

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

PROBATION OFFICE

January 16, 1990
Columbia, S. C.

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Mr. Paul Martin
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Re: Guideline Amendments

Dear Paul,

I am writing in response to the Commission's request for input from the field. I attempt to read all the presentence reports completed here in the District of South Carolina before the case gets to the sentencing hearing. The amendments that became effective November 1, 1989, cleared a lot of things up. It is surprising how the change of one or two words can make such a big difference. The application note amendments were particularly helpful. As far as any further changes are concerned, I would like for the Commission to consider several of the following items with which we continue to have difficulty.

First, in Chapter IV, I feel that it would be to everyone's benefit to have the applicable time periods noted under 4A1.2(e) included under appropriate subsections of 4A1.1, Criminal History Category. This would make an easier reference for the probation officer in computing the guidelines and would also make it easier to find the proper authority for prior sentences. Also in Chapter IV, many people are having difficulty with the definition of "conduct not part of the instant offense," which is found under 4A1.2(a)(1). Our position is that if any previous conduct for which the defendant was sentenced is related in any way to the instant offense, we do not count that previous sentence. Others have taken the view that the previous conduct has to be the same harm or at least punished in some way under the relevant conduct considerations in the instant federal case. I think an application note may be helpful to clear up some of the differences.

Paul Martin
January 16, 1990
Re: Guideline Amendments

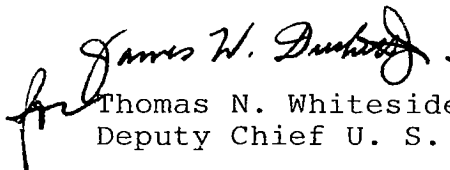
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Probably the most problems we have experienced for the past year have been in the area of supervised release and fines. I really don't think any additional changes should be made in the supervised release guidelines unless others around the country are having an unusual amount of difficulty. At this point, our people have a knowledge of them, particularly the application of those guidelines in Title 21 drug cases.

However, the area of fine computation is another story. We continue to have errors where restitution is involved and the amount of restitution is greater than the minimum of the fine range. More specifically, under 5El.2(c)(2)(C), many probation officers have had difficulty understanding the pecuniary gain to all participants. Many feel that once restitution has been made, there is no gain, and, therefore, an enhancement should not be made to raise the top of the fine range. An application note clearing this up would be helpful.

The Commission's consideration of these items will be very much appreciated by all of us here in the District of South Carolina. I wish you continued success in Law School, as well as in any other pursuits that you may be undertaking at this time.

Sincerely,


Thomas N. Whiteside
Deputy Chief U. S. Probation Officer

TNW/bw

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

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January 19, 1990

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COMMERCIAL CIRCLE
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PLEASE REPLY TO: Corpus Christi

Mr. Paul Martin
U. S. Sentencing Commission
1331 Pennsylvania Avenue NW, Ste. 1400
Washington, D. C. 20004

Attn: Communications Director

RE: ROLE IN OFFENSE DEFINITIONS
AND CRIMINAL HISTORY SCORING

Dear Mr. Martin:

During 1989, I wrote 129 Guideline Presentence Reports, and two of my colleagues in this office wrote at least the same number. During that time, we have noted one particular problem area which takes up an inordinate amount of time not only in discussions among ourselves, but also in court at the time of sentencing. That area has to do with a defendant's role in the offense. Specifically differentiating between a minor participant, and a participant who receives no adjustment. Also addressed in this letter is an area of concern I have concerning criminal history scoring, and an apparent disparity in that area. First, I will provide input regarding role in the offense.

Many of the offenses we encounter involve multi-defendant drug cases. It is difficult to differentiate between a "minor" participant and a participant who should not receive any adjustment as indicated in 3B1.4. It is believed Sections 3B1.2 and 3B1.4 need further clarification as the definitions provided do not supply enough guidance. To a lesser extent, there are also problems differentiating between a "minor" and a "minimal" participant. Section 3B1.1 has not proved as problematic. In an effort to further clarify how to evaluate the roles of defendants, a definition is being offered. It is suggested the following be added to Application Note #3 following 3B1.2:

A "minor" participant generally means any participant who works under the direction of and/or is paid by another participant, and does not have decision making authority, nor does this participant direct the activities of others. This participant is recruited by others, and is involved in the offense to a greater extent than is described as minimal. Examples of a "minor" participant would be a bodyguard, an individual who is a messenger on a continuing basis, or an individual who facilitates the commission of the offense, but whose role is not necessary to the offense.

To further differentiate when a person is a "minor" participant and when no points are involved, it is suggested the following be added to the commentary for 3B1.4:

No adjustment should be given to participants whose role is important in the commission of the offense, but have little decision making authority and do not qualify for an adjustment under 3B1.3. Examples of this would be a participant whose only role is that of a "broker" in an offense, or a participant whose only role was to transport a large amount of drugs to a particular destination.

In reference to scoring criminal history, it is felt there is some disparity. Section 4A1.1(c) provides for one point to be added to each sentence not included under 4A1.1(a) or (b). Under this provision, defendants can receive the same increase for remarkably different offense severities. For example, a defendant may receive one point for misdemeanor possession of marihuana that involved only a few grams and where a fine was the only penalty; yet another defendant may be convicted of a felony drug offense involving perhaps 100 pounds of marihuana, and receive probation. Under both sentences, the defendants receive one point. To take this further, it is possible for a defendant convicted of a class C misdemeanor involving petty theft (in Texas, this offense carries a fine as the only punishment), and receive one point; yet another defendant will receive the same increase for a sentence of probation assessed in a crime of violence such as burglary of a habitation. There have been a number of occasions where I have scored a defendant whose instant offense is a drug offense as a category I offender, when this same defendant has had a previous scoreable felony drug conviction, for which he received probation. It seems quite inconsistent that a defendant who has a previous felony conviction for which he received probation to be in the same criminal history category as the defendant who has no prior convictions.

Additionally, under the scoring rules, it is possible for a defendant with a previous drug or crime of violence conviction for which probation was assessed to be placed in criminal history category number I; yet, with a second drug or crime of violence conviction (which may also carry probation as the sentence), the defendant is designated a Career Offender with its ramifications (provided the instant offense involves drugs or a crime of violence). This appears to be an "all or nothing" provision in the scoring process. It is believed the scoring discrepancy problem is also compounded when contrasted to a defendant who perhaps received 60 days in jail for DWI or child support matter, and is placed in criminal history category II.

In an attempt to resolve this, it is suggested that all scoreable felony convictions for which probation was assessed to be given two points, unless additional points are assigned under 4A1.1(d), at which time only one point

U. S. Sentencing Commission

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January 19, 1990

would be given for the conviction. This would ensure that no defendant with a scoreable prior felony conviction would be a category I offender, and it would differentiate some of the scoring between felony and misdemeanor convictions.

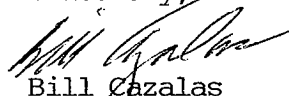
In an attempt to assist us in understanding the guidelines, any information that may be available regarding the philosophy of the Sentencing Commission in formulating Chapters 2 and 4 would be appreciated. Our Court has asked our office in the past if we understood the reasoning the Sentencing Commission used in certain aspects of Chapters 2 and 4, when formulating the guidelines for those chapters.

Additionally, our office has yet to be positive about whether the guidelines are to be applied in a revocation of probation matter. For instance, if a defendant receives probation with no incarceration and is later revoked, are the original guidelines to be applied? Additionally, if the revocation is based on a new conviction, would the new conviction be added in to the criminal history category score? One last area would be if the defendant who received probation also received intermittent confinement, and if the guidelines do apply, would that intermittent then be deducted from the guidelines upon calculating the guideline range at a probation revocation hearing?

I had previously written the Sentencing Commission in December, 1988 with the above concerns, and received no response. I decided to again express these concerns after noting an article in the Probation Division newsletter, "News and Views".

It is hoped my input is of assistance. Should you have any questions, I can be reached at FTS 529-3145.

Sincerely,



Bill Cazalas

U. S. Probation Officer

BC/igc



AMERICAN BAR ASSOCIATION Section of Criminal Justice

1800 M Street, NW, 2nd Floor
South Lobby
Washington, DC 20036-5886
FAX: 202/331-2220
202/331-2260
ABA/net: ABA128

January 25, 1990

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

Dear Judge Wilkins:

The Sentencing Commission again has solicited public comment on a revised interim policy regarding public access to Sentencing Commission documents and data. On behalf of the American Bar Association's Committee on the United States Sentencing Commission, I would like to offer the following comments on that revised interim policy statement.

When I last wrote to you in this regard commenting on the Commission's publication of its initial interim policy (Letter of August 30, 1989, copy attached), the principal thrust of my remarks were directed towards the Commission's decision to not make certain "source documents" publically available. The Commission's persistence in retaining such a posture within this revised document again provides the basis for our continuing concern and disagreement.

The Commission offers three reasons to support its position in this regard: it is under no legal obligation to provide access to these documents; it would be fiscally burdensome to do so; and a surrogate or substitute for the information contained within those documents will, indeed, be made available in the datasets provided to the Inter-university Consortium for Political and Social Research. It is respectfully submitted that those rationales are neither individually nor collectively sufficient to justify the Commission's policy decision here.

Without rehashing the arguments provided in detail in my August 30, 1989, letter, suffice it to say that, first, the perceived lack of a legal obligation to provide access to such materials does not negate the demonstrable wisdom of the Commission's responsibl

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Director
Criminal Justice Standards
Patricia Puritz
Director
Juvenile Justice Center
Susan W. Hillenbrand
Director
Victim/Witness Project

making those items available to litigants, practitioners and researchers and, further, such affirmative action on its behalf avoid the time and expense necessary to determine the propriety of the Commission's belief in that regard. Next, in an area as important as this, administrative convenience and budgetary priorities should not be used as the decisional linchpin. And, finally, in addition to the critical delay it introduces, abstracting of documents, by definition, results in a product far less than the whole, with significant and (to some) necessary material and information being lost forever in the process.

The Commission has indicated that this policy will be maintained as "interim" rather than "final" to afford more flexibility in responding to suggested revisions. On behalf of the Committee, I urge you to reconsider the comments made herein and in my prior letter as well as those similar suggestions in this regard made by other commentators. And I urge you to amend the proposed policy to make clear that the public will have access to all nonconfidential court documents in the hands of the Commission.

I again commend the Commission for seeking public comment and I thank you for this opportunity to provide input. Furthermore, I renew my offer to meet and work with you to help craft what I believe would be a more reasonable and appropriate policy on accessibility and accountability.

Sincerely,



Samuel J. Buffone

SJB/ms
Enclosure

cc: Laurie Robinson

THE UNITED STATES SENTENCING COMMISSION

**1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800**

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



February 5, 1990

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Staff Director
John Steer, Charles Betsey, David Anderson, Candy Johnson

FROM: Paul K. Martin *PKM*

SUBJECT: ABA Response to Revised Public Access Policy

Appended for your review is a letter from Sam Buffone spelling out the ABA's position on the revised interim policy on public access to Commission documents and data.

Attachment

Description: This regulation prescribes limitations on the payment of dividends by national banks in relation to the bank's capital and earnings position and requires approval from the Comptroller of the Currency for dividend payments in excess of statutory limitations.

Respondents: Businesses or other for-profit, small businesses or organizations.

Estimated Number of Respondents: 115.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 115 hours.

Clearance Officer: John Ference (202) 447-1177, Comptroller of the Currency, 5th Floor, L'Enfant Plaza, Washington, DC 20219.

OMB Reviewer: Gary Waxman (202) 395-7340, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.
Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 89-14643 Filed 6-20-89; 8:45 am]

BILLING CODE 4810-25-M

Public Information Collection Requirements Submitted to OMB for Review

Date: June 15, 1989.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512-0220.

Form Number: ATF F 5170.4.

Type of Review: Extension.

Title: Application for Importers and/or Wholesaler's Basic Permit Under Federal Alcohol Administration Act.

Description: Form 5170.4 is completed by persons intending to engage in the business of importing and/or wholesaling alcoholic beverages. The information provided allows ATF to identify the applicant and the location of the business and to determine whether the applicant qualifies for a

basic permit under the Federal Alcohol Administration Act.

Estimated Number of Respondents: 1,300.

Estimated Burden Hours Per Response: 3 hours.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 3,900 hours.

OMB Number: 1512-0398.

Form Number: ATF F 2093 (5200.3) and ATF F 2098 (5200.16).

Type of Review: Extension.

Title: Application for Permit Under 28 U.S.C. Chapter 52—Manufacturer of Tobacco Products or Proprietor of Export Warehouse and Application for Amended Permit Under 28 U.S.C. 5712—Manufacturer of Tobacco Products or Proprietor of Export Warehouse.

Description: These forms are used by tobacco industry members to obtain and amend permits necessary to engage in business as a Manufacturer of Tobacco Products or Proprietor of Export Warehouse.

Estimated Number of Respondents: 336.

Estimated Burden Hours Per Response: 1 hour 30 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 504 hours.

Clearance Officer: Robert Masarsky, (202) 566-7077, Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue, NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 89-14644 Filed 6-20-89; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES SENTENCING COMMISSION

Public Access to Sentencing Commission Documents and Data

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed policy regarding public access to Sentencing Commission documents and data; interim adoption of policy.

SUMMARY: Pursuant to its authority under section 995(a) of Title 28, United States Code, the Sentencing Commission adopts as an interim policy and proposes for public comment the policy on public access to Sentencing

Commission documents and data set forth below. The Commission invites comment on this proposal.

DATE: Comments should be received by the Commission no later than September 1, 1989.

ADDRESS: Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., Suite 1400, Washington, DC 20004, Attention: Public Access Comment.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director for the Commission, telephone: (202) 662-8800.

SUPPLEMENTARY INFORMATION: Section 995(a)(1) of Title 28 authorizes the U.S. Sentencing Commission, an independent agency in the judicial branch of government, to establish general policies and promulgate rules and regulations for the Commission as necessary to carry out the purposes of the Sentencing Reform Act of 1984.

Providing public access to non-confidential sentencing information is consistent both with the letter and spirit of the Sentencing Reform Act of 1984. The Act also envisions the Commission serving as a clearinghouse for information on Federal sentencing practices.

The Commission seeks to carry out its Congressional mandate in a manner that provides the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents pertaining to imposition of sentence in individual cases. To this end the commission proposes that Commission publications and other reports will be made available to the public through the Government Printing Office or other administratively efficient means. Statistical information contained in published and/or commission approved reports will be available upon request. Photocopies of documents exceeding five pages will be provided at fifteen (15) cents per page.

Access to Commission data in the form of comprehensive datasets will be provided through public use tapes provided to the Inter-university Consortium for Political and Social Research at the University of Michigan. Source documents in the Commission's possession, including presentence reports, plea agreements, and judgment and sentence orders, will not be made available to the public. Approved Commission minutes will be available for public inspection. Photocopies of the minutes will be available at a cost of fifteen (15) cents per page. The

Commission's library is open to the public. Selected books and other documents may be borrowed and others may be photocopied at the user's expense.

The Commission has authority to enter into cooperative agreements with private individuals, firms, and organizations. Under certain circumstances the Commission may enter into cooperative agreements with private researchers to undertake an analysis of sentencing data. All confidentiality requirements pertaining to Commission staff shall apply to any party who enters into a cooperative agreement with the Commission. Proposals for such agreements shall be considered by the Commission on the basis of the nature of sponsorship, the purpose of the research, and the administrative burden it will impose.

Proposals will be reviewed by a group including the Commission's Staff Director (or his representative), the General Counsel (or his representative), and the Director of Monitoring. The group will forward its recommendation to the Commission after assessing the feasibility and appropriateness of the proposal. The Staff Director shall ensure consultation with representatives of the Administrative Office of the U.S. Courts with respect to the proposed cooperative agreement as it relates to confidentiality of sentencing data.

Authority: 28 U.S.C. 995(a)(1), Sentencing Reform Act of 1984 (Pub. L. 98-473, October 12, 1984).

William W. Wilkins, Jr.,
Chairman.

Public Access to Sentencing Commission Documents and Data

I. Introduction: General Purpose and Authorities

Providing public access to non-confidential sentencing information is consistent both with the letter and the spirit of the Sentencing Reform Act of 1984. Among the Commission's duties under the Act is to "establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C). As part of that mandate, Congress envisioned that the Commission would "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices." 28 U.S.C. 995(a)(12)(A).

Consistent with its clearinghouse function, the Commission is required to provide certain information to the public

regarding sentencing in the federal system. Thus, the Commission is reasonable for: (a) Collecting systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process (28 U.S.C. 995 (a)(13)); (b) publishing data concerning the sentencing process (28 U.S.C. 995(a)(14)); (c) collecting systematically and disseminating information concerning sentences actually imposed, and the relationship of such sentences to the statutory purposes of sentencing set forth in section 3553(a) of title 18, United States Code (28 U.S.C. 995(a)(15)); (d) collecting systematically and disseminating information regarding effectiveness of sentences imposed (28 U.S.C. 995(a)(16)); and, (e) maintaining and making available for public inspection a record of the final vote of each member on any action taken by it (28 U.S.C. 995(e)).

The U.S. Sentencing Commission seeks to carry out its Congressional mandates in a manner that provides for the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents.

II. Public Access to Commission Publications and Other Reports

Publications. Official Commission publications are available to the public through the Government Printing Office or other administratively efficient means. Copies of all such documents are available in the Commission library for public review.

Other Reports. Requests for statistical information regarding federal sentencing practices will be limited to published and/or Commission approved reports. The reports produced from monitoring data collected by the Commission will be available on an updated-monthly basis and photocopies of such reports may be requested from the Commission. Photocopied documents exceeding five pages are available at a cost of fifteen (15) cents per page.

III. Public Access to Commission Data

Comprehensive Datasets. The Commission will create a comprehensive dataset on federal sentencing practices under the Sentencing Guidelines that will be made available for public use through the Inter-university Consortium for Political and Social Research. The dataset, with information that specifically identifies an individual deleted, will be updated periodically. To ensure against the dissemination of confidential

information, those receiving information from the consortium will be required to sign confidentiality agreements.

Source documents. Source documents, in general, will not be available to the public. Much of the information contained within individual files is of a confidential nature and is protected by an agreement entered into by the Commission with the Administrative Office of the U.S. Courts.

IV. Public Access to Commission Minutes and Library Services

Commission Minutes. Approved minutes of Commission meetings are available for public inspection. Appointments to view the minutes must be coordinated through the Communications Director. Photocopies of minutes are also available at a cost of fifteen (15) cents per page.

Library Services. The public is afforded full access to the library and the documents contained therein. Selected books and other documents are available on a lend basis and other materials are available for photocopying. The expense of photocopying rests with the user.

V. Special Research Projects

Authority and Purpose. Under 28 U.S.C. 995(a) (6)-(7), the Commission has authority to enter into "cooperative agreements [] and other transactions . . . with any person, firm, association, corporation, educational institution, or nonprofit organization" and to "accept and employ . . . voluntary and uncompensated services." From time to time the Commission may enter into cooperative agreements with private researchers to undertake an analysis of sentencing data. The purpose of such agreements would be to further the Commission's duty to "establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C).

Criteria and Requirements.

Cooperative agreements, when entered into, will involve formal arrangements with outside persons or organizations. All requirements with respect to preserving the confidentiality of information that are applicable to the Commission and its staff will apply equally to any party who enters into a cooperative agreement with the Commission. Proposals for cooperative agreements will be considered by the Commission in light of the following criteria:

- Whether the proposed research is sponsored by a recognized academic institution, non-profit research organization, or government entity;
- The purpose of the research and extent to which the proposed project would advance the knowledge of human behavior as it relates to the criminal justice process; and
- The amount of data that is being requested and the administrative burden involved in providing such data.

Special Project Coordination and Feasibility. Proposals for special projects will be reviewed by the Staff Director (or his representative), the General Counsel (or his representative), and the Director of Monitoring of the Sentencing Commission, who shall report to the Commission on the feasibility and appropriateness of the proposal. The Staff Director shall ensure that a representative of the General Counsel's Office and of the Probation Division of the Administrative Office of the U.S. Courts are consulted with respect to the proposed cooperative agreement as it may relate to the Commission's obligations involving confidentiality of sentencing data.

Explanation

Section I.

This section sets forth the statutory authorities under which the Commission adopted a policy on public access.

Section II.

Publications. This section refers to official Commission publications such as the Guidelines Manual, the Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, and the Annual Report that are currently available from the Government Printing Office (GPO). As new reports are produced and approved by the Commission for dissemination, they too will be made available through the GPO or other administratively efficient means. It is anticipated that the computer software developed to assist in application of the Sentencing Guidelines (ASSYST) will be made available to the general public through the National Technical Information Service.

Other Reports. This section provides that materials other than official publications will only be made available to the public upon specific approval by the Commission.

Section III.

Comprehensive Datasets. This section provides that comprehensive datasets of sentencing information will be made

available through the Inter-university Consortium for Political and Social Research. Making information available to the public in that manner is consistent with the policies of other federal agencies conducting or administering research related to sentencing and other criminal justice issues. The dataset will contain complete information on cases sentenced under the guidelines with individual identifiers deleted.

Source Documents. This section states that source documents will not be made available to the public. The Commission takes this position relative to source documents for two reasons. First, in June of 1988 the Commission entered into an agreement with the Administrative Office of the U.S. Courts concerning the appropriate treatment of confidential sentencing data.¹

This agreement places several limitations on the Commission in terms of the data collected by representatives of the U.S. Courts and provided by the Commission:

- It permits the use of confidential information "only in connection with" the Commission's "statutory duties;"
- It requires that "[n]o information that will identify an individual defendant or other person identified in the sentencing information" be released outside of the Commission without the express permission of the court for which the information was prepared and that public Commission reports or summaries containing sentencing information be free of confidential identifying information; and
- It requires the Commission to maintain administrative and physical security over the information and limits internal distribution of confidential sentencing information to Commissioners and Commission personnel with a "need for the information."

It is imperative that the Commission operate both by the letter and the spirit of the agreement with the Administrative Office. The cooperation of the Administrative Office in the collection of the data is essential to the Commission's ability to carry out its statutory mandate to "collect systematically and disseminate information regarding effectiveness of sentences imposed."

The second reason that the Commission is unable to make source documents available to the public relates to the physical and financial burden that such a policy would place

on the Commission. In order to protect the confidentiality of information, photocopies of every non-confidential document would be required. Each photocopy would require inspection and removal of individual identifying information. Separate storage would be required for the desensitized documents in order to remove the potential of accidental availability of confidential documents or documents that contained individual identifiers. The Commission simply does not have the resources to provide such a service, particularly given that all information available from such source documents would be available through the dataset provided to ICPSR.

Section IV

Commission Minutes. Section 995(e) of title 28, United States Code, requires that a record of votes of each member of the Commission to be made available to the public. This policy is proposed in furtherance of that statutory requirement.

Library Services. The Commission is assembling a library that will contain books, academic journals and articles, government reports and documents, reports of varied studies on federal sentencing, and bibliographic materials on selected topics related to federal sentencing. As part of its clearinghouse function it is proposed that library materials be made available to the public for review on Commission premises, duplication at the users' expense, or, with respect to some materials, on a lend basis.

Section V

This section provides a formal structure under which the Commission may share information with outside researchers for mutually beneficial purposes. The Commission possesses the authority under statute to enter into "cooperative agreements" with private individuals and organizations and to accept voluntary, uncompensated services. This section anticipates situations where the Commission may wish to cooperate with outside research organizations in the interests of furthering "the advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. 991(b)(1)(C). It provides that such cooperative agreements be formal and that all requirements concerning the confidentiality of information be observed. Criteria for accepting a proposed project are provided. Further, a staff committee is required to access proposals for feasibility and appropriateness. It is also required that

¹ Letter from L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, to Honorable William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, June 22, 1988.

certain offices within the Administrative Office of the United States Courts be consulted with respect to any questions concerning the Commission's obligations involving the confidentiality of sentencing data as they may relate to a proposed cooperative agreement.

[FR Doc. 89-14585 Filed 6-20-89; 8:45 am]
BILLING CODE 2210-40-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301-73]

Initiation of Section 302 Investigation and Request for Public Comment; Certain Import Restrictions in Brazil

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of investigation under section 302 of the Trade Act of 1974, as amended; request for written comments.

SUMMARY: The United States Trade Representative (USTR) has initiated an investigation under section 302 of the Trade Act of 1974, as amended ("the Trade Act") with respect to certain import restrictions maintained by the Government of Brazil. USTR invites written comments on the matter being investigated.

DATES: This investigation was initiated on June 16, 1989. Written comments from interested persons are due July 18, 1989.

ADDRESS: Comments should be addressed to the Chairwoman, Section 301 Committee, Office of the United States Trade Representative, Room 223, 600 17th St., NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Jon Huenemann, Director, Brazil and Southern Cone Affairs, (202) 395-5190, or Jane Bradley, Associate General Counsel, USTR, (202) 395-3432.

SUPPLEMENTARY INFORMATION: Under section 310 of the Trade Act of 1974, as amended (19 U.S.C. 2420), the USTR must identify as "priority practices" foreign trade barriers the elimination of which is likely to increase U.S. exports, either directly or through establishing a beneficial precedent. Accordingly, on May 28, 1989, the USTR identified as a "priority practice" certain quantitative import restrictions maintained by the Government of Brazil (54 FR 24438). Brazil maintains an import prohibition list which covers approximately 1,000 items, barring U.S. exports of agricultural items and manufactured goods, including meat, dairy products,

plastics, chemicals, textiles, leather products, electronic items, motor vehicles, and furniture. Brazil also uses its licensing regime to implement company-specific and sectoral import quotas, which impede many important U.S. export items, including office machine parts, internal combustion engine parts, and electrical machinery. The lack of transparency of Brazil's licensing system creates uncertainty for U.S. exporters to Brazil and inhibits market access.

Investigation

Section 319(b) of the Trade Act requires the USTR to initiate an investigation, pursuant to section 302(b)(1)(A) of the Trade Act, of this "priority practice", in order to determine whether it is actionable under section 301 of the Trade Act.

Public Comment

The public is invited to comment on the policies and practices of the Government of Brazil that are the subject of this investigation, including (1) whether Brazil's import restrictions referred to above are actionable under section 301, including comments on whether they are inconsistent with a trade agreement; and (2) the amount of the burden or restriction on U.S. commerce caused by the Brazilian restrictions on particular U.S. products.

Interested persons must submit 20 copies of their written comments, in English, by 5:00 p.m. on July 18, 1989, to the Chairwoman of the Section 301 Committee at the address listed above. All submissions must be filed in accordance with 15 CFR part 2006.8, and will be placed in a file (Docket 301-73) open to public inspection pursuant to 15 CFR 2006.12 (except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15).

A. Jane Bradley,
Chairwoman, Section 301 Committee.

[FR Doc. 89-14720 Filed 6-20-89; 8:45 am]
BILLING CODE 3190-01-M

[Docket No. 301-78]

Initiation of Section 302 Investigation and Request for Public Comment; Insurance Market Barriers Maintained by the Government of India

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of initiation of investigation under section 302 of the

Trade Act of 1974, as amended; request for written comments.

SUMMARY: The United States Trade Representative (USTR) has initiated an investigation under section 302 of the Trade Act of 1974, as amended ("the Trade Act") with respect to barriers to foreign insurance providers imposed by the Government of India. USTR invites written comments on the matter being investigated.

DATES: This investigation was initiated on June 16, 1989. Written comments from interested persons are due July 18, 1989.

ADDRESS: Comments should be addressed to the Chairwoman, Section 301 Committee, Office of the United States Trade Representative, Room 223, 600 17th Street NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Peter Collins, Director for Southeast Asian and Indian Affairs, (202) 395-6813, or Jane Bradley, Associate General Counsel, USTR, 395-3432.

SUPPLEMENTARY INFORMATION: Under section 310 of the Trade Act of 1974, as amended (19 U.S.C. 2420), the USTR must identify as "priority practices" foreign trade barriers the elimination of through establishing a beneficial precedent. Accordingly, on May 28, 1989, the USTR identified as a "priority practice" the barriers maintained by the Government of India with respect to sales of insurance in India by foreign insurance companies. Private insurance companies are not permitted to sell insurance in India. The state-owned General Insurance Company of India and its four subsidiaries have a monopoly on sales of general insurance, and the state-owned Life Insurance Corporation of India has a monopoly on the sale of life insurance in India.

Investigation

Section 310(b) of the Trade Act requires the USTR to initiate an investigation, pursuant to section 302(b)(1)(A) of the Trade Act, of this "priority practice", in order to determine whether it is actionable under section 301 of the Trade Act.

Public Comment

The public is invited to comment on the policies and practices of the Government of India that are the subject of this investigation, including (1) whether India's insurance market barriers are actionable under section 301; and (2) the amount of the burden or restriction on U.S. commerce caused by these policies and practices.



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Patricia Puritz
Director

Juvenile Justice Center

Susan W. Hillenbrand
Director

Victim/Witness Project

August 30, 1989

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

Dear Judge Wilkins:

The Sentencing Commission has solicited public comment on a proposed interim policy regarding public access to Sentencing Commission documents and data. I would like to offer the following comments of the American Bar Association's Committee on the United States Sentencing Commission on that proposed interim policy. At the outset, we again commend the Commission for seeking public input on this important aspect of the Commission's mission.

The Committee supports and agrees with the opening statement in the Commission's policy that: "Providing public access to non-confidential sentencing information is consistent with both the letter and the spirit of the Sentencing Reform Act of 1984." We further support and agree that the Commission has a duty to establish sentencing policies and practices that reflect "advancement in knowledge of human behavior as it relates to the criminal justice process" and we applaud the Commission's very promising structure for public access to full library services and the to-be-developed comprehensive data set.

Our principal concern is the "source documents" paragraph of Section III of the Commission's proposed policy statement which provides that

Source documents, in general, will not be available to the public. Much of the information contained within individual files is of a confidential nature and is protected by an agreement entered into by the Commission with the Administrative Office of the U.S. Courts.

According to the release accompanying the Commission's publication of the policy statement, four "source documents in the possession of the Commission . . . will not be made available for public inspection: presentence reports, plea agreements, judgments and sentencing orders." We understand and agree as to the withholding of the first of these, but question and disagree with the decision as to the others.

Our comments are prompted by the fact that, while one of the four source documents referred to by the Commission -- the presentence report -- is ordinarily considered to be a confidential document, the other three items -- the plea agreement, the judgement and the sentencing order -- are not confidential matters. Written plea agreements are often found in public records. See, e.g., U.S. v. Perez, 1 FSR 93, U.S. v. Malaysiak, 1 FSR 94; U.S. v. Scott, 1 FSR 196; and U.S. v. Restrepo, 1 FSR 336. Judgements and sentencing orders are always parts of the public record. They are found in the court file of every federal criminal case in which a defendant has been convicted and sentenced.

Except for those presentence reports that are maintained as confidential by a district court, all other sentencing documents are nonconfidential sources of sentencing information. As to each of them, in the words of the Commission, public access is "consistent with both the letter and the spirit of the Sentencing Reform Act of 1984."

The Committee recommends that the Sentencing Commission revise the "Source Documents" provisions of Section III so as to provide that:

- 1) Source documents about sentencing will, in general, retain the same availability to the public in the hands of the Commission as they enjoy in the files of the district court;
- 2) Presentence reports, and any other document that is not public at the courthouse where sentence is imposed, will not be made available to the public by the Commission;
- 3) The Commission expects that copies of plea agreements, judgements, sentencing orders, statements of reasons, and the courts' sentencing opinions or transcripts of proceedings, whenever found in the public record of a criminal case, will be transmitted by the sentencing court to the Commission at the conclusion of each case;
- 4) Each of the papers specified in 3), as well as any other public information transmitted to the Commission by a court, will be available for inspection by members of the public at the offices of the Commission.

The documents to which this letter is addressed are already in the public record of each federal criminal case. These records are available to any judge, lawyer, reporter, researcher or other member of the public who seeks access through the clerk's office during normal business hours. These materials are also among the essential documents needed by the Commission to perform its monitoring,

research, policymaking and reporting functions. It would be anomalous, in light of the Commission's status as a public agency and a repository of knowledge about the sentencing process, if it were to withhold these nonconfidential documents from the public, thereby making it necessary for every lawyer, researcher and reporter who wishes to study current or past sentencing practices to travel to the particular federal court that sentenced an offender in order to read the public record of the sentence.

Moreover, it seems clear from Rule 32 of the Federal Rules of Criminal Procedure that the only document Congress intended to withhold from public view is the presentence report. No other paper or record mentioned as a "source document" by the Commission is, by law, a document entitled to confidentiality.

Section I of the Commission's interim policy statement refers to a not-yet-published agreement with the Administrative Office by which the Commission undertook to protect the "confidentiality of certain documents." Those "certain documents" are not specified in the policy itself. Furthermore, Section V of the statement indicates that some Commission information may be divulged to researchers for special research projects if the obligation of the Commission to preserve otherwise confidential information is preserved. Personnel of the Administrative Office are to be consulted if issues relating to "the Commission's obligations involving confidentiality of sentencing data" arise.

Insofar as presentence reports are concerned, the agreement between the Commission and the Administrative Office is appropriate. It signifies that the submission of presentence reports by courts to the Commission does not destroy their confidentiality. As to sentencing documents of an otherwise nonconfidential nature, however, transmittal by a court to the Commission cannot transform a public document into one that is now confidential. Nor can the submission of information by courts be considered a voluntary act since the Commission is required by 28 U.S.C. §994(w) of the Sentencing Reform Act to request from courts whatever information and documents it needs to carry out its statutory responsibilities.

The new statute alters many pre-existing norms about sentencing information in the federal system. The traditional structure tolerated a low level of visibility in the sentencing process. It has now been displaced by an entirely new construct, one characterized by guidelines, statements of reasons, and appellate review and one that emphasizes high visibility and judicial accountability.

William W. Wilkins, Jr.
August 30, 1989
Page 4

These Congressionally-imposed values may not be defeated or subordinated by agreement with the Administrative Office or any other entity for that matter.

It would be especially anomalous for the Commission to adopt a policy of withholding from the public plea agreements, judgements, sentencing orders and the like when materials of this sort are increasingly finding their way into print. Federal Supplement, Federal Reporter, Lexis, Westlaw, the Federal Judicial Center's Guideline Sentencing Update, the Federal Sentencing Reporter, the Criminal Law Reporter and other national and local publications are already bringing large numbers of federal sentencing decisions to public attention. As professional and public appetite for information about sentencing grows, the Commission ought to be in the vanguard of information providers, not in the caboose. Lawsuits and public demands ought not be necessary to encourage the Commission to take a leadership role and act as a clearinghouse in the dissemination of sentencing information.

The ABA believes that the Commission, as a matter of policy, ought to seek broad public and professional acceptance of its sentencing guidelines. We believe it can best do this by making its processes and those of sentencing courts visible, understandable and accountable. A policy of public access will promote public respect and trust. The opposite policy -- making it difficult for the public to see how public proceedings in the federal sentencing process are carried out -- is bound to lead to public mistrust.

To the extent that our recommendations concern sentencing documents already available at the court of origination, the Commission could not succeed in preventing them from reaching an interested press, legal profession or research community. At most, the Commission can make it expensive and vexatious for sentencing researchers to find what they are looking for. That ought not be the policy of a United States Sentencing Commission.

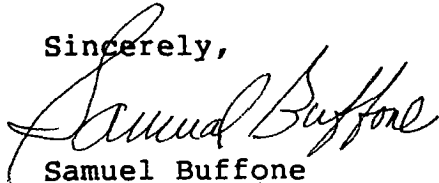
We recognize that due regard must be paid to the difficulties that judges, lawyers, defendants, the Commission and the public face as we all try to adapt to the new system. More specifically, the Committee is sensitive to the transitional problems that the Administrative Office/Sentencing Commission agreement has raised. We would be pleased to meet with the representatives of both agencies to help work out a reasonable transition from the old system of limited public information about sentencing to the new system of accessibility and accountability that Congress ordained to

William W. Wilkins, Jr.
August 30, 1989
Page 5

replace it. We believe that that transition can undoubtedly be made within the framework established by the Commission's interim draft. But the proposal should first be amended to make clear that the public will have access to all nonconfidential court documents in the hands of the Commission.

I again thank you for this opportunity to provide input and look forward to working with you on the resolution of this issue.

Sincerely,

A handwritten signature in cursive script, reading "Samuel Buffone".

Samuel Buffone
Committee Chairperson

2406Q

HOFSTRA UNIVERSITY

HEMPSTEAD · NEW YORK 11550

SCHOOL OF LAW

August 10, 1989 FACULTY

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Commissioners:

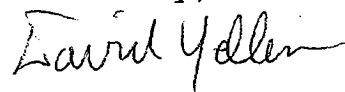
I would like to address a concern I have regarding the Commission's proposed policy on public access to sentencing documents and data.

My concern relates to judges' statement of reasons for departing from the guidelines. Departures are one of the most critical aspects of the guideline system. As such, it is important that there be sound analysis done of departures. I know that the Commission is monitoring this and other aspects of sentencing practice. I believe, however, that a useful role can also be played by independent researchers and scholars. For example, a useful project would be a detailed examination of the factors courts are relying on to depart from the guidelines. The results could be informative for judges and practitioners, and could assist the Commission in refining and amending the guidelines.

As it stands now, however, it would be hard, if not impossible, to do such research in a systematic manner. In those departure cases where there is no reported decision and no appeal, the only real source of information is the judge's statement of reasons required by 18 U.S.C. 3553(c). Further, the only meaningful way to get access to a large sample of such statements would be through the Commission.

I understand the Commission's concern with confidentiality and administrative burden. However, I do not believe that the statements of reasons for departing raise confidentiality problems and I hope that some meaningful form of public access that is not overly burdensome to the Commission can be worked out. I believe that the Commission's goals and responsibilities, including furthering the interest of justice and knowledge of the sentencing process, would be advanced by such a policy.

Sincerely,



David Yellen
Assistant Professor

THE SENTENCING GROUP

SENTENCING AND PAROLE CONSULTANTS
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MATTHEW G. YEAGER
CRIMINOLOGIST

JOEL A. SICKLER
INVESTIGATOR
LIC. NO. AA011941

August 21, 1989

MEMBER:
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OF CRIMINOLOGY
INTERNATIONAL
SOCIETY OF CRIMINOLOGY
WESTERN SOCIETY OF
CRIMINOLOGY

U.S. SENTENCING COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Attn: Public Access Comment

RE: Access to Sentencing Commission Data

Dear Commission:

Allow me to comment on the Commission's interim policy as it relates to the disclosure of documents and microdata. The comments below represent my personal viewpoints, and are intended as a response to the Commission's invitation for public comment on its interim disclosure policy. For clarity, I have grouped my comments under various subject headings.

A. FAILURE TO CONSULT WITH INTERESTED PARTIES PRIOR TO
ESTABLISHMENT OF INTERIM POLICY

Perhaps the most glaring problem evidenced by the new interim policy is the Commission's failure to seek comment from interested parties prior to the establishment of its disclosure policies. The Commission failed to create an outside advisory group, or invite its creation before entering into an agreement with the Administrative Office of the U.S. Courts regarding confidentiality of certain court records. It is now extremely difficult to comment on a policy, part of which is embedded in a June 22, 1988 letter from Mr. L. Ralph Meham, which is predicated on a clandestine agreement that has already been signed, sealed, and delivered.

B. ACCESS TO PERSONAL IDENTIFIERS FOR RESEARCH

The interim policy sheds little light on whether researchers from the non-government sector will be permitted to access "personal identifiers" when that information is needed to address the research hypotheses. Will outside researchers be given access to confidential information, or not? The issue is never specifically affirmed or denied in the policy notice.

C. CLARIFICATION: ORIGINAL SOURCE DOCUMENTS

The establishment of policy with little or no input from outside parties is also illustrated by a concern over original source documents. For example, what parts of the Judge's sentencing form will be encoded onto computer; and will this necessarily include a narrative section to address reasons for departure? This is not made clear in the policy initiative. Take another example. The Commission will create a "comprehensive dataset" on sentencing trends under the new guidelines. Which information does the Commission intend to select? ¹ Will this information come from the presentence reports? From a form to be filled out by defense attorneys? In my opinion, the whole issue is presumably delegated to the Commission without outside input.

D. DISCLOSURE OF THE FPSSIS DATASET

Nowhere in the interim policy is there any mention of the extremely interesting FPSSIS dataset. As the Commission is well aware, this dataset documents sentencing practices prior to inauguration of the guidelines. Will this dataset be made available through the Inter-university Consortium for Political and Social Research?

1

For instance, will the dataset of current trends under the Guidelines conform with the original FPSSIS dataset, for which there is no mention at all in the interim policy? Some researchers will want to compare trends between the two sets of data.

E. APPOINTMENT OF AN INFORMATION COORDINATOR

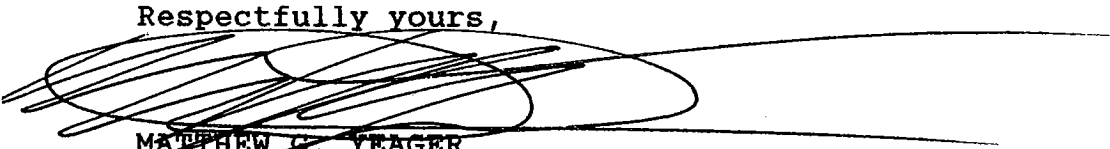
There is an urgent need to appoint an information coordinator who will work with interested parties to expedite disclosure of information, and assist in the prompt dissemination of data. For example, only recently have I obtained a copy of the ASSYST program. There is absolutely no need for this diskette to be made available through N.T.I.S. It should be disseminated by the people who are directly involved in its creation and updating.

Part of the Coordinator's job would be to expedite dissemination of datatapes through CJAIN [Criminal Justice Archive & Information Network]. The Coordinator would be available to assist with the development of research projects, and to make sure that staff members of the Commission's research unit return phone calls, and are available to discuss technical problems with interested parties.

SUMMARY

In summary, the Commission's interim policy is a noble effort that falls short of its mission. It fails to address central issues (such as which data is to be encoded onto computer for public disclosure). And, it appears to continue a system where policy originates within the Commission and is institutionalized with little or no outside commentary.

Respectfully yours,



MATTHEW G. YEAGER
Criminologist

cc: Members of Congress

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ADMITTED IN
FLORIDA, ILLINOIS & LOUISIANA

August 24, 1989

Mr. Paul K. Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Ste. 1400
Washington, D.C. 20004

Attention: Public Access Comment

Dear Mr. Martin:

The following is my comment on the Commission's Notice of Proposed policy regarding public access to Sentencing Commission documents and data.

These comments are based on my experience as a federal criminal law defense attorney, mainly in the Southern District of Florida.

Basically, it is my opinion that the appellate courts, in interpreting the Commission's guidelines, treat those guidelines almost as if they were statutes. Unfortunately, there is no legislative history for the particular guidelines themselves. While it is possible in a very gross way to sometimes trace a guideline through three or four revisions, there is, more often than not, no way to know why the Commission took a specific course or altered or amended a guideline. Without knowing the guidelines' history, it becomes very difficult to suggest specific applications.

With the passage of the Freedom of Information Act the Congress decided that the era of government 'secret law' had come to an end. The application of the criminal justice system to the citizenry is perhaps the most intrusive way that government impacts upon our lives.

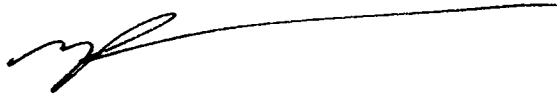
Openness in Government is a hallmark of democracy. A Government that operates in the shadows using secret law is a Government that is unaccountable to its citizens. Through administrative oversight, it appears that the laws granting access to information do not apply to agencies placed in the judicial branch. The Commission may, however,

Mr. Paul K. Martin
August 24, 1989
Page Two

administratively adopt measures which would provide citizens with the same type of access to information freely available from all of the agencies in the Executive branch.

Therefore, it is respectfully recommended that the Commission administratively adopt procedures analagous to the Freedom of Information Act and the Privacy Act in the furtherance of our democratic principles.

Sincerely yours,

A handwritten signature in black ink, appearing to be "M. J. O'Kane", followed by a long horizontal line extending to the right.

Michael J. O'Kane

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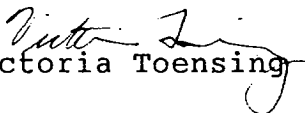
September 11, 1989

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

Dear Chairman Wilkins:

On behalf of General Electric, I submit to you Preliminary Comments of General Electric Company on The United States Sentencing Commission's Proposed Organizational Sanctions. Thank you for your invitation to participate in this important process.

Sincerely,


Victoria Toensing

cc: Hon. Stephen G. Breyer
Hon. Helen G. Corrothers
Hon. George E. MacKinnon
Hon. Ilene H. Nagel
Hon. Benjamin F. Baer (ex officio)
Hon. Stephen Saltzburg (ex officio)

PRELIMINARY COMMENTS
OF
GENERAL ELECTRIC COMPANY
ON
THE UNITED STATES SENTENCING COMMISSION'S
PROPOSED ORGANIZATIONAL SANCTIONS

September 11, 1989

Philip A. Lacovara
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Victoria Toensing
Hughes Hubbard & Reed
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**IMPUTED CRIMINAL LIABILITY
REQUIRES ADJUSTMENTS TO ORGANIZATIONAL SANCTIONS**

Commentators have viewed corporate sanctions differently from individual sanctions, basing this distinction on the obvious fact that "corporations do not go to jail." The doctrine of imputed criminal liability, however, provides another more fundamental reason for this distinction.

As currently applied in the federal courts, this doctrine may impose virtually automatic criminal responsibility on the organization because of the conduct of one of its employees, even a low-level employee, and even for conduct in defiance of corporate policy. The doctrine imputes equal legal guilt whether it is the President and sole stockholder of a small corporation engaging in the criminal conduct or a field-level salesperson in a 50,000 employee multinational corporation doing so. Thus, despite the fact of conviction, the actual culpability of the corporation may be non-existent or minimal when contrasted with the level of personal culpability that accompanies the conviction of an individual. Yet, as the Supreme Court noted in United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978), an element of moral culpability must be present if a sanction is to "square with the generally accepted functions of the criminal law."

The public policy goals of corporate sanctions are (1) to punish culpable corporate conduct and (2) to encourage

corporations not only to deter crime but also to detect and disclose possible criminal behavior. Accordingly, sentencing guidelines should look principally to the corporate behavior leading to the corporation's conviction and not solely to an agent's act imputed to the corporation. So long as this doctrine of imputed liability is used to convict corporations, organizational sanctions should be flexibly tailored to credit the corporation that does not have high-level management involved and that establishes programs to comply with the law and report crime.

For the Commission, the guiding principle that should flow from the existence of imputed guilt is the following: to the extent that a corporation automatically bears the responsibility, or liability, for an illegal act committed by its agent, organizational sanctions should be flexible enough to recognize that there may be little or no basis for a punitive fine (beyond any appropriate restitution); and it is especially appropriate to mitigate penalties when the individual wrongdoer was not vested with managerial authority or when the corporation has tried in good faith to prevent wrongdoing and/or was instrumental in discovering and reporting it.*

* An example of corporations pledging policy and funds to prevent and uncover possible criminal activity is the Defense Industry Initiatives (DII). Attached as an Appendix is information about the DII, the participating companies, and the outside auditing of each company's compliance with the DII standards.

THE FEDERAL DOCTRINE OF IMPUTED CRIMINAL LIABILITY MAY PERMIT
CONVICTION WITHOUT ACTUAL CORPORATE CULPABILITY

A corporation is an artificial legal person. It is composed of three distinct categories of other persons: first, the shareholders who own it and select the corporation's directors; second, the directors who are elected to oversee the corporation's affairs and the officers who are appointed to manage the business; and third, the employees who are to implement the policies and plans established by the directors and management.

Unlike most state courts, federal courts have adopted a broadly defined doctrine of imputed liability, which provides that corporations can "be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 494-95 (1909). The modern industrial, financial, or service corporation may have thousands of employees, or even hundreds of thousands of employees scattered around the world. Yet, under the doctrine of imputed liability, the criminal act of just one of these employees may provide the basis for the entire organization to be found guilty of a crime. This standard of automatic imputed guilt would be unconstitutional if applied to natural persons.

Moreover, many courts treat imputed corporate culpability under federal law as even broader than the New York Central test above might at first glance imply. Liability may flow not only for the criminal acts of officers, directors and managers, but also for acts of employees far removed from supervisory positions,

Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962), such as salespersons, clerical workers, truck drivers and manual laborers. Under some circumstances, criminal liability can even be imputed to the corporation through the evil deeds of an independent contractor, United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), cert. denied, 332 U.S. 851 (1948).

A corporation's exposure to federal criminal sanction is extended still further through broad judicial interpretation of the term "agent acting within the scope of authority." By not requiring the prosecution to show that the corporation's managers at least implicitly authorized the criminal acts, federal courts have imputed guilt for:

- acts an offending employee is not actually authorized to commit;
- acts committed despite the corporation's good faith efforts to prevent them; and
- acts specifically violating company policy and management directives.

Thus, as one commentator has explained:

Indeed, acts in disobedience of specific prohibitions against that very conduct have been held to constitute acts occurring within the scope of the agent's employment. In the context of corporate criminal prosecutions, then, 'within the scope of employment' is a term of art signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity. 1 K. Brickey, Corporate Criminal Liability, § 3:01 at 40 (1984).

While it is the general rule that one of the employee's purposes must be an intent to benefit the entity, a court may find that this standard is satisfied even though the employee's primary motive was personal profit and even though the corporation did not actually benefit from its employee's conduct, e.g., U.S. v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979), or would not have desired to benefit if a responsible corporate official had known in advance of the conduct. Additionally, the intent to benefit the corporation may only be relevant if intent is a specific element of the crime. U.S. v. Automated Medical Laboratories, Inc., 770 F.2d 399, 407 (4th Cir. 1985); U.S. v. Cincotta, 689 F.2d 238, 241-242 (1st Cir.) cert. denied, 459 U.S. 991 (1982); U.S. v. Ridglea State Bank, 357 F.2d 495, 498-99 (5th Cir. 1966).

Furthermore, the so-called "collective knowledge" doctrine provides prosecutors with yet another tool to charge the corporation for the acts of its agents. Under the "collective knowledge" doctrine -- a doctrine that surely runs counter to fundamental notions of culpability traditionally associated with criminal conduct -- a corporation may be convicted for knowing violations of the law even though no single agent intended to commit the offense or even knew of the existence of the operative facts leading to the violation. See, e.g., U.S. v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), cert. denied, ___ U.S. ___, 98 L.Ed. 2d 356, 108 S. Ct. 328 (1987); U.S. v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir.), cert. denied, 478 U.S. 1007 (1986); U.S. v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

Thus, unlike a private individual who can be found guilty only if the jury finds beyond a reasonable doubt that he or she personally committed the crime or knowingly aided another person to do so, a corporation is exposed to prosecution, for example, when (A) the criminal act was committed by one low-level employee having no authority whatsoever in the organization, (B) the corporation's management tried actively and in good faith to prevent the criminal act, or (C) separate "elements" of the crime were committed by several low-level employees not one of whom intended to commit an offense, and no supervisor was aware of these collective acts.

This is not the forum to argue the merits, or lack thereof, of the doctrine of imputed guilt or the extremes to which it is sometimes pushed. There are substantial reasons of policy and constitutional principle why the standards for finding a corporate person guilty of a crime should be narrowed substantially. This is the place, however, to point out that the current contours of the doctrine of imputed corporate criminal liability may permit a finding of guilt in the absence of real culpability of the sort the criminal law normally addresses. The Commission should appreciate this fundamental distinction when deciding the underpinnings for the corporate sanction guidelines.

PUNITIVE FINES SHOULD REFLECT THE ACTUAL CORPORATE BEHAVIOR
AND NOT MERELY THE FACT OF CONVICTION

In addition to requiring the convicted corporation to make restitution when the criminal acts of an employee create gain or

PROBATION

We are aware the Commission is considering various proposals on probation for corporations. There does not appear to be a universally accepted definition of "probation." The term can be used to describe a situation where the court wants to retain jurisdiction solely to ensure a fine is paid or restitution is made, thus providing a ministerial function.

The term is also used to define more intrusive situations, where the court actually supervises activities of the corporation by forcing it to do or restricting it from doing certain inherently corporate acts. Our remarks are addressed to the imposition of supervisory rather than ministerial probation.

However doubtful the basis for concluding under proposed § 8D1.3(d) that it is feasible to impose by probation an internal compliance program, far more troublesome is proposed § 8D1.3(c). That latter kind of supervisory probation is triggered whenever the court requires restitution under proposed § 8D1.1(b) but the restitution is not paid at the time of sentencing. That will not be an uncommon event, since it may take time to identify victims and determine the appropriate amount of compensation. Nevertheless, even though actual payment may be assured, proposed § 8D1.3(c) seems to permit enormously restrictive regulation of ordinary business affairs, such as requiring court approval of dividend payments or the issuance of stock or commercial paper and also requiring court

approval of all employment compensation paid to directors, officers, or managers.

Another important observation is in order. As the commentary notes, Congress has expressed clear opposition to organizational probation except where the organization is essentially a corrupt entity organized or operated primarily to engage in illegal conduct.

We are concerned about the lack of empirical studies of successful supervisory corporate probations. We strongly urge that any further consideration of guidelines on organizational supervisory probation be postponed until there is an impact study to determine the percentages and types of offenders that would fall into this category. Imposing a court's oversight authority on the everyday decisions of a corporation could be a managerial disaster for both the court and the corporation. Until the Commission and interested commentators can identify and study a sufficient number of cases in which organizational probation has been successful, the Commission should heed Congressional opposition and not tread quickly into such unknown waters.

* * * *

We appreciate the opportunity to submit these preliminary comments.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
PROBATION DIVISION

S. THOMAS NOELL, JR.
CHIEF PROBATION OFFICER
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November 29, 1989

DIVISIONAL OFFICES
REPLY TO:

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Asheville, NC 28801

Mr. Paul Martin
U. S. Sentencing Commission
Communications Director
1331 Pennsylvania Avenue N. W., Suite 1400
Washington, D. C. 20004

Re: Suggestion for a
1990 Amendment Cycle

Dear Mr. Martin:

This is in response to the article, which appeared in the 11/13/89 issue of News and Views regarding needed input.

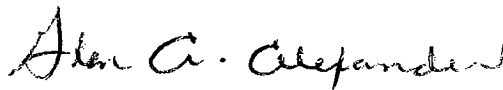
I feel one major problem with the guidelines, which was not addressed by the 11/01/89 revision is multiple bank robbery situations. I think we need to be able to make some addition for situations where several bank robberies occur within a short period of time and where the government chooses to prosecute all of the robberies at the same time.

It seems to me the present situation where the guideline range is increased through the use of units just does not reflect the seriousness of these multiple bank robbery cases. Bank robberies are such potentially dangerous situations that I feel the commission has a real responsibility to make sure these individuals are punished and to let others know sanctions for this type of behavior are very severe.

This problem has been discussed quite a bit in our office and I have had comments from Assistant U. S. Attorneys and FBI Agents regarding the apparent leniency of the guidelines in this type situation.

Thank you very much for taking time to consider my comments. I hope this will be helpful to you in some way.

Sincerely yours,



Glen A. Alexander
U. S. Probation Officer

GAA:zlj

cc: Jerry Miller, AUSA
Asheville, NC
Steve White, FBI
Asheville, NC
CUSPO, Charlotte, NC