preliminary Draft Guidelines, delineate relatively fine gradations of commerce which will probably cause corporate defendants to contest vigorously the government's proof at the sentencing hearing regarding the amount of commerce impacted by the violation. The Committee believes broader gradations of commerce would obviate or lessen the risk that the sentencing hearing would become a mini-trial on the issue of the volume of commerce involved.

defendant has sincerely accepted responsibility for the crime and is deserving of the maximum adjustment to the base sentence on this ground can, under the Revised Guidelines, sentence the defendant to a term of community confinement or home detention for four to six months.³ Under the Preliminary Draft Guidelines, this mitigating factor would only have reduced the defendant's sentence from a minimum jail term of 18 months to a minimum jail term of 12 months. The provisions of §2214, regarding minor participants, provide even greater flexibility. The Committee believes that such flexibility is desirable and permits the appearance of substantial jail sentences for deterrence purposes while allowing room for less harsh sentences in appropriate cases. In sum, while the Committee still believes that the Guidelines are excessive in appearing to mandate imprisonment for virtually all but the smallest antitrust violations, the flexibility available to the sentencing court mitigates the inappropriateness of such a reversal of the generally accepted sentencing practices for antitrust violations.

³ Under §R211, the offense level would be 12, corresponding to a sentence of 8-14 months, without adjustment. The offense level would be reduced by 3 to a level of 9, corresponding to a sentence of 4-10 months, due to the adjustment under §C321 for acceptance of responsibility. Because the minimum sentence in the Guideline range is less than six months, the court can sentence the defendant to home detention or community confinement under §A521(c).

2. Fines

The Revised Guidelines provide for fines for individuals in the amount of 4 to 10 percent of the amount of commerce but not less than \$20,000 which is adjusted upward by \$1,500 for each month of imprisonment and \$50 to \$300 for each month of probation supervision under section A542(i). Fines for corporate offenders are 20 to 50 percent of the volume of commerce but not less than \$100,000. The Committee believes that these formulas will result in the imposition of the statutory maximum fine in the majority of every type of case but bid rigging cases. As a result, fines will in most cases cease to be a meaningful gauge of severity of the crime (although, for individuals, prison sentences will serve that function).

The Revised Guidelines define "volume of commerce" as the volume of commerce "done by [the defendant] or his principal in the goods or services that are the subject of the offense." As demonstrated by the Committee in its comments on the Preliminary Draft Guidelines, the average dollar volume of commerce done by each conspirator in criminal Sherman Act cases during the period 1974 to 1980 was probably in excess of \$50 million. The Committee is of the opinion that this average has fallen somewhat since 1980 but is certainly above \$5 million, the level at which the maximum corporate fine must be imposed under the Revised Guidelines, and above the \$6.25 million level

at which the maximum individual fine must be imposed under the Revised Guidelines.

Assuming arguendo (and contrary to the clear intent of Congress in increasing the maximum fine to \$1 million in 1974) that large fines are necessary for deterrence, the Committee finds a sentencing scheme which results in the imposition of the maximum fine in average cases to be unwise. Such a sentencing scheme creates the impression that the fine is simply a uniform "license fee" to commit antitrust violations even though, as a practical matter, ensuing treble damage actions may serve to punish the corporate offenders to a degree proportionate with the offense. Moreover, the failure of these fines to be proportional to the offense except in instances involving the smallest amounts of commerce may even raise issues under the Eighth Amendment. See Solem v. Helm, 463 U.S. 277 (1983).

Further, by employing a formula which results in imposition of the maximum fine in the great majority of cases, the Revised Guidelines remove any discretion from the sentencing judge. In the great majority of cases there will be no opportunity for the judge to modify the fine to take into account individual factors such as corporate recidivism, major participant, or minor participant, because in most cases both the maximum and minimum fine levels will exceed the statutory maximum fines.

The Committee is also troubled by the purported theoretical rationale for corporate antitrust fines. The commentary to section R211 indicates that the commission appears to believe the estimate of Assistant Attorney General Ginsburg that "price fixing typically results in price increases of at least 10 percent." Statement of Douglas H. Ginsburg Before The United States Sentencing Commission, July 15, 1986, Dep't of Justice Release at 9. The Committee knows of no empirical evidence to support this assertion and is aware of several government studies which contradict it. See, e.g. D. Lean, J. Ogur & R. Rodgers, Competition and Collusion in Electrical Equipment Markets: An Economic Assessment 74-75 (F.T.C. Bureau of Economics Staff Report, July 1982) (studying eight major electrical equipment lines which were the subject of price fixing in the electrical equipment conspiracies of the 1950's and 1960's and concluding the price fixing resulted in an average overcharge of 2.02%). Although the Committee has no comprehensive evidence as to what the average illegal overcharge is in all industries, it believes that the ipse dixit of the Assistant Attorney General that the overcharges are "typically" ten percent is a slender reed on which to rest the Commission's formula for determining corporate fines.⁴

⁴ The commentary to section R212 suggests that the recommended corporate fine, together with treble damages, represents an amount substantially in excess of the illegal profits obtained from the violation which is justified "because of the

3. Definitional and Application Problems

The Committee is also concerned that the "volume of commerce" test employed by the Revised Guidelines may provide insufficient guidance in the areas of inchoate offenses, bid rigging, and international commerce. A criminal violation of the antitrust laws occurs even when competitors agree to fix prices or allocate markets but never implement that agreement. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26, n.59 (1940); United States v. Nash, 229 U.S. 373, 378 (1913); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977). If the volume of commerce is the volume of commerce that is actually affected by a violation, the sentence should be the minimum sentences provided by the Revised Guidelines, a result the Committee believes is appropriate. The phrase "the subject of the violation" can be interpreted, however, to mean the amount of commerce the defendants intended the violation to impact, whether or not the illegal agreement was implemented. The Committee believes the phrase "the subject of the

difficulty in identifying violators." This suggests that the Commission believes that the probability of detection ranges from approximately 12 percent to 20 percent. The Committee knows of no support for this belief and is concerned that the Commission's apparent justification for higher corporate fines may be unsupportable on the basis of empirical evidence.

violation" should be changed to "actually affected by the violation."

The Revised Guidelines also need clarification in the context of international cartels, where domestic and foreign commerce may be involved. If a defendant has sold goods, domestically and abroad, the Revised Guidelines should make it clear that goods imported into or exported from the United States should be included with the affected domestic commerce in the "volume of commerce," but goods manufactured and sold abroad should be excluded.

In bid rigging cases, it not infrequently occurs that a defendant agrees to submit high bids to permit a competitor to win a bid but does not win any projects through the bid rigging activities. In such cases, the "volume of commerce" for that defendant would be nothing and the defendant would get the minimum fine. This result is proper where the defendant obtains no benefit from the illegal wrongdoing but appears to the Committee to be inappropriate where the defendant receives monetary compensation in the form of pay-offs for his participation. In that instance, the Committee believes that the amount of commerce should be "defined" as the amount which is five times the amount of the pay-offs in order to be at least somewhat consistent with the principle of the Revised Guidelines that corporate fines should at least equal the illegal profits obtained from the violation (that is, if five

times the pay-off is the "amount of commerce," then a fine of 20% of the "amount of commerce would provide for a fine equal to the amount of the pay-off).

The Revised Guidelines make an individual responsible for all of the volume of commerce affected by his employer even though the individual is not responsible for the entire volume of commerce. While this result may well not be appropriate where an individual defendant is a local office manager of a corporate defendant engaged in a national conspiracy, it seems equally inappropriate for employees who terminate their employment with the corporate defendant before the conspiracy is over. For example, if a corporate defendant participates in a conspiracy affecting twelve million dollars of commerce annually for five years, but the individual employee defendant terminates his employment after the first year, the individual will receive the maximum fine and a prison term of 10 to 16 months whereas his sentence would be only 6 to 12 months if the commerce affected during the period of his employment were considered.⁵ The Committee believes the individual defendant should have volumes of commerce attributed to him which were impacted during the period of his employment with a corporate defendant.

⁵ In either event, the individual defendant would receive the maximum statutory fine, even if he withdrew from the conspiracy out of misgivings over the illegal activity. If the individual defendant organized the conspiracy, section 2211 allows the court to make significant upward adjustments.

4. Internally Inconsistent Treatment of Multiple Conspiracies

Certainly one of the most troubling problems in the Revised Guidelines is the inconsistent treatment for multiple conspiracies. Indeed, the Revised Guidelines provide a substantial incentive for prosecutors to carve up broad conspiracies into separate conspiracies, pushing the double jeopardy clause of the Fifth Amendment as far as possible.

Thus, section R211 states that "[w]hen multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level." The Committee believes that this is, indeed, the correct method for the Guidelines to deal with the difficult question of whether local bid-rigging conspiracies to various customers are part of one conspiracy or are separate conspiracies. The total amount of commerce subject to the various local conspiracies should be cumulated to determine the volume of commerce.

The inconsistency arises when separate indictments are brought on the various customers affected by the local conspiracies and a conviction on the conspiracy to rig bids to the first customer is treated as a "prior sentence" under section A312, even though the conduct upon which the second (or indeed third) indictment is based was fully contemporaneous

with the conduct in the first indictment, but merely dealing with a different purchaser.

This is far from a theoretical issue. The Antitrust Division of the Department of Justice has obtained a number of indictments for bid-rigging on electrical construction projects in the Philadelphia area and at least one individual was indicted twice.⁶ Since the overall scope of the conspiracy is to be taken into account in the first sentencing judge's determination of the amount of commerce, it appears to be inappropriate at the least to require a subsequent sentencing judge to increase the prescribed sentence on a second indictment on the basis of the "prior sentence." Thus, the Committee believes that conduct that is geographically and temporally related to a prior indictment should not be subject to increase for a prior sentence on the prior indictment even if the two indictments do not constitute double jeopardy.

5. Dichotomy Between Horizontal and Other Violations

The Committee is concerned that the Commission has perpetuated the dichotomy between horizontal price fixing and

⁶ Mr. Pinney was first indicted for conspiring to rig bids on work for U.S. Steel in the Philadelphia region. He was sentenced by Judge Pollack for that violation following a plea. That same day, a second indictment was returned alleging that Pinney engaged in a conspiracy to rig bids to Gulf Oil in the Philadelphia area. Judge McGlynn found that the second indictment violated Mr. Pinney's double jeopardy rights, but the Third Circuit reversed over a strong dissent by Judge Adams and reinstated the indictment, even though many of the conspirators were the same and the time periods overlapped.

market allocation offenses governed by section R211 and other antitrust offenses under section R212. Historically, the Antitrust Division has brought criminal cases which would be governed by section R212 only in cases of most egregious conduct. Yet, by severely limiting the range of sentences available for vertical and certain horizontal restraints the Guidelines may deter prosecutors from bringing cases in these areas for even the most aggravated violation. In that regard, the Revised Guidelines are not enforcement neutral. The Committee believes it would be preferable to establish a base offense level for all antitrust offenses using the commerce levels in section R211 but permitting a reduction of 1 to 7 offense levels for conduct other than horizontal price fixing and market allocation.

6. Plea Bargains

Finally, the Committee believes that, at least in the area of antitrust offenses, the Revised Guidelines have taken the proper approach to the treatment of plea bargains. Antitrust crimes are generally expensive to prosecute and the Antitrust Division should be allowed flexibility for the most efficient allocation of its scarce resources. Moreover, the Committee believes that as long as prosecutors have prosecutorial discretion to bring a case, they should not lose that flexibility once an indictment is returned.

Conclusion

In conclusion, the Committee is disappointed that the Commission has decided to increase the average penalties for antitrust crimes over existing practice without any proof that increases are necessary for the purposes of punishment or deterrence. The Committee is also concerned that the apparent rationale for the sentencing formula for horizontal price fixing and market allocation is based on unsubstantiated assumptions about average illegal overcharges and the risk of detection. The Committee believes, however, that the Revised Guidelines represent an improvement over the Preliminary Draft Guidelines and that with some additional refinements the Revised Guidelines will provide a workable scheme for establishing antitrust penalties.

March 16, 1987

Respectfully submitted,

David Klingsberg, Chair

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* Members of the Subcommittee that prepared this report.

ADDENDUM

Several additional issues were raised and identified by Committee members too late in the process to obtain Committee approval for inclusion in the Committee's comments. For the benefit of the Commission, these issues are presented in this Addendum. These issues represent the thoughts of individual members of the Committee, rather than the consensus of the Committee as a whole.

The issues in this Addendum relate to the practical consequences of a commerce-based sentencing scheme for antitrust violations. One member of the Committee noted that bid rigging cases raise the same problems with regard to individual jail sentences and fines as they raise for corporate fines. This individual suggested that, where a company participates in bid-rigging but does not win any projects, individuals employed by that company should receive the minimum fines and jail sentences unless pay-offs were involved. If the company received a pay-off for its participation in bid rigging, it was suggested that the individuals who are employed by that company, as well as the company itself (see pp. 10-11 of Committee's Comments), should be deemed to have a volume of commerce equal to five times the amount of the pay-offs.

The second, and final, issue raised by individual members of the Committee was that in certain

situations, parties will be involved in antitrust violations affecting lines and levels of commerce in which they do not participate. For example, a trade association may participate in price-fixing by its members or a manufacturer not integrated into distribution may facilitate horizontal price-fixing by its distributors. In these particular instances, one member of the Committee suggests, it would be inappropriate to impose minimum sentences. The member suggests that a possible solution may be to attribute a volume of commerce to these entities equal to the largest volume of commerce of the individual companies found to have participated in the line and level of commerce affected by the violation.



NATIONAL TROOPERS COALITION

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March 16, 1987

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Mr. William W. Wilkins, Jr.
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Dear Mr. Wilkins:

The National Troopers Coalition is composed of State Police and Highway Patrol Agencies throughout the United States. Our organization represents approximately forty thousand (40,000) police officers of all ranks.

Our philosophy in regard to the purpose of sentences being implemented, is to prevent the furtherance of crime and to protect the public from criminal activity. Sentences should be commensurate with the seriousness of the offense, reflecting the physical, economic and psychological harms to the victim and the victim's family. Sentences need be sufficiently punitive so as to cause a deterrent effect and in conjunction making it clear to criminals and would-be criminals that crime does not pay. At present, there is too much of a disparity in sentences. In too many instances, the sentence does not fit the crime. We applaud the Commission for attempting to correct this imbalance, however, after a thorough review of the 'Revised Draft Sentencing Guidelines', we find the revised draft as a conduit for a soft posture on crime.

The second draft is weak in the following areas: The blanket ability to continually utilize probation, plea bargaining, loop holes, sentencing ranges are too vague. Offenses need to be systematically ranked. (Sentences must be consistently and rationally distinguished according to the relevant offense and offender characteristics).

In summation, we feel the Sentencing Reform Act of 1984, which created the United States Sentencing Commission, had two main objectives. First, the Commission's guidelines must provide a



NATIONAL TROOPERS COALITION

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rational and structured sentencing system that will further the purposes of just punishment and crime control. Second, the guidelines must reduce unwarranted disparity among sentences for similar offenders who commit similar offenses.

If the proposed second draft can be modified to close the gap in the above noted inequities, we feel it would have satisfied the Legislative Mandate.

Thank you for the continued opportunity to comment.

Sincerely,

Johnny L. Hughes
Legislative Director
National Troopers Coalition

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

March 16, 1987

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Re: SENTENCING GUIDELINES

Dear Mr. Wilkins:

Robert Latta, Chief U. S. Probation Officer for the Central District of California, has asked me to prepare a response to the sentencing guidelines draft, from the perspective of a presentence investigator. I scored the ten Presentence Reports that were part of the Sentencing Guidelines Project, and I have reviewed the results from the other participating districts.

As the scoring results of the recent Sentencing Guidelines Project reflect, application of the guideline rules by different scorers result in markedly different sentencing ranges. Many key variables affecting the final offense level are open to subjective assessments that inevitably create this disparity. While the Courts need some room for discretion, the purpose of the guidelines are defeated when they allow for such wide interpretive differences. The variable of "cooperation" alone can reduce the sanction by 100 percent, based on the scorer's perception of the extent of cooperation and how much weight it should carry with respect to sentencing. I find myself in agreement with Commissioner Robinson's statement as written in Appendix B of the current draft, and those of us preparing Presentence Reports in the Central District of California are also concerned with the significant impact of these guidelines on our day-to-day functioning.

Although the draft states that, "An increase or decrease of one or even two levels will not necessarily result in a different sentence...", we do not believe this to be an accurate assessment of what will occur when a variable, such as "role in the offense," can result in an increase or decrease of one to six levels. Even today, defense counsel in the Central District of California frequently attempt to modify or delete information contained in the Presentence Report which they find will adversely affect the offense severity level determined by the

U. S. Parole Commission. I do not think it is unrealistic to anticipate that there will be innumerable controverted issues when there is such a high degree of flexibility afforded in determining the final offense level. Furthermore, with so many variables subject to interpretation, there are bound to be delays in sentencing while the interested parties prepare and argue their positions with respect to the relevant issues.

On page 173 of the draft it is stated, "...In all cases, the court shall confirm that within a reasonable time before sentencing the attorney for the government and the attorney for the defendant or the pro se defendant have exchanged written statements of sentencing factors each party intends to rely on at sentencing.... Copies of all sentencing statements shall be filed contemporaneously with the court and submitted to the Probation officer assigned to the case. This provision may be satisfied through a stipulation or plea agreement that complies with A413" I do not believe that it is farfetched to expect a trial-type proceeding at the time of sentencing, for even if some agreement is made between defense counsel and the government with respect to all the variables in a particular case, the independent assessment of the probation officer as to specific increases or decreases in offense levels will be subject to dispute. As stated on page 174 of the draft, "...In all cases, the court shall resolve disputed factors 'important to the sentencing determination' in accordance with Rule 32(a)(1), Federal Rules of Criminal Procedure (effective November 1, 1987)." This means that the presentence investigator will be assisting the court in resolving the disputed factors and as such even further delays are anticipated. This is particularly evident when one considers the provision in the draft regarding notice of tentative findings, also on page 174. "In cases involving significant disputed sentencing factors, the commission recommends that the court notify the parties of its tentative findings and provide a reasonable time for the submission of written objections before imposition of sentence." Particularly in districts such as the Central District of California, where there are many complex cases with a multitude of sentencing issues, the number of those cases resulting in further litigation at sentencing will be extremely high; I believe to the extent that will dramatically impact upon the resources of the Probation Office and the court.

As indicated in our previous response to the first guideline draft, we think probation officers should be mandated to compute the scores determining the guideline range, since it will be a function assigned to us by the court in any event. However, with the wide range of potential adjustments to the offense level, I foresee many extra hours of discussions with defense counsel and the government and review of their written sentencing statements, in addition to the increased time spent in

assisting the court to resolve the disputed factors and then providing the court with a rationale for our specific scoring results. Resources are not at their peak even now and to reiterate part of our response to the first guideline draft, "To impose such a responsibility upon the presentence investigator would be a dilution of the Probation Officer's historical role of determining any circumstances or offender characteristics that might particularize a case."

Respectfully,



NANCY REIMS
U. S. Probation Officer

NR:alt

cc: Robert M. Latta
Chief U. S. Probation Officer

L. Russell Burress
U. S. Probation Officer

JOINT STATEMENT ON
REVISED SENTENCING GUIDELINES

This is a joint statement of the undersigned district judges of the Second Circuit commenting on the January 1987 Revised Draft Sentencing Guidelines proposed by The United States Sentencing Commission.

First, we commend the obviously sincere and painstaking effort of the Commission to respond to the various criticisms of the original draft and the suggestions for improvement, including our own. And we are delighted to see that the present draft represents a major improvement over the original. However, we believe that further changes should be made, particularly in the respects of giving the sentencing court discretion to take into account additional factors which have traditionally been relied upon in granting leniency and greater latitude in the use of probation.

We recognize that the Commission is now engaged in analyzing data collected from a large sample of cases to compare the sentences actually imposed with the sentencing ranges prescribed by the guidelines, and that such analysis may lead to changes in the numerical values assigned to various offenses and modifying factors, with consequent

effect on guideline sentencing ranges. However, because we cannot foresee what changes will be made and because only one brief period is allowed for comment on the revised draft, we felt impelled to speak now to insure, if possible, that the guidelines are not effectuated without further revision.

We further appreciate that the intent of Congress in passing the Comprehensive Crime Control Act of 1984 was not merely to achieve more uniformity in sentencing, but also to insure the imposition of sufficient punishment to serve as an effective deterrent to crime. And we realize that the Commission is bound by the minimum sentencing provisions of the Anti-Drug Abuse Act of 1986. However, we believe that the present draft guidelines go substantially beyond what is required.

Increase in terms of imprisonment

The guidelines as presently constituted will result in sentences of incarceration which substantially exceed the average sentences which have heretofore been imposed in comparable situations. For example, assume the case of a young woman who is arrested as a "mule" carrying three ounces of heroin. She immediately pleads guilty to one count of possession of heroin with intent to distribute it. She has no prior criminal record, speaks only Spanish, has little education and no job skills. She is unmarried, with

a two-year-old child and is expecting another baby in two months. The fathers of both children have abandoned her and have contributed nothing to their support. She was introduced to the drug dealer by a friend who knows she is having trouble subsisting on welfare. She expected to be paid \$50 for delivering the drugs. It appears that she is genuinely remorseful and that there is little chance that she will ever become involved in such activity again. There is no one to provide long-term care for her children in the event of her incarceration.

We believe that most judges would suspend the imposition of sentence and place her on probation with appropriate special conditions, such as that she learn to speak English, obtain vocational training and use her best efforts to get a job and support herself and her family. The minimum sentencing provisions of the Anti-Drug Abuse Act of 1986 would not apply because less than 100 g. of heroin was involved.

Under the present guidelines, because 60-99 g. of heroin was involved, the base level of the offense would be 24. Even deducting the maximum of three levels for a guilty plea and the maximum of six levels for a minor participant in the offense, the final offense level would

be 15, which would require incarceration for a minimum of eighteen months. While we realize that in appropriate circumstances the Court will have the power to impose sentences below the guideline range, sentences which are substantially below that range will probably lead in many cases to appeals by the government. If the guideline ranges are inordinately high, the courts of appeals will be swamped with more new cases than they can properly handle.

We believe that an appropriate way of shifting the guideline sentencing ranges downwardly would be to amend § D316 to give the court discretion to reduce the offense level by, say, one to three levels, in cases of extreme hardship to innocent persons, for example, where the defendant has primary responsibility for the care of small children or an invalid spouse. We also believe that § D314 should be amended to give discretion to reduce the offense level where the defendant became involved in the crime because of drug addiction. These sections now specifically provide that family responsibilities and drug dependency may not be relied upon in reducing the punishment, although the latter factor may increase it.

Diminished use of probation

A related change which would be effected by the present guidelines is the reduction, almost to the point of elimination, of the use of probation as a sentencing alternative. Under the guidelines, probation may be substituted for incarceration only where the minimum term of imprisonment specified in the sentencing table is not more than six months. The minimum sentence, even for a defendant with no prior criminal record, is eight months for any offense level of eleven or more. The base offense level for most offenses exceeds eleven. Even where the offense has a base level less than eleven, increases in the offense level for such factors as the amount of money involved frequently promote the offense level above the cutoff point for probation.

To allow the sentencing court greater discretion in the use of probation in appropriate circumstances, we urge that the maximum length of incarceration for which probation, with suitably punitive or rehabilitative conditions, may be substituted, be substantially increased from six months to, say, eighteen months.

Impact on the prison system

Unless the guideline sentencing ranges are shifted downwardly, and/or the courts are given additional discretion to grant leniency, as proposed above, there will in time be an enormous increase in the inmate population of a federal prison system which is already filled in excess of capacity. We do now know what plans are being made to provide additional facilities to accommodate such a massive influx of prisoners. But we are concerned that even if the implementation of such plans began immediately, it would be a number of years before the needed facilities would be available. In the meantime there might be such overcrowding as would violate the eighth amendment and require early release of many prisoners, as has already happened in several state prison systems.

Increase in monetary penalties

We also believe that the guidelines require the imposition of monetary penalties which are unnecessary and excessively punitive. Under the guidelines, which implement 18 U.S.C. § 3663, the Court must order restitution to the extent that it is "fair to the victim * * * and will not unduly complicate or prolong sentencing."

In addition, the guidelines provide that unless the defendant establishes that he would be unable to pay, even on an installment schedule, or that it would unduly burden his dependents, the Court must not only impose a substantial fine (for example, for an offense level of twelve, the prescribed range is \$3,000 to \$30,000) but also must increase the fine by an additional amount sufficient to pay the cost of imprisonment (at \$1,500 per month) or probation (at \$50 to \$300 per month depending on the degree of supervision).

This last provision, which was apparently not mandated by statute but conceived by the Commission itself, seems particularly draconian, not unlike requiring a man condemned to hanging to pay for the rope.

Recommendations

We therefore respectfully recommend that the guidelines be revised to effect substantial reductions in the upper and lower limits of the ranges of sentences of incarceration; to increase substantially the length of a term of incarceration for which probation may be substituted (for example, from six months to eighteen months); to allow reductions of from one to three levels for those

having primary responsibility for the care of young children or invalid spouses, or for those who became involved because of drug addiction; to make fines discretionary in all cases; and to eliminate entirely the requirement that every defendant who is financially able to do so be ordered to pay the cost of his or her imprisonment or probation.

We further recommend that there be a delay period, for example one year, between congressional approval of the guidelines and their going into binding effect. During this period, judges would be asked to report to the Commission, through their district court executives, court clerks or probation officers, the sentences actually imposed and those that would have been imposed under the guidelines. This will allow evaluation of the impact of the guidelines on prison population and on probation departments and perhaps suggest revisions of the guidelines to avoid problems which might arise from the abrupt implementation of a radically different and untested sentencing scheme.

Dated: New York, New York
March 16, 1987

Respectfully submitted,

Franklin S. Billings, Jr., D.Vt.

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Vincent L. Broderick, S.D.N.Y.

Ellen Bree Burns, D.Conn.
Miriam Goldman Cedarbaum, S.D.N.Y.
Albert W. Coffrin, D. Vt.
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Robert W. Sweet, S.D.N.Y.

John M. Walker, S.D.N.Y.

Edward Weinfeld, S.D.N.Y.

Jack B. Weinstein, Chief Judge, E.D.N.Y.

Inzer B. Wyatt, S.D.N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

March 16, 1987

JACK B. WEINSTEIN
CHIEF JUDGE

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

My dear Chairman:

I have had an opportunity to discuss with most of the judges of the United States District Court for the Eastern District of New York your revised draft, dated January, 1987, but only recently received by us. I believe that most of our judges support the conclusions set out below.

While substantially improved, such serious problems remain with the methodology and the substance of the Commission's Revised Draft Guidelines that it would be irresponsible to permit them to become operative this year. At least a year and one-half is required to observe and make precise estimates of the effects on prisons, probation services, trial court hearings, appeals and individual defendants -- some of whom would be treated with unnecessary cruelty, and some with excess leniency.

1. Lack of Adequate Published Statistics

A grave problem with the Revised Draft Guidelines is the lack of adequate statistical and other research data to support the offense levels selected and the additional criteria relied upon for enhancement or reduction of sentences. The published materials of the Commission do not provide sufficiently useful and reliable statistics on current sentencing practices.

The Commission's use of data on current average sentences imposed after conviction at trial to design levels for minimum sentences on pleas and convictions at trial causes gross distortions. The Commission's data is based, as I understand the matter, on an

analysis of sentences of incarceration imposed on first offenders after trial and conviction on the offenses charged. To assume that these sentences can be used to develop Sentencing Guidelines is fallacious because the reality is that cases going to trial represent on the order of a mere 10% of all convictions. Convictions on pleas to one or more of the lesser offenses charged are the rule, not the exception. For purposes of analysis, trials and pleas must be separated. The Commission's published data also appears to ignore the vital fact that a very large proportion of cases result, at least in part, in probation. Inadequate or no effect is given to negotiated pleas, negotiated charges, the effect of cooperation and the like.

The statistics published do not show any breakdown sufficient to permit intelligent analysis. How many cases were used in each category? What is the spread? What are the statistical measures of reliability? Without further details we cannot check your figures against your proposals or our experience.

2. Excessive Sentences to Prison

To extrapolate from this inapplicable and unreliable data a matrix of minimum sentences for all offenders may result in a vast increase in our prison population and the imprisonment for extended periods of time of people who should receive probation or other forms of alternative punishment.

An example -- one of many -- illustrates the exceptional cruelty which may result from use of the Revised Guidelines. A first offender "mule" -- a drug courier from Africa or Latin America who is paid a few hundred dollars to smuggle drugs into the United States -- is typically sentenced, in this district, to three years with time served about two years. (Two judges of the court do typically sentence such "mules" to six to ten-year terms.) Under the Guidelines, if she carried between 500 and 999 grams of heroin, punishment would be imposed at Level 30 with a minimum sentence of eight years and one month (97 months). Of course the courts must follow the changes made by the new drug laws which

require high minimum sentences, but the minimums set by the Guidelines are, in many cases, in excess of the statutory minimums and far in excess of sentences required under plea bargains.

I have attached a chart from your study dealing with drugs. The heavy lines were added by me to indicate the changes from current sentence levels which would be required by the Revised Draft Sentencing Guidelines, while the "X"s mark your studies of average sentences after trial. The underlying chart was prepared by your research staff and graphs average sentences of imprisonment for first time offenders on drug charges based on the amount (in pounds) of the drug involved. Since your study is based on the English system of measurements and the Revised Draft Sentencing Guidelines are written in terms of the metric system, there is no perfect correspondence between offense levels and amounts. This creates the range of sentence levels represented by the heavy lines I have superimposed on your chart. For the smallest quantities of drugs the term of imprisonment would decrease but would be mandatory in all cases, whereas under present practice only one-third to three-quarters (depending on the offense) of these offenders are sentenced to imprisonment. For larger amounts of drugs, sentences would have to be very greatly increased by most of our judges. The net effect would, in our district, result in an extremely large increase in prison space required.

By contrast, I have checked sentences and proposed sentences of a selected group of white collar political defendants. Your proposals seem quite light compared to current New York metropolitan sentences. Of course this may be due to the fact that political crimes may be unusually prevalent in this area at this time.

3. Virtual Elimination of Probation

The Guidelines virtually eliminate probation as a sentence in any serious case by providing that probation is not available in any case where the sentence for the base offense is more than six months' imprisonment. Yet, the Commission's own study shows that only 35% of first offenders convicted of a heroin offense involving less than an ounce of heroin are currently sentenced to prison. Under the Guidelines,

imprisonment for 15 - 21 months would be required with no provision for probation.

As already indicated to you in my earlier communications, our court finds probation highly useful in many cases. Our community service and probation training and control programs are, we believe, useful in our district. We doubt that we have the prisons to hold the long-term prisoners the proposals would generate. Moreover, we doubt whether we should emphasize prison so much. Home detention, half-way houses, strictly supervised probation, community service and the like should be utilized in more, not fewer, cases. Revision of the Guidelines to provide for probation across the whole spectrum of offenses (except where statutorily prohibited) is necessary. Where probation is allowed by the Guidelines, detailed conditions are imposed on its use which must be left to the discretion of the courts and the probation departments.

The Guidelines also require that virtually all probationers serve intermittent periods of incarceration, detention in a half-way house or home detention. See pages 179-180. We do not have, in the Eastern District of New York, the facilities or personnel to supervise a large number of such short-term detainees. Nor do we deem them desirable in many cases. Limits on the form of probation in the Commission's proposals should be eliminated.

4. Split Sentences

The Commission should recommend to Congress that Congress reinstate split sentences. Accordingly, the Guidelines should be designed to permit split sentences. All our judges believe that, in a significant number of cases, a short term in jail with a long prison term suspended and strict long-term probation is highly useful in deterring further crime.

5. Delay of One and a Half Years

Given the enormity of the problem posed by the lack of adequate data on which to base the Guidelines, it is clear that even if Congress allows the Guidelines to go into effect in November (which I oppose), operation must be stayed for at least one and a half

years. A minimum of half a year is necessary for training and education of our judges, the bar and Probation and other services in the application and effects of the Guidelines.

An additional year, at a minimum, is required to allow for a controlled field experiment in actual sentencing as compared with sentencing under the Guidelines. During that year judges should be required to indicate both the actual sentence imposed and what the sentence would be under the Guidelines. This simple experiment is the only method available to generate quickly more reliable data on the divergence between current sentencing practices and the sentences the Guidelines envision. At the end of the year a full review should be made. Only then can the impacts that sentencing under the Guidelines would have on the size and make up of prison populations, on the Probation Departments and other services, the number of hearings required under the Guidelines and the effect on the volume of appeals, both by the Government and by defendants, be assessed.

Federal judges would be willing, I believe, to take on the extra work involved in such an experiment during a transition year. Additional support from our Probation Departments will be required; I urge the Commission to recommend that funds be allotted to cover the extra paperwork required. The cost -- both in terms of delaying the operational date of the Guidelines and in dollar terms -- of such a study would be slight in comparison to the savings that having adequate data will produce.

Implementation of such a scheme and the subsequent adjustment of the Guidelines, up or down, as needed, would avoid flooding our courts with hearings. More importantly, adjustments based on realistic data are needed to prevent our prison system from being overwhelmed -- to the point of possible Eighth Amendment violations -- with an influx of prisoners, many of whom should not be incarcerated. The impact on Probation and other services is also, at present, incalculable, but obviously considerable. The Court of Appeals would doubtless find such data useful in considering the myriad issues which will be raised on appeal once sentencing under the new Guidelines begins.

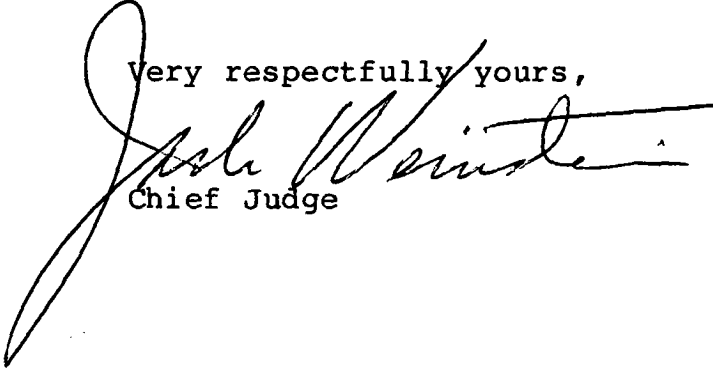
In the meantime, the necessary adjustments will prevent a huge increase in the volume of appeals.

6. Excessive Expenditure of Court Time

While the second draft is more flexible than the first, for much the same reasons indicated in my comments on the first draft, there will be many extensive factual hearings on sentences. This will require much of the judges' time. Will Congress authorize the new judges and facilities required? Inducements to plead and cooperate will be substantially reduced. This will result in more trials and require still more judges.

On behalf of all the judges, we wish to express our thanks to your consultant, Kenneth Feinberg. He met with us at considerable personal inconvenience to himself to answer questions and to defend your revised draft.

Very respectfully yours,



Chief Judge

Enc.

Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time

presently in prison!!
See p 44 Page 2

Sentence Levels

Estimated
X Sentenced
To Prison

6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35

Other bribery offenses

\$100/less
\$101/25,000
\$3,001/25,000
\$25,001 +

Heroin offenses

1 oz/less
1 oz.
2/5 oz.
6/20 oz.
21/50 oz.
51/200 oz.
201/700 oz.
701/1,000 oz.
1,001/10,000 oz.
10,001/50,000 oz.
50,001 + oz.

Cocaine offenses

1 oz/less
1 oz.
2/5 oz.
6/20 oz.
21/50 oz.
51/150 oz.
151/500 oz.
501/1,500 oz.
1,501/6,000 oz.
6,001/25,000 oz.
25,001 + oz.

Marijuana offenses

1 lb/less
1 lb
2/10 lbs
10/35 lbs
35/200 lbs
201/1,000 lbs
1,001/3,000 lbs
3,001/10,000 lbs
10,001/40,000 lb
40,001 + lbs

Civil Rights, Involving:

Electoral laws
Arms
Violence
Victims death
Other

Note
p 175
of 2nd of 2
pages
no need
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more
than
Cross

ATTACHMENT

Notes: X indicates the sentence severity level (see Chapter 5) for the corresponding offense.

PCB00072



1750 K STREET, N.W.
WASHINGTON, D.C. 20006

TELEPHONE: (202) 452-8444
TELEX: 892722 FMI USA WSH

March 16, 1987

BY HAND-DELIVERY

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

Dear Members of the Commission:

This letter presents the views of the Food Marketing Institute as to Section N221 -- Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product -- found in the January 1987 Revised Draft Sentencing Guidelines. As discussed below, FMI believes these sections take a proper approach, with one significant exception.

FMI is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume of \$150 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is composed of independent supermarket operators or small regional firms. Its international membership includes more than 100 members from 40 nations.

Section N221 relates, inter alia, to adulteration or misbranding of foods, drugs and cosmetics, and other items prohibited by 21 U.S.C. § 331, a section that affects the retail and wholesale food industry. In apparent recognition that Section N221 applies in part to "strict liability" offenses where there is no mens rea component, the base offense level is level 4. However, if intentional conduct or fraud is involved, the base offense value is raised 2 to 3 levels or 3 to 6 levels, respectively. See Section N221 (1 & 2).

This is a sensible approach. Section 331 has been applied against persons having no criminal intent or specific knowledge of the violation, only management responsibility. See, e.g., United States v. Park 421 U.S. 658 (1975). While the law allows a conviction for such non-volitional conduct, onerous sentences should not be imposed for this type of violation. If knowing

The United States Sentencing Commission
March 16, 1987
Page 2

conduct or fraud is present, a more stringent sentence is appropriate.

However, FMI believes that the offense level should not automatically be raised 2 to 6 levels "if the offense involved ... distribution of any product". While there is ambiguity here, any food item shipped at some time to a warehouse or retail store might be said to "involve ... distribution" in some way. In many conceivable circumstances where "distribution" is involved, a higher offense level would not be appropriate for a wholly non-volitional crime. Section N221 (3) should be deleted both because of its lack of clarity and because it might result in penalties not warranted by the offense.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", written in dark ink.

Harry Sullivan
Senior Vice President
Public Affairs
General Counsel



CHEMICAL MANUFACTURERS ASSOCIATION

DAVID F. ZOLL
Vice President
General Counsel

March 16, 1987

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

Re: CMA Comments on Proposed Sentencing Guidelines

Dear Commissioners:

The Chemical Manufacturers Association (CMA) hereby submits ten (10) copies of its comments on the Proposed Sentencing Guidelines and Policy Statements for the United States Courts (52 Fed. Reg. 3920, February 6, 1987.) These comments were prepared for CMA by Richard M. Cooper and Paul Mogin of the law firm of Williams & Connolly. Please do not hesitate to contact me (202/887-1350) if you have any questions regarding these comments.

Sincerely yours,

A handwritten signature in cursive script, reading "David F. Zoll".

LAW OFFICES
WILLIAMS & CONNOLLY
HILL BUILDING

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March 16, 1987

David F. Zoll, Esquire
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Chemical Manufacturers Association
2501 M Street, N.W.
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COUNSEL
CHARLES H. WILSON
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JAMES A. BRUTON, III

* NOT ADMITTED IN DC

Dear Mr. Zoll:

You have asked us to review the sections of the United States Sentencing Commission's Proposed Sentencing Guidelines for United States Courts that deal with environmental offenses, 52 Fed. Reg. 3920, 3960-62 (Feb. 6, 1987). Our comments on those sections of the Proposed Guidelines, for purposes of submission to the Commission on behalf of the Chemical Manufacturers Association, follow.

INTRODUCTION

For the reasons set forth below, we believe that the base offense levels prescribed in §§ Q211 and Q215 of the Proposed Guidelines should be reduced, so that probation without intermittent or similar confinement may be imposed, without departing from the Guidelines, for first-time violators of the

David F. Zoll, Esquire
March 16, 1987
Page 2

misdeemeanor statutes covered by these sections. See § A511(a). With respect to certain felonies covered by § Q211, the Guidelines should be modified to provide for a reduction in the offense level in the case of minor violations. Finally, the Commission should modify certain provisions for increases to base offense levels.

BACKGROUND

Sections Q211 and Q215 of the Proposed Guidelines specify a base offense level of 9 for a broad range of environmental violations. These sections of the Guidelines cover violations of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136j, 136l; the Toxic Substances Control Act, 15 U.S.C. §§ 2614, 2615; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1319, 1321(b)(5); the Resource Conservation and Recovery Act, 42 U.S.C. § 6928; the Air Pollution Prevention and Control Act, 42 U.S.C. § 7413; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by Pub. L. No. 99-499, 100 Stat. 1613, Title III, § 325 (Oct. 17, 1986); and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1350. See 52 Fed. Reg. 3960, 3962. Under the Proposed Guidelines, an individual with no prior criminal record who is convicted of an offense under any of these

David F. Zoll, Esquire
March 16, 1987
Page 3

statutes^{1/} would presumptively receive a term of imprisonment or other confinement of 4 to 10 months. See id. at 3926.

DISCUSSION

Sections Q211 and Q215 of the Proposed Guidelines create a presumption in favor of imprisonment or other confinement for an unduly broad category of environmental offenses.

The requirements of the environmental statutes and their implementing regulations, permits, and other administrative documents are extensive and in many respects detailed. Consequently, there are countless opportunities for violations, many of which present no risk to human health or the environment. The Final Sentencing Guidelines should reflect, in a more refined way than do the Proposed Sentencing Guidelines, the diversity of the environmental laws, the diversity of the circumstances in which violations occur, and the diversity in the consequences of those violations.

^{1/} The sole exception is 33 U.S.C. § 1321(b)(5). The proposed guidelines assign a base offense level of 9 to violations of 33 U.S.C. § 1321(b)(5) that involve a hazardous substance, but assign a base offense level of 6 -- which corresponds to a presumptive sentence of zero to six months imprisonment -- to violations of § 1321(b)(5) that involve oil.

David F. Zoll, Esquire
March 16, 1987
Page 4

I. BASE LEVELS FOR MISDEMEANORS

Several of the environmental offenses that are assigned base offense level 9 by §§ Q211 and Q215 -- and that would therefore presumptively be punished by imprisonment or other confinement for 4 to 10 months -- are misdemeanors. See 7 U.S.C. §§ 136j, 136l; 15 U.S.C. §§ 2614, 2615; 33 U.S.C. §§ 1319, 1321(b)(5); 42 U.S.C. § 7413.^{2/} A presumption in favor of

^{2/} The exceptions are the Resource Conservation and Recovery Act, 42 U.S.C. § 6928; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by Pub. L. No. 99-499, 100 Stat. 1613, Title III, § 325 (Oct. 17, 1986); and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1350.

Under 42 U.S.C. § 7413, a violation by a person previously convicted of a violation constitutes a felony. Under 7 U.S.C. § 136l, use or disclosure of confidential information with intent to defraud constitutes a felony.

Subsequent to the preparation of the proposed guidelines, the criminal provisions of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1319, were amended by the Water Quality Act of 1987, Pub. L. No. 100-4, Title III, § 312 (Feb. 4, 1987). As amended, 33 U.S.C. § 1319 proscribes four distinct offenses. Negligent violations are dealt with in § 1319(c)(1) and constitute misdemeanors. Knowing violations are addressed in § 1319(c)(2) and constitute felonies punishable by imprisonment for up to three years. Section 1319(c)(3) makes violations that entail knowing endangerment felonies punishable by imprisonment for up to 15 years. And § 1319(c)(4) makes false statements felonies punishable by imprisonment for up to two years.

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incarceration or other confinement is ordinarily inappropriate for a misdemeanor. In general, Congress's decision to make a particular offense a misdemeanor reflects a considered determination that the conduct proscribed is not so blameworthy as to warrant treatment as a felony, and that a person convicted of the offense, therefore, should not be burdened with the stigma and damaging collateral consequences that accompany a felony conviction. See, e.g., 18 U.S.C. § 1 (1982) (subsequently repealed), Revisor's Note (1948) ("For violations of regulatory statutes, constituting mala prohibita, a maximum imprisonment penalty of 1 year seemed adequate. This prevents the stigma and consequence of a felony conviction from attaching to the defendant"). To provide that a misdemeanant presumptively should be given a substantial term of imprisonment or other confinement would be inconsistent with this legislative determination.

The Proposed Guidelines themselves reflect a recognition that a presumption in favor of imprisonment or other confinement is generally unwarranted where misdemeanors are involved. We have discovered only two other portions of the entire Guidelines

The arguments presented in Part I of these comments apply with equal force to 33 U.S.C. § 1319(c)(1), as amended, since violations of that provision are only misdemeanors. Section 1319(c)(2) is addressed in Part II, infra.

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in which the presumptive sentence for a misdemeanor is imprisonment or other confinement, regardless of the nature and circumstances of the offense. See Part H, subparts 1 and 2 (offenses involving interference with civil and political rights); § K215 (unlawfully possessing an explosive in a government building). In general, the Proposed Guidelines wisely assign to misdemeanors base offense levels that do not create a presumption in favor of imprisonment or other confinement for first-time offenders. See, e.g., § E261 (assigning a base offense level of 6 to misdemeanor of interfering with NLRB in the performance of its duties); § G212 (assigning a base offense level of 6 to misdemeanor of engaging in prostitution near a military establishment); § H231 (assigning a base offense level of 6 to misdemeanor of intercepting radio communications); §§ K211 and K212 (assigning a base offense level of 6 to failure to report theft of explosives and improper storage of explosives).^{3/} Indeed, under the Proposed

^{3/} A number of sections of the Guidelines create a base offense level range for misdemeanors that may yield a presumption in favor of imprisonment, depending upon the nature and circumstances of the actual offense committed by a particular defendant. See, e.g., § E259 (base offense level range of 6 to 12 for offense of making prohibited payments or lending money by employer or agent to employees, representatives, or labor organizations); § F211 (base offense level range beginning at 6 for offenses involving fraud and deception); § J215 (base offense level range of 6 to 10 for failure to
(Footnote continued)

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Guidelines many felonies have been assigned base offense levels that are lower than the base offense levels assigned to misdemeanor environmental offenses by §§ Q211 and Q215.^{4/}

It would be inappropriate, absent compelling justification, for the Commission to provide that particular misdemeanors

appear by material witness); §§ P211(3), P212(3) (assigning base offense level of 8 to misdemeanors of escape or attempted escape from prison after arrest for misdemeanor or while awaiting extradition, and instigating or assisting such an escape, but providing for reduction of offense level by 2 levels if non-secure custody involved). But apart from §§ Q211 and Q215, the sections cited in the text (which cover offenses involving civil and political rights and the offense of unlawfully possessing an explosive in a government building) are the only portions of the Guidelines that create a general presumption in favor of imprisonment or other confinement for a misdemeanor regardless of the nature and circumstances of the offense.

^{4/} See, e.g., § G231 (assigning a base offense level of 6 to offenses of mailing obscene or crime-inciting matter, importing or transporting obscene matters or matters intended for immoral or indecent use, mailing indecent matter on wrappers or envelopes, and transporting obscene matters for sale or distribution); § G232 (assigning a base offense level of 4 to offense of broadcasting obscene language); § H233 (assigning a base offense level of 6 to offense of possessing an eavesdropping device); § H234 (assigning a base offense level of 6 to offense of obstructing correspondence); § K234(3) (assigning a base offense level of 6 to offenses of failure by transporter of hazardous liquids or owner or operator of pipeline facilities to maintain plan of inspection under Liquid Pipeline Safety Act and failure to permit access to information as required by the Act); § L223 (assigning a base offense level of 8 to trafficking in a United States passport).

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shall receive more severe punishment than crimes that Congress has categorized as felonies. The classification of an offense as a felony or a misdemeanor constitutes a legislative determination concerning the seriousness of the offense, and the relationship among the base offense levels assigned to various offenses should be consistent with that legislative determination, except in truly exceptional circumstances. -

Assuming that a presumption in favor of incarceration or other confinement is ever appropriate for a misdemeanor, such a presumption should be applied only to exceptional misdemeanors that, by the very nature of the conduct proscribed, constitute serious offenses comparable to felonies. The only other two instances in which the Proposed Guidelines create a general presumption in favor of imprisonment or other confinement for misdemeanors involve such exceptional misdemeanors. Thus, the misdemeanor offenses involving civil rights and political rights included in Part H, subparts 1 and 2, are invested with added seriousness by the history of civil rights and the "compelling public interest in deterring and adequately punishing civil rights violators," 52 Fed. Reg. 3947. Moreover, these offenses generally require specific intent to violate the law. See, e.g., Screws v. United States, 325 U.S. 91 (1945) (18 U.S.C. § 242,

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which prohibits "willful[]" deprivation of federal rights, requires proof of specific intent to deprive a person of a federal right); 18 U.S.C. § 245 (prohibiting "willful[]" interference with federally protected activities); 18 U.S.C. §§ 243, 246 (prohibiting discrimination). Similarly, the misdemeanor offense embraced by § K215 of the Guidelines applies to highly blameworthy and extremely dangerous conduct -- unlawful possession of an explosive in a government building.

The misdemeanor environmental offenses encompassed by §§ Q211 and Q215 of the Proposed Guidelines are not comparable to the misdemeanors encompassed by Part H, subparts 1 and 2, and § K215.

First, the environmental misdemeanors generally do not require proof of specific intent to violate the law. Whereas federal felonies frequently require proof that the defendant acted "willfully," i.e., with specific intent to violate the law, see, e.g., United States v. Mallas, 762 F.2d 361, 363 (4th Cir. 1985), most of the misdemeanor environmental statutes covered by §§ Q211 and Q215 permit the imposition of criminal liability upon proof that the defendant acted "knowingly." In construing a similar regulatory statute, the Supreme Court has held that the term "knowingly" does not require proof that the defendant had

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knowledge of the regulation that he allegedly violated. See United States v. International Minerals & Chemical Corp., 402 U.S. 558, 565 (1971); see also United States v. Hayes International Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986).

Moreover, one of the statutes covered by §§ Q211 and Q215 permits the imposition of criminal liability on the basis merely of negligence. See 33 U.S.C. § 1319(c)(1); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1129 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). As the Commission has implicitly recognized elsewhere in the Proposed Guidelines, creating a presumption in favor of imprisonment or other confinement is unwarranted where proof of negligence is sufficient to establish liability. See § P213(2) (assigning a base offense level of 6 to misdemeanor of negligently permitting a prisoner to escape).

Second, some of the misdemeanor offenses embraced by §§ Q211 and Q215 are record-keeping violations. See 7 U.S.C. § 136j(a)(2)(B); 15 U.S.C. § 2614(3). The Commission has recognized elsewhere in the Proposed Guidelines that record-keeping violations are relatively minor offenses, see § Q214 (assigning a base offense level of 6 to record-keeping violations involving environmental pollutants); § T222 (assigning a base offense level

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of 5 to record-keeping violations involving alcohol and tobacco taxes), and that is equally true of the record-keeping offenses covered by §§ Q211 and Q215.

Third, in many instances, there may be substantial uncertainty as to whether particular conduct violates the statutes covered by §§ Q211 and Q215. These are regulatory statutes, rather than statutes that embody clear and long-established legal norms, and there has been little opportunity for clarification of the statutes through judicial interpretation. Difficult questions concerning the scope of the statutes may arise. See, e.g., United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852 (E.D. Pa.-1980) ("uncollected surface runoff may, but does not necessarily, constitute discharge from a point source" for purposes of the Federal Water Pollution Control Act). Moreover, liability may be imposed under several of the statutes for violation of administrative regulations, permits, or implementation plans, see, e.g., 15 U.S.C. § 2614; 33 U.S.C. § 1319(c); 42 U.S.C. 22 7413(c)(1), which are often elaborate and complex.

Fourth, two of the misdemeanor statutes covered by §§ Q211 and Q215 impose liability upon "any responsible corporate officer." See 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 7413(c)(3).

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These provisions permit imposition of criminal liability upon corporate officers deemed to hold a position of responsibility, regardless of the officer's actual participation in the conduct at issue. The broad reach of these provisions constitutes an additional reason why a presumption in favor of imprisonment or other confinement is unwarranted.^{5/} Indeed, where a corporate officer is held criminally liable solely by reason of his corporate position and no finding of significant mens rea is necessary for the conviction, the base offense level should be reduced to a level below offense level 6.

For the foregoing reasons, the Proposed Guidelines should be modified so as to eliminate the presumption in favor of imprisonment or other confinement that §§ Q211 and Q215 create

^{5/} It should also be noted that §§ Q211 and Q215 embrace one misdemeanor offense for which the maximum term of imprisonment authorized by law is six months. See 42 U.S.C. § 7413(c)(2). The effect of assigning a base offense level of 9 to this misdemeanor is to create, for a first offender, a presumption in favor of imposition of a term of imprisonment or other confinement in the upper third -- four to six months -- of the range Congress created for this offense. There is no justification for establishing such a harsh presumption for first offenders. Also, under 7 U.S.C. § 1361(b)(2), the maximum period of incarceration is 30 days (for a knowing violation), which is below the minimum period permitted by offense level 9; the Proposed Guidelines would thus create a presumption in favor of the maximum sentence allowed by law.

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for a broad range of misdemeanor environmental offenses. As in the case of the conservation and wildlife offenses dealt with in §§ Q221 through Q226 of the Proposed Guidelines, the base offense level should be "low, so that probation may be imposed on first-time offenders." 52 Fed. Reg. at 3963 (commentary to §§ Q221-Q226). Aggravating circumstances may be dealt with by the identification of specific offense characteristics justifying an increase in the offense level. Moreover, in the case of particular environmental offenses that disrupt a governmental function, endanger public health or safety, cause property damage or loss, or inflict physical injury, the offense level can be adjusted upward under § Y212, § Y215, § Y221, or § Y225, respectively. A base offense level of 6 or lower would be appropriate for the misdemeanor offenses addressed by §§ Q211 and Q215.

II. BASE LEVELS FOR CERTAIN FELONIES

A. The Resource Conservation and Recovery Act

With respect to violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928 ("RCRA"), the Commission should provide for a reduction of the base offense level of 9 by 3 levels if a minor violation is involved. Cf. §§ P211(3), P212(3) (providing for reduction of offense level if specified mitigating circumstances exist).

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Although violations of RCRA constitute felonies, they may vary widely as to both the blameworthiness of the conduct and the risk it creates. The statute can be violated by the failure to comply with any one of literally hundreds of reporting, recordkeeping, design, engineering, testing, permitting, etc. requirements associated with the treatment, storage, disposal or transportation of hazardous waste. 42 U.S.C. § 6928. Moreover, what is a hazardous waste is often unclear, and the risk presented by different hazardous wastes can vary widely. For example, a waste may range from a recognized human carcinogen to thousands of gallons of process wastewater that inadvertently may have been allowed to come into contact with literally a single molecule of a listed hazardous waste. 40 C.F.R. § 261.3(a)-(2)(iv).

The sentencing range provided in § 6928 is broad enough to deal with the widely varying violations that can occur. Under the statute, a violator can receive a sentence of no imprisonment, or any sentence of imprisonment not to exceed two years. 42 U.S.C. § 6928(d). Violations that entail knowing endangerment are punishable by a sentence of imprisonment of up to 15 years. 42 U.S.C. § 6928(e).

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If the Commission preserves the base offense level of 9 for violations of RCRA, it should also provide for a reduction of the offense level by 3 levels in the case of technical or otherwise minor violations. Such a modification is essential to ensure that judges need not depart from the Guidelines to impose probation without intermittent or similar confinement for first offenders who have committed only a minor violation of RCRA. If the Commission establishes a base offense level that creates a sentencing range far narrower than that created by Congress, the Commission should also specifically provide for reduction of the range in the case of minor violations, just as it has provided for an increase in the sentencing range where certain aggravating circumstances exist. See § Q211(a).

B. The Comprehensive Environmental Response,
Compensation and Liability Act

With respect to violations of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq. ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, and violations of Title III of SARA, § 325 (Oct. 17, 1986), the Commission should provide for a reduction of the base offense level of 9 by 3 levels if a violation imposes no significant health risk.

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Section 103 of CERCLA and § 304 of SARA establish obligations to report to designated federal, state and local agencies releases of certain hazardous chemicals that exceed certain quantities. The failure to comply with these notification requirements can be punishable as a felony, but the maximum term of imprisonment for a first offense is two years (for violations of § 304) or three years (for violations of § 103), rather than the five years ordinarily provided for federal felonies. Thus, violations of these notification requirements rank among the least serious of all federal felonies.

Furthermore, these notification requirements can be triggered by a very small (e.g., one pound) release of a hazardous chemical, which may pose no risk whatsoever to the public health. Although criminal prosecution may still be appropriate in such cases to implement a highly precautionary public health policy, a presumption in favor of incarceration or other confinement is unwarranted. This is particularly true since CERCLA and SARA impose criminal liability for failure to take affirmative action (i.e., provide notification).^{6/} The

^{6/} Moreover, under SARA, criminal liability can be imposed for a failure to notify a state agency, even though notification was provided to the local agency which would be expected to take the lead in coordinating any governmental response to the release.

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criminal law ordinarily punishes acts of commission, rather than acts of omission. Congress's decision to provide a maximum penalty lower than that generally provided for federal felonies may very well reflect a recognition of the exceptional nature of the crimes that CERCLA and SARA create.

If the Commission preserves a base offense level of 9 for violations of CERCLA and SARA, the foregoing considerations suggest that it should also provide for a reduction of the offense level by 3 levels in the case of violations that pose no significant health risk.

C. Federal Water Pollution Control Act

Should the Commission decide to assign a base offense level of 9 to violations of § 309(c)(2) of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1319, as amended by the Water Quality Act of 1987, see note 2, supra, the Commission should likewise provide for reduction of the offense level by 3 offense levels in the case of either (1) a minor violation or (2) a violation predicated upon the language of § 1319(c)(2)(B) reaching any person who "reasonably should have known" that a discharge "could cause personal injury or property damage."

The considerations supporting a reduction for minor violations parallel those applicable to minor violations of RCRA

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and SARA. The prohibitions of the FWPCA encompass discharges as small as a few parts per billion, discharges that would not have any discernible impact on water quality. A presumption in favor of imprisonment or other confinement is unwarranted for technical or otherwise minor violations of § 1319(c)(2).

A reduction of the offense level where liability is based upon the "reasonably should have known" clause of § 1319(c)(2)(B) is essential, because this provision has the effect of permitting the imposition of liability based merely on negligence. Cf. § P213(2) (assigning a base offense level of 6 to misdemeanor of negligently permitting a prisoner to escape). Though the act of discharging the substance must be knowing under § 1319(c)(2)(B), the prosecution need only prove that the defendant "reasonably should have known" of a risk to persons or property. Because this offense incorporates a negligence standard with respect to a critical element of the offense, a presumption in favor of imprisonment or other confinement would be inappropriate.

III. ADJUSTMENTS TO BASE LEVELS

A. Section Q211(a)(2)

Section Q211(a)(2) provides for an increase in the offense level of three to six levels in the case of ongoing,

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continuous or repetitive releases of hazardous or toxic substances. The requirement that the increase be at least three levels is excessive. First, the fact that an increase is ongoing, continuous or repetitive does not necessarily mean that it is quantitatively substantial. In some circumstances, an ongoing, continuous or repetitive discharge of a miniscule (but violative) quantity may, itself, still be miniscule. Second, even though the discharged substance is classified as "hazardous" or "toxic," nevertheless, in the quantity or quantities discharged, it may be innocuous -- and neither cause actual harm, nor present a risk of harm. Although the Guidelines suggest that all substances that are "hazardous" or "toxic" as a legal matter would be so also as a lexicological matter, see 52 Fed. Reg. at 3960-61, in fact some "hazardous" or "toxic" substances are, in certain quantities, non-hazardous, non-toxic and, indeed, necessary for life -- e.g., selenium, zinc, chromium, copper. Third, cases of ongoing, continuous, or repetitive discharges do not necessarily involve more culpable mens rea than cases of a single, instantaneous discharge. The fact that the discharge would continue or recur may have been unforeseeable. The offender may have had no responsibility at all for the continuation or recurrence of the discharge. A single human error or

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deficiency may have led to the offense; the fact that the discharge continued or recurred may not reflect any greater failing on the part of the offender. The offender may not have even learned of the discharge or of its unlawful nature until after it had continued or recurred.

For all these reasons, an increase in offense level should not be triggered automatically by the fact that a discharge is ongoing, continuous or repetitive. The sentencing judge should have discretion to take all such factors into account in determining whether any upward adjustment of the offense level is warranted and, if so, how much. Section Q211(a)(2) should provide, therefore, for an increase of zero to three levels or, perhaps, zero to six.

B. Section Q211(a)(4)

Section Q211(a)(4) provides for an increase in the offense level of three to six levels where the offense concealed an environmental offense. In general, such concealment is not an element of the offenses covered by section Q211, and the mens rea for those offenses generally does not relate to a separate offense that was concealed by the offense of which the offender was convicted. For example, a deficiency in record-keeping under 15 U.S.C. § 2614(3) may have had the unintended and unknowing

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effect of failing to disclose (and, thereby, arguably concealing) a separate violation. The offender may have been completely unaware that any such independent violation had occurred or was being concealed.

To avoid an unjustified increase in the offense level in such circumstances, section Q211(a)(4) should incorporate an element of mens rea with respect to the concealed offense: the increase in offense level should occur only where the offender intended to conceal a separate offense. Alternatively, the increase prescribed by section Q211(a)(4) should be zero to six levels, so that, in appropriate circumstances, the sentencing judge can determine that no increase under the paragraph is warranted.

C. Section Q212(a)(2)

With respect to "an ongoing, continuous, or repetitive release of a contaminant," this paragraph is similar to § Q211(a)(2), discussed at pp. 18-20, supra. The considerations set forth there apply here as well, and a similar conclusion follows: insofar as § Q212(a)(2) applies to ongoing, continuous, or repetitive releases, the prescribed increase in offense level should be zero to three or, perhaps, zero to six levels.

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D. Section Q214(a)(1)

Section Q214 of the Proposed Guidelines provides a base offense level of 6 for certain environmental offenses involving "substances designated hazardous or toxic." Commentary to § Q214. Section Q214(a)(1) provides, however, that the offense level is to be increased by 4 levels whenever the defendant "discharged or emitted a pollutant into the water, air or land." 52 Fed. Reg. at 3961. The resulting offense level would be 10, which corresponds to a presumptive prison sentence or other confinement of 6 to 12 months for a first offender.

Section Q214(a)(1) creates an unduly harsh presumptive sentence. Most of the offenses it covers are misdemeanors. See 33 U.S.C. § 411; 33 U.S.C. § 1344(s)(4)(A); 33 U.S.C. § 1415(b); 42 U.S.C. § 4912; 42 U.S.C. § 7413; 42 U.S.C. § 4912.^{7/} The effect of § 214(a)(1) as it now stands is to create a presumption in favor of a substantial term of imprisonment or other confinement for any violation of the foregoing misdemeanor statutes that involves the discharge or emission of a pollutant.

^{7/} The offense proscribed by 33 U.S.C. § 1907 is a felony. With respect to 33 U.S.C. § 1319, see p. 4 and note 2, supra. One statute listed in the Commentary does not authorize imprisonment. See 42 U.S.C. §§ 300i, 300j-4.

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Such a presumption is unwarranted not only because the offenses are misdemeanors, but also because a broad range of violations of these statutes will involve at least some minimal discharge or emission of a pollutant. The fact of a discharge is not generally an aggravating circumstance of conduct otherwise violative, but is in many instances the way the violation occurs. Therefore, under the Guidelines as currently proposed, the base level for such violations is, in reality, not 6 but 10. That level is excessive. Many violations of these statutes do not create any harm to the environment or even a risk of harm. Moreover, because these statutes do not require proof of specific intent to violate the law,^{8/} there can be no assurance that a person convicted of violating them is deserving of the punishment that § Q214(a)(1) would presumptively require.

E. Section Q214(a)(3)

With respect to "an ongoing, continuous, or repetitive release of a pollutant," this paragraph is similar to § Q211(a)(2), discussed at pp. 18-20, supra. The considerations set forth there apply here as well, and a similar conclusion

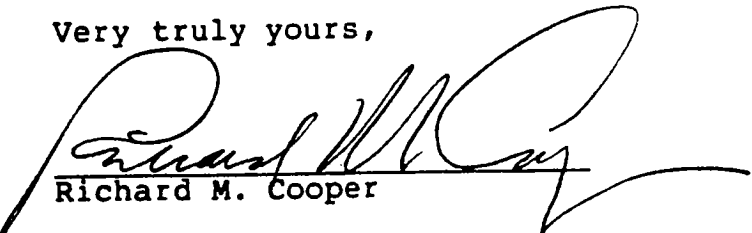
^{8/} Indeed, two of the statutes permit the imposition of liability based on negligence. See 33 U.S.C. §§ 1319(c)(1), 1344(s)(4)(A).

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follows from them: insofar as § Q214(a)(3) applies to ongoing, continuous, or repetitive releases, the prescribed increase in offense level should be zero to three or, perhaps, zero to six levels.

An additional consideration applicable to § Q214(a)(3) warrants a reduction in the maximum permissible increase. Section Q214 deals with substances not legally designated as hazardous or toxic, whereas § Q211 deals with substances so designated. Although very small quantities of substances designated hazardous or toxic may in fact present no risk of harm, in many instances even large quantities of substances not so designated would present no risk of harm. Consequently, a reduction in the maximum permissible increase under § Q214(a)(3) from six to three would be justified.

Very truly yours,



Richard M. Cooper



Paul Mogin

PUBC00042



NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION

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Dr. Jack D. Early
President

March 16, 1987

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

RE: Sentencing Guidelines

Gentlemen:

The National Agricultural Chemicals Association ("NACA")* submits these comments on the Commission's notice of proposed Sentencing Guidelines and Policy Statements for the United States Courts. 52 Fed. Reg. 3919 et seq. (February 6, 1987). These comments specifically address Chapter 2, Part Q, which, in part, provides that a person with no prior criminal record who is convicted of an offense under certain environmental statutes, including those laws which directly impact NACA's members and their customers, would presumptively receive a term of imprisonment or other confinement of 4 to 10 months. NACA believes that the base level of 9 in Part Q, which leads to the presumption of imprisonment, is too stringent compared to other offense categories and should be reduced to a level to allow first-time offenders a presumption that no imprisonment may be imposed. In this regard, NACA supports the comments of the Chemical Manufacturers Association and would like to add the following thoughts specifically on offenses under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

NACA believes that the proposed approach to incarceration for misdemeanors involving pesticides may be unintentionally harsh. Unlike most environmental statutes, the principal

* NACA is an association of manufacturers of pest control products used in agricultural production. NACA's membership is composed of 89 major companies which produce and sell virtually all of the technical pesticides and a large percentage of the formulated pesticide products registered for use in the United States.

federal law regulating pesticides, FIFRA, subjects a potentially vast number of private citizens to criminal penalties. FIFRA regulates all users of pesticides, as well as individuals and entities who produce and sell pesticides. It is a violation of FIFRA, among other prohibited acts, for a person to use a pesticide inconsistent with its labelling. Criminal penalties in FIFRA do not require specific intent, but merely a "knowing" violation.

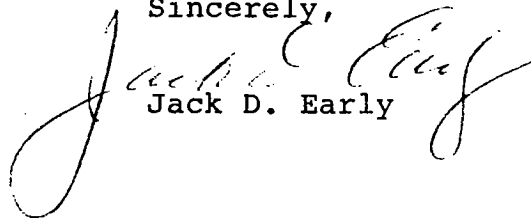
In other words, users of pesticides--constituting virtually every U.S. citizen who uses these ubiquitous products--are subject to criminal penalties for misuse. These individuals are the homeowners, farmers, ranchers and others who use pesticides, many products of which are no more toxic than housecleaning compounds and crabgrass applications.

In light of this background, the excess in the proposed Guidelines is clear. The Guidelines subject millions of private citizens, who may violate this relatively obscure environmental law for the first time, to a presumption at sentencing of at least 4 to 10 months imprisonment, barring mitigating factors. We feel sure that this result was not intended by the Commission.

Accordingly, in addition to those inequities in treatment of different offenses described in the Chemical Manufacturers Association's comments, we submit that the Guidelines are unduly harsh for FIFRA violations, and should be changed. A base offense level of 6 or lower would be appropriate.

NACA appreciates this opportunity to comment on the proposed Guidelines and would be available to answer any questions.

Sincerely,


Jack D. Early

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March 16, 1987

BY HAND-DELIVERY

The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
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Dear Members of the Commission:

This letter presents the views of the Food Marketing Institute (FMI) as to how the final Sentencing Guidelines should treat offenses under 18 U.S.C. § 1365, the section of the federal criminal code dealing with "Tampering with consumer products." For the reasons set forth below, FMI supports tough sentences for tampering offenses -- sentences that, in some respects, are more onerous than those the Commission has proposed in its January 1987 Revised Draft Sentencing Guidelines.

FMI is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,500 members -- food retailers and wholesalers and their customers in the United States and overseas. FMI's domestic member companies operate more than 17,000 retail food stores with a combined annual sales volume of \$150 billion -- half of all grocery sales in the United States. More than three-fourths of FMI's membership is composed of independent supermarket operators or small regional firms. Its international membership includes more than 100 members from 40 nations.

I. Tampering is a Serious Offense

We begin by emphasizing FMI's view that product tampering is one of the most serious offenses covered by the federal criminal code. FMI fully concurs in the observation of the Food and Drug Administration that "tamperings, such as in the case of the Tylenol incident, represent another version of terrorist activity, not unlike planting a bomb in some public place."^{1/} In the 1982 Tylenol incident, seven persons in the Chicago area died after ingesting cyanide-laced Tylenol capsules.

While this incident remains the most heinous tampering event, other egregious acts have occurred, for example:

^{1/} Food and Drug Administration "Report on Tampering," July 9, 1986, at p. 3.

- ° Earlier this year two people in Washington State died after taking Excedrin capsules containing cyanide.
- ° Also this year, a Los Angeles stockbroker was charged with putting rat poison in Contac, Dietac and Teldrin capsules and planting them in stores in Houston, Texas, and Orlando, Florida. His apparent aim was to profit when the stock of Smith Kline, the maker of the products, plummeted. He now has been convicted of a federal crime and sentenced to 27 years in prison.
- ° In 1985 a Peekskill, New York, woman died after taking Tylenol capsules treated with cyanide.

Not only has there been tampering, there also have been incidents of extortion and serious threats to tamper, for example:

- ° In February 1986, a man attempted to extort \$2 million dollars from Tylenol's manufacturer, Johnson & Johnson Products, Inc., by falsely claiming that he was responsible for the Peekskill, New York, death and threatening to strike again.
- ° In Nashville, Tennessee, a man was convicted in 1985 of attempting to extort \$100,000 from a local food retailer by threatening to put cyanide in food it sold.
- ° In Atlanta a man recently was sentenced to 40 years in prison after he attempted to extort \$650,000 by threatening to poison food sold in a restaurant with cyanide and arsenic.
- ° In Pueblo, Colorado, a man was convicted in 1984 for attempting to extort \$500,000 from a grocery chain by claiming he had put cyanide in the retailer's products.

Furthermore, there have been tampering hoaxes, some of which also sought monetary gain, for example:

- ° A North Carolina mother was arrested in April 1986 for feeding bits of wire in baby food to her infant, who was hospitalized.
- ° In March 1986 two women were arrested in Louisville, Kentucky, for falsely reporting a pin in baby food.
- ° Also in March 1986, a woman in Galesburg, Illinois, falsely reported finding glass in baby food.

- ° In April 1986, a Waterbury, Connecticut, woman was arrested and accused of falsely reporting that she cut her mouth on a razor blade embedded in a chocolate Easter bunny.
- ° Also in April of this year, a woman in Jacksonville, Florida, was arrested because she falsely reported finding staples in Girl Scout cookies.
- ° In March 1986 an Idaho Falls man told a television station that he had poisoned Skippy peanut butter in local supermarkets, a hoax for which he received a prison sentence.^{2/}

In fiscal year 1986, the FDA received a record 1720 tampering complaints. Recent reports have involved a wide variety of food products, including Jell-o, soft drinks, dairy products, meat, fish and fresh produce.

Reports of tampering incidents usually produce many "copycat" acts or threats. Even bare threats are not mere pranks; there are often significant costs connected with them since products must be pulled from shelves and tested. Moreover, publicity surrounding such events creates doubts about the integrity and safety of our food supply.

II. The Statute Treats Tampering as a Serious Crime

Most or all of the events described above are federal crimes. Section 1365 of Title 18 generally makes the following acts criminal, if the product involved affects interstate or foreign commerce:

- ° Tampering with a product with reckless disregard for the safety of others
- ° Attempting to tamper with a product
- ° Tampering with a product with the intent seriously to injure a business
- ° Falsely labeling a consumer product with the intent seriously to injure a business
- ° Rendering false information that a product has been tainted

^{2/} The above events are discussed in "Tamperings, False Reports Bring Arrests, Jail", FDA Consumer, September 1986.

- ° Threats to tamper
- ° Conspiring to tamper

As you are aware, the statute imposes stiff penalties for these offenses.

- ° If death results from tampering, imprisonment for life
- ° If serious bodily injury results, imprisonment for not more than 20 years
- ° For an attempt to tamper, imprisonment for not more than ten years
- ° For communicating false information that tampering has occurred that could result in death or bodily injury, imprisonment for not more than five years
- ° For attempting to injure a business by tampering or spreading false information, imprisonment for not more than three years
- ° For falsely labeling a consumer product, imprisonment for not more than five years
- ° For threatening to tamper, imprisonment for not more than five years
- ° For conspiring to tamper, imprisonment for not more than ten years.

In addition, all of the offenses listed above now can be penalized by a fine of up to \$250,000. See 18 U.S.C. §§ 3623, 3571 (the latter section becomes effective on November 1, 1987).

There must be harsh sentences for such acts of domestic "terrorism". Deaths have resulted from intention or reckless and wanton acts taken in total disregard of human life and safety. Manufacturers and retailers have been forced to spend huge sums to recall products or develop anti-tampering packaging. The 1982 Tylenol incident reportedly cost Johnson & Johnson -- which recalled, tested and destroyed the product involved -- more than \$100,000,000. Over-the-counter drug makers reportedly have spent between \$500 million and \$1 billion on tamper-resistant packages since that disaster. Anxious consumers, at immeasurable costs, have foregone needed medication or been forced to switch from effective products.

III. Stringent Sentences Should be Prescribed for Tampering Offenses

The Food Marketing Institute supports the general approach to Tampering found in the Sentencing Commission's January 1987 Revised Draft Sentencing Guidelines, Sections N211, N212, and N213, and the related Commentary. However, the Commission's recommendations are insufficient in several respects and should be further modified.

FMI, of course, agrees with the Commission's Commentary statement that: "Product tampering is a very serious offense, as evidenced by cases in recent years where tampering with over-the-counter drugs resulted in several deaths, widespread public concern, and significant losses by pharmaceutical manufacturers." FMI also agrees that: "Protection of the health and safety of the individual and the integrity of the marketplace are of paramount importance."

The Commentary states that a court may refer to the general provisions of Part Y if "death or injury" results from product tampering or if the target suffers "significant monetary losses." Under Part Y, "departures" from the guidelines are permissible, inter alia, where death results, where there is extreme, unusually heinous conduct, or where "public health . . . was significantly endangered". See Sections Y211, Y213 and Y215. In these circumstances, courts may impose a sentence that reflects the seriousness, nature and extent, or circumstances of the conduct. In appropriate situations, therefore, a court could impose the maximum sentence allowed by the federal statute.

FMI submits that the Commentary also should specifically state that Part Y is applicable in tampering situations where death, injury or significant monetary losses have not resulted. An illustration demonstrates the need for this modification. Assume that cyanide is placed in baby food on a supermarket shelf, but that the crime is detected by a store clerk before any harm is caused. Surely in that circumstance, a court should be able to go beyond the sentence permitted for a base offense level of 25, which could be as low as 57 months. We note in this regard that Section Y215 provides for a "departure" from the guidelines "where public health . . . was significantly endangered". Public health, of course, could be "significantly endangered" even where death, injury or significant monetary loss

does not result, as the hypothetical just presented illustrates.^{3/}

FMI also believes that reference to Part Y is appropriate where an unsuccessful attempt to tamper occurs, and death, injury or significant monetary losses thus do not result. Indeed, the Commentary itself indicates that tampering attempts should be treated like completed acts, stating: "Attempts are treated with the same severity as completed acts, pursuant to Commission decision and guidance from 18 U.S.C. § 1365, which provides for maximum sentences of ten years for both attempted and completed tamperings". However, unless Part Y applies to attempts, the maximum ten-year sentence for attempted tampering would not be possible, unless the offender is in a high Criminal History Category. For example, the maximum sentence for an offender in Criminal History Category I would be 71 months.

There is another anomaly that should be mentioned. Under the Draft Guidelines (Section N212) actual tampering with intent seriously to injure a business carries only a base offense level of 12, but providing false information or threats to tamper with consumer products (Section N213) carries a base offense level of 16. We see no reason why actual tampering intended to cause serious business injury should generally be penalized to a lesser degree than threats or the provision of false information, where no tampering has in fact occurred. We also believe the base offense levels for all these crimes should be higher.

Finally, FMI wishes to comment on Section A542, Fines for Individual Defendants. In the situation where a tampering offense has occurred, but there has been no monetary loss to the victim or monetary gain to the defendant, the Fine Table determines the fine. Use of the Fine Table could result in deficient fines for serious tampering crimes. For example, where there is an attempt to tamper but no monetary loss, the minimum fine would be \$10,000 and the maximum fine only \$100,000, as opposed to the \$250,000 fine allowed by law. See 18 U.S.C. §§ 3571, 3623. If attempts truly are to be treated as completed offenses as the Commentary states, this disparity is inappropriate.

Even more troubling, where there has been actual tampering with intent seriously to injure a business, but no serious injury results, the fine could be as low as \$3,000 and not more than \$30,000, instead of the maximum \$250,000 fine allowed by law. We

^{3/} The Commentary to § N221, which deals with adulteration of food products, allows reference to Part Y for any "property damage" or "harms", even though the crime may be non-volitional.

The United States Sentencing Commission
March 16, 1987
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believe a court in appropriate situations should be permitted to impose the maximum fine allowed for tampering offenses, even where there has been no monetary loss to the victim or monetary gain to the defendant.

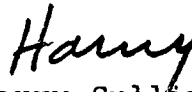
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FMI hopes these views will prove useful. We will be pleased to provide any further information or comment that the Commission desires. We appreciate the opportunity to present our views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", written in dark ink.

Harry Sullivan
Senior Vice President
Public Affairs
General Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
NEW YORK, NEW YORK 10007

THOMAS P. GRIESA
DISTRICT JUDGE

March 16, 1987

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

Dear Sirs:

I have reviewed the January 1987 draft of the Sentencing Guidelines, and have joined with many other judges in the Second Circuit in a statement being mailed to the Commission today.

I would like to submit certain of my own comments, which go beyond the reservations and suggestions in the joint statement.

I do not believe that the revised draft goes nearly far enough to remedy the problems with the original draft. The most fundamental difficulty was and is the attempt to give a numerical value to most of the factors which are to be considered in connection with sentencing. This is simply not rational or realistic. No sentencing judge in an actual case would ever attempt to take the relevant factors and assign some kind of numerical rating to each one. He knows that he must assess these factors in their relationship with each other, and as a totality. He further knows that these matters must be weighed with some intelligent judgment, rather than being dealt with according to a mechanical formula.

What I am suggesting is that an attempt be made to establish guidelines which will recognize the inescapable reality that fair and just sentencing depends heavily upon the exercise of intelligent judgment by the judge. An attempt to turn the process into one of aggregating a series of numerical values is not consistent with a rational system of justice. Also, it will have the courts spinning their wheels in controversy over endless minutiae, for no purpose that has to do with justice or the public good.

In my view, the complexity of the mechanism proposed by the Sentencing Commission goes far beyond any legitimate need in handling disparity of sentencing in the federal courts. It approaches the proverbial use of an "elephant gun to kill a fly."

A great many of the offenses we deal with involve statutes with a maximum prison term of five years. Of course, we often deal with indictments charging multiple counts, but for a variety of reasons we often end up considering the matter as involving a single crime. I doubt that there is any great problem of disparity among the judges in handling these cases. Of course, we apply the relevant individual factors, but that is not, in and of itself, the kind of disparity which is thought to be a problem. What I am getting at is that on these five-year counts, the federal judges probably are producing a rational pattern of sentencing without any need for an elaborate mechanism.

Of course, there are a number of crimes for which the maximum penalties are 15 or 20 years or more. Congress has already stepped into the narcotics area in the 1986 statute, and has limited judicial discretion to a certain extent. However, the theoretical opportunity for disparity in sentencing for narcotics offenses, and for other offenses such as bank robbery, is still substantial. Yet, the proposed sentencing guidelines do not seem to reflect any real attempt to discover the extent to which there are norms in the sentencing practices of the federal judges in respect to these areas of the criminal law. The Commission's proposals seem not so much related to the curing of disparity as to the establishment of entirely new norms, much higher in the narcotics area, and perhaps lower in other areas.

With respect to probation, the Commission's guidelines appear to have very little to do with rationalizing disparity. They ignore the practices which may well be rather consistent with respect to probation and create wholly new norms which would drastically reduce the granting of probation. Unless the past practices of the federal judges are deemed wholly lacking in wisdom, there would not seem to be a sound reason for such a change.

Very truly yours,



THOMAS P. GRIESA

United States District Judge

TPG/fm

24 March, 1987

U.S. Sentencing Commission
Attention: Guidelines Comments
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, D.C. 20004

Dear Sentencing Commission Members:

I wish to address the proposed new guidelines of punishment for violators of draft registration. It is my belief that these guidelines are extremely harsh, and fail to provide for adequate allowance of conscientious objector status. The burden of proof lies upon the violator, by these new proposals, to show 'altruistic purpose' in having violated the draft law, in order to avoid being fined and/or jailed. Since altruistic purpose is not legally defined, and is an otherwise subjective acknowledgement of an individual of a recognized personal state of ethics and morality of an undefined religious basis which supercedes the legal system, the possibility of forming positive proof of holding true 'altruistic purpose' in having violated the draft law is, for all practical purposes, nil, as a person's case would rest almost solely upon subjective and wholly intangible material, the order of which generally has no sway in a court of law. The only known exception to this is the individual who, usually by virtue of his parents' religion and gifted forethought, has been a practicing Quaker throughout his life. For those individuals who have not been formally associated with a commonly known and accepted religion which opposes war and the action of killing, there does not exist a method of objective proof for whatever intrinsic beliefs or religious convictions other young men may hold which belong to that widely interpretable, and as yet undefined, 'altruistic purpose'. Is this not a violation of one of the basic tenets of our constitution, which guarantees for all citizens 'the freedom to practice one's own religion'? Since a person's personal religion may not include a known church or commonly recognized organization, the burden of proof in establishing 'altruistic purpose' rests upon the individual unconstitutionally. What is already guaranteed under 'freedom of religion' does not need to be re-established as such. Because of this, conscription itself of conscientious objectors, those with 'altruistic purpose', is essentially illegal. Removing the method of recourse under these new guidelines, by which violators can even attempt to successfully fight fines and jail sentences, the imposition of which assumes guilt before innocence, is a flagrant violation of one's right to religious freedom, as the new guidelines leave no secure channel providing for the continued guarantee of this freedom.

I urge you, as members of the Commission, to seriously reconsider the new guidelines, and to ask yourselves if this does not violate the Constitution itself. Could you personally place yourselves in the positions that these young men are in? What would you do, each one of you, if your personal 'altruistic purposes'

for not registering for the draft were deemed 'unacceptable, innapplicable, or inadequate', just because you didn't have the support of the Quakers, or a similar religious organization, to back you, and validate your conviction?

The act of conscription itself is outrageously unfair and abominable, and has been used to support historically unpopular wars, which speaks for the true lack of support that Americans have shown for such wars; the newly proposed changes in draft violation sentencing, however, nearly nullifies all possibility of showing C.O. or 'altruistic purpose' status successfully, and imposes highly unfair legal punishment on violators, the caliber of which reflects the worst element of the American spirit. With such stiff fines and the threat of imprisonment, in terms of the many thousands of violators at large, the new sentencing arrangements may very well succeed in underhandedly coercing a great majority of violators to simply step forward 'early', and, pleading 'nolo contendere', to join the forces of those who have already agreed to have their lives interrupted so that they could take a few years off to learn how to kill. Indeed, the results from the sentencing changes may be so effective that soon, we will not know our own government from that of the Contras.

Yours truly,

Betsy A. Bradshaw

Betsy A. Bradshaw
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