

STATEMENT

of

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COMMITTEE ON CRIMINAL LAW & PROBATION ADMINISTRATION
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

and

**HON. MARK WOLF, CHAIRMAN
SUBCOMMITTEE ON SENTENCING GUIDELINES AND PROCEDURES**

before the

UNITED STATES SENTENCING COMMISSION

March 5, 1991

We appreciate the opportunity to appear before the Commission to comment on various proposed amendments to the Sentencing Guidelines. We speak on behalf of the Committee on Criminal Law and Probation Administration, a Committee of the Judicial Conference of the United States. Federal judges are in a unique position to assess the Guidelines. We see them in operation every day. We bear primary responsibility for their implementation. Because of this close involvement, the Judicial Conference, through our present Committee and its predecessors, has maintained a working relationship with the Commission. We recognize that the Sentencing Guidelines are a permanent part of the federal criminal law landscape, and we are anxious to work with the Commission to make them as effective as possible. We welcome this and other opportunities to work with the Commission in the development of a fair and workable guideline system.

We want to emphasize this point of "development." Congress in establishing the Sentencing Commission recognized that there would be a process of development. Thus it conferred upon every sentencing judge the authority to depart from the Guidelines, up or down, if the judge found that there existed a circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the relevant Guidelines, provided that the judge also found that the existence of that circumstance should result in a departure. This concept of

departure is essential to the future resiliency and health of the Guidelines. Departures will be considered by the Sentencing Commission in refining and fine-tuning the Guidelines in the future: the interplay between departures and the Sentencing Commission's oversight will result, in time, in the Sentencing Guidelines reflecting, in fact, a process of common law growth.

In September of 1990, the Judicial Conference of the United States sent to the Commission eight recommendations for amendments to the Guidelines. These recommendations, which were formally adopted by the Judicial Conference, were addressed to problems identified by members of our Committee, drawing on the experience of sentencing judges. Many of these same problems had also been identified by the Federal Courts Study Committee (FCSC). A principal problem which these recommendations addressed was a lack of flexibility on the part of the judge at the low end of the Guidelines. Most judges agree with Congress that the Guidelines should "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Most judges also believe that under the Guidelines there is too little flexibility in sentencing first offenders. A copy of the Judicial Conference's recommendations, which were delivered to the Commission in September 1990 and which we understand are presently under study by the Commission, is attached to this statement.

At the urging of the Committee on Criminal Law and Probation Administration Committee, the Judicial Conference took no action on several measures with respect to the Sentencing Guidelines urged by the FCSC, such as the recommendations to make the Guidelines merely advisory, and to establish a distinct standing Committee to study proposed Guidelines. Instead, the Judicial Conference authorized our Committee to recommend specific guideline amendments, as needed, to address problems we perceived with the Guidelines, and to comment directly to the Commission, when we deemed it appropriate, on Guideline matters.

Today we are faced with 51 pages of amendments to the Guidelines proposed by the Commission in January of 1991. Obviously, the time has been too short for any comments we make to reflect a position with respect to these proposed amendments which has been taken by the Judicial Conference, which does not meet until next week, or even by our own Committee, which does not meet until June. Thus, what our comments do reflect are the views of our Subcommittee on Sentencing Guidelines and Procedures.

We derive from these proposed amendments the strong sense that the members of the Commission and we in the judiciary seek the same goals: the development of a system of sentencing which is fair and efficient, and which reflects, to the extent possible, proportionality, uniformity, and honesty. The goal is not easy to achieve. Indeed Congress has charged the Commission in carefully chosen words to recognize that disparities (but not unwarranted disparities) will persist, and that the establishment of general sentencing practices does not eliminate the need, on occasion, for a judge to consider individualizing disparities:

"The purposes of the United States Sentencing Commission are to---

(1) establish sentencing policies and practices for the federal criminal justice system that---

(B) provide certainty and fairness in meeting the purposes of sentencing , avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

28 U.S.C. §991(b).

We understand that we are not the only constituency with which the Commission must be concerned. The Commission in fact is directed, in fulfilling its duties and exercising its powers, to consult not only with the Judicial Conference, but also with representatives of the Bureau of Prisons, the Department of Justice, and the Federal Public Defenders. But we draw attention to the numbers of amendments which have been made since November, 1987, and we suggest that some attention need be given to whether the present amendment process lends itself to meaningful input by any of the constituencies.

In the comments which follow we direct our attention to three areas which the proposed amendments point up: that of the amendment process; lack of flexibility in sentencing; and plea negotiation.

The Amendment Process

Understanding the goals of the guideline system. In order to decide what amendments are needed, we need to understand what the Guidelines are trying to do, and how well they are working. The Guidelines are part of a complex system. Their effectiveness depends on their interaction with other sentencing statutes and with the policies and practices of prosecutors, probation officers, defense attorneys, and judges. Attempts to correct problems in one area can create new ones in another. No significant amendment can be considered in isolation.

To weigh the costs and benefits of the present proposals, we need to understand how they fit into the Commission's view of problems with the current system, and its vision of a better one. The Commission outlined the purposes of the Guidelines and its resolution of major policy issues in Chapter 1 of the Guidelines Manual. It has since published annual reports containing data on the operation of the system. But hard data on how the system as a whole is working are sorely needed. The proposals before us are not accompanied by a comprehensive evaluation of the Guideline system, nor by a comprehensive explanation of how the amendments will help accomplish the Commission's goals. The brief "Reason for the Amendment" published after each proposal is only somewhat informative.

The amendments appear to be piecemeal. This would not be unusual in cases of technical amendments or those that clarify a simple ambiguity in application, though a piecemeal approach still creates problems for judges and probation officers and prosecutors and defense counsel who must struggle to stay abreast of each round of changes. Some of the amendments seem to be reactions to individual court decisions rather than part of a comprehensive program of refinement and evolution. Some amendments appear designed to advance a particular policy agenda--- further to reduce prosecutorial and judicial discretion, or to ensure real-offense sentencing without regard to offender characteristics. But there is no public study of plea bargaining, no comprehensive analysis of how judges have exercised their departure power, and no invitation to public debate on whether this is the direction in which the system should be going.

The Commission has requested comment on several areas of special interest to the judiciary. Proposals concerning the appropriate sentence for multiple counts of perjury (proposed amendment 19) would undoubtedly benefit from the comment of judges familiar with such cases. The organizational Guidelines now under consideration raise a multitude of

issues of concern to the bench. We cannot arrange a helpful response to your requests, however, unless we are given sufficient time and data. Absent personal experience in these areas, and absent time to elicit views of judges who have had such experience, and absent the data which underlie the making of the proposals, we cannot usefully respond (except as to organizational proposals, to the limited extent we already have).

We understand that to a certain extent the amendment process is driven by statutorily ordained time tables, but we strongly suggest that a more extended public gestation period for analysis and development of meaningful comment on proposed amendments will in the long run be in the interests of the Commission, and will result in the development of the Guidelines in the directions anticipated by Congress.

Our suggestion is, therefore, that there should be a more extended period for public comment on proposals by the Commission to amend the Guidelines. We also urge the Commission to propose amendments in related packages. This would permit the "Reason for Amendments" section to contain a more general discussion of the problems and policy goals each package is designed to address.

The Commission has proposed amendments in areas that we believe are the unique province of the court, and which are the subject of rapidly developing case law. For example, proposed additions to Chapter 6 of the Guidelines state the Commission's view of what standard of evidence is required by due process and who should bear the burden of persuasion (proposed amendment 36). We suggest that the development of sentencing procedures are beyond the Commission's statutory authority, and that difficult questions of procedural fairness are best left to resolution through traditional case-by-case adjudication.

We believe the Guidelines are here to stay, and that they work. As developed under the Commission's empirical approach, they tell judges what the average imprisonment for various types of crimes and offenders has been. They thus help judges identify in each case the fair sentence, and they restrain those who might otherwise have imposed an atypical sentence due to lack of familiarity with general practice or idiosyncratic sentencing philosophy. The departure power gives judges the additional discretion they need when the Guidelines have not taken into account an important factor present in a given case. The Guideline system will be accepted and faithfully implemented when it adheres to this approach.

The Guidelines will create problems if they attempt to limit the judge's ability to fashion a fair sentence. The Judicial Conference recommendations are aimed at giving judges greater flexibility to tailor sentences to the individual, either within the guideline structure or through reasoned departure. They are largely aimed at the first offender end of the sentencing scale, where the considerations are prison or no prison. They seek to ensure that explicit incentives will be found within the Guidelines so that prosecutors will not resort to, and judges will not accept, plea agreements that misrepresent the real offense. These concerns need attention if the system is to be fair and workable. The proposed amendments do not adequately address them: certain proposals may exacerbate the problems or create new ones.

We turn now to a consideration of certain of the current proposals that affect sentencing flexibility and the plea negotiation process.

Flexibility in Sentencing

Offender Characteristics. A major goal of the Judicial Conference's recommendations was to increase judges' flexibility to take into account offender characteristics. We note with approval that the Commission has proposed eliminating language in Chapter 5, Part H, that attempts to keep judges from considering offender characteristics when choosing a sentence from within the Guideline range (**proposed amendment 34(A)**). However, the overall and ultimate thrust of the Commission's proposed amendments may be to prevent or deter judges from considering individual characteristics.

Thus Recommendation 5 of the Judicial Conference asked the Commission to accord judges greater flexibility to consider the youth of an offender, but the Commission has proposed the opposite (**proposed amendment 34(a)**). Where the Judicial Conference asked for greater flexibility to depart if an offender has combinations of characteristics that make a sentence outside the Guidelines better suited to the purposes of sentencing (listed at 18 U.S.C. 3553(a)), the Commission proposes to add to the list of characteristics that *cannot* be considered by eliminating consideration of characteristics such as exemplary military service and good works, which many judges believe are relevant to the purposes of sentencing (**proposed amendment 34(C)**).

Many of the proposed amendments to Part H appear designed to "plug holes" that have been opened by judicial departures from the

Guidelines. It has always been our view, which we understood that each of the Commissioners shared, that departures are crucial to the creative evolution of the Guidelines. If this is so, is it useful to correct departures with which the Commission may disagree by immediate amendment of the Guidelines? Will this not have a chilling effect upon other judges who may contemplate departures in conscientious attempts to accommodate the Guidelines to individual offenders? Is the departure power so subject to abuse that an amendment is required instructing judges that "physical...appearance, including physique," is not ordinarily a basis for departure? (**Proposed amendment 34(B).**)

The Commission's proposed restrictions on the consideration of offender characteristics go well beyond those required by 28 U.S.C. 994. They will stunt the development of a common law of sentencing, as envisaged in the Sentencing Reform Act. Departures are now subject to review by the Courts of Appeals, which have required that judges give detailed statements of reasons and that the degree of departure be structured. We ask the Commission to allow, and indeed encourage, this emerging area of law to develop. We urge you not to respond by amendment to every case where a judge has considered a factor the Commission believes is inappropriate.

We also ask that the Commission adopt the Judicial Conference's Recommendation 5 to add an application note to Part H of Chapter 5, which will make it clear that factors that are not ordinarily relevant "may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case." This would help reinforce the position that while offender characteristics are not *ordinarily* relevant, they may be considered in the unusual case.

We applaud the Commission's addition of two new policy statements on grounds for departure; restitution prior to the discovery of the offense and voluntary disclosure of the offense (**proposed amendment 37(x)**). These additions should add needed flexibility to recognize the remedial efforts of offenders. However, as proposed the amendments contain so many conditions that they may as a practical matter actually limit the availability of departure on these grounds. The statement on restitution limits the departure to situations where there has been full restitution. We urge the Commission to also permit significant restitution to be recognized, particularly since restitution may be limited by ability to pay. Similarly, the limitation to offenses that are totally unplanned and isolated seems unnecessary. The statement on voluntary disclosure limits the departure to

cases that were unlikely to have been otherwise discovered. Few offenses fall into this category. Early disclosure can limit harm and should be encouraged. We urge the Commission to allow judges to tailor the departure to the individual circumstances of each case when a defendant has made significant remedial efforts.

Sentencing Options. The Guidelines not only radically reduce the proportion of offenders for whom probation is an option, but they also virtually rule out judges' ability to consider many of the factors they believe are most important to the decision of prison or probation: factors such as the threat to the community posed by the defendant; his potential for rehabilitation; the effect imprisonment is likely to have on the defendant's family, and on his post-release life. Consequently, this is the area where acceptance of the Guidelines by judges has proven most difficult, and where judges see the greatest need for change. This is especially so since many judges believe that the present Guidelines do not conform to the statutory requirement that they "reflect the general appropriateness of imposing a sentence other than imprisonment" for first offenders (U.S.C. 28 994(j)) nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons..."(U.S.C. 28 994(g)).

The Judicial Conference recommendations now pending before the Commission seek to increase the availability of sentencing options at lower guideline ranges, especially for first offenders. They recommend that the Commission redefine the split sentence (recommendations 1 and 2); that the Guidelines provide a probation option for Category I offenders up to offense level 8 (recommendation 3), which would add two new cells to the probation range; and that the Guidelines provide for the option of probation with confinement conditions for 10 additional cells in the sentencing table (recommendation 4). We ask the Commission to consider as soon as possible these, and other recommendations from your Alternatives to Incarceration Task Force, that seek to expand sentencing options with particular emphasis on the lower end of the sentencing range.

This round of amendments proposes a new category VII for offenders with very serious records (proposed amendment 31). The Commission's monitoring data show there have been 13 upward departures from Category VI based on the seriousness of the offender's criminal record. We suggest that the Commission allow judges to exercise their departure power as needed rather than build more rigidity into the sentencing table. We also urge the Commission to consider the Judicial Conference recommendation to amend policy statement §4A1.3 to

encourage judges to consider both the length and nature of a defendant's criminal record so that departures protect the public from the most dangerous repeat offenders (recommendation 6).

Individualizing Culpability. The Commission has requested comment on "whether the Guidelines place too great a reliance on drug quantity in punishing drug offenders, particularly for less culpable aiders and abettors" (proposed amendment 11). They do. The Guidelines often force judges to impose draconian sentences on "mules" or other marginally involved participants which are grossly disproportionate to their culpability or threat to the community. We applaud the Commission's examination of this issue.

Our committee in fact struggled with this problem when developing the Judicial Conference's recommendations to the Commission. At that time we studied two approaches: 1) Providing a 6-point reduction under the mitigating role guideline §3B1.2 for "passive participants," or 2) limiting the amount of drugs included in a defendant's relevant conduct to that which a defendant was actually aware of, or might have foreseen. We preferred the second approach because the drug amounts included in defendants' relevant conduct are often so high, and so arbitrarily related to their culpability, that a fixed reduction from that level would still not bear a rational relationship to the punishment they deserve. We appreciate that concepts such as "foreseeability" have problems of their own, however, and share the Commission's interest in finding some principled way of defining the class of less culpable defendants and assigning appropriate punishment.

In proposed amendment 15, the Commission introduces a third approach that might be used for this problem: 3) Cap the base offense level for defendants playing limited roles in various types of crimes. For example, if the defendant has "no role other than renting or allowing use of the premises," (proposed amendment 15, option 1) then the offense level is 4 levels below the table from §2D1.1, but not greater than 16. A similar amendment might work for defendants having "no role other than delivery."

This is a problem which deeply disturbs judges, and we shall welcome the opportunity to work with the Commission and its staff in seeking a solution. This third approach has promise, but in the absence of more comprehensive analysis we are reluctant to endorse it at this time.

Relevant Conduct. The Commission's central principle for individualizing punishment and implementing "modified real-offense sentencing" (initial Guidelines Manual, page 1.5; phrase deleted in later amendments) has been the relevant conduct guideline §1B1.3. It permits judges to look beyond the counts of conviction to impose a sentence (within statutory limits) that is more appropriate to a defendant's actual criminal behavior. But how does one define the scope of conduct to be assessed against each defendant? The distinctions in the Guideline and its application notes have too often confused instead of clarified. And the Commission appears to be changing its own policies regarding the types of charge bargains to be respected by the Guideline. The esoteric distinctions and shifting policies have led to serious confusion and disparate application.

In some cases, the relevant conduct principle has appeared to include too much. The initial training provided probation officers often led them to assess to each participant the total harm caused by a criminal enterprise. Later training and Guideline amendments emphasized that relevant conduct is not necessarily the same for each participant, but how to draw the line has proved troublesome. The Guideline instructs that all acts actually committed or "aided and abetted" or for which a defendant is "otherwise accountable" shall be included in the base offense level (§1B1.3(a)(1)). For so-called "aggregable" offenses, any conduct that is part of a common "course of conduct" or "scheme or plan" as the offense of conviction is included (§1B1.3(a)(2)). For jointly-undertaken criminal activity, judges are encouraged to draw lines based on "foreseeability" and the "scope of the defendant's agreement" (application note 1). Since aggregable crimes such as the importation of drugs are also often jointly undertaken, there appear to be confusing if not competing definitions governing the scope of each defendant's culpability.

In other cases, the principle has appeared to include too little. The Commission is apparently concerned that the common "course of conduct" or "scheme or plan" principle has not always led to enhancement for possession of a firearm unless it was present during the act constituting the count of conviction (**proposed amendment 37(F)**). The proposed change, however, would do little to clarify the real cause of the confusion--the relevant conduct Guideline. What we need is clarification of how the distinctions in that Guideline are to work for firearms possessed by co-conspirators. If the firearm was used by one defendant in the course of a common plan to import drugs, but was not part of the defendant's agreement, is it included? What if the defendant was not aware of the gun, and could not have foreseen it? We urge the Commission not to expand the

cases when a firearm enhancement is to be applied without clarifying when it should be excluded.

Since the common "course of conduct" or "scheme or plan" principle is limited to aggregable offenses, prosecutors have been able to exclude from consideration at sentencing firearms or robberies that were part of the real offense conduct by reaching plea agreements that drop those counts. This latter problem is addressed by the Commission in this round of amendments (proposed amendment 7(C)). Regardless of whether the policy of reducing the effectiveness of this type of charge agreement is a good one, we are convinced that this method of doing so is not. The proposed amendment would add a special instruction to the robbery Guideline that creates yet another distinction specific to robberies---those that are, or are not, part of the "same series." This standard is parallel with, but not synonymous to, the common "course of conduct" or "scheme or plan" principle that applies to aggregable offenses. The use of a time interval to differentiate series seems arbitrary. The amendment would lead to very awkward application of the multiple count rules when the defendant is convicted of more than one robbery. We urge the Commission not to add confusing special cases.

The Judicial Conference's recommendation 7 was intended to help clarify some of the confusion surrounding relevant conduct. It sought consistent treatment of all types of offenses by moving the distinctions from Application Note 1 into the text of the Guideline. We urge you to consider it as part of a thorough re-examination of the language and structure of the relevant conduct Guideline. Also useful would be a clear statement of the current policy goals meant to be implemented through this Guideline, and how the distinctions it contains are part of a rational plan for the regulation of plea agreements as well as sentences.

Plea Negotiations

Judicial review of plea agreements. A number of amendments in this and previous cycles move the Guidelines further toward a real-offense sentencing system. Cross-references to the drug tables added to the Guidelines for "Use of a communication facility" or "Managing a drug establishment" eliminate base offense level caps for these crimes and peg the punishment to the amount of drugs within the scope of relevant conduct. The Commission clearly has a legitimate concern; disparity is created if some defendants are arbitrarily allowed to plead guilty to a lesser offense when the real offense conduct was more serious. The

"Thornburgh Memorandum" to federal prosecutors states that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt about the government's ability to prove a charge for legal or evidentiary reasons." But there is an exception if an office is "particularly over-burdened" and there is little doubt that plea agreements that limit the defendant's exposure to punishment are still common.

The Sentencing Commission has encouraged judges to defer acceptance of all pleas pending receipt of the PSR and to reject agreements that fail to "adequately reflect the seriousness of the actual offense behavior." (Policy statement §6B1.2(a)) We know of no data on how frequently pleas are rejected, but reports from probation officers and judges around the country confirm our sense that many judges are reluctant to engage in detailed review of plea agreements. Many judges believe that charging and bargaining decisions are the province of the prosecutor. They question whether they have the authority or resources to review decisions not to bring or to drop charges. They do not want to re-open investigations, second-guess the prosecutor about the availability of persuasive evidence, or tell the government how to use its time.

Detailed review of plea agreements and implementation of real-offense sentencing will increase the burdens on judges. The FCSC found that 90% of judges believe the Guidelines have already made sentencing more time-consuming. The Commission initially moved away from a real-offense system because "it found no practical way...to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process" (Guidelines Manual 1.5). We urge the Commission not to change its policy toward charge bargains without a thorough analysis of the entire plea negotiation system.

Incentives for guilty pleas. A concern of our Committee and the FCSC is that the Guidelines may also increase the number of cases going to trial. The federal bench is already burdened with an increasing workload, especially in the criminal docket. Since historically about 90% of all cases are resolved with a guilty plea, a drop of even a few percentage points in this rate could dramatically increase the number of trials.

The Commission has reported that the Guidelines have had no effect on the percentage of cases resolved through guilty plea (Sentencing Commission Annual Report). However, the FCSC reported that half the judges surveyed stated that the Guidelines had decreased the percentage of guilty pleas in their caseloads, and that 70% of judges surveyed believe the Guidelines had reduced the incentives to plead guilty. Recommendation

8 of the Judicial Conference, which suggests that the Commission reconsider the "Acceptance of Responsibility" Guideline, was predicated on the assumption, which we believe is solidly grounded, that at the upper end of the Guideline range the incentives within the Guidelines are sometimes not adequate to induce a timely plea. Recommendation 8 would increase the incentives to plead guilty *within the Guidelines*.

Absent incentives within the Guidelines to induce pleas at the upper ranges, surrogate incentives may operate outside the Guideline system. For example, if charge dismissals become an ineffective incentive, prosecutors can resort to pre-indictment or collateral bargains that are virtually unreviewable, such as promises not to indict family members. In other cases, defendants may be misled into thinking they have won a bargaining concession, when in fact the relevant conduct included in the remaining counts incorporates all the conduct in the dismissed charges. Judges at the Sentencing Institute held for the Fifth Circuit last September were concerned about the poor "quality of justice" afforded these defendants. As defense attorneys become more familiar with the Guidelines, these deals may become less frequent. But can we say we have achieved honesty in sentencing when defendants are misled in plea negotiations?

In some districts the major tool to induce bargains is the departure under 5K1.1 for substantial assistance to the government. Our Committee engaged in lengthy consideration of problems created by this guideline. On the issue of whether a motion by the government should be required for this departure (proposed amendment 35), we concluded that requiring a motion would prevent courts from having to make difficult determinations of the extent of a defendant's cooperation. We are in substantial agreement with the Commission's resolution of this issue.

Encouraging meticulous implementation of the Guidelines. When the Guidelines attempt radical changes from traditional plea negotiation and sentencing practices, they encounter resistance from prosecutors and from judges. If the Guidelines don't provide adequate bargaining incentives, prosecutors may use their charging and bargaining discretion to avoid strict application of the statutes and Guidelines.

The jury is still out on whether the Guidelines have attained the acceptance and refinement needed to fulfill the purposes of the Sentencing Reform Act. Tables of so-called judicial "compliance rates," as found in the Commission's Annual Reports, tell us very little if the charges, facts, and Guidelines on which sentence calculations are based have already distorted the real picture of the defendant's conduct. We need a study at least as

comprehensive as that now underway by the General Accounting Office--- which compares the investigating officer's files, the original indictment, the plea agreement, the presentence report, and the final sentence. Only then can we answer the important question: Have the Guidelines truly eliminated unwarranted disparity without creating more problems than they solve?

If the Guidelines are to be strictly applied, we believe the Commission must accommodate, within the Guideline structure, the need of prosecutors and judges for negotiating and sentencing flexibility. The Committee's approach has been to work with the Commission for the elimination of mandatory minimum statutes, for the creation of explicit bargaining incentives and options within the Guidelines, and to encourage departure where appropriate. We undertake to continue to work closely with you as we both strive for a better federal criminal justice system.

RECOMMENDATIONS OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES TO THE
UNITED STATES SENTENCING COMMISSION

Recommendation #1: Redefine the "Split" Sentence in a Probation Sentence

This proposed revision redefines the split sentence as the imposition of at least 1 month of imprisonment rather than the current requirement of imprisonment for at least one-half of the minimum term. The Judicial Conference believes that the proposed change would do little to diminish the punishment meted out to these offenders. The punitive value of short periods of incarceration is greatest at the start, with the "clanging of the prison doors," netting diminishing returns (at great cost) after that.

§ 5B1.1(a) Imposition of a Term of Probation

Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized: ... (2) if the minimum term of imprisonment ... is at least one but not more than ~~six~~ ten months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2)...

Recommendation #2: Redefine the "Split" Sentence in a Supervised Release Sentence

The rationale for redefining the split sentence for a supervised release sentence is the same as for a probation sentence. Currently, the definitions of this sentencing option are equivalent for probation and supervised release and in the proposed revision, the definitions would also correspond.

§ 5C1.1(c) Imposition of a Term of Imprisonment

If the minimum term of imprisonment ... is at least one but not more than ~~six~~ ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in § 5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e)

~~provided that at least one-half of the minimum term,~~
~~but in no event less than one month,~~ is satisfied by imprisonment.

Recommendation #3: Permit Straight Probation at Two Additional Offense Levels for Category I Offenders

Category I of the Criminal History Score includes first offenders. This recommendation permits probation without confinement conditions at two additional offense levels for this category only (i.e., moving two cells from Zone B to Zone A) by changing the current range.

Judges have the greatest sentencing flexibility when the guideline range permits, but does not require, straight probation. Within these ranges, the decisions of whether to imprison and, if not, what conditions to impose, are left to the discretion of the court. Since the guideline table is expressed in "months of imprisonment," and all of the ranges include a term of imprisonment, all cells in the table would seem to be subject to the statutory requirement that the maximum of the range not exceed the minimum by the larger of 6 months or 25 percent (28 U.S.C. 994(b)(2)). Therefore, the only way to increase the availability of probation without conditions specifically deemed the equivalent of prison is to increase the number of 0-6 cells in the guideline table. Accordingly, the Judicial Conference recommends a revision to Offense Levels 7 and 8 in Category I only.

In the Sentencing Table at Category I:

Offense Level Current Range Recommended Range

7	1-7	0-6
8	2-8	0-6

Recommendation #4: Combine Zone B and C in the Sentencing Table

This revision would combine Zones B and C to permit probation with community confinement/home detention conditions to substitute for imprisonment in 10 additional guideline cells. This change would remove the requirement for some term of imprisonment in cells with minimum terms of from 7 to 10 months, while maintaining the availability of the "split sentence" where it is now permitted.

§ 5C1.1(d) Imposition of a Term of Imprisonment

Delete this provision:

- (d) ~~If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

Adoption of Recommendations 1 - 4 would modify the Sentencing Table at the lower end of the guidelines in the following fashion:

Criminal History Category (Criminal History Points)						
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
A 4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7 0-6	2-8	4-10	8-14	12-18	15-21
8	2-8 0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
B 10	6-12	8-14	10-16	15-21	21-27	24-30
& 11	8-14	10-16	12-18	18-24	24-30	27-33
C 12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
↓	↓	↓	↓	↓	↓	↓

Recommendation #5: Revise the Policy Statement Pertaining to Age

The Judicial Conference believes that judges need greater flexibility to consider age as a basis for departure or when determining length or type of confinement, and to consider other offender characteristics when present in unusual degrees or combinations.

The Commission's policy statements regarding age restrict judicial discretion beyond that required by the statute. Section 994(e) does not define age as a factor that is generally inappropriate for consideration in sentencing. But policy statement 5H1.1 directs that age is not ordinarily relevant for deciding whether a departure or the use of sentencing options may be appropriate (except that a departure may in some cases be appropriate for offenders who are "elderly and infirm"). Further, the Commission's restrictions on consideration of age are confusing in light of the distinctions found in 994(e). For example, the policy statement for age is more restrictive than the ones for factors statutorily restrained by the "general inappropriateness" standard. The Commission directs that family and community ties and employment record may be relevant to whether the use of sentencing options is appropriate while the policy statement for age states that it is not ordinarily relevant to either a decision to depart or for the use of sentencing options.

The following revisions are recommended to make the guidelines more consistent with statutory language and less restrictive in the use of offender characteristics in the sentencing decision.

5H1.1 Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. ~~Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines propose sentencing options.~~ Age may be a reason to go below the guidelines ~~when the offender is~~ if combined with another factor (e.g. young and naive or elderly and infirm) and where a form a punishment (e.g: home confinement) might be equally efficient as and less costly than incarceration. ~~If, independent of the consideration of age, a defendant is sentenced to probation or supervised release,~~ Age may also be relevant in the determination of the length and conditions of supervision.

Application Note (to Chapter 5, Part H):

1. Those offender characteristics that are not ordinarily relevant when determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, or the type of sentence to be imposed when the guidelines provide sentencing options, may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case.

Recommendation #6: Delineation of Policy Statements Pertaining to Departure for Dangerousness

The Judicial Conference is concerned that the guidelines do not give enough flexibility to depart upward based on offender dangerousness. The guidelines address the concept of dangerousness at two places: the Career Offender provisions (§ 4B1.1) and the Adequacy of Criminal History Category (Policy Statement § 4A1.3). The former, however, only applies when the current offense involves violence or drug trafficking. The latter addresses both the degree of risk and type of risk, and, although obviously contemplated as the vehicle for addressing dangerousness, is not explicit.

The proposed revision would clarify the Commission's position on dangerousness by dividing its current policy statement on the adequacy of the criminal history category into two parts, one focused on the degree of risk (i.e., over- or under-representation of the likelihood that the defendant will commit further crimes); the other, on the type of risk (i.e., if the defendant does re-offend, what type of crime is s/he likely to commit). In the following recommended amendment, current text that is moved rather than deleted is indicated by a strikethrough bracketed by asterisks.

§ 4A1.3 Adequacy of Criminal History Category:
(Policy Statement)

(a) Degree of Risk If reliable information indicates that the criminal history category does not adequately reflect ~~*the seriousness of the defendant's past criminal conduct or*~~ the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (a-1) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);
- (b-2) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (e-3) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
- (d-4) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;
- ~~*(e) prior similar adult criminal conduct not resulting in a criminal conviction.*~~

A departure under this provision is warranted when the criminal history category significantly under-represents ~~*the seriousness of the defendant's criminal history*~~ or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of ~~serious assaults criminal acts~~, (3) ~~*had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding,*~~ (4-3) committed the instant offense while on bail or pretrial release for another ~~serious~~ offense or (5 4) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more ~~serious~~ extensive than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents ~~*the seriousness of a defendant's criminal history*~~ or the likelihood

that the defendant will commit further crimes. An example might include the case of a defendant with two ~~minor-misdemeanor~~ convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less ~~serious~~ extensive than that of most defendants in the same criminal history category (Category 11), and therefore consider a downward departure from the guidelines.

(b) Type of Risk. If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information includes the nature of the criminal conduct underlying a defendant's prior convictions, and prior similar adult criminal conduct not resulting in a criminal conviction, that establishes a pattern of particularly harmful or very minor criminal behavior.

An upward departure may be warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history. Examples might include offenders with a history of repetitive assaultive behavior, of repetitive sophisticated criminal behavior (e.g. a series of sophisticated frauds or a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding), and those with unusually extensive and serious prior records.

A downward departure may be warranted when the criminal history category significantly overrepresents the seriousness of the defendant's criminal history. Examples might include offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor, victimless crimes such as prostitution.

(c) In considering a departure under ~~this provision~~ these provisions the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For

example, if the court concludes that the defendant's criminal history of III significantly under-represents the seriousness or ~~extensiveness~~ of the defendant's criminal history, and that the ~~seriousness of the defendant's~~ criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

Recommendation #7: Include the Definition of "Otherwise be Accountable" from the Commentary in § 1B1.3 to the guideline.

The Judicial Conference proposes that the Sentencing Commission revise the relevant conduct guideline (1B1.3) and accompanying commentary to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

Commentary accompanying the guideline defines the phrase "otherwise be accountable" in (a)(1) as follows, "Conduct 'for which the defendant would be otherwise accountable,' as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced procured, or willfully caused." Foreseeability is also addressed in the commentary. The proposed amendment would make the Commission's definitions of "otherwise be accountable" and foreseeability part of the guideline itself.

In addition, these revisions would clarify that the foreseeability standard applies to (a)(2) aggregable offenses. At present, the first illustration in the commentary suggests that defendants who aid and abet a joint criminal activity are liable for the full amounts of drugs or money, notwithstanding

claims that they were not aware of and could not reasonably foresee the amounts involved.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapters Two (Offense Conduct) and Three (Adjustments).

- (1) all acts and omissions committed or aided and abetted by the defendant, ~~or for which the defendant would otherwise be accountable,~~ or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
- (2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and amounts that were part of the same course of conduct or common scheme or plan as the offense of conviction, and of which the defendant was aware or which were reasonably foreseeable to the defendant.

Recommendation #8: The Sentencing Commission Should Consider Modification of the Offense Level Adjustment for Acceptance of Responsibility.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his

criminal conduct." The guideline appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.¹ The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.² It also appears that there were greater reductions where offenders faced longer sentences.

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and

1. For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, ___ F.2d ___ No. 89-1799 (June 1, 1990).

2. The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

"related conduct."³ This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial Conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6

3. There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, ___ F.2d ___, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.