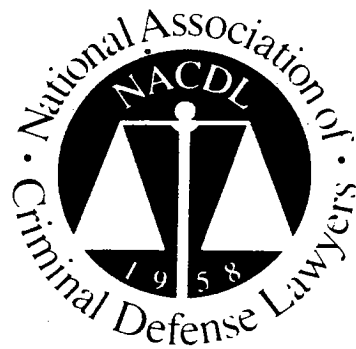


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**STATEMENT OF
JEFFREY S. WEINER
PRESIDENT
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
BEFORE THE
UNITED STATES SENTENCING COMMISSION
FEBRUARY 25, 1992**

Mr. Chairman and Commissioners, it is my privilege to appear before you today as President of the National Association of Criminal Defense Lawyers, on behalf of 25,000 dedicated private lawyers, public defenders, law professors, law students and related professionals who are members of NACDL and its 54 state and local Affiliates.

We appreciate this opportunity to testify today, to continue a process of NACDL working with the Commission which is as old as the Commission itself. Though we may not always see eye to eye, I want to express our most sincere appreciation for your ongoing openness to our input. You have labored mightily at a difficult and important task, under an often contradictory statutory mandate, and have excluded no one.

We extend our deepest appreciation to the Commission

for establishing the Practitioners' Advisory Group, as a channel for the criminal defense bar to work more closely with the Commission. We hope that the input the Commission has received from the Advisory Group has been useful in identifying problem areas in the guidelines and advancing our common goal of sentencing rationality and fairness.

We urge one more important step in this direction, however. Of the three basic components of the criminal justice system--defense, prosecution and judiciary--two have been generously represented among the membership of the Commission since the beginning. The authorizing legislation mandates three seats for federal judges and one ex officio seat for the Justice Department, and in fact, prosecutorial experience has been well represented in various members of the Commission.

But as commendable as the Commission has been in bringing the defense bar into the process through outreach such as the Practitioners' Advisory Group, the fact remains that the defense bar--the third necessary, coequal and in fact constitutionally mandated branch of the criminal justice system--is not yet an equal partner in the process. No criminal case in the nation can go forward without a defense lawyer participating, and yet these guidelines which bind every defendant and defense lawyer in the federal system have been written for years with no direct participation by any person with significant practical experience in the representation of people accused of crime.

We ask the Commission to throw its weight behind seeking a public or private defender member of the Commission. Obviously,

the final appointment power rests in the White House. But if the Commission were to take the position that the addition of a defense member would enrich the Commission's deliberative process and improve the chances of producing guidelines which require less subsequent refinement and correction, we have no doubt that such a position would be considered most seriously at both ends of Pennsylvania Avenue.

We also suggest that the Commission make a formal recommendation to Congress for legislation establishing a non-voting defense seat equivalent to that provided for the Justice Department--an ex officio seat, that is, either for a federal public defender or a representative of the Defender Services Division of the U.S. Judicial Conference.

Mr. Chairman, one of the most powerful and unsettling criminal law reform documents to come forth in recent years was this Commission's extraordinarily thorough August 1991 report on mandatory minimums. Such a report we think fulfills one of the Commission's most vitally important statutory mandates--that is, to recommend to Congress, under section 994(r), legislation to help the Commission fulfill its mission of providing fair and individualized sentencing, and avoiding unwarranted sentencing disparities.

Mandatory minimums are the main obstacle to that mission. They are the bull in the china shop of sentencing reform.

We commend the Commission for dissecting this issue so conscientiously. Never has there been such a clear and well

documented understanding of the disastrous consequences of mandatory minimums. We are confident that reform will come, as it did in 1970.

The problem, as you know too well, is that political considerations may prevent quick action.

We would like to suggest a few significant related problem areas which can and should be corrected without waiting for a comprehensive repeal of mandatory minimums.

1. Race proportionality review: The first is the issue of race in sentencing. Your report found disturbing evidence of racial disparities in mandatory minimum cases. And though we realize that you may have some disagreement, Judge Heaney's study in the Eighth Circuit found some similar evidence in guideline cases. Looking at either of these findings, it is not necessary to say that either mandatory minimums or the guidelines are inherently racially discriminatory. Such discrimination as there may exist does not necessarily enter through the law but through the people who carry it out--from the law enforcement officers who investigate offenses and make arrests, to the prosecutors who file charges, to the juries and judges who hear the case. Though both Congress and the Commission have made clear that they expect race-neutrality in sentencing, indications are that racial disparities creep in nevertheless.

We appreciate that the Commission has sought conscientiously to carry out Congress's directive that the guidelines must be

neutral as to race, by providing in guideline 5H1.10 that race is simply "not relevant" in determining a sentence. Our concern is that, although the guidelines are race-neutral, other factors contributing to the sentence may not be, and the guidelines' prohibition against considering race has the unintended effect of preventing judges from adjusting sentences to correct for discrimination which has otherwise already influenced the case. Currently, a federal judge is powerless to correct a racial disparity even if he conclusively determines that the defendant's or victim's race is the sole factor responsible for a higher sentence.

We believe that the Commission can correct this problem itself, within the statutory restrictions, simply by changing the "not relevant" sentence in 5H1.10 to read: "Sentences imposed shall be entirely neutral as to race, sex [etc.]." Under this formulation, judges would be authorized to depart where necessary to avoid a discriminatory result.

Alternatively, if it is determined that the statute does not afford the Commission this latitude, we recommend that legislation be sought revising the last sentence of §994(d) to read: "The guidelines and policy statements shall contain provisions ensuring that sentences are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

This process of sentence correction can be called "race proportionality review." We have drafted legislative and

explanatory language on this issue, based upon the non-discrimination theme of the administration's "Equal Justice Act," as approved by the House of Representatives last Fall, which I will be happy to furnish to the Commission.

2. **Good time.** Bureau of Prisons Director Michael Quinlan has told Congress that the current automatic 54 days per year of good time does not give him sufficient tools to control discipline, particularly among inmates serving long mandatory minimums. We agree with this assesment, and with the findings of the National Task Force on Correctional Substance Abuse Strategies, published by the Justice Department's National Institute of Corrections in June 1991, which strongly recommended the establishment of incentives for inmates to initate and maintain their commitment to treatment and other correctional programs. The report particularly commended good time credits as a "powerful incentive" for good behavior.

Again, we have prepared legislative and explanatory language on this point, which we offer for the Commission's consideration in recommending to Congress. It is based upon the most thoroughly analyzed and successful good-time program in the nation--the one in Illinois. That state's 90-day per year good-time allowance was reviewed in an extensive report by the National Council on Crime and Delinquency, under contract with the state Department of Corrections, which found that the law saved the state \$1.2 billion in prison costs, while having a negligible effect on

public safety--that is, only one-fifth of one percent of the offenders released committed a new offense during the period of their early release. I will provide a copy of the report to the Commission with our other submissions.

Under the Illinois program, violent offenders are not eligible for good-time consideration, and the credits must be earned, by participation in some desirable program, such as education, treatment, or job training.

Based on this report, the Illinois legislature voted to double the 90-day maximum allowance, to 180 days. We would note that if there is a concern that vesting this type of authority in the Director of the Bureau of Prisons--where current good-time authority is vested--might begin to undermine the guidelines, the new legislation could give the Commission the authority to set guidelines governing the BOP's determinations or, alternatively, the authority to make the determinations could be vested back in the sentencing judge. The bottom line is maintaining some power of rational and consistent sentencing differentiation, consistent with the principles driving the guidelines--i.e., where such differentiation is warranted and controlled by uniform factors.

3. Consistency in Drug Sentencing. The third and final issue we wish to suggest is drug-quantity disparities. The Commission is well aware of the drug-dosage disparities produced in LSD cases, because of counting the weight of the carrier, whether sugar cubes, blotter paper or some other medium. Unfortunately,

LSD is only the most egregious situation where sentencing uniformity is frustrated--if not obliterated--by the combination of arbitrary drug quantities, carriers or cutting agents, and mandatory minimums.

As Justice Stevens pointed out in his dissent in the Chapman LSD case, dose disparities are scattered throughout title 21's sentencing provisions: In his footnote 12, he notes that the defendant in Chapman actually sold about 12,000 doses of LSD and got a 20 year sentence, but that a heroin dealer would have had to sell ten kilograms--yielding between one and two million doses--to get the same sentence, a cocaine dealer would have to sell between 325,000 and 5 million doses, but a crack dealer would have to sell only 50,000 doses.

We think it is time to do two things: First, immediately change the LSD provision to exclude the weight of any carrier substance. Your letter to Chairman Biden, Judge Wilkins, on April 28, 1989, indicates your longstanding sensitivity to this issue. Ultimately, we support the elimination of the "detectable amount" standard in the title 21 mandatory minimum penalty provisions--a standard which, like the LSD carrier issue, results in low level dealers receiveing proportionately heaview sentences than their higher-ups who deal only in the pure drug.

Second, we hope that the Commission will seek a full review of the dose equivalencies in current law, with an eye to recommending to Congress that those amounts be changed to assure greater sentencing uniformity among different types of drugs.

Again, we have prepared legislative and explanatory language proposing such a review to be conducted by the National Institute on Drug Abuse--that is, as dose comparison, including any appropriate multiplier to take relative dangerousness of the various drugs into account--and we are happy to furnish this material for your consideration.

The question we would ask today is for you to consider whether this is a review that the Sentencing Commission might be able to undertake itself, in consultation with NIDA or other expert drug agencies, and then furnish a report to Congress documenting the disparities and recommending appropriate changes in the statutory drug quantities.

I realize that the issues I have presented are a mix of legislative and guideline issues. But all affect the fundamental mission and success of the guidelines, and we hope the Commission will be as activist as possible in working for the necessary legislative changes.

We thank you for your kind consideration of these important matters.