

WASHINGTON LEGAL FOUNDATION

1705 N STREET, N. W.
WASHINGTON, D. C. 20036
202-857-0240

March 16, 1987

Paul Martin
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Paul:

Enclosed is an original and copy of the testimony that I delivered last week for the Commission. Please make it available to the Commissioners and insert in in the public record.

Thank you for your assistance.

Sincerely,



Paul D. Kamenar

encl

TESTIMONY OF THE WASHINGTON LEGAL FOUNDATION

PRESENTED BY PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

BEFORE THE

UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

MARCH 12, 1987

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N.W.
WASHINGTON, DC 20036
202-857-0240

Mr. Chairman and Members of the Commission:

On behalf of the Washington Legal Foundation (WLF), I appreciate the opportunity to testify once again before this Commission on its formulation of sentencing guidelines to be used by federal courts. As a preliminary matter, I would like to express our disappointment by the Commission's vote the other day to exclude capital punishment sentencing guidelines from its final draft. If the Commission does not include capital punishment guidelines in its report to Congress, it is our position that it should make clear in that report that the failure by the Commission not to include it does not mean that capital punishment cannot be imposed for those federal crimes which provide for it. The Commission should at least acknowledge or recognize that the Supreme Court has not ruled on the constitutionality of the federal death penalty, and that there are legitimate arguments that Rule 32 of the Federal Rules of Criminal Procedure provide the necessary and sufficient guidelines for imposing capital punishment.

Looking at the latest draft of the guidelines, I have a few stylistic suggestions to make to the Commission. The guidelines are set up under numerical chapters numbered 1-6 and within each chapter there are alphabetical parts such as A-Z, and within those parts there are numerical sections. Yet, the guidelines are designated with the alphabetical part first and then reference the chapter. For example, for homicide, it is listed as Section A211. However, since 2 is the chapter and A is a

part within the chapter, I suggest that you reverse the A and the 2 and list homicide, for example, as Section 2A11 so that the reader will immediately know that the number 2 is for offense characteristics and 3 is for offender characteristics. In fact, since Chapter 1 is only an overview of all of the sentencing guidelines and is not substantively incorporated in computing the actual sentence, I suggest that you eliminate Chapter 1 and have Chapter 2 be renumbered as Chapter 1, and have Chapter 3 be renumbered as Chapter 2, so that by looking at the sections, one would immediately know that the number 1 refers to offense characteristics and the number 2 refers to offender characteristics.

Also, if you look at the ten steps that you have listed on page 5 for computing the actual sentence, the order in which the steps are listed are out of sequence. For example, step number 1 refers to computing the offender characteristic level from Chapter 3. We think that you should make the computation process "user friendly" and begin with the beginning, keeping the steps in logical order. In step number 4 you should put in reference to Part Y to make it clear as to whether or not you are referring to adjustments only or are you also adding departures in section 1 of Part Y? In other words are we talking about adjustments with a capital "A" or adjustments with a small "a"? Step number 5 should have reference to Part Z and number 6 should have reference to Part C. Finally, all of your special offense characteristics are in subsection (a) and

there is never any subsection (b). I suggest therefore that you eliminate the reference to subsection a, and simply insert a period after the section. In other words, one section might read as section 2A1.1.

With respect to our general views on the sentencing guidelines as a whole, we share many of the concerns expressed by Commissioner Robinson in his dissent to the guidelines. For example, ranges in the sentences are too large and greatly exceed the 25% specified in the statute, thereby resulting in gross disparities in the sentences that could be imposed. We also think that the base offense levels for many of the crimes listed should be much higher than they currently are. We also think that the provision for departures from the guidelines could very well lead judges to ignore the guidelines, although I must admit that most of the departures listed would increase the base level of the sentences. On the other hand, the departure listed at section Y217 entitled "Altruistic Purposes" may present some problems. For example in Minnesota, U.S. District Judge Miles Lord gave probation to several anti-war demonstrators who broke into a defense contractor and with hammers in hand, damaged the computers which were used to develop our strategic missiles. Judge Lord praised their conduct and said that the real criminals were those who were making the bombs. Similarly, a federal judge in Texas who sentenced those found guilty of illegally smuggling aliens praised their motives as part of the sanctuary movement.

Perhaps this disagreement on the ranges, departures, adjustments, and so forth is the result of the necessary tension between the duties of the Commission in promulgating these guidelines and the duties of a federal judge in applying them. Thus, under 18 U.S.C. § 3553(b), a judge is required to impose a sentence within the guidelines unless the court finds aggravating or mitigating circumstances that were "not adequately taken into consideration". Thus, the court could find an aggravating circumstance was taken into account by this commission, but not "adequately" and therefore can reduce the sentence under the law. Such a sentence will be upheld by the Court of Appeals if the departure was "not unreasonable." Accordingly, in our view, many of the sentences imposed by judges today could very well be imposed under the guidelines and still be upheld by the court of appeals. The Commission's reference to departures and adjustments appears to be a mechanism to give some guidance to the district court in terms of what is reasonable or unreasonable.

Looking at the specific crime categories and their base offense levels, we have a few suggestions. For example, the crime of espionage on page 97 and 98 was not in your first draft. Section M233 is the espionage section under which John Walker and those in the Walker spy ring were convicted. However, the base offense level that you have listed is 30, which translates to 97 to 121 months of incarceration or only about 8-10 years. We think that that base offense level is

woefully inadequate and that this Commission should raise the base offense level to ensure that those convicted of espionage would serve at least twenty years in prison. Subsection A1, as a special offense characteristic, would increase the base offense level to 43 if the espionage occurred in time of war. However, we believe that extreme damage to the national security can be accomplished even in a time of relative peace even though we are engaged in low intensity warfare around the globe. Therefore I would recommend that if you do not increase the espionage base offense level, that at least you indicate that "war" does not mean a formal declaration of war by Congress or Executive Order finding of an Emergency, but means declared or undeclared hostilities, or that it involves giving secrets to an enemy such as the Soviet Union. Therefore, some distinction may be made between espionage for an enemy such as the Soviet Union, and a different category for spying for an ally such as Israel. In both cases, the espionage is serious breach of our national security and should be treated harshly, but if you are going to make any distinctions of espionage, we would think it makes just as much sense to treat the spy more harshly in the case where the secrets are given to an enemy.

The other major concern we have is with the category of drug trafficking. We do not believe that the punishment listed in the base offense levels adequately reflect the severity of these crimes. There can be absolutely no question that drug trafficking and drug abuse in our country has reached serious

proportions and is literally killing our citizens. Drugs are destroying our children's health and safety, our families, our schools, and the entire fabric of our society. Accordingly, this Commission has the responsibility and duty to treat drug traffickers in as severe a manner as possible. In that regard, on page 46, this Commission has listed drug trafficking of Scheduled I or II controlled substances at a base offense level at only 12. This translates into only 10-16 months of incarceration at best for a drug dealer in that level or amount of drugs listed in the category. We believe that this is entirely too low of a base offense level, and we think that it should be at least doubled. We think it is inappropriate to have to distinguish between trafficking in 200 marijuana plants as opposed to 300 or 400. That's like saying that we should go easier on someone who places Cyanide in only ten Tylenol bottles as opposed to someone who placed Cyanide capsules in 20 bottles or 30 or 40. The current sentencing practice of drug traffickers is a national scandal and is entirely too low to begin with. Thus, although this proposed sentencing scheme increases drug sentences somewhat, it is still far short of the minimum sentence that we think adequately reflects the severity of the crime. We suggest that you increase the base level from 12 at least to 24, and then if you want to have several gradations above that that's fine, but as long as you start from a higher sentence. We also think it is totally outrageous that for certain drug traffickers, this Commission is actually considering that with respect to a drug trafficker of Schedule V

drugs, that the level is only 6 which translates into 0 to 6 months of incarceration, and under the Commission's guidelines, that person is eligible for probation. We think it should be made clear that when anybody is ever convicted of dealing in or trafficking in illegal controlled substances, regardless of whether it's cocaine or marijuana or lesser type of drugs, that the dealer knows that they are going to jail for some minimum amount of time. Accordingly, we suggest that you double the base offense level from 6 to 12 for Schedule V drugs. I can assure this Commission that if these recommendations by us for increasing the levels of the punishment for drug traffickers is acted upon and sent to the Congress, not even Senator Joseph Biden will get on the Senate floor and announce his intention to veto your guidelines, as he did on the capital punishment issue, on the basis that this Commission is too tough on drug pushers. As it now stands, I dare say that there may even be opposition by Congress because of the lenient sentences currently proposed for drug traffickers.

Thank you for the opportunity to present our testimony today.

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N.W.
WASHINGTON, DC 20036

202-857-0240